

SLIPPING THROUGH THE GATE: TRUSTING *DAUBERT* AND TRIAL
PROCEDURES TO REVEAL THE ‘PSEUDO-HISTORIAN’ EXPERT WITNESS
AND TO ENABLE THE RELIABLE HISTORIAN EXPERT WITNESS—
TROUBLING LESSONS FROM HOLOCAUST-RELATED TRIALS

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I. INTRODUCTION

Historians have played a significant role in some of the most high-profile and important trials in this country. Historians have influenced courtroom proceedings by both testifying as experts and by filing amicus curie briefs.¹ Courts also rely on historical interpretations without using expert witnesses to provide this evidence.² This Article explores two related problems associated with ascertaining truth in the courtroom when historians serve as expert witnesses. The first involves screening experts for admissibility. Arguably, screening an expert historian presents unique

¹Historians filed amicus briefs in many seminal cases. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²*See* Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 488 (2008). Professor Festa describes the increase in courts’ (and lawyers’) use of history. Unlike Festa’s article, which involves the courts’ gathering of and relying on historical evidence, this Article involves historians brought to the courtroom as expert witnesses.

challenges for the trial judge different from the challenges a scientific expert presents, as the *Daubert* trilogy, beginning with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³ and concluding with *Kumho Tire Co., Ltd. v. Carmichael*,⁴ originally was designed to avoid “junk science.”⁵ Yet, courts use this same test to assess the reliability of historical interpretation, evidence very different from scientific evidence. Existing trial procedures like *Daubert* hearings were not designed to test for “junk history,”⁶ a phrase I use to mean history based on an unreliable historical methodology.

With regard to screening expert historians, the Article distinguishes the historian whose methodology is reliable from the pseudo-historian, whose historical methodology is flawed. By “pseudo-historian,” I mean the purported expert who enters the courtroom seeking to advocate a particular ideology or social policy and whose historical methodology he deliberately perverts to achieve that goal. My primary focus is the pseudo-historian, the purported expert who brings propaganda, rather than truth, into the courtroom.

Ideally, we want federal courts⁷ as gatekeepers to cut off the pseudo-historian before he takes the stand, thus avoiding junk history. Arguably, if a *Daubert* hearing fails to reveal the pseudo-historian, devices within our adversarial system like impeachment and cross-examination will reveal the

³509 U.S. 579 (1993). The other case in the trilogy is *General Electric Co. v. Joiner* in which the Supreme Court declared “abuse of discretion” as the proper standard of review for the district court’s evidentiary rulings concerning expert admissibility. 522 U.S. 136, 143 (1997).

⁴526 U.S. 137 (1999).

⁵“Junk science” typically refers to novel conclusions allegedly based on the scientific method. In *Joiner*, the Court described, “[A]n example of ‘junk science’ that should be excluded under *Daubert* would be the testimony of a phrenologist who would purport to prove a defendant’s future dangerousness based on the contours of the defendant’s skull.” *Joiner*, 522 U.S. at 154 n.6.

⁶By junk history, I mean something different from junk science. I do not mean history that is new (like a revisionist or post-modern theory) but rather history not founded on a reliable historical methodology, meaning the history is actually junky (using junk in the true sense of the word to mean something of little worth or meaning).

⁷Many state courts have also adopted *Daubert* as the gatekeeping standard for expert testimony. The same issues discussed in this Article would arise as courts apply *Daubert* in these states. Certain states continue to use the *Frye* “general acceptance” test. See David E. Bernstein, *Asbestos Litigation & Tort Law: Trends, Ethics, & Solutions: Keeping Junk Science out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 23 n.72 (2003) (listing Alabama, Arizona, California, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Missouri, New Jersey, New York, North Dakota, Pennsylvania, and Washington as *Frye* states).

“shaky but admissible evidence.”⁸ Yet, this Article explores whether our legal system is equipped to catch the pseudo-historian at the outset, and the danger if our legal system allows these purported experts to slip through the gate and testify, thus permitting junk history into the courtroom.

The Article also explores a second, related problem of how we present experts, specifically expert historians, and how our methods of presenting experts may pervert an otherwise reliable historian’s testimony. Though important, this analysis gets less attention here, as others have addressed this concern. Commentators have written on how the adversarial system mistreats expert historians, exerting “undue pressure” on these witnesses and thus skewing their testimony.⁹ Accordingly, the flip-side of the pseudo-historian problem is the toll that rigorous cross-examination and how we present experts even on direct-examination may take on the reliable historian’s testimony.

Previous scholarship about historians as expert witnesses—generally premised on the notion that historian testimony becomes one-sided because of our adversarial system and lawyers’ zeal to win—describes ways to minimize the ill-effects of the adversarial system on these experts. Yet, none of the commentary focuses on the potentially more perilous problem of managing the pseudo-historian, whose historical methodology she intentionally skews to promote an ideological agenda in a public forum, gaining notoriety for herself and her beliefs (and the tenuous fit between *Daubert* and expert historian testimony).

Historians have testified in both high and low-profile cases in this country, many of which I describe in Part II, illustrating the prominence of historians in the courtroom. In *EEOC v. Sears, Roebuck & Co.*, for example, a highly-publicized gender discrimination case against Sears Roebuck, the lawyers pitted two acclaimed feminist historians, Professors Alice-Kessler Harris and Rosalind Rosenberg, against each other on the issue of women’s traditional role in the workplace.¹⁰ The historians’ testimony, and more specifically, the fact that Rosenberg would testify on Sears’ behalf, gained significant attention in the academic community, causing feminist historian groups to ostracize Rosenberg as a result of her

⁸ *Daubert*, 509 U.S. at 596.

⁹ Daniel A. Farber, *Adjudication of Things Past: Reflections on History as Evidence*, 49 HASTINGS L.J. 1009, 1011 (1998); see Jonathan D. Martin, Note, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518 (2003).

¹⁰ 628 F. Supp. 1264, 1308–15 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988).

choice.¹¹ In the high-profile tobacco litigation, expert historians played a pivotal role by describing the public's knowledge of smoking hazards, a crucial issue at trial.¹²

Obviously, historians have also played a significant role in constitutional jurisprudence by lending their weight to disputes concerning the Founding Fathers' intentions.¹³ Judges have at times relied on historians to testify at trial and have gathered historical evidence themselves, relying on books and treatises by historians to establish facts of history.¹⁴

In light of the prominence of expert historians at trial, Part III explores federal courts' gatekeeping role under the Supreme Court's *Daubert* gatekeeping test, as applied to historians serving as expert witnesses. The Section explores whether *Daubert*, originally meant to assess novel scientific evidence (junk science) but later applied to non-scientific testimony, would expose a historian whose bibliography is respectable, but whose methodology he deliberately distorts to pursue a political ideology. In other words, would *Daubert* expose a purported expert historian whose testimony is propaganda rather than truth?

Part IV illustrates the reason for alarm if *Daubert* is not up to snuff. In this Part, I introduce David Irving by describing two Holocaust-related¹⁵ trials from Britain and Canada in which he played a role. I describe these

¹¹See Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEX. L. REV. 1629, 1630 (1988) (stating the scholarly community's treatment of Rosenberg "seems plainly designed to insure that no other historian, especially one without tenure, ever will dare to express similar views in court or in any other forum.").

¹²See *Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 436-37 (D. Md. 2005).

¹³I certainly do not wish to join the controversy over the Supreme Court's use of history about, for example, the founding fathers' intentions to decide constitutional questions. See generally Festa, *supra* note 2; Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Use of History*, 13 J.L. & POL. 809 (1997); Bukner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377 (1998).

¹⁴See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 435 (1980) (Rehnquist, J., dissenting) (chastising majority for relying on work of "revisionist historians"); Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1076 (1994) (discussing the internal controversy between Supreme Court justices about the use of history).

¹⁵The word Holocaust literally means a burnt offering dedicated to the Lord. LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS* xv (1975).

cases for three reasons: first and foremost, to illustrate the workings and attributes of the pseudo-historian; second, to compare how these jurisdictions screen expert historians; and, third, to show the prominence expert historians may have at trial. As a minor point, these trials also illustrate the travails of the reliable historian, whose testimony is altered by the strictures of trial. These trials, *Irving v. Penguin Books Ltd.*¹⁶ and *Commonwealth v. Zundel*,¹⁷ also demonstrate why pseudo-historians may seek to testify at trial and give unreliable testimony. Often, as shown herein, these purported experts are drawn to high-profile cases where the stakes are high in terms of public impact and notoriety.

In *Irving*, a libel case brought by Holocaust denier David Irving against Professor Deborah Lipstadt based on statements in her book, *Denying the Holocaust*, much of the case focused on plaintiff David Irving's flawed historical methodology regarding Auschwitz (Irving believes Nazis did not use gas chambers to murder Jews at Auschwitz).¹⁸ At the end of the ten week trial, presiding judge Charles Gray ruled that Irving had intentionally contorted the historical evidence to align it with his politics.¹⁹

David Irving, revealed by Judge Gray as a phony for his faulty interpretation of the history of gas chambers at Auschwitz, had testified a few years earlier in a lawsuit by the Canadian government against Holocaust denier Ernest Zundel. Irving, admitted as an expert historian in that case, testified that the Nazis did not use gas chambers to murder Jews at Auschwitz. Thus, the same historical interpretation that led Judge Gray to rule Irving had deliberately falsified history was admitted as expert testimony on the same historical issue in an earlier case in Canada. Herein lies one possible danger of inadequate gatekeeping; unless flaws in methodology are revealed at the outset, these flaws are difficult to uncover absent a lengthy hearing or trial focused on historical methodology.

Part V examines how we present expert historians once admitted to testify. The Section begins with a brief discussion of the historians' craft. This discussion highlights differences between the courtroom and the arena

¹⁶*Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478 (Q.B.D. Apr. 11, 2000), available at <http://www.holocaustdenialontrial.org/trial/>.

¹⁷See generally *R. v. Zundel*, [1992] 95 D.L.R. (4th) 209 (Can.); *R. v. Zundel*, [1990] 53 C.C.C. (3d) 161 (Can.); *R. v. Zundel*, [1987] 35 D.L.R. (4th) 338 (Can.).

¹⁸See DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST*, 179–81 (The Free Press 1993).

¹⁹See generally *Irving*, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/13.63>.

in which historians practice their craft. The Section also explores whether cross-examination and impeachment are likely to reveal the lack of reliability of a historian's methodology. Or, a flip-side of the question, does cross-examination skew the reliable historian's testimony, preventing that expert from testifying in a manner true to her craft? The Article has a comparative component, as some of the trials described in the Article occurred on foreign soil, where gatekeeping and trial procedures differ, thus providing additional information for assessing the effectiveness of our current system.

