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THE CORPORATIZATION OF ACADEMIC RESEARCH: WHOSE INTERESTS ARE SERVED?

*Risa L. Lieberwitz**

The following article is the text of a speech given at the Association of American Law Schools annual meeting in January 2005, which has been edited and footnoted for publication in the *Akron Law Review*.

The “corporatization” of the university has become an important concept, particularly since the 1980s, with the ever broadening and deepening effects of privatization on a national and global scale. While university corporatization has affected all facets of university functions, I will focus on its impact on academic research, with particular attention to the life sciences.¹ I will begin with an overview of the three issues that I will explore in my talk. After providing this broad overview of the three issues, I will explore certain aspects of these three issues in greater detail.

The first issue is the institutional nature of the university. What makes the university a distinctive institution—particularly, as an institution in a democratic society? This institutional characterization includes defining the university’s traditional public interest goals and corresponding practices in furtherance of the public interest, including

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1. See Risa L. Lieberwitz, *Confronting the Privatization and Commercialization of Academic Research: An Analysis of Social Implications at the Local, National, and Global Levels*, 12 IND. J. GLOBAL LEGAL STUD. (forthcoming 2005) [hereinafter *Social Implications*]; Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?*, 12 B.U. PUB. INT. L.J. 73, 80–85 (2002) [hereinafter *Distance Learning*] (discussing the impact of corporatization on the teaching function of the university); Risa L. Lieberwitz, *The Marketing of Higher Education: The Price of the University’s Soul*, 89 CORNELL L. REV. 763, 781–83 (2004) (reviewing DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* (2003)) [hereinafter *Marketing of Higher Education*] (regarding the impact of corporatization on academic research in the university).

faculty academic freedom. The second issue that I will address in my talk concerns the changes that have been occurring—particularly since 1980—in the definition of this institutional character of the university and the ways that these changes have affected both the goals and practices of the university. The term used to describe these changes—“corporatization,” is useful and informative in capturing the changes that have had an actual impact and that continue to have potential negative effects on multiple areas in the university. These negative consequences include the shift from a public to a private mission of the university, which, in turn, has been reflected in changes in the policies and practices in university research and teaching functions. The shift in goals from the public to the private interest has also altered professional norms of university faculty in ways that undermine faculty academic freedom. I will conclude my talk with a third, larger issue, addressing some recent developments that reflect a growing recognition of the problems resulting from the corporatization of the university. These recent developments, I believe, also suggest some possibilities for future responses that can start to reclaim public interest goals and practices in the university. I always like to give the bad news first and then give some hope—you can’t come out of a background in labor law and collective action without ending with some hope.

Returning to the first issue, the institutional nature of the university: What makes the university distinctive as an institution—particularly, one in a democratic society? This institutional definition includes defining the goals and corresponding practices in the university. My focus here will be on the United States, which entails placing the question of the institutional character of the university in a social context that is divided into public and the private spheres.² The existence of the public/private distinction raises the question of the appropriate model for the university to follow. First, is the university like a public or governmental institution in its goals and organization? This would create a model for defining institutional goals and practices consistent with the public interest. On the other hand, is the university more like an organization in the private sphere, but one that is still defined according to public interest goals—that is, a private, non-profit organization? The traditional definition of the American university has been as an institution with a public interest mission, either as a public university or

2. See, e.g., Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1406-15 (1982).

as a private, non-profit university.³ Defining the institutional model in terms of public interest goals requires the next step of choosing the policy and practices that the university should adopt to further those goals. Two key aspects of shaping institutional policies and practices in line with the public interest concern external and internal relationships. The first aspect—the relationship between the university and external institutions—has traditionally emphasized the university’s independence from outside institutions—particularly, independence from financial supporters.⁴ The second aspect—internal relationships—also emphasizes independence, focusing on the central role of faculty rights of academic freedom to provide faculty the autonomy and independence to define and control their work.⁵

In defining university goals and practices, and particularly, the significance of university and faculty independence and autonomy, it is useful to remember the roots of these values in the history of the university in the United States. In the early part of the twentieth century, university faculty engaged in collective action to form the American Association of University Professors (AAUP) to claim their rights of autonomy in teaching and research as well as in extramural speech.⁶ The AAUP 1915 Declaration of Principles⁷ recognizes some basic ideas that we still find important today,⁸ including the need to act collectively

3. See AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, available at <http://www.aaup.org/statements/Redbook/1940stat.htm#back1a> (stating that “[i]nstitutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole.”) (last visited Apr. 16, 2005); *Distance Learning*, *supra* note 1, at 82-84.

