

## Don't Dirty the Robe

When did the justices get so touchy about science?

BY EVAN P. SCHULTZ

**L**aw and science have a lot in common. Both use logic and analysis to strive toward the truth. And both have more than their share of egos, errors, and elusiveness. At the end of its last term, the Supreme Court marked off two more similarities: money and bias. The Court did not seem happy with the parallels.

Justices eagerly listen to arguments from even the best-paid lawyers. But the Court seemed to shudder when a party to a pending case pointed the justices' attention to scientific studies that the same party had funded.

The justices may be right to fear even the appearance of a perversion of science or law. But if there is a problem here, the Court should partly blame itself.

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What, exactly, did the Court say as it fastidiously stepped around the studies?

In *Exxon Shipping Co. v. Baker*, the Court struck down a massive punitive damages award. From a legal perspective, there's nothing particularly interesting about this holding. The Court had already struck down other massive punitive damages awards for violating the Constitution.

The key challenge in the Exxon case—which involved the infamous oil spill off the coast of Alaska—didn't come from constitutional law. Rather, Exxon attacked the punitive damages award under federal maritime law. Not surprisingly, the Court extended essentially the same standards it had already set forth in its previous cases to this area of law.

The decision gets interesting, though, deep in the footnotes. Justice David Souter, writing for the Court, spent pages emphasizing that judges and juries award punitive damages on an arbitrary basis. Exxon or its allies apparently spent a fair amount of effort to illustrate this point. And they apparently convinced Souter, who wrote that “anecdotal evidence” suggests that judges and juries do not carefully set punitive damages to deliver an “optimal” amount of deterrence.

Fair enough. But why rely only on anecdotes?

See footnote number 17. There, Souter wrote that lots of rigorous studies conclude that juries are plenty arbitrary. One was authored by Harvard Law School luminary Cass Sunstein. One appeared in the *Columbia Law Review*. And one was published in the *Yale Law Journal*. These aren't the standard sources of junk science. But the Court made clear that it had no respect for such perfectly pedigreed studies. Why not?

According to the Court, “Because this research was funded in part by Exxon, we decline to rely on it.” Oh.

Put aside for the moment that the Court ruled in favor of Exxon even while rejecting the studies it had tainted. There is something inherently sensible in keeping a wary eye out for overzealous advocacy posing as hard science.

Nothing sums this up better than the narrator in “Thank You for Smoking,” a movie (based on a novel) about a tobacco lobbyist. Speaking about that industry's in-house scientist, the narrator gushes, “He's been testing the link between nicotine and lung cancer for 30 years and hasn't found any conclusive results. The man is a genius. He could disprove gravity.”

Completely nonfictional and completely non-funny are the means that the tobacco industry actually used to manipulate scientific research over the years. According to Richard Kluger's Pulitzer Prize-winning book, *Ashes to Ashes*, the scientist in charge of the Tobacco Industry Research Center himself said,

“Essentially, the major purposes of the TIRC are research and public relations.” The center, along with its Scientific Advisory Board, funded a number of research projects. According to Kluger, many of these projects “were conceived largely as lawyers’ tools to defend the industry.”

Kluger quotes one R.J. Reynolds research director who said that once funded, a project “was a privileged relationship, and couldn’t come into court.” That is, presumably, unless the company liked the results.

So maybe we should forgive the justices for fearing that scientists, if too closely linked to litigants, might just be blowing smoke.

### BLAME BRANDEIS

Then again, maybe we shouldn’t. After all, the justices threw open the courthouse doors to science decades ago.

Louis Brandeis, before he became a high-court justice himself, pioneered the strategy of marshaling shelves of expert studies to make a legal argument. His brief in *Muller v. Oregon* (1908)—the original “Brandeis brief”—argued in favor of the constitutionality of a state law limiting the hours that women could work. Page after page of his brief cited medical journals and articles, including reports from “Dr. Percy Kidd, physician in Brompton and London Hospitals,” “Dr. Ely Van der Warker,” the “Travail de Nuit des Femmes dans l’Industrie,” and—a man who apparently very much needed an introduction—“Thomas Oliver, M.A., M.D., F.R.C.P., Medical Expert on the White Lead, Dangerous Trades, Pottery, and Lucifer Match Committees of the Home Office.” Brandeis won.

It seems unlikely that Brandeis or his clients ever influenced (or even spoke with) doctors Kidd, Van der Warker, or Oliver. But in another famous Supreme Court case—complete with its own famous footnote—the litigants and lawyers were very much in league with the expert. The case was *Brown v. Board of Education* (1954), which struck down racial segregation in public schools.

In certain circles, *Brown*’s footnote No. 11 may be almost as famous as the decision itself. The note addresses various tests that social scientists ran on students in segregated schools. In the most famous of these tests, conducted by Kenneth Clark, students were shown light- and dark-skinned dolls and asked to “Give me the doll that is the nice doll” or “Give me the doll that looks bad.” The research showed that African-American students had, in Clark’s words, “an unmistakable preference for the white doll and a rejection of the brown doll.” (The quote and the other information here on Clark’s studies and footnote 11 come from another book by Kluger, *Simple Justice*.) Clark’s research led off a list of similar studies that the Supreme Court pointed to in footnote 11 as evidence that

segregation in schools caused real psychological harm to African-American students.

Clark researched and wrote the article cited in the footnote years before the *Brown* litigation began. And the NAACP Legal Defense Fund did not fund the paper that the Supreme Court decision cited. But at some point in the case, the line separating lawyers and expert became vanishingly thin.

What would Justice Souter and the *Exxon* Court think of these facts: The NAACP arranged to drive Clark around South Carolina so that he could administer his doll tests to students there. NAACP lawyers worked hand-in-hand with Clark to attract other scientists to support the case, to edit the briefs, and to draft an appendix to a brief. Clark also testified as an expert in the South Carolina and Virginia components of the litigation.

Given all this, should it have mattered that Clark’s experiments—even when they were published—triggered some doubt in academic circles about the methods used? That is, should close coordination between lawyers and experts magnify independent scientific doubts? Chief Justice Earl Warren, who authored *Brown*, seems to have felt that it stretched the bounds of legal propriety at the time to cite to social science in the Court’s opinion. But, according to Warren, footnote 11 “was only a note, after all.”

### MONEY MATTERS

Since *Brown*, the Court has decided that science deserves far more than just a footnote. In *Daubert v. Merrell Dow Pharmaceuticals* (1993), Justice Harry Blackmun wrote an opinion that eased up on the standards for admitting testimony from expert witnesses.

The prior standard came from a 1923 D.C. Circuit case that had rejected use of lie detector tests. The earlier case reasoned that courts should only admit scientific evidence that had “gained general acceptance in the particular field in which it belongs.” But in *Daubert*, the Supreme Court lowered the threshold. It held that scientific evidence is admissible if “an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”

To be fair, the *Exxon* footnote hasn’t directly dialed back on *Daubert*’s invitation. *Daubert* speaks only to what sort of evidence parties can offer and courts will admit. Even after *Exxon*, parties are still free to tell trial judges and juries about a wide range of scientific information—maybe even studies funded by one of the parties. But now, the justices might not listen.

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