The final section of the Article, Part VI, considers possible remedies, ways to improve our existing legal system to more carefully and effectively use historians as expert witnesses. For example, perhaps the Supreme Court should reconsider emphasizing the "general acceptance" factor for admissibility of expert historians (currently general acceptance is one of the *Daubert* factors; yet courts fail to emphasize it). In *Frye*, the court announced a test whereby expert testimony was admissible if the methodology was "generally accepted" in the scientific community.²⁰ The test was deemed under-inclusive, as it precluded novel scientific theories, and over-inclusive because it allowed any methodology that courts had deemed generally accepted among the scientific community.²¹ Yet with expert historians, perhaps federal courts should emphasize general acceptance of the methodology to screen these experts. I examine several other possible remedies including using special masters (themselves historians) to assist in gatekeeping of historian experts or, a commonly-suggested proposal, using neutral, court-appointed or lawyer-designated experts rather than lawyer-selected historian experts. I also urge involving the American Historical Association in gatekeeping as well as peer review.

In the end, each proposal is flawed, as our existing procedures for gatekeeping and presenting experts are firmly entrenched in the promise (or myth) of the adversarial system's ability to determine the reliability of expert testimony. In fact, when I asked a preeminent trial lawyer and law professor about the danger of the pseudo-historian described in this Article, he answered, "I don't see a problem—the adversarial system will take care of it." Yet, in view of the ever-increasing role of these experts, and their

²⁰*Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

²¹Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 867 n.4 (2005).

continuing role in trials with political overtones,²² this Article reflects less confidence in adversarialism for addressing the dual problems of the pseudo-historian and the reliable historian striving to present an accurate interpretation of history.

II. HISTORIAN EXPERT WITNESSES' PROMINENCE IN UNITED STATES COURTROOMS

Historians have played a substantial role in shaping this country's law, as testifying experts, authors of amicus curie briefs, academic resources, and consulting experts. Historians have served as expert witnesses in some of the most high-profile and high-stakes lawsuits in this country, testifying in cases involving gay rights,²³ gender discrimination,²⁴ voting rights,²⁵ tobacco litigation,²⁶ naturalization proceedings against defendants suspected of failing to disclose ties to organizations hostile to the United States,²⁷ and Native-American hunting and fishing rights.²⁸ This list is by no means complete.

²²In recent cases against alleged terrorists, the government typically calls an expert historian or political scientist to testify as to al Qaeda and its practices. These cases are political in the sense that many believe the government has been over zealous in prosecuting these cases.

²³*Evans v. Romer*, 882 P.2d 1335, 1343 (Colo. 1994) (en banc), *aff'd*, 517 U.S. 620 (1996).

²⁴*See generally* *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); Thomas Haskell & Sanford Levinson, *Academic Freedom and Hypothetical Pools: A Reply to Alice Kessler-Harris*, 67 TEX. L. REV. 1591 (1989); Alice Kessler-Harris, *Academic Freedom and Expert Witnessing: A Response to Haskell and Levinson*, 67 TEX. L. REV. 429 (1988); Haskell & Levinson, *supra* note 11; Alice Kessler-Harris, *Equal Employment Opportunity Commission v. Sears, Roebuck and Company: A Personal Account*, 35 RADICAL HIST. REV. 57 (1986).

²⁵*See* *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) ("Although understandably no 'eyewitnesses' to the 1901 proceedings testified, testimony and opinions of historians were offered and received without objection."); *City of Mobile v. Bolden*, 446 U.S. 55, 59–60 (1980); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1020 (2d Cir. 1995); *Brown v. Bd. of Sch. Comm'rs*, 542 F. Supp. 1078, 1087 (S.D. Ala. 1982), *aff'd*, 706 F.2d 1103 (11th Cir. 1983).

²⁶*See* *Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 434 (D. Md. 2005), *aff'd*, 162 Fed. App'x. 231 (4th Cir. 2006).

²⁷*See* *United States v. Lileikis*, 929 F. Supp. 31, 37–38 (D. Mass. 1996).

²⁸*See* *United States v. Michigan*, 471 F. Supp. 192, 219 (W.D. Mich. 1979); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 181 (1999), *aff'g* 124 F.3d 904 (8th Cir. 1997); *Cayuga Indian Nation v. Pataki*, 165 F. Supp. 2d 266, 300 (N.D.N.Y. 2001) (historians testifying about New York's disputed purchase of Cayuga land at a certain time).

For example, historians testified as experts in the high-profile tobacco litigation concerning public awareness during the twentieth century of the health risks of smoking. Plaintiffs sued for products liability and were required to prove the dangers of smoking were not obvious or commonly known. Robert J. Norrell, a historian at University of Tennessee, testified for R.J. Reynolds in *Waterhouse v. R.J. Reynolds Tobacco Co.*,²⁹ that between 1947 and 1969, ordinary people generally knew that smoking could cause serious life-threatening illness.³⁰ The plaintiff's expert pulmonologist countered this testimony, contending that most smokers "did not have a real understanding of the risk of cigarette smoking during those years."³¹

The trial court described the expert historian Dr. Norell's "credentials, principles, and methodology" as "if not impeccable—at least unchallenged,"³² granting R.J. Reynolds' motion for summary judgment. The Fourth Circuit agreed with the lower court, stating the pulmonologist "reached his conclusion without establishing what his mode of historical analysis is or whether that mode is generally considered reliable or acceptable."³³ Arguably, the methodology used by these experts played a pivotal role in the outcome of the case.

In a gay rights case, also a matter of national concern, historian Martha Nussbaum and Professor John Finnis testified at trial about the moral thoughts of Aristotle and Plato regarding homosexuality.³⁴ The case arose when the State of Colorado sought to pass "Amendment 2," which would have prohibited a political entity from enacting any law giving protected status to homosexuals. On behalf of the plaintiffs' suit to enjoin the amendment's enforcement, historian Nussbaum testified about the morality derived from Plato and Aristotle, challenging the state's argument (and evidence) that these philosophers believed homosexuality countered the

²⁹ 162 Fed. App'x. 231, 234 (4th Cir. 2006), *aff'g* 368 F. Supp. 2d 432, 436 (D. Md. 2005). In the trial court, defendants submitted "extensive historical evidence" on the ill-effects of smoking, including the testimony of Dr. Norell.

³⁰ *Waterhouse*, 368 F. Supp. 2d at 436.

³¹ *Id.* at 434.

³² *Id.* at 436–37 ("[Norell] examined a wide array of historical scholarship and primary sources of public knowledge about the effects of tobacco use, including the New York Times and other national newspapers, as well as regional and local newspapers . . .").

³³ *Waterhouse*, 162 Fed. App'x. at 234.

³⁴ See Martha Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515, 1517–18 (1994).

state's interest in family values.³⁵ The trial court granted the injunctions, the Supreme Court of Colorado affirmed, and ultimately the United States Supreme Court agreed that the amendment violated the Equal Protection Clause.³⁶ Incidentally, the testimony of Nussbaum and Finnis became the object of bitter contention between the two, generating an academic battle that continued long after the trial ended.³⁷

In another case in which the academic controversy continued long after the lawsuit concluded, *EEOC v. Sears, Roebuck & Co.*,³⁸ the lawyers pitted two prominent feminist historians, Professor Alice Kessler-Harris and Professor Rosalind Rosenberg, against each other as experts. The 1988 case involved alleged gender discrimination by Sears Roebuck for purportedly failing to promote women to sales commission (more lucrative) jobs. The EEOC relied on statistical evidence to show Sears' intentional discrimination against women. Sears contended that women were less likely to apply for commission jobs, which involved more stress and financial risk. Historian Rosenberg testified on behalf of Sears that women traditionally did not seek risky or stressful employment. The trial court held for Sears on all claims, and the Seventh Circuit affirmed the ruling.³⁹ Although most contend the historian expert testimony did not alter the outcome, the case generated substantial attention because of Rosenberg's willingness to testify for Sears.⁴⁰

In lower-profile denaturalization proceedings,⁴¹ expert historians are generally admitted to testify for the government against a defendant seeking

³⁵ *Id.*

³⁶ *Romer v. Evans*, 517 U.S. 620, 635–36 (1996). The case arose after the trial court enjoined enforcement of Amendment 2 to the Colorado Constitution, which would have prohibited a political entity from protected status to homosexuals. The Colorado Supreme Court and United States Supreme Court agreed that the amendment violated the plaintiffs' rights under the equal protection clause.

³⁷ *Id.* at 1522–25; see John M. Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049, 1059 (1994) (referring to some of Nussbaum's oral testimony as "outlandish" and "pure fabrication").

³⁸ 628 F. Supp. 1264, 1308–15 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

³⁹ *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 360 (7th Cir. 1988).

⁴⁰ See *Haskell & Levinson*, *supra* note 11, at 1631 n.19 (a committee of women historians passed a resolution stating, "as feminist scholars we have a responsibility not to allow our scholarship to be used against the interests of women struggling for equity in our society.").

⁴¹ See *United States v. Firishchak*, 468 F.3d 1015, 1018 (7th Cir. 2006); *United States v. Zajancauskas*, 441 F.3d 32, 41 n.6 (1st Cir. 2006); *United States v. Szehinskyj*, 104 F. Supp. 2d 480 (E.D. Penn. 2000); *United States v. Stelmokas*, 100 F.3d 302, 307 (3d Cir. 1996). In

to avoid deportation. In these cases, the government seeks to revoke the citizenship of a defendant who purportedly failed to disclose personal involvement with genocide crimes or an organization hostile to the United States. In *United States v. Lileikis*, for example, the government sought to revoke Lileikis's citizenship for failing to disclose his personal involvement in genocide crimes.⁴² Specifically, the government alleged Lileikis was head of Lithuanian security for the Third Reich during World War II and thus had overseen the murder of tens of thousands of Jews during the war.

To support its summary judgment, the government presented a detailed affidavit of Dr. Yitzhak Arad, an acclaimed historian of the Jewish ghettos in Lithuania.⁴³ Defendant argued Dr. Arad lacked credibility as a historian of the Nazi era in Lithuania.⁴⁴ Specifically, he argued Dr. Arad had testified during the trial in Israel of Ivan Demjanjuk and his testimony was criticized "by Holocaust scholars and American courts precisely on the ground of bias and lack of scholarship."⁴⁵ The court rejected defendant's challenge and admitted Dr. Arad's affidavit, granting the government's summary judgment.

In another denaturalization proceeding, *United States v. Stelmokas*, the Third Circuit praised the government's historian expert witness, Dr. Raul Hilberg, as "a particularly credible witness with a remarkable knowledge of the documents placed into evidence."⁴⁶ The government sought to deport Stelmokas for failing to disclose his leadership in the Schutzmannschaft, an armed unit that assisted the Germans in persecuting Jews during World War II. Much of the bench trial concerned the authenticity of the documents the government used against Stelmokas, many of which Hilberg authenticated. In rejecting defendant's challenges regarding these documents, the court stated, "Hilberg, who has testified in many cases regarding eastern European Holocaust records and whose expertise cannot be doubted, testified that the documents he examined were authentic. . . ."⁴⁷

Szehinskyj, the court accepted testimony of government's expert, Dr. Charles W. Sydnor, "without hesitation" and referred to his knowledge as "encyclopedic." *Szehinskyj*, 104 F. Supp. 2d at 489.