4. *Distance Learning*, *supra* note 1, at 83-85; J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 273-77 (1989); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1276-81 (1988).

5. Metzger, *supra* note 4, at 1276-81.

6. *Distance Learning*, *supra* note 1, at 83-85. Extramural speech includes “speech outside a faculty member’s professional duties or disciplinary expertise, whether the speech was made on or off campus, thus actually covering intramural and extramural speech.” *Id.* at 83; *Marketing of Higher Education*, *supra* note 1, at 791.

7. THE 1915 DECLARATION OF PRINCIPLES, 40 AM. ASS’N OF U. PROFESSORS BULL. 89 (1954), reprinted in ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 155, 155-76 (Louis Joughin ed., 1967) [hereinafter 1915 DECLARATION].

8. See 1915 DECLARATION, *supra* note 7, at 155-76. The 1915 Declaration led to a response in 1925 by the American Council on Education, which called a conference of higher education organizations for the purpose of issuing a joint statement of principles of academic freedom and tenure. *Id.* at 157. The resulting 1925 Conference Statement on Academic Freedom and Tenure was followed by the AAUP 1940 Statement on Academic Freedom and Tenure, which was endorsed by the Association of American Colleges, and over subsequent decades, by over 150 academic professional organizations and universities. *Id.* The 1940 Statement of Principles, which

to protect faculty from retaliation for their academic work and public speech, which results when university administrators respond to pressures from powerful industrialists acting as trustees or financial benefactors of universities.⁹ The Declaration of Principles also recognizes that faculty academic freedom is essential to enable faculty to do their work in a way that fulfills the university's public mission and its social role as a public trust,¹⁰ free from the influence of third parties, whether these are university administrators or trustees, legislators, or corporate financial donors.¹¹ The Declaration of Principles broadly defines academic freedom to include teaching, research, and extramural speech.¹² The resulting Declaration of Principles recognizes that academic freedom provides both individual and collective rights of faculty, encompassing individual faculty autonomy and independence,¹³ as well as collective rights of faculty self governance, which includes peer review and participation in university governance.¹⁴

The second broad issue of my talk concerns the changes that have been occurring—particularly since 1980—in the traditional definition of the university's institutional character. These changes have affected both the goals and practices of the university through the process of the “corporatization” of the university. I will highlight three areas of the multiple ways in which these changes have taken place.

The first concerns the change of the mission of the university, from its traditional public interest mission to a goal of serving private market interests of corporations and the university. This shift creates an

has been widely accepted by academic organizations and institutions, has been described as “adher[ing] to, adapt[ing], and strengthen[ing]” the principles of the 1915 Declaration. *Id.* The 1915 Declaration has been called “the single most important document relating to American academic freedom.” Byrne, *supra* note 4, at 276. It has also been called “the first comprehensive analysis of academic freedom in the United States, [which] remains the foundation for the nonlegal understanding of academic freedom within the academic world.” David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 232 (1990).

9. 1915 DECLARATION, *supra* note 7, at 165-66. See also RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 419, 426-27, 439, 439 n.94 (1955); ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 14-17 (1986).

10. 1915 DECLARATION, *supra* note 7, at 158-61 (asserting that the institutional legitimacy of a university is dependent on its identity as a “public trust,” given the role of “education [as] the cornerstone of the structure of society,” and “advancing knowledge by the unrestricted research and unfettered discussion of impartial investigators”).

11. Byrne, *supra* note 4, at 273-76; Metzger, *supra* note 4, at 1276-81.

12. 1915 DECLARATION, *supra* note 7, at 158.

13. *Id.* at 160-63.

