

Case 51

Revolutionizing Legal Discourse: Law and Economics

John M. Olin Foundation, 1978

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Background. John Olin, founder of the Olin Foundation, accumulated his fortune through the success of a firearm munitions firm that his father started and that he grew into a large chemical corporation. He was a wellknown outdoors enthusiast. He was also deeply committed to American capitalism and conservative ideals.⁷⁷⁶

The Olin Foundation was created in 1953, but until 1973, it served primarily as a vehicle for Olin's own personal charitable giving, primarily to a local PBS station, Cornell University (his alma mater), and the Episcopal Church.⁷⁷⁷ In 1973, Olin recruited a staff for his foundation and expressed his desire that his fortune be used to help preserve the capitalist economic system which made the accumulation of his fortune possible.⁷⁷⁸ The Foundation staff met with other conservative foundation leaders, researched pro-market academic scholarship, and drafted a memo to Olin outlining proposals for pursuing Olin's charge.⁷⁷⁹

Olin's philanthropic approach was influenced significantly by Henry Ford II's resignation from the Ford Foundation Board of Trustees in the 1970s in protest of Foundation activity Ford considered subversive to capitalism. William Simon, Treasury Secretary under Gerald Ford and a neighbor of John Olin, was also influenced by Henry Ford's resignation from the Ford Foundation. Upon his retirement, Simon published a book, *A Time for Truth*, in which he called on corporations and the broader national community to embrace a more laissez-faire economic system.⁷⁸⁰ In the book, Simon pledged to convince the business community, particularly business philanthropies, to stop supporting liberal institutions which, as he saw it, were undermining American capitalism. "Most businessmen have been financing their own destruction," Simon stated in a *New York Times* article.⁷⁸¹

In 1977, Olin recruited Simon to direct his foundation's activities.⁷⁸² Simon's strategy was to fund the development of a "counterintelligentsia" trained to combat the assumptions and change the direction of American life by advocating a broad set of guiding conservative principles.⁷⁸³ The Olin Foundation concentrated its grantmaking in the mid-1970s on supporting "scholarship in the philosophy of a free society and the economics of a free market."⁷⁸⁴

Strategy. The law and economics movement began prior to Olin's involvement; many mark its birth at the University of Chicago in the 1950s, when Aaron Director, an economist, served as a professor at Chicago's law school. Ronald Coase, another University of Chicago economist, is credited for advancing the movement by authoring in 1961 his widely esteemed article "The Problem of Social Cost." Henry Manne, another Chicago alumnus, also played a leading role in incorporating law and economics into corporate law scholarship. Richard Posner, another member of the University of Chicago law school and now chief judge of the Seventh Circuit Court of Appeals, authored what is still considered the bible of law and economics, *Economic Analysis of Law*, in 1973.⁷⁸⁵

Staff members at the Olin Foundation noted that lawyers tend to play influential leadership roles in various segments of society. The Foundation consequently provided substantial funding to shape the intellectual climate in the legal realm to embrace free market insights through the study of economic implications of law.⁷⁸⁶ According to the Foundation, law and economics was an accepted paradigm in legal scholarship in the 1970s, but its use was limited. The Foundation perceived an opportunity to spread its adoption in legal scholarship and among current and prospective legal practitioners.⁷⁸⁷

Among its early initiatives in Simon's tenure was the funding of a center of law and economics at the University of Miami as well as centers for economic study of the law at the University of Chicago

and U.C.L.A.⁷⁸⁸ The Foundation then pursued a strategy of making grants to outstanding law schools (including Harvard, Yale, Chicago, Georgetown, Stanford, USC, Virginia, Michigan, Columbia, Toronto, and Cornell) to establish law and economics programs on those campuses. The Foundation thought, correctly, that other schools would be compelled to follow these leading institutions in adopting law and economics programs. Foundation grants to establish law and economics programs at law schools totaled \$50 million.

Later grants established John M. Olin fellowships that went to students in the top quarter of their class in order to provide them with an economic perspective of law. The Foundation also provided grants to universities to establish fellowships both for junior faculty members, who had not yet received tenure or established themselves as prominent scholars, as well as endowed chairs for senior scholars.⁷⁸⁹

Perhaps most controversially, the Foundation has supported a program of the Law and Economics Center at George Mason University to educate current members of the bench on law and economics through weeklong institutes and other seminars. The Foundation's giving to the LEC totaled more than \$2 million. By 2002, the John M. Olin Foundation had given more than \$68 million to support the law and economics movement.

Impact. As a measure of the success of the movement, the Foundation notes that numerous early advocates of law and economics have become prestigious members of the bench, including Robert Bork, Stephen Breyer, Guido Calabresi, Frank Easterbrook, Richard Posner, and Antonin Scalia.⁷⁹⁰ An article in the ABA Journal considering the career of Richard Posner, widely considered something of a godfather of the law and economics movement, assesses the impact of the movement:

Although criticism of law and economics has been abundant, most of it contending that it is inhumane to apply a cost-benefit analysis to conflicts and issues of human behavior, particularly when it leaves out the role of human emotion, the approach has become entrenched in both academia and jurisprudence.

By 2002, more than 600 federal judges had participated in the LEC institutes supported by the Olin Foundation. The LEC survived legislative attempts by Senators Russ Feingold and John Kerry in 2000 to prevent it from providing free seminars to judges, but, in part because of the lobbying support of numerous federal judges, including Chief Justice William Rehnquist, the legislation did not pass. Associate Justice Ruth Bader Ginsburg, in fact, sent a letter of appreciation for the work the center had done in "lifting the veil on regression analysis" for members of the bench.⁷⁹¹ Law and economics has become an analytical tool that increasingly appears in judicial opinions.

Perhaps most significantly, law and economics have served as tools that support conservative ideals of limited government and regulation and that political opponents have failed to counter. Some consider the law and economics movement as one of a few factors that have fostered the rise of conservative politics in the United States.⁷⁹²

Notes

776. John J. Miller, *Strategic Investment in Ideas: How Two Foundations Reshaped America* (Washington: The Philanthropy Roundtable, 2003), 9.

777. *Ibid.*

778. *Ibid.*, 10.

779. *Ibid.*

780. "Simon: Preaching the Word for Olin," *New York Times*, 7/16/1978, F1.

781. *Ibid.*

782. Miller, *Strategic Investment in Ideas*, 11–12.

783. William E. Simon, *A Time for Truth* (New York: Reader's Digest Press, 1978), 218–21.

784. "Simon: Preaching the Word for Olin."
785. Miller, *Strategic Investment in Ideas*, 23–25.
786. Ibid.
787. "Overview of John M. Olin Foundation Grants in Law," Internal Memo, John M. Olin Foundation, Spring 2002.
788. "Simon: Preaching the Word for Olin."
789. Kathleen Teltsch, "Conservative Unit Gains from Legacy," *New York Times*, 10/2/1983.
790. "Overview of John M. Olin Foundation Grants in Law," Internal Memo, John M. Olin Foundation, Spring 2002.
791. Miller, *Strategic Investment in Ideas*, 26.
792. Ibid., 28.