⁴² 929 F. Supp. 31, 32–33 (D. Mass. 1996).

⁴³ *Id.* at 38. Essentially, Dr. Arad testified as to the authenticity of certain of the documents implicating Lileikis. *Id.*

⁴⁴ *Id.* at 37.

⁴⁵ *Id.* at 38.

⁴⁶ 100 F.3d 302, 307 (3d Cir. 1996).

⁴⁷ *Id.* at 312.

Similarly, in recent government trials against those accused of terrorist activities, courts typically admit expert witnesses to testify as to terrorist organizations and a particular defendant's activity within these organizations.⁴⁸ These experts are not necessarily academic historians⁴⁹—they often come from think tanks concerning terrorist organizations; yet they often testify as to facts of history regarding the formation and activities of al Qaeda.

Despite the prominent role these experts play in the courtroom (and, consequently, in influencing our country's law), courts have expressed little concern over trial procedures involving expert historians. Specifically, courts have not emphasized gatekeeping and presentation measures suited to expert historians, whose craft distinguishes these experts from scientists, for example. And while courts and commentators have certainly noted their influence in the courtroom⁵⁰ and examined the often one-sidedness of expert testimony in adversarial proceedings,⁵¹ academia has not addressed how poorly-suited *Daubert* is for screening these experts and how dangerous the outcome if junk history is admitted at trial. Thus, this Article departs from existing scholarship, in part, by focusing on the pseudo-historian and the resulting need to better equip federal courts to screen the expert historian.

III. *DAUBERT*—SCREENING HISTORIANS FOR ADMISSIBILITY AT TRIAL IN THE UNITED STATES

Federal courts currently use the test from *Daubert*,⁵² as applied to non-scientific testimony in *Kumho Tire*, to screen expert witnesses for reliability

⁴⁸ See generally *United States v. Damrah*, 412 F.3d 618, 625 (6th Cir. 2005); *United States v. Hammoud*, 381 F.3d 316, 337 (4th Cir. 2004); *United States v. Abdi*, 498 F. Supp. 2d 1048, 1068–70 (S.D. Ohio 2007); *United States v. Hayat*, No. 2:05-cr-240-GEB, 2007 WL 3340838 (E.D. Cal. Nov. 7, 2007).

⁴⁹ I use academic historian to mean a historian who teaches, researches, and writes in an academic setting. Defining the term historian is troubling and beyond the scope of this Article. Generally, I mean a person who studies, researches, and writes about historical events using a methodology particular to the historians' craft.

⁵⁰ See Farber, *supra* note 9, at 1519; Peyton L. McCrary & J. Gerald Herbert, *The Role of Historians as Expert Witnesses in Southern Voting Rights Cases*, 16 S.U. L. Rev. 101, 121 (1989).

⁵¹ See Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1129–30.

⁵² See *supra* text accompanying note 7.

and relevance.⁵³ Under Federal Rule of Evidence 702, expert testimony is admissible if it satisfies the following criteria:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁵⁴

Daubert mandates the trial court acts as “gatekeeper,” assessing the relevance⁵⁵ and reliability of the expert’s theory using the following five factors: (1) whether the theory has been subjected to peer review and publication; (2) whether it has attracted widespread acceptance within a relevant scientific community; (3) whether the theory or technique has been tested; (4) its known potential error rate; and (5) the existence and maintenance of standards controlling its operation.⁵⁶

The party proffering the expert witness must establish the testimony is admissible (the expert is qualified and the testimony is relevant and reliable) by a preponderance of the evidence.⁵⁷ An appellate court reviews the trial court’s admissibility decision for an abuse of discretion, sustaining the decision unless it is manifestly erroneous.⁵⁸

⁵³ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *United States v. Tucker*, 345 F.3d 320, 327 (5th Cir. 2003).

⁵⁴ FED. R. EVID. 702.

⁵⁵ Courts decide relevance by exploring whether the expert testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” FED. R. EVID. 702. The focus here is on reliability of the testimony.

⁵⁶ *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149–50 (1999) (citing *Daubert*, 509 U.S. at 592–94).

⁵⁷ FED. R. EVID. 104(a); *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc).

⁵⁸ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995).

In *Daubert*, the Supreme Court rejected the prior “general acceptance” test⁵⁹ for admissibility of expert witnesses espousing scientific theories and instead adopted the list of nonexclusive factors, including general acceptance, for deciding the reliability of expert testimony under Rule 702. In view of the increase in types of novel scientific testing, the goal of *Daubert* was, in part, to assist judges in screening out “junk science.”⁶⁰

In *Kumho Tire*, the Supreme Court relied on the plain language of Federal Rule of Evidence 702 to apply the *Daubert* test, traditionally applied to scientific methods, to non-scientific areas where “technical and other specialized knowledge” is required.⁶¹ Justice Breyer emphasized the flexibility of the test—the specific factors neither necessarily nor exclusively apply to every case. The trial court can decide *how to determine* reliability, just as it determines the ultimate question of reliability of the conclusions reached.⁶²

The Supreme Court described the *Daubert/Kumho Tire* standard as liberal and permissive, giving courts wide latitude in terms of allowing expert testimony and deciding how to test expert testimony.⁶³ Yet, many

⁵⁹Beginning in 1923, courts applied the *Frye* (general acceptance) test to the admissibility of experts espousing novel scientific theories. In *Daubert*, the Supreme Court rejected *Frye* and adopted the test described above for courts’ use in determining the reliability and relevance of expert testimony. Under *Frye*, courts did not have to analyze the scientific method, but rather, courts had only to ensure that the method was accepted by those in the field. Brodin, *supra* note 21, at 867 n.4 (citing 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 702.5[1] (2d ed. 1997)).

⁶⁰Brodin, *supra* note 21, at 871; *Joiner*, 522 U.S. at 153.

⁶¹*Kumho Tire Co.*, 526 U.S. at 141. *Kumho Tire Co.* involved personal injury claims against the maker and distributor of a minivan tire sued after the tire blew out, causing the van to overturn in a fatal accident. *Id.* at 142. The Supreme Court decision involved the admissibility of testimony from plaintiff’s expert, a mechanical engineer who had conducted a visual and tactile inspection of the tires. *Id.* at 142–44. The Supreme Court made clear that the *Daubert* test should be applied to all expert witnesses, including those with “technical and other specialized knowledge,” not just those with scientific evidence. *Id.* at 141.

⁶²*Joiner*, 522 U.S. at 142. In *Joiner*, the Supreme Court added to the gatekeeping test the court’s role in assessing not only the reliability of the methodology but also the reliability of the ultimate conclusion. *Id.* at 143.

⁶³See *Kumho Tire Co.*, 526 U.S. at 150; but see Daniel D. Blinka, *Expert Testimony and the Relevancy Rule in the Age of Daubert*, 90 MARQ. L. REV. 173, 188 (2006) (citing the North Carolina Supreme Court for this objection to *Daubert*: “despite its proposed ‘flexibility’ and the purported lowering of barriers to expert assistance, the federal reliability rule’s application ‘has been anything but relaxed’ as trial courts strictly scrutinize expert testimony . . .”).

criticize the standard for its permissiveness (or complain it is too stringent), leading to its lack of reliability.⁶⁴

Regardless of its merits as a screening tool for scientific testimony, the *Daubert* test is arguably and predictably ill-suited for testing theories that arise from a non-scientific methodology.⁶⁵ For example, a historian's methodology does not involve testing a hypothesis and then replicating the test to check the hypothesis. Rather, it may involve choosing whether to rely on a certain source to arrive at a universe of facts supporting a particular historical interpretation.⁶⁶ Thus, the *Daubert* test (three prongs of which involve testing and error rates when replicating tests) is ill-suited for helping courts differentiate the purveyor of junk history from the reliable historian.⁶⁷

As a more concrete example, could a Nazi sympathizer who distorts his historical methodology to espouse the Nazis did not use gas chambers to murder victims at Auschwitz, if presented in a United States court as a historian on the Third Reich or the Holocaust, satisfy *Daubert/Kumho Tire* if he bears impressive credentials in terms of writings on the subject? Would a two-hour *Daubert* hearing, at which the court assesses whether the ideologue's historical interpretation had been subjected to peer review and publication, reveal the methodological flaws (if, in fact, the interpretation had been subjected to peer review and publication and it was relatively well-received)? Similarly, would *Daubert* reveal the social activist/historian, who feels strongly enough about a particular social issue to relax his professional standards and testify according to his beliefs, exaggerating findings as necessary to support a cause?⁶⁸

⁶⁴Blinka, *supra* note 63, at 187; Brodin, *supra* note 21, at 875; Michael H. Graham, *The Expert Witness Predicament: Determining 'Reliable' Under the Gatekeeping Test of Daubert, Kumho, and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. MIAMI L. REV. 317, 321 (2000).

⁶⁵Brodin, *supra* note 21, at 875.

⁶⁶MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS 2, 69 (2001).

⁶⁷Throughout the Article, I refer to the reliable historian as one who sports both sufficient credentials to qualify him as having expertise *and* a reliable historical methodology (as described and sort of defined in *supra* Part IV).

⁶⁸Allan M. Brandt, who testified on behalf of plaintiffs in the tobacco litigation, concludes the epilogue of his book describing his experiences as follows: "It seems to me now, after the hopes and disappointments of the courtroom battle, that we have a role to play in determining the future of the tobacco pandemic. If we occasionally cross the boundary between analysis and

In a recent trial against an alleged al Qaeda terrorist, the court conceded *Daubert* does not lend itself to assessing a non-scientific expert historian's methodology because courts scrutinize only the expert's credentials and peer review using *Daubert*.⁶⁹ Yet, courts continue to use *Daubert* to screen historian experts. What then if the pseudo-historian comes to call? Can we risk relying on other tools in the adversarial toolbox to reveal his true colors (so as to avoid junk history influencing our law)? The next Section introduces the pseudo-historian and demonstrates the impact such a proposed expert could have on the law.