14. *Id.* at 169.

institutional conflict of interest for the university between its public interest goals and the private economic interests that it has now adopted. The second aspect of the changes brought about by corporatization flows from this shift in the university's mission, which is implemented through university policies and practices. My focus, in this talk, is primarily on the increased interest in the commercial potential of academic research, particularly regarding the lucrative potential of life science research following the mid-1970s explosion of genetic engineering and biotechnology.¹⁵ The third aspect of the changes resulting from corporatization relates to the impact on the professional norms of faculty academic freedom and academic culture due to conflicts of interest created by faculty concerns for proprietary interests in research.

The revolutionary advances in academic genetics research coincided with important legislative and judicial developments encouraging a huge increase in university market activity through patenting and licensing of research. Since World War II, universities have continued to rely heavily on public funding to support academic research activity.¹⁶ Prior to 1980, such public research funding policy was consistent with the value of academic freedom and universities functioning in the public interest, as there was a presumption that publicly funded research result would be placed into the public domain.¹⁷ A major legislative development in 1980 altered that

15. See, MARTIN KENNEY, *BIOTECHNOLOGY: THE UNIVERSITY-INDUSTRIAL COMPLEX* 23-27 (1986) (discussing the impact of the development of recombinant DNA); Sheldon Krinsky, *The Profit of Scientific Discovery and Its Normative Implications*, 75 *CHI.-KENT L. REV.* 15, 17-18 (1999) (describing the way in which "rDNA technology . . . opened up possibilities for synthesizing new organisms and establishing revolutionary methods for mass producing biological products," with the simultaneous recognition of "[t]he commercial opportunities of this discovery.")

16. See, KENNEY, *supra* note 15, at 35-36 (stating that federal funding levels have consistently provided universities with at least sixty to seventy percent of research support since 1960). See also Eyal Press & Jennifer Washburn, *The Kept University*, *ATLANTIC MONTHLY*, Mar. 2000, at 40. Public funding for university life sciences research is estimated at seventy to eighty percent of total funding. David Blumenthal, *Biotech in Northeast Ohio Conference: Conflict of Interest in Biomedical Research*, 12 *HEALTH MATRIX* 377, 380-81 (2002); Kenneth Sutherlin Dueker, *Biobusiness on Campus: Commercialization of University-Developed Biomedical Technologies*, 52 *FOOD & DRUG L.J.* 453, 457 (1997).

17. See Rebecca S. Eisenberg, *Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research*, 82 *VA. L. REV.* 1663, 1663, 1671-91 (1996) (detailing post-World War II government "spending on research and development to support the war effort" and the debate of "who should own title to [government-sponsored] research"); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 *NW. U. L. REV.* 77, 92-93 (1999). The government agency could choose to dedicate an invention to the public domain by publishing the results without obtaining a patent or by providing nonexclusive licenses to private parties seeking to use a government-owned patent. Eisenberg, *supra*, at 1675-76; Rai, *supra*, at 97 n.113. In some agencies, a university or other government contractor could

presumption, with the Federal Bayh-Dole Act,¹⁸ which is based on values in tension with the university's public interest mission. Bayh-Dole was enacted in the early stages of the drive toward privatization of public services and public institutions in the United States.¹⁹ Bayh-Dole transformed the university's public mission by emphasizing private corporate interests through the commercialization of publicly funded research discoveries. Specifically, the Bayh-Dole Act authorizes and encourages federal fund recipients to patent the results of their federally funded research.²⁰ The patents belong to the federal fund recipient—including universities—which can then license these patents for use, including exclusive licenses to for-profit corporations²¹ such as Merck, Monsanto, and Novartis, for commercial development.

These market research activities undermine academic freedom and the public mission of the university. The university's interests now overlap with private economic interests of business corporations, creating a conflict of interest that compromises the university's independence to engage in academic research without regard to the commercial potential of research.²² This conflict of interest, in turn, can damage both the actual quality of the research and the public confidence in the legitimacy of university research.²³ Corporations that negotiate exclusive licenses of university patents can now charge monopoly prices, creating an added cost to the public through the Bayh-Dole Act's use of public funding as an indirect subsidy to private businesses.²⁴ The exclusive licensing of university-owned patents to businesses, therefore, is tantamount to the corporate purchase of the university's federally funded patent.

The Bayh-Dole Act has had its desired effect of privatizing publicly funded research, evidenced by the enormous increase in the patenting and licensing activities in the university. In 1979, prior to the Bayh-Dole Act, U.S. universities obtained 264 patents.²⁵ That number

petition the federal agency to shift title from the government to the contractor. Eisenberg, *supra*, at 1683–84, 1691–92.