IV. DAVID IRVING—THE PSEUDO-HISTORIAN REVEALED: A TALE OF TWO (ACTUALLY THREE) TRIALS

In *Irving v. Penguin Books Ltd.*,⁷⁰ David Irving sued Professor Lipstadt⁷¹ for libel in the Royal Courts of London because she referred to him as a Holocaust denier in her book, *Denying the Holocaust*. The case highlights two aspects of historians in the courtroom: primarily, the case alerts us to the threat of the pseudo-historian—the purported historian whose scholarship reflects a superior knowledge to a layperson's of a particular historical time or event (thus, it would assist the jury), yet whose methodology is intentionally flawed to promote an ideology. In the cases above, many of which involved socially-significant and highly-politicized issues, courts do not express concern at the possibility of the pseudo-historian bringing junk history into the courtroom. Yet, *Irving* illustrates the burden of revealing the pseudo-historian's true colors. Though Irving was not an expert witness at trial, given the legal issues in the case, Judge Gray had to scrutinize the reliability of Irving's historical methodology. To do so, Judge Gray used a list of factors vastly different from *Daubert*, highlighting the inadequacy of those factors when applied to a different type of expert.

advocacy, so be it. The stakes are high, and there is much work yet to do." ALLAN M. BRANDT, *THE CIGARETTE CENTURY* 505 (2007).

⁶⁹United States v. Paracha, No. 03 CR. 1197(SHS), 2006 WL 12768, at *20 (S.D.N.Y. Jan. 3, 2006) ("Although Kohlmann's methodology is not readily subject to testing and permits of no ready calculation error rate, it is more reliable than a simple cherry-picking of information from websites and other sources.").

⁷⁰*Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478 (Q.B.D. Apr. 11, 2000), available at <http://www.holocaustdenialontrial.org/trial/>.

⁷¹Lipstadt is Dorot Professor of Modern Jewish and Holocaust Studies at Emory University and director of the Institute for Jewish Studies at Emory University.

As a secondary concern, *Irving* illustrates the toll litigation may take on the reliable historian, the one whose methodology the judge deems sound, in terms of skewing his testimony. Finally, the trial reflects one possible standard federal courts could use to test a historian's methodology. Judge Gray applied an "objective historian" test to Irving's historiography⁷²—a test bearing no resemblance to *Daubert*.

A. Irving v. Lipstadt

In 1994, Penguin Books published Professor Lipstadt's *Denying the Holocaust*. In her book, Lipstadt describes the origin and attributes of Holocaust denial; she identifies deniers,⁷³ explaining their roles and motivations. Lipstadt identifies those in the United States and abroad whom she calls "the architects" of Holocaust denial from the 1920s to the present. By 1950, Lipstadt explains, "the foundation had been laid" for those who would both mitigate Germany's role in World War II and argue the Holocaust was a hoax to engender support for Zionism⁷⁴ and American Jewry.⁷⁵ Lipstadt names pro-Germany sentiments, anti-Semitism, neo-Nazism, and racism as the common motivators underlying Holocaust deniers' views and activities.⁷⁶

⁷²*Irving*, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/judgement/13.11> (Judge Gray mentioning the term "objective historian" fifteen times in his judgment). See generally Wendie Ellen Schneider, *Past Imperfect*, 110 YALE L.J. 1531 (2001) (teasing out the various rules from Judge Gray's judgment to then summarize the standard).

⁷³In Europe, French author and political activist Paul Rassinier led the Holocaust-denial movement. While imprisoned in Buchenwald during World War II, Rassinier became vehemently anti-Semitic and pro-Nazi. Rassinier argued the "genocide myth"—the Nazis' murder of Jews using gas chambers—was invented by the "Zionist establishment." LIPSTADT, *supra* note 18, at 51, 55. French academic Robert Faurisson, who at one time taught French literature at Lyons-II University, followed Rassinier's charge, arguing the Holocaust occurred, but historians misinterpreted its scale. He also argued that gas chambers did not exist at extermination camps such as Auschwitz. *Id.* at 9. Rather Auschwitz was just a concentration camp for housing slave labor. Linguist Noam Chomsky wrote an essay introducing Faurisson's book and commending the historical research underlying Faurisson's views. *Id.* at 15–16.

⁷⁴Zionism originally referred to the movement supporting the creation of a Jewish state and national homeland. Today, it typically means support for the modern State of Israel. SHORTER OXFORD ENGLISH DICTIONARY 3712 (5th ed. 2002).

⁷⁵LIPSTADT, *supra* note 18, at 47.

⁷⁶*Id.* at 106–07.

In her chapter about those who contend the Nazis did not use gas chambers to murder Jews at Auschwitz,⁷⁷ Lipstadt discusses David Irving,⁷⁸ whom she describes as “one of the most dangerous spokespersons for Holocaust denial.”⁷⁹ Lipstadt goes on to explain why Irving is so dangerous, saying: “[f]amiliar with historical evidence, he bends it until it conforms with his ideological leanings and political agenda.”⁸⁰ She describes Irving as “an ardent admirer” of Hitler.⁸¹ “On some level,” according to Lipstadt, “Irving seems to conceive of himself as carrying on Hitler’s legacy.”⁸²

Irving has written more than thirty books, most involving WWII and more specifically the Third Reich.⁸³ Esteemed historians have praised Irving’s work, lauding his skills as a thorough researcher.⁸⁴ According to

⁷⁷David Irving claims he is not a Holocaust denier while at the same time contending that Nazis did not use gas chambers to murder victims at Auschwitz and other extermination camps. *See generally id.*

⁷⁸British author David Irving, writer of what one historian described as “popular historical accounts,” is perhaps the best-known Holocaust denier because of the libel case against Lipstadt in England. Irving is known for his well-publicized Holocaust denial and for his recent conviction under Germany’s laws prohibiting Holocaust denial. Many of Irving’s books praise Hitler’s role in World War II, claiming Hitler was a friend to the Jews who did not order or even know about the Final Solution until late in the war. Irving has had no formal training in history. *See generally* DEBORAH E. LIPSTADT, *HISTORY ON TRIAL* (2005); D.D. GUTTENPLAN, *THE HOLOCAUST ON TRIAL* (W.W. Norton & Co. 2001); RICHARD J. EVANS, *LYING ABOUT HITLER* (2001).

⁷⁹LIPSTADT, *supra* note 18, at 181.

⁸⁰*Id.*

⁸¹*Id.* at 161. Irving wrote a biography of Nazi propagandist Josef Goebbels in which he intimated that Hitler was not personally responsible for the Holocaust. In *Hitler’s War*, Irving posited that Hitler neither knew about nor ordered the genocidal “Final Solution.” *See* EVANS, *supra* note 78, at 79, 101.

⁸²LIPSTADT, *supra* note 18, at 161.

⁸³Irving’s more well-known titles include *The Destruction of Dresden*, *Hitler’s War*, *Goebbels—Mastermind of the Third Reich*, and *Goering—a Biography*.

⁸⁴Sir John Keegan provided positive feedback about Irving as a historian on the Third Reich. Sir Martin Gilbert praised Irving’s book *Hitler’s War* as “a scholarly work, the fruit of a decade of wide researches.” EVANS, *supra* note 78, at 9 (citing Martin Gilbert, *Unobtrusive Genocide*, *THE GUARDIAN*, 16 June 1977); *see also* Peter R. Teachout, Essay, *Making “Holocaust Denial” a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 667 n.61 (2006); EVANS, *supra* note 78, at 9 (quoting a review of Irving’s book *Goebbels* by Gordon Craig, “the eminent American specialist on modern Germany,” who said, “Silencing Mr. Irving would be a high price to pay for freedom from the annoyance that he causes us. The fact that he knows more about National Socialism than most professional scholars in his field, and students of the years 1933–1945 owe more than they

Judge Gray, who presided over the trial, Irving's books "are eloquent testimony to his industry and diligence."⁸⁵

In July 1996, Irving sued Lipstadt and Penguin Books for libel in the Royal Courts of Justice in London.⁸⁶ In the lawsuit, Irving claimed Lipstadt libeled him by calling him a Holocaust denier.⁸⁷ Irving elected to represent himself at the trial, claiming he could best pursue his claims because he was most familiar with the material (historical documents) at issue in the case. Though he conceded the truth of certain of Lipstadt's statements, he described as a "particular evil" being called a Holocaust denier,⁸⁸ complaining that this description damaged his reputation as a legitimate historian. Irving claimed Lipstadt's book was part of a Jewish conspiracy aimed at undermining his credibility, thus leaving him financially bankrupt.⁸⁹

Under British libel law, defendants Lipstadt and Penguin Books had to prove Lipstadt's statements were true, even if defamatory.⁹⁰ The parties agreed to try the case to the bench before Judge Charles Gray beginning on

are always willing to admit to his energy as a researcher It is always difficult for the non-historian to remember that there is nothing absolute about historical truth.").

⁸⁵ Irving v. Penguin Books Ltd., No. 1996-I-1113, 2000 WL 362478 (Q.B.D. Apr. 11, 2000), available at <http://www.holocaustdenialontrial.org/trial/judgement/01.02>.

⁸⁶ I often refer to the case as *Irving v. Lipstadt* and the defense as Lipstadt's statements and allegations of defense (rather than referring to both defendants: Lipstadt and Penguin). The case was actually styled *Irving v. Penguin Books, Ltd.* Penguin supported Lipstadt throughout the trial, rejecting Irving's attempt to hinder her defense efforts by offering to settle with only Penguin.

⁸⁷ See *Irving*, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/transcripts/day01/pages21-25> (Claimant's Opening Statement).

⁸⁸ GUTTENPLAN, *supra* note 78, at 27.

⁸⁹ In his opening at trial, Irving analogized calling him a Holocaust denier to "a verbal yellow star." *Id.* at 28. He also described how publishers like Penguin had once published his books; yet the same publishers were now refusing to enter into contracts with him because of Lipstadt's assertions. *Id.* at 26; see also *Irving*, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/transcripts/day01/pages21-25> (Claimant's Opening Statement).

⁹⁰ See *Irving*, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/judgement/04.03>. Lipstadt hired solicitor Anthony Julius, a partner in the London firm Mischon de Reya, and Richard Rampton, QC, as barrister. EVANS, *supra* note 78, at 7. Julius had represented Princess Diana in her divorce proceedings. Penguin employed in-house lawyers and outside counsel, Kevin Bays, a partner at Davenport Lyons.

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January 11, 2000.⁹¹ Trial concluded on March 15, 2000, with Judge Gray issuing his 200 page judgment on April 11, 2000.

Expert historians played a pivotal role at trial. Although Judge Gray announced early on that the Holocaust was not on trial,⁹² the truth of Irving's assertions regarding the Holocaust, such as his assertion that the Nazis did not use gas chambers to murder Jews at Auschwitz, became critical. Lipstadt's defense team had to show her statements regarding Irving's deliberate distortions of history were accurate. Lipstadt's team presented a three prong defense: (1) Irving fabricated and misrepresented evidence in describing history; (2) Nazis did use murderous gas chambers at Auschwitz to kill more than one million Jews; and (3) Irving was deliberate in his denial (and distortions of history) because he was motivated by a right-wing, neo-fascist political agenda.⁹³

At trial, the defense presented five expert witnesses:⁹⁴ Christopher Browning,⁹⁵ Robert Jan van Pelt,⁹⁶ Richard Evans,⁹⁷ Hajo Funke,⁹⁸ and

⁹¹ LIPSTADT, *supra* note 78, at 47.

⁹² In the "Summary of the Main Issues" of his Judgment, Judge Gray wrote, "[I]t is important that I stress at the outset of this judgment that I do not regard it as being any part of my function as the trial judge to make findings of fact as to what did and did not occur during the Nazi regime in Germany." Irving, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/judgement/01.01>.

⁹³ EVANS, *supra* note 78, at 29–30.

⁹⁴ The defense presented reports from other experts. I mention only the testifying experts here. *Id.* at 29.

⁹⁵ Professor of history at University of North Carolina, Browning, a specialist on the Nazis' extermination policy, has served as an expert in many war-crime trials. He also testified for the Canadian government in its case against Ernest Zundel. GUTTENPLAN, *supra* note 78, at 209.

⁹⁶ Robert Jan van Pelt is Professor of Architecture at the University of Waterloo, Canada and co-author (with Deborah Dwork) of *Auschwitz: 1270 to the Present*. As discussed herein, Irving challenged van Pelt's credentials as a historian because of his title as a Professor of Architecture.

⁹⁷ Evans is Professor of Modern History at Cambridge and Fellow of the British Academy and the Royal Historical Society. GUTTENPLAN, *supra* note 78, at 93. Along with other books about history, Evans has written about historical methodology (*In Defense of History*), and he wrote a book about the Lipstadt trial (*Lying About History*). He also wrote an article explaining his decision to testify in Holocaust-related trials. See generally Richard J. Evans, *History, Memory, and the Law: The Historian as Expert Witness*, 41 HIST. & THEORY 326 (2002).

⁹⁸ Lipstadt describes Funke as "a German specialist on extremism." The defense team requested Funke testify on Irving's neo-Nazi motivations and ties. See LIPSTADT, *supra* note 78, at 41.

Peter Longerich.⁹⁹ Irving subpoenaed two expert witnesses to testify on his behalf: Donald Cameron Watt¹⁰⁰ and Sir John Keegan,¹⁰¹ who both testified about Irving's historiography.¹⁰² Another "expert," Kevin MacDonald,¹⁰³ a professor of psychology at Long Beach State University in California, volunteered to testify on Irving's behalf about Jewish-Gentile interactions.¹⁰⁴

At trial, Irving strategically chose the existence of gas chambers at Auschwitz as his point of contention (he challenged Lipstadt's statement that he denied the Holocaust by distorting evidence concerning the Nazis' use of gas chambers at Auschwitz) because this fact of history is particularly hard to "prove."¹⁰⁵ Irving posits that Auschwitz was merely a slave labor camp where many died from disease and malnutrition, and the number killed at Auschwitz was far less than the more than one million generally estimated.¹⁰⁶ According to Irving, the existence of gas chambers at Auschwitz represents "the biggest lie of the lot, the blood libel of the German people (because people were hanged for this)"¹⁰⁷

⁹⁹EVANS, *supra* note 78, at 29–30. Peter Longerich, who was teaching at Royal Holloway College in the University of London at the time of the trial, was retained to testify and prepare a report concerning Hitler's anti-Semitism and the systemic killing of the Jews under the Third Reich.

¹⁰⁰Donald Cameron Watt is Emeritus Professor of International History at the London School of Economics. EVANS, *supra* note 78, at 244.

¹⁰¹Currently, military historian Sir John Keegan serves as the defense editor of the *Daily Telegraph*. *Id.* at 240–41. He has praised Irving's book, *Hitler's War*, as a good "starter book" to explain World War II. *Id.* at 240–41. During the trial, when Irving asked Keegan if he (Irving) was wrong about the Holocaust, Keegan described as "perverse" Irving's opinion that Hitler did not know until late in the war what Nazis were doing to the Jewish population of Europe. LIPSTADT, *supra* note 78, at 187.

¹⁰²Historiography here refers to "the writing of history . . . the study of history-writing." SHORTER OXFORD ENGLISH DICTIONARY 1247 (5th ed. 2002).

¹⁰³Lipstadt described MacDonald's anti-Semitism (disguised as evolutionary psychology): "MacDonald considered Jews a genetically distinct group, who conspired in virtually everything they did to gain political and economic advantage over non-Jews." LIPSTADT, *supra* note 78, at 151.

¹⁰⁴*Id.*

¹⁰⁵See GUTTENPLAN, *supra* note 78, at 8, 10–11.

¹⁰⁶*Id.* at 14.

¹⁰⁷*Id.* at 149.

1. Professor Robert Jan van Pelt

On the issue of gas chambers at Auschwitz, Lipstadt's defense team presented Robert Jan van Pelt, professor of History of Architecture at University of Waterloo in Toronto, Canada and co-author of *Auschwitz, 1270 to the Present*,¹⁰⁸ to counter Irving's assertions.¹⁰⁹ Van Pelt prepared a 767 page report for the court.¹¹⁰ In his report, van Pelt explained his historical methodology as categorizing¹¹¹ the list of "evidential historical sources" on which he relied and treating sources differently depending on their reliability. He describes the "hierarchy of reliability" of sources, treating contemporaneous documents and the trial transcripts as most reliable.¹¹² Van Pelt also noted that he refrained from relying too heavily on any one source. He relied on the convergence of evidence rather than on one smoking gun.¹¹³

In his report, van Pelt comprehensively explains and describes Auschwitz,¹¹⁴ which, by anyone's account, is difficult to understand, as the camp operated for different purposes at different times before being

¹⁰⁸ See VAN PELT, *supra* note 96. The book was also translated into German and Dutch.

¹⁰⁹ GUTTENPLAN, *supra* note 78, at 123.

¹¹⁰ ROBERT JAN VAN PELT, THE VAN PELT REPORT: ELECTRONIC EDITION, HOLOCAUST DENIAL ON TRIAL, available at <http://www.holocaustdenialontrial.org/trial/defense/van> (hereinafter "Van Pelt's Report"). He also co-wrote *Architectural Principles in the Age of Historicism*, which involves the historiographical implications of the history of the Holocaust.

¹¹¹ Van Pelt explained that he categorized his sources as follows: (1) contemporaneous documents (letters, blueprints, contractor's bids, etc.); (2) unpublished trial transcripts; (3) published trial transcripts; (4) contemporary newspaper articles and other publications reporting on concentration camps; (5) contemporary documents and reports like the Vrba-Wetzler report; (6) memoirs; and (7) academic historical studies published after the war. *Id.* at Preface, 5.

¹¹² *Id.*

¹¹³ Judge Gray noted the propriety of this methodology in his judgment. *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478 (Q.B.D. Apr. 11, 2000), available at <http://www.holocaustdenialontrial.org/trial/judgement/13.36> ("My conclusion is that the various categories of evidence do 'converge' in the manner suggested by the Defendants.").

¹¹⁴ Auschwitz was the deadliest of the extermination camps. According to van Pelt, approximately 1.1 million victims died at Auschwitz and only 100,000 Jews left the camp alive. ROBERT JAN VAN PELT, THE CASE FOR AUSCHWITZ 12 (2002). It remained a death camp during 1944, after the Nazis had ceased to operate the Kulmhof, Sobibor, Belzec, and Treblinka death camps by the end of 1943. *Id.* at 80. According to van Pelt, once these camps ceased operating, Auschwitz was left to "mop up the remnants of the Jewish communities of Poland, Italy, France, the Netherlands, and the rest of occupied Europe." *Id.*

liberated in January 1945.¹¹⁵ Van Pelt's report outlines the ten distinct functions of Auschwitz, describing the time periods during which it performed each of the sometimes related, sometimes inconsistent functions. Van Pelt describes the complicated history of Auschwitz as follows:

In a sense, it would be possible to write ten histories of Auschwitz: Auschwitz as a concentration camp for Poles, Auschwitz as a production site for gravel and sand, and so on. . . . [A] historian who desires to make a judgment about any aspect of the history of Auschwitz must take into account an often labyrinthine context, which is made even more difficult to negotiate because of intentional camouflage of certain aspects of the camp's history during the war and the willful destruction of archival and other material evidence at the end of the war.¹¹⁶

Van Pelt testified for almost three days.¹¹⁷ His examination-in-chief was very brief (less than an hour); he was simply asked to confirm his report, which presumably Judge Gray had read.¹¹⁸ In cross-examining van Pelt (for almost three full days), Irving first attacked van Pelt's credibility because he is a professor of architecture.¹¹⁹ Irving then chose two substantive areas of attack: (1) Irving's "no holes, no Holocaust" theory

¹¹⁵Gas chambers at Auschwitz, which ultimately killed approximately more than one million victims, were operated from late 1942 until liberation, January 27, 1945, as part of Hitler's Final Solution. *Id.* at 80, 158. Auschwitz had previously been a camp housing those who served as slave labor for German factories located nearby. *Id.* at 71. But later it was converted to a death camp. *Id.* at 80.

¹¹⁶Van Pelt's Report, *supra* note 110, at Part One Concerning History, I Auschwitz.

¹¹⁷VAN PELT, *supra* note 114, at 473.

¹¹⁸*Id.* at 456.

¹¹⁹In British courts, admissibility relates to credibility rather than reliability. British courts have not prescribed a standard for admissibility of experts espousing a novel scientific theory. PETER MURPHY, A PRACTICAL APPROACH TO EVIDENCE 306-07 (4th ed. 1992). The court does not perform a formal gatekeeping function for reliability; rather, courts scrutinize the credentials of the proposed expert (mostly to assess competence). *Id.* "[I]f the witness has some claim to expertise, the modern practice is to receive his evidence, though its weight may be open to serious adverse comment if the apparent expertise is not translated into reality." *Id.* at 306. The British gatekeeping procedure presumably differs from the procedures here because most civil trials are to the judge as fact finder, so courts are not as concerned with the risk that juries will be overly influenced by the mystique of an expert witness. Van Pelt describes himself as a cultural historian and, though he teaches in the Department of Architecture, he has no specializations in that field. VAN PELT, *supra* note 114, at 456. Judge Gray and the appellate court rejected Irving's challenge.

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based on the physical structure currently existing at Auschwitz;¹²⁰ and (2) Irving's mortality rate argument—the camp could not physically accommodate the murder and incineration of 120,000 people per month, the number posited in van Pelt's report.¹²¹

During cross-examination on Irving's second point of attack (the mortality rate), Irving posited that the elevator shafts moving bodies out of gas chambers to the crematoria could not possibly have held van Pelt's suggested number.¹²² Irving engaged van Pelt in the following exchange about the elevators carrying corpses to be incinerated:

[Irving]: "It would be difficult to envisage having a working lift system with people piled four or five or six or seven high, because quite simply the doors would not close."