18. See Bayh-Dole Act of 1980, 35 U.S.C. §§ 200–212 (2001).

19. See *Marketing of Higher Education*, *supra* note 1, at 780.

20. 35 U.S.C. § 200 (2000). See also Eisenberg, *supra* note 17, at 1664–65.

21. Eisenberg, *supra* note 17, at 1663–65.

22. See *Marketing of Higher Education*, *supra* note 1, at 782, 789; *Social Implications*, *supra* note 1.

23. *Social Implications*, *supra* note 1.

24. *Id.*; Eisenberg, *supra* note 17, at 1666–69; *Marketing of Higher Education*, *supra* note 1, at 782.

25. Arti K. Rai & Rebecca S. Eisenberg, *Bayh-Dole Reform and the Progress of Biomedicine*, 66 LAW & CONTEMP. PROBS. 289, 292 (2003).

increased to 2,436 patents obtained by U.S. universities in 1997,²⁶ and 3,450 patents in 2003.²⁷ Between 1991 and 2000, new patent applications by U.S. universities increased by 238 percent, university-industry licensing agreements increased by 161 percent, and royalty revenues to universities increased by more than 520 percent.²⁸

In addition to authorizing and encouraging the use of public funding for the private interest, the Bayh-Dole Act also increased the contact between industry and academia, greasing the wheels for the growth of private corporate funding for academic research. As in the case of increased university patenting and licensing activities since 1980, there is also a trend of rising corporate funding of university research. Corporate funding of university research, in general, rose from 2.3 percent in the early 1970s to almost 8 percent by the year 2000,²⁹ and 11.7 percent of life sciences research in 1994.³⁰ Corporate funding includes both faculty research support and faculty consulting fees.³¹ At the institutional level of the university, corporate funding has included multi-million dollar, multi-year “strategic corporate alliances.”³² The notorious 1998 Berkeley-Novartis agreement is the most widely known,³³ but certainly not the sole example,³⁴ of a strategic corporate alliance. Under these agreements, a corporation gives millions of dollars

26. *Id.* at 291-92.

27. Goldie Blumenstyk, *Colleges Seek a Record Number of Patents*, CHRON. HIGHER EDUC., Dec. 3, 2004, at 27.

28. Jerry G. Thursby & Marie C. Thursby, *University Licensing and the Bayh-Dole Act*, SCI., Aug. 22, 2003, at 1052.

29. DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 12 (2003).

30. David Blumenthal et al., *Relationships Between Academic Institutions and Industry in the Life Sciences—An Industry Survey*, NEW ENG. J. MED., Feb. 8, 1996, at 368, 369–71.

31. See Blumenthal, *supra* note 16, at 379 (estimating that about half of life sciences faculty members act as consultants for industry). Since the mid-1980s, twenty-one to twenty-eight percent of life sciences faculty members have consistently received research support from industry, and about seven to eight percent of faculty members reported that they held equity in a company related to their research. *Id.* at 378-79. See *Social Implications*, *supra* note 1.

32. See *Marketing of Higher Education*, *supra* note 1, at 788 (quotes added); *Social Implications*, *supra* note 1.

33. See Press & Washburn, *supra* note 16, at 39-40 (explaining that Novartis (Syngenta) agreed to provide \$25 million of corporate funding over a five-year period in exchange for exclusive licensing rights to about one-third of the Plant and Microbial Biology department’s discoveries).

34. See, e.g., KENNEY, *supra* note 15, at 67–69 (describing the 1982 agreement in which Monsanto gave Washington University \$23.5 million of corporate funds over five years in exchange for exclusive licensing rights to patents resulting from biomedical research); Andrew Lawler, *Last of the Big-Time Spenders?*, SCI., Jan. 17, 2003, at 330 (describing the 1994 agreement in which Amgen gave \$30 million of corporate funding to the MIT Departments of Biology and Brain and Cognitive Sciences over a ten-year period in exchange for resulting patents to be owned jointly by MIT and Amgen).

to fund entire university departments for research programs in exchange for the right to exclusive licenses for academic research developed in that department or program.³⁵ In other words, the corporation gets exclusive monopoly control over academic research results. The strategic corporate alliance extends additional benefits, including the right of corporate pre-publication review of academic research,³⁶ preferred access to faculty, students, and university facilities,³⁷ and the right to participate in the process of deciding which faculty will be awarded corporate research funds.³⁸

Similarly to the Bayh-Dole Act, the growth in private corporate funding imposes multiple costs on the public.³⁹ Although public funding of research is not at issue, the public mission of the university is still at issue, with similar costs to the public interest. Through the use of patents and licenses, the public domain of academic research results will be restricted. The university is placed in a conflict of interests, as it seeks to attract corporate funding for academic research that will enhance the corporation's and the university's financial interests rather than the public interest. As the university and faculty become business partners with the funding corporation, the university loses its independence. The distinction between the research and development department of a for-profit corporation and the research carried out in a university starts to become blurred or perhaps completely unrecognizable in certain aspects.

Among faculty, the market-driven policies and practices of university corporatization undermine traditional professional norms of academic freedom, which are based on faculty autonomy and independence from private economic interests—whether those private interests are those of the faculty member, the university, or third-party funders.⁴⁰ Such independence is needed to support the quality and integrity of the research and to support a faculty culture that values

35. *Marketing of Higher Education*, *supra* note 1, at 788; *Social Implications*, *supra* note 1.

36. See Rebecca S. Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 *YALE L.J.* 177, 216-26 (1987) (stating that publications may be delayed for three to six months to provide time for corporate review and for filing patent applications); Krinsky, *supra* note 15, at 30; Joshua A. Newberg & Richard L. Dunn, *Keeping Secrets in the Campus Lab: Law, Values, and Rules of Engagement for Industry-University R&D Partnerships*, 39 *AM. BUS. L.J.* 187, 201-12 (2002).

37. KENNEY, *supra* note 15, at 55-72.

38. Charles C. Caldart, *Industry Investment in University Research*, *SCI., TECH., & HUM. VALUES*, Spring 1983, at 24-25; Press & Washburn, *supra* note 16, at 40.

39. See *Marketing of Higher Education*, *supra* note 1, at 786-88; *Social Implications*, *supra* note 1.

40. See Byrne, *supra* note 4, at 273-76; Metzger, *supra* note 4, at 1276-81.

openness in research—sharing research methods and results in the public domain.⁴¹ The expansion of the public domain, in turn, promotes the quality and advancement of academic research, as researchers share their discoveries and test the research results of their colleagues. The shift of university mission from public to private interests and the accompanying increase in market-driven practices have had a negative impact on these professional norms and culture of academic freedom. Similar to the university institutional conflict of interests, faculty involved in market activities have individual professional conflicts of interest.⁴² Communal values are undermined by increased secrecy resulting from private economic concerns about preserving proprietary rights in research results.⁴³ Dependence on corporate research funds compromises independence in research, for example, when the university administration or faculty agree to submit research results for corporate review prior to publication. Studies have demonstrated a significant impact on research, with more favorable research results concerning the corporate funder's product by faculty whose research is funded by the corporation.⁴⁴ Disturbing incidents have been reported of corporate pressure placed on faculty researchers to change or suppress research findings that go against the corporation's interests.⁴⁵

As previously stated, I find that several recent developments show some recognition of the harms resulting from university corporatization, which can lead to hope for change and reform. There are three issues that have recently been in the spotlight that show that even bad news can

41. See BERNARD BARBER, *SCIENCE AND THE SOCIAL ORDER* 84-100 (1953) (regarding the values of "communalism," openness in research, and "disinterestness" in science research); ROBERT K. MERTON, *THE SOCIOLOGY OF SCIENCE* (1973); Eisenberg, *supra* note 36, at 181-84; Rai, *supra* note 17, at 88-94.