A: "There were no doors."

Q: "There were no doors?"

A: "No. It was simply a platform which went up and down."

Q: "That would be even worse then. The bodies would presumably get jammed against the side of the shaft if they

¹²⁰ Irving adopted this theory from Faurisson, who had posited that there could not have been gas chambers at Auschwitz because there was no existing evidence of such. VAN PELT, *supra* note 114, at 459. Specifically, there was no evidence of the wire mesh chambers in the ceilings of the morgues through which the poison would have been inserted. GUTTENPLAN, *supra* note 78, at 175. In Crematoria Two and Three, the gas chambers were located in underground buildings and the Zyklon pellets were inserted through holes in the roof. *Id.* at 174. Crematoria Four and Five were at ground level; the Zyklon pellets were tossed in through window-sized openings covered with metal shutters. *Id.* Regarding the absence of holes in the ceiling of the crematorium, van Pelt testified that the building at issue was not originally intended as a gas chamber; it was later adapted for that purpose. *Id.* at 176. After the gassings ceased, the Nazis destroyed it in two phases, the Nazis first dismantled and later dynamited the gas chambers. *Id.* at 188. The remains of the concrete roof did not allow any conclusions to be drawn as to whether any holes existed where Zyklon pellets could be dropped. *Id.* at 258.

¹²¹ The argument is essentially that too much coke (fuel) would be necessary to incinerate van Pelt's suggested number of corpses. See GUTTENPLAN, *supra* note 78, at 171–73; see also Van Pelt's Report, *supra* note 110, at II Auschwitz and the Holocaust n.79.

¹²² GUTTENPLAN, *supra* note 78, at 179.

piled them too high. I am just looking at practicalities here, that although technically the final version of the lift, and I emphasise [sic] that, was going to have the 1500 kilogram capacity, in theory, when was the lift actually installed?"¹²³

After more exchange, Irving asked about the length of time for the elevator to make a round trip. When van Pelt could not answer because he had not yet calculated the time, Irving forced van Pelt to do "back of the envelope calculations."¹²⁴

Van Pelt countered each argument with varying degrees of skill. Only about five percent of the material in van Pelt's written report was elicited during trial.¹²⁵ In describing his trial experience, van Pelt said he felt "somewhat cheated of the opportunity to show my learning, in a systematic manner. Instead my whole appearance would be limited to defenses against Irving's attacks."¹²⁶

Judge Gray commended van Pelt's historical methodology,¹²⁷ though for the press, trial observers, and even Lipstadt, van Pelt was not particularly effective as an expert witness.¹²⁸ The press described van Pelt's rebuttal of Irving's cross-examination as weak and lackluster.¹²⁹ Commentators objected to van Pelt's testimony (in sharp contrast to his report which was described as comprehensive and completely reliable) as lacking the nuance necessary to explain Auschwitz. Guttenplan, a journalist who observed the trial, noted: "To respond adequately to the interpretive and evidentiary problems posed by Auschwitz in the space of a few days' testimony was a

¹²³VAN PELT, *supra* note 114, at 470.

¹²⁴*Id.*

¹²⁵*Id.* at 478.

¹²⁶*Id.* at 456.

¹²⁷Irving v. Penguin Books Ltd., No. 1996-I-1113, 2000 WL 362478 (Q.B.D. Apr. 11, 2000), available at <http://www.holocaustdenialontrial.org/trial/judgement/13.35>.

¹²⁸It would be interesting to examine the impact of the trial (and van Pelt or other witnesses' specific testimony) not on Judge Gray's judgment but on public opinion based on press and witness observations. This topic is outside the scope of this paper.

¹²⁹VAN PELT, *supra* note 114, at 471 (explaining how James Dalrymple writing for the *Independent*, described van Pelt's testimony about the mortality rates as it related to the single elevator: "Irving gave [van Pelt] little leeway, and by late afternoon, with another verbal flourish, [Irving] suddenly produced what might be the main witness for his case. Not a human being—but something as mundane as the single lift-shaft connected the 'alleged' gas chamber with the crematorium ovens above.").

doomed venture; to try to do so under hostile cross-examination was quixotic in the extreme.”¹³⁰

In *Denying the Holocaust*, Lipstadt describes being disappointed and concerned at van Pelt’s half-hearted protest to certain of Irving’s provocations.¹³¹ Lipstadt felt van Pelt had appeared caught off guard on the issue regarding holes in the ceiling. She worried about how the press would portray his testimony.¹³² Guttenplan described van Pelt’s testimony on cross-examination as being “reduced to dueling assertions, a stichomythia whose outcome rested entirely on the judge’s whim.”¹³³ Van Pelt himself described portions of his testimony as “lackluster” and nerve-wracking¹³⁴ and described himself (as a witness) as “pea-brained” and stupid.¹³⁵ Thus, the expert historian whom Judge Gray commended for relying on a “‘convergence’ of evidence” was made to feel “pea-brained” and frustrated on the witness stand.¹³⁶ More importantly, while on the stand he felt powerless to relay his historical interpretation.¹³⁷ Thus, the question arises whether the courtroom is amenable to the historian’s task, allowing him to relay his interpretation as he would, for example, in the classroom.

2. Judge Gray’s Judgment

Following the ten-week trial, Judge Gray ruled for the defense, finding Lipstadt and Penguin had succeeded in establishing their defense.¹³⁸ In his judgment, Judge Gray emphasized historical methodology, noting that regarding Auschwitz, van Pelt had relied on the convergence of numerous sources—prisoner testimony, German documents, blueprints, physical evidence from crematoria, letters by camp administrators, bills of lading,

¹³⁰GUTTENPLAN, *supra* note 78, at 183.

¹³¹LIPSTADT, *supra* note 18, at 139.

¹³²*See id.*

¹³³GUTTENPLAN, *supra* note 78, at 184. As explored in Part III, expert historians who have testified in the United States have complained of the challenges of presenting a properly nuanced historical analysis in the face of cross-examination, which truncates the analysis, leaving little room for thorough explanation.

¹³⁴*See* VAN PELT, *supra* note 114, at 471.

¹³⁵*See id.* at 460.

¹³⁶*Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478 (Q.B.D. Apr. 11, 2000) available at <http://www.holocaustdenialontrial.org/trial/judgement/13.34>.

¹³⁷*See* VAN PELT, *supra* note 114, at 456.

¹³⁸*See Irving*, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/judgement/13.34>.

work orders, and drawings by *Sonderkommandos*—to support his historical account, while Irving had relied on a wholly one-sided treatment of the evidence skewed to fulfill his ideological agenda.¹³⁹ Irving had relied on the absence of evidence (discarding reliable evidence contra to his theory) and his purported “smoking gun.”¹⁴⁰

Throughout his judgment, Judge Gray relied on historian Richard Evans’ report and testimony to describe a standard for an “objective, fair-minded historian”¹⁴¹ and illustrate how Irving had strayed from that standard.¹⁴² Judge Gray’s standard is described in greater detail in the proposal section of this Article. For example, “an objective historian is obliged to be even-handed in his approach to historical evidence: he cannot pick and choose without adequate reason.”¹⁴³ Van Pelt had satisfied that standard; Irving had not.¹⁴⁴

Judge Gray also found that Irving’s flawed methodology was deliberate, motivated by his anti-Semitism and fondness for Hitler: “Irving appears to take every opportunity to exculpate Hitler. . . . [T]here are other occasions where Irving’s treatment of the historical evidence is so perverse and egregious that it is difficult to accept that it is inadvertence on his part.”¹⁴⁵ Judge Gray stated that Irving had deliberately perverted the historical evidence to make it align with his politics.¹⁴⁶

¹³⁹ Judge Gray describes van Pelt’s explanation of how the different strands of evidence “converge.” *Id.* He notes that defendants had recognized that not all the evidence was reliable yet the convergence was compelling: *Id.* “The case for the Defendants, summarised [sic] above, is that there exists what van Pelt described as a ‘convergence’ of evidence which is to the ordinary, dispassionate mind overwhelming that hundreds of thousands of Jews were systematically gassed to death at Auschwitz” *Id.*

¹⁴⁰ See EVANS, *supra* note 78, at 11.

¹⁴¹ See *Irving*, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/judgement/13.41>.

¹⁴² See generally Schneider, *supra* note 72.

¹⁴³ *Irving*, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/judgement/13.41>.

¹⁴⁴ *Id.*; EVANS, *supra* note 78, at 226–27.

¹⁴⁵ See *Irving*, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/judgement/13.62>.

¹⁴⁶ See *id.* (“Mistakes and misconceptions such as these appear to me by their nature unlikely to have been innocent. They are more consistent with a willingness on Irving’s part knowingly to misrepresent or manipulate or put a ‘spin’ on the evidence so as to make it conform with his own preconceptions. In my judgment the nature of these misstatements and misjudgments by Irving is

The outcome of the trial was, by most accounts, a victory. Yet, the case demonstrates both hypothetical and real dangers regarding historians as expert witnesses. What if, for example, David Irving was brought as an expert witness on the Third Reich in a Holocaust-related case in this country? *Daubert/Kumho Tire*, as commonly used by federal courts, would probably not reveal his lack of objectivity. Could a strong adversary reveal the shortcomings in his methodology through cross-examination? And again, the flip side of the coin, how would a witness like van Pelt (reliable but not charismatic and accustomed to a much more nuanced discourse) fare in front of a jury if his analysis was, as many observed, truncated and undermined by cross-examination?

Irving has, in fact, testified as an expert witness. In the Holocaust-denial trial of Ernest Zundel in Canada in 1988, the Canadian government prosecuted Zundel under laws prohibiting “the spreading of false news.”¹⁴⁷ At trial Irving testified that the Nazis did not use gas chambers at Auschwitz to murder Jews.¹⁴⁸ In the Zundel trials (Zundel was tried and then re-tried on the same charge) the pseudo-historian threat was realized, as the defense called Irving to testify as an expert historian about gas chambers at Auschwitz, here under Canadian law, where admissibility focuses on credibility rather than reliability.¹⁴⁹

a further pointer towards the conclusion that he has deliberately skewed the evidence to bring it into line with his political beliefs.”)

¹⁴⁷ See ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW 41 (2004).

¹⁴⁸ LIPSTADT, *supra* note 18, at 179.

¹⁴⁹ In *R. v. Mohan*, the Supreme Court of Canada outlined a list of criteria for admissibility of expert testimony. [1994] 2 S.C.R. 9, 1994 LEXIS 2458 (Can.). Under *Mohan*, the party seeking to proffer the expert must establish the following four criteria for expert testimony: (1) relevance; (2) necessity in assisting the trier of fact (providing information that is likely to be outside the knowledge and experience of the jury or judge); (3) a properly qualified expert; and (4) the absence of any exclusionary rule that would preclude admitting the testimony. *Id.* at para. 17–21. The trial judge has discretion to exclude evidence if the jury is likely to misuse the evidence or the evidence will distort the fact-finding process. SYDNEY N. LEDERMAN & ALAN W. BRYANT, THE LAW OF EVIDENCE IN CANADA 619, 633 (2d ed. 1999). Courts typically first apply traditional exclusionary rules, the expert evidence rule, and then invoke policy to the proffered evidence to determine admissibility.