42. See *Marketing of Higher Education*, *supra* note 1, at 772; *Social Implications*, *supra* note 1.

43. See KENNEY, *supra* note 15, at 108-11, 121-31; Blumenthal, *supra* note 30, at 372-73; Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 *TEX. L. REV.* 1363, 1375 (1988); Jonathan King & Doreen Stabinsky, *Patents on Cells, Genes, and Organisms Undermine the Exchange of Scientific Ideas*, *CHRON. HIGHER EDUC.*, Feb. 5, 1999, at B6. See also Jordan Paradise, *European Opposition to Exclusive Control Over Predictive Breast Cancer Testing and the Inherent Implications for U.S. Patent Law and Public Policy: A Case Study of the Myriad Genetics' BRCA Patent Controversy*, 59 *FOOD DRUG L.J.* 133, 149 (2004) (discussing the negative impact on researchers of the decreased sharing of basic data).

44. Krinsky, *supra* note 15, at 34; Mildred K. Cho & Lisa A. Bero, *The Quality of Drug Studies Published in Symposium Proceedings*, *ANNALS INTERNAL MED.*, Mar. 1, 1996, at 485; Mark Clayton, *Corporate Cash & Campus Labs*, *CHRISTIAN SCI. MONITOR*, June 19, 2001, at 11; Press & Washburn, *supra* note 16, at 42.

45. *Distance Learning*, *supra* note 1, at 75-83; Press & Washburn, *supra* note 16, at 42; Peter Ritter, *Bitter Pills*, *CITY PAGES*, July 4, 2001, at <http://www.citypages.com/databank/22/1074/article9665.asp> (last visited Apr. 16, 2005).

be good news if it draws attention to problems of conflicts of interest that can harm the public interest. The first issue concerns the 2004 external evaluation report of the Berkley-Novartis Strategic Corporate Alliance, concluding that universities should avoid such agreements due to the problems of conflicts of interest.⁴⁶ One of the most interesting aspects of the report is the lengthy discussion of policy issues, encouraging faculty and the university to engage in public debate about the identity of the university, including issues of the public mission of the university, conflicts of interest, and collegial relationships and values that may be altered by such large corporate funding agreements.⁴⁷

The second development is the public discussion of the potential influence of corporate financial support for drug trials at the Food and Drug Administration (FDA). Since 1992, "user fees" from industry have supported drug approval reviews conducted by the FDA.⁴⁸ The recent spotlight on this issue provides important evidence of the potential impact on public health when an institutional public interest mission conflicts with private corporate economic interests. In particular, the delays and even possible suppression of FDA employees' reports of the medical risks of pharmaceutical products such as Vioxx and anti-depressant medications for treatment of adolescents have raised important questions of whether FDA dependence on corporate support has led to the restriction of the public domain and a lack of integrity in FDA drug approval decisions.⁴⁹ Dr. David Graham, the FDA researcher who had the courage to speak publicly about the FDA's suppression of evidence concerning drug safety, has sought whistleblower protection due to his fear of retaliation from his government employer.⁵⁰ Any reasonable person witnessing the problems at the FDA would find a need for legislative or agency regulations to ensure that the conflict between public and private interests does not result in the sacrifice of

46. See Lawrence Busch et al., *External Review of the Collaborative Research Agreement between Novartis Agricultural Discovery Institute, Inc. and The Regents of the University of California* (2004), available at http://www.berkeley.edu/news/media/releases/2004/07/external_novartis_review.pdf.

47. *Id.* See also Goldie Blumenstyk, *Reviewers Give Thumbs Down to Corporate Deal at Berkeley*, CHRON. HIGHER EDUC., Aug. 6, 2004, at 25; Rex Dalton, *Biotech Funding Deal Judged to be 'a Mistake' for Berkeley*, NATURE, Aug. 5, 2004, at 598.

48. See Gardiner Harris, *At FDA, Strong Drug Ties and Less Monitoring*, N.Y. TIMES, Dec. 6, 2004, at A1.

49. See Gardiner Harris, *Drug-Safety Reviewer Says F.D.A. Delayed Vioxx Study*, N.Y. TIMES, Nov. 4, 2004, at A21; Gardiner Harris, *FDA Leader Says Study Tied to Vioxx Wasn't Suppressed*, N.Y. TIMES, Nov. 18, 2004, at C7.