B. Ernest Zundel Trials

A lesser-known Holocaust denial trial involved Ernest Zundel, a German citizen¹⁵⁰ convicted twice in Canada of hate speech (specifically, spreading false news) in 1985 and 1988.¹⁵¹ Zundel, a notorious anti-Semite, neo-Nazi, and shameless publicity hound¹⁵² used his own publishing house, Samisdat Publications,¹⁵³ to publish and circulate pamphlets such as *The Hitler We Loved and Why* and *Did Six Million Really Die?*¹⁵⁴

In 1985, Zundel was tried to judge and jury under Canadian law, Criminal Code section 181, for knowingly spreading false news.¹⁵⁵ The prosecution presented as witnesses Professor Raul Hilberg¹⁵⁶ and several survivors of extermination and concentration camps, including Professor Rudolf Vrba, who had escaped from Auschwitz and written a book describing his recollections.¹⁵⁷ These witnesses testified to the falsehoods in Samisdat's publication *Did Six Million Really Die?*¹⁵⁸

¹⁵⁰Zundel had been deported from Germany and had "landed immigrant" status in Canada. See LIPSTADT, *supra* note 18, at 157.

¹⁵¹*Id.* at 159–60.

¹⁵²Zundel believes in an international Jewish conspiracy and calls the Holocaust "a money-making Zionist hoax." See Leonidas E. Hill, *Trial of Ernest Zundel: Revisionism and the Law in Canada*, 6 SIMON WIESENTHAL CENTER J. 165, 166 (1989). At his sentencing Zundel arrived at court in a Rent-A-Wreck vehicle; he had a blackened face and he carried an eleven foot cross labeled "Freedom of Speech." *Id.* at 197.

¹⁵³Samisdat Publications became an international distributor of Nazi and neo-Nazi posters, audiotapes, and memorabilia. See LIPSTADT, *supra* note 18, at 158.

¹⁵⁴*Did Six Million Really Die?* was written by Richard Verrall (under the name Richard E. Harwood) and published in England in 1974. See LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* 213 (2001).

¹⁵⁵See LIPSTADT, *supra* note 18, at 157. Sabrina Citron, a Holocaust survivor living in Canada filed a private criminal complaint against Zundel in 1983 before the Canadian Human Rights Tribunal. The Ontario government joined the criminal proceedings in 1984.

¹⁵⁶See *R. v. Zundel*, [1987] 58 O.R.2d 129, 143 (Can.). Professor Hilberg, who died on August 4, 2007, was considered one of our most eminent Holocaust historians. As described in Part II, he testified for the government in denaturalization proceedings against those who participated with the Nazis in persecuting Jews. He taught at University of Vermont from the 1950s until he retired in 1991. His most notable book was *The Destruction of the European Jews* which was published in 1985.

¹⁵⁷*Id.* at para. 117, 135.

¹⁵⁸*Id.* at para. 116–35.

The defense called, among other noteworthy Holocaust deniers, Robert Faurisson and Charles Weber as witnesses.¹⁵⁹ Douglas Christie, a lawyer who has represented neo-Nazis and racists defending similar charges,¹⁶⁰ defended Zundel. While eccentric and prone to defend people like Zundel, Christie is reputedly a strong adversary, well-versed in evidence and procedural rules (hearsay played an enormous role in the Zundel trials) and law.¹⁶¹

At trial, Christie challenged the testimony of historian Raul Hilberg on credibility and competence grounds (he claimed Hilberg was merely relying on hearsay to prove disputed facts).¹⁶² Judge Locke allowed the expert testimony, finding Hilberg had expertise “beyond the ken of the average layman,” and had specific expertise in the Nazi’s extermination of the Jews.¹⁶³ Christie was unrelenting in his attack on Hilberg’s competence, calling him “a historian of sorts;”¹⁶⁴ Christie also attacked the other witnesses, including Holocaust survivors, who appeared against Zundel.¹⁶⁵ The jury convicted Zundel in the 1985 trial, and he was sentenced to fifteen months in prison and ordered him to refrain from any speech relating to the

¹⁵⁹ *Id.* at para. 136–42.

¹⁶⁰ Christie is notorious for defending Holocaust deniers, white supremacists, anti-Semites, Nazi war criminals, and neo-Nazis. Christie has been widely criticized both for his political views (like those of his clients) and for his unrelenting advocacy. See DOUGLAS, *supra* note 154, at 224–25.

¹⁶¹ The hearsay objection played a persistent crucial role in the trial. See KAHN, *supra* note 147, at 44–59. Christie used the hearsay objection throughout the trial, continually forcing Judge Locke to rule on hearsay objections. *Id.* Christie objected to portions of survivors’ testimony where survivors relayed, for example, what others described to them about, for example, Dr. Mengele’s visit to Auschwitz, or about the gas chambers. *Id.* He also objected to documentary evidence, including, for example, the film *Nazi Concentration Camps*, which the prosecution wanted to show to prove the falsehood of Zundel’s publication that great suffering did not occur at concentration camps. *Id.* The judge allowed the film under the public records exception to the hearsay rule. *Id.* at 50–52.

¹⁶² See Zundel, 58 O.R.2d at para. 143.

¹⁶³ For a more thorough discussion of Christie’s use of hearsay objections at Zundel’s trial, see KAHN, *supra* note 147, at 53. Judge Locke relied on *McCormick on Evidence* in applying the two-part test for admissibility of an expert. *Id.*

¹⁶⁴ LIPSTADT, *supra* note 18, at 160.

¹⁶⁵ See *id.*

Holocaust for three years.¹⁶⁶ But the ruling was overturned for procedural errors.¹⁶⁷

Zundel was tried again from mid-January until May 1988 before a different trial judge.¹⁶⁸ Professor Christopher Browning, who testified for Lipstadt in *Irving v. Lipstadt*, served as chief prosecution witness in Hilberg's place.¹⁶⁹ During this trial, David Irving testified in Zundel's defense.¹⁷⁰ Irving testified that he now rejected his own statements in his book *Hitler's War* regarding extermination camps.¹⁷¹ He now agreed with Zundel about the absence of gas chambers at Auschwitz.¹⁷² According to commentators, Irving was the "sensation of the trial."¹⁷³ Holocaust denier Robert Faurisson also testified, but the trial judge limited his testimony concerning the technical workings of the gas chamber because of his lack of expertise.¹⁷⁴

Fred Leuchter, a self-professed execution expert,¹⁷⁵ testified at the 1988 trial. In what came to be called the "Leuchter report," Leuchter claimed that as a matter of engineering principles, the Nazis could not have used gas chambers to murder Jews at Auschwitz.¹⁷⁶ He testified gas chambers could not have existed at Auschwitz because there were no traces of gas remaining in the remaining buildings (more than forty years after the

¹⁶⁶ Many who observed the trial were disappointed by Judge Locke's refusal to take judicial notice of the Holocaust. See Hill, *supra* note 152, at 180–81.

¹⁶⁷ Judge Locke, according to Ontario Supreme Court (court of appeals), had erred in five rulings. Because of these failings, the Crown would have to prosecute again. KAHN, *supra* note 147, at 87.

¹⁶⁸ See DOUGLAS, *supra* note 154, at 246.

¹⁶⁹ Hilberg refused to return for the second trial. See DOUGLAS, *supra* note 154, at 246.

¹⁷⁰ LIPSTADT, *supra* note 18, at 161.

¹⁷¹ See *id.* at 162.

¹⁷² See *id.* Irving had gone through a conversion of sorts after reading the report of Fred Leuchter about execution methods. Apparently, after reading Leuchter's report, Irving changed his mind and joined those who believe the Nazis did not use gas chambers to murder Jews at Auschwitz.

¹⁷³ Hill, *supra* note 152, at 202.

¹⁷⁴ KAHN, *supra* note 147, at 55.

¹⁷⁵ Leuchter was ultimately revealed as a hoax because of his lack of engineering expertise. Errol Morris, director of *The Thin Blue Line*, produced a documentary film in 1999 called *Mr. Death* about Leuchter. The film documents Leuchter's views on electric chairs, gallows, lethal injection machines, and gas chambers. See VAN PELT, *supra* note 114, at 85–86.

¹⁷⁶ *Id.* at 43.

war).¹⁷⁷ The trial judge excluded the Leuchter report, because Leuchter had no engineering expertise (he had no training, education, or certification as an engineer).¹⁷⁸ Judge Thomas allowed Leuchter to testify, but did not let him discuss engineering questions involving the construction and functioning of the gas chambers.¹⁷⁹

Again, the jury convicted Zundel;¹⁸⁰ yet the Supreme Court of Canada overturned Zundel's conviction, holding that the Canadian Charter of Rights and Freedoms guaranteed freedom of expression.¹⁸¹ Reaction to the Canadian government's prosecution of Zundel was mixed; Christie's mistreatment of Hilberg and Holocaust survivors during trial angered many in Toronto's Jewish community, leading them to doubt the efficacy of prosecuting Zundel, who gained notoriety as a result of the trial.¹⁸²

Much differs between the Zundel trials and *Irving*. Obviously, Zundel was a criminal prosecution against denier Zundel under Canadian law while *Irving* was a civil trial under British law. Yet, similarities exist in terms of the prominent role David Irving played in both trials and the significance of expert historians at trial (one of the experts, Christopher Browning, actually overlapped). Together, these cases (and those from United States courts showing the types of cases in which historian experts testify) raise concerns about whether our legal system is equipped to ensure expert historians provide truthful historical accounts at trial. Specifically, using the *Daubert* factors, can trial courts stop "pseudo-historians" at the gate? And, do existing trial procedures allow reliable historians to testify in a manner true to their craft? The next Section addresses existing trial procedures with these questions in mind.

V. FORCING A SQUARE PEG INTO A ROUND HOLE—IS THE COURTROOM SUITED TO THE HISTORIANS' CRAFT?

This Section briefly illustrates the awkward intersection that occurs when the historian enters the courtroom and testifies as an expert witness.

¹⁷⁷ Hill, *supra* note 152, at 202.

¹⁷⁸ LIPSTADT, *supra* note 18, at 166–67.

¹⁷⁹ *Id.*

¹⁸⁰ In this second trial, Judge Thomas actually took judicial notice of Nazi genocide, instructing the jury to accept the "mass murder and extermination of Jews in Europe by the Nazi regime during the Second World War" as beyond dispute. See DOUGLAS, *supra* note 154, at 246.

¹⁸¹ See KAHN, *supra* note 147, at 86, 96.

¹⁸² *Id.* at 86.

Professor Matthew Festa describes this tension as “a contrast between competing professional standards: the historians’ teleological goal of determining truth through objectivity versus the legal system’s goal of arriving at truth through adversarial practice.”¹⁸³ As such, the Section begins with a brief description of the professional historians’ world. The Section then goes on to demonstrate the tension that may arise when the historian testifies as an expert. The focus here is not on gate keeping but rather on trial practices once the historian expert is admitted. Trial procedures are purportedly aimed at permitting the expert historian to testify fully (in accordance to her task) while revealing any lies or distortions in her historical account.

A. *Professional Historians’ Craft*

The professional historian’s goal is, presumably, to portray, whether in writing, in the classroom, or in the courtroom, an objective historical interpretation. Thomas L. Haskell likens the coveted objectivity to what Nietzsche called “asceticism,” that which requires practitioners of a craft to “abandon wishful thinking, assimilate bad news, discard pleasing interpretations that cannot pass elementary tests of evidence and logic, and, most important of all, suspend or bracket one’s own perceptions long enough to enter sympathetically into the alien and possibly repugnant perspectives of rival thinkers.”¹⁸⁴ Haskell parts ways with historian Peter Novick by describing objectivity as both worthy and attainable (Novick believes objectivity is an outdated ideal).¹⁸⁵ Haskell’s ideal, while distinct from neutrality, leaves no room for propaganda and lies.¹⁸⁶ Haskell embraces the objectivity ideal, calling on “respect for logical coherence, fidelity to evidence, detachment, candor, honesty, and the like” as the prevailing values underlying this goal.¹⁸⁷

¹⁸³ Festa, *supra* note 2, at 479.

¹⁸⁴ THOMAS L. HASKELL, OBJECTIVITY IS NOT NEUTRALITY 148–49 (1998).

¹⁸⁵ See *id.*; see generally PETER NOVICK, THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL QUESTION (1998).

¹⁸⁶ Haskell describes detachment as the attribute which allows for objectivity among historians: “To be dissatisfied with the view of the world as it initially appears to us, and to struggle to formulate a superior, more inclusive, less self-centered alternative, is to strive for detachment and aim at objectivity.” HASKELL, *supra* note 184, at 149.

¹⁸⁷ *Id.* at 168.

As shown, the very goal to which professional historians aspire is thus controversial. Similarly, identifying what methods constitute a reliable historian's craft is difficult; in terms of methodology, historians do not conceive of themselves as having a single, common procedure for viewing the past (or even a common goal).¹⁸⁸ In a well-regarded treatise on historical methods, the authors describe the historian's task as "to choose *reliable* sources, to read them *reliably*, and to put them together in ways that provide *reliable* narratives about the past."¹⁸⁹ The obvious question then is whether the reliable historian's methodology fits within the constructs of the adversarial system, enabling the reliable historian to embrace and relay his theory in the courtroom, thereby assisting the fact-finder, while still vetting the historian's testimony for inaccuracies.

B. An Awkward Convergence

Some argue the courtroom is the best venue for determining accurate facts of history, even if the historian expert is made to feel uncomfortable by and in the process.¹⁹⁰ Yet many commentators argue that combining the

¹⁸⁸ Questions about the historian's goal or end result, historical knowledge, create as many unknowns and uncertainties as there are historians. Historian Richard J. Evans stated, "[T]he level of abstraction at which most studies of historical epistemology operate is so theoretical, so far removed from actual problems experienced by working historians, that the subject in general is of little practical relevance to what historians actually do." RICHARD EVANS, IN DEFENSE OF HISTORY 9 (1999).

¹⁸⁹ HOWELL & PREVENIER, *supra* note 66, at 2. Whether historians' conception of reliability coheres with lawyers' conception of the same trait is beyond the scope of this paper (it could certainly be the topic of an article or book by itself). Also, how historians achieve reliability within their craft is difficult to summarize. To describe it in the most cursory manner, most historians engage in some degree of interpretation. Also, historians, both unreliable and legitimate, bring values and biases, even political commitments, to their historiography, though the reliable historian detaches himself from these commitments sufficiently to accept all plausible evidence in arriving at an interpretation. See HASKELL, *supra* note 184, at 19. Yet, certain tenets of reliability are commonly accepted: "Historians must always consider the conditions under which a source was produced—the intentions that motivated it—but they must not assume that such knowledge tells them all they need to know about its 'reliability.'" HOWELL & PREVENIER, *supra* note 66, at 19. Historians should distinguish for readers between information that comes directly from the source itself and the historian's personal interpretation of the source; historians should consider an oral source reliable only when the source can be verified by external evidence; and historians typically rely on more than one source. *Id.* at 19–22.

¹⁹⁰ See McCrary & Herbert, *supra* note 50, at 128 ("As we have seen, however, the courtroom helps keep the academics honest as well. If experts do not testify fully, logically, convincingly, and honestly, then the process of cross-examination by skillful attorneys is likely to expose their

two crafts may actually bring out the worst in each:¹⁹¹ “The adversary system exerts a powerful force on all trial participants, and it compels historians to generate uncharacteristically categorical and unequivocal assertions.”¹⁹² A historian who testified in cases involving Native American hunting and fishing rights described her experience as traumatic:

My experience has taught me that the law is opposed to history; that history and the law are in a state of perpetual warfare in the courts of law. As a historian, I feel that every time I have gone into a courtroom, I have been flung into an arena where I might be chewed up by the legal lions before I can get out alive.¹⁹³

Generally speaking, the trial lawyer presenting a witness at trial, whether fact or expert, seeks to strip away nuance, to boil it down, make it understandable, and perhaps even give the jury a “sound bite.”¹⁹⁴

faults.”); *see also* Dr. Helen Hornbeck Tanner, Address at the Dedication of the Indian Law Center at the University of Detroit Mercy Law School, in *History vs. The Law: Processing Indians in the American Legal System*, 76 U. DET. MERCY L. REV. 693, 694 (1998–1999).

¹⁹¹ *See* Festa, *supra* note 2, at 515 (describing the views of those who believe the courtroom is not amenable to an objective facts of history, as follows: “Advocacy, they claim, risks distorting the historical record, which, to be accurate, requires more explanation of context and a better understanding of its differences from our world today than can be provided in the situation of a discrete trial or legal controversy.”); *see also* Stephen Whinston, *Can Lawyers and Judges Be Good Historians?: A Critical Examination of the Siemens Slave-Labor Cases*, 20 BERKELEY J. INT’L L. 160, 162 (2002) (The article identifies differences that could lead one to believe historians do not belong in the courtroom. For example, attorneys focus on primary sources while historians rely on these sources but are also comfortable with secondary sources. Historians debate facts for years while lawyers have a specific, limited time to develop facts. Lawyers approach facts as zealous advocates while historians are supposed to aspire to a more objective approach. Finally, judge or jury in a case resolves or finds the facts to resolve the debate, thus an official version of the facts arises—not so in the historical context); Martin, *supra* note 9, at 1541–42; G.M. Dickinson & R.D. Gidney, *History and Advocacy: Some Reflections on the Historian’s Role in Litigation*, 68 CANADIAN HIST. REV. 576, 584–85 (1987) (“[T]he problem is that what constitutes ethical practice for lawyers may include elements which invite unethical practices for historians, and *vice versa* . . . [T]he rules of advocacy, within which historians must work if they are to participate in the litigation process, may contravene the goals and procedures that give legitimacy to their own craft, and undermine their effectiveness in their own professional forum.”).

¹⁹² Martin, *supra* note 9, at 1541–42.

¹⁹³ *See* Tanner, *supra* note 190, at 694.

¹⁹⁴ The O.J. Simpson murder trial became famous in part because of the mantras Simpson’s defense lawyer Johnny Cochran presented to the jury, such as “If it doesn’t fit, you must acquit.”

According to an American Bar Association practice guide on expert witnesses, “Typically, the best strategy for direct examination is to get to the point quickly. . . . Overkill can bore jurors and open up subjects that otherwise would not be available for cross-examination.”¹⁹⁵ Thus even on direct examination, the historian may feel dissatisfied at her ability to explain facts of history.¹⁹⁶

Cross-examination, during which the opposing counsel attempts to discredit the testimony by seizing on any nuance or ambiguity to reveal a purported flaw in methodology, may leave the reliable historian feeling not only attacked but also that she has compromised her professional craft when testifying. “The subject of expert cross-examination is usually closer to the core of the witness’s self image and social identity, and the attack is often far more demeaning.”¹⁹⁷ And the expert historian, presumably coached to answer directly (“yes” or “no,” if possible) without gratuitous information, may be unable or unwilling to defend against attacks. One expert historian described feeling “shocked” after the opposing counsel challenged her testimony as incompetent and irrelevant.¹⁹⁸ As a result, the judge treated her with care during trial, feeding her peppermints so she would not lose her cool during cross-examination.¹⁹⁹

Alice Kessler-Harris, after testifying as an expert historian in the 1986 gender discrimination case against Sears, complained that cross-

Irving adopted the “No Holes, No Holocaust” mantra from his fellow-denier Robert Faurisson. See VAN PELT, *supra* note 114, at 3.

¹⁹⁵ CECIL C. KUHNE III, A LITIGATOR’S GUIDE TO EXPERT WITNESSES 133 (2006).

¹⁹⁶ Professor Samuel Gross in his article on expert evidence distinguishes the courtroom from the classroom for the expert historian:

[The expert] must present information in interrogatory form, subject to objections and interruptions to an unfamiliar audience that has no particular background in the area and over whom she has no power. She cannot pose questions to her listeners, let alone give them tests and grades. She is not even allowed to speak of her own volition. The lawyers and the judge ask her questions, and they can compel her to answer in their terms. In addition, and more important, the primary purpose of her testimony is not to instruct but to persuade, and confusion, even legitimate and inevitable confusion, is rarely persuasive. This drives expert witnesses to compromise accuracy to achieve clarity, and to favor simple assertions over complex explanations.

Gross, *supra* note 51, at 1163–64.

¹⁹⁷ *Id.* at 1167 (comparing cross-examination of expert and lay witnesses).

¹⁹⁸ See Tanner, *supra* note 190, at 697–98.

¹⁹⁹ See *id.*

examination and the pressure to simplify her theory on direct examination resulted in eliminating necessary subtleties, resulting, to some, in seeming exaggerations in her testimony.²⁰⁰ Her job, as described to her, was to answer questions. “Any attempt I made to introduce controversy, disagreement and analysis merely revealed that history was an uncertain tool and invalidated both its findings and my conclusions.”²⁰¹ Given these rules,²⁰² Kessler-Harris was forced to oversimplify her conclusion