50. See Denise Grady, *FDA Employee Seeks Help from Whistle-Blowers' Group*, N.Y. TIMES, Nov. 24, 2004, at A21.

public health and safety.⁵¹ In fact, Congress is now considering the need for an independent arm of the FDA to act as watchdog—this, of course, means that the original watchdog function of the FDA has been compromised by its overriding concerns with private corporate interests.⁵² Similarly, the ever-increasing role of private industry in the university—particularly, through licensing of publicly and privately funded patents—should raise the same concerns about the compromise of university independence, institutional integrity, reliability of research results, and the restriction of the public domain.

The third development concerns public access to scholarly publications reporting results of federally funded research. The National Institutes of Health (NIH) has proposed a plan to place on its website scholarly articles reporting the results of publicly NIH-funded research.⁵³ This plan would, therefore, expand the public domain by providing the public with free access to articles that are published in expensive scientific and medical journals. The NIH plan is opposed by the private, for-profit journals that are concerned with their economic interests and by nonprofit journals concerned with maintaining a revenue flow sufficient to support their publication expenses.⁵⁴ This debate brings into the open the question about how to best serve the public, raising fundamental issues about the role and functions of a public agency like the NIH in contrast with the private goals of the publishing industry.

These three recent developments demonstrate that even in times of seemingly insuperable power of capitalist institutions, concerns with the

51. See Denise Grady, *A Medical Journal Calls for a New Watchdog on Drugs*, N.Y. TIMES, Nov. 23, 2004, at A18.

52. See Barry Meier, *A Top Republican to Offer Drug Data Bill*, N.Y. TIMES, Dec. 10, 2004, at C3; Sheryl Gay Stolberg, *Idea of Drug Safety Office Is Already Hitting Snags*, N.Y. TIMES, Nov. 25, 2004, at A30.

53. See Julianne Basinger, *NIH Would Post Free Online Papers*, CHRON. HIGHER EDUC., Sept. 17, 2004, at 14; Lila Guterman, *NIH Proceeds With Plan to Provide Open Access to Scientific Papers*, CHRON. HIGHER EDUC., Sept. 10, 2004, at 19. See also Art Brodsky, *Public Knowledge Disappointed in New Open Access Policy*, at <http://www.publicknowledge.org/pressroom/releases/pressrelease.2005-02-03.9256951814> (stating that on February 3, 2005, the NIH announced its policy that requests NIH-funded authors to make their articles available for free online access on its PubMed Central Web site within twelve months of official publication date). This policy has been criticized for weakening the original proposal that would have required NIH-funded authors to make their papers available for free online access within six months of official publication date. *Id.* See also *Social Implications*, *supra* note 1; Lila Guterman, *The NIH Reportedly Is Weakening Its Plan for Free Access to Journal Articles*, CHRON. HIGHER EDUC., Jan. 28, 2005, at 16 (stating that additional developments at the NIH to address problems of corporate influence and conflicts of interest include the NIH issuing a temporary one-year prohibition, announced in September 2004, of NIH researchers' paid consulting for corporations, pending further systematic reforms).

54. See Lila Guterman, *The Promise and Peril of 'Open Access'*, CHRON. HIGHER EDUC., Jan. 30, 2004, at 10.

public interest can still take center stage and demand our attention. I am encouraged by the existence of organizations that seek to further public interest goals of universities. Some have been in existence for almost a century, like the AAUP. Others are newer, such as Universities Allied for Essential Medicines⁵⁵ and Public Knowledge,⁵⁶ which seek to expand the public domain of academic research. Through a combination of individual and collective efforts, faculty academic freedom and university independence can be reclaimed and restored. I hope that university faculty will seize such developments as opportunities to face similar issues in the context of the university's public interest mission and academic freedom.

55. See UNIVERSITIES ALLIED FOR ESSENTIAL MEDICINES, ABOUT UNIVERSITIES ALLIED FOR ESSENTIAL MEDICINES, at <http://www.essentialmedicines.org/about.html> (stating that "Universities Allied for Essential Medicines" links universities in the United States, the United Kingdom, and Canada, to support faculty and student efforts to place pressure on the universities to waive their patent rights on AIDS medicines in developing countries).

56. See PUBLIC KNOWLEDGE, OPEN ACCESS, at <http://www.publicknowledge.org/issues/openaccess.html> (stating that Public Knowledge describes its goals in its Open Access Project as "work[ing] for open access to (1) taxpayer-funded research and (2) research that scientists and scholars consent to publish without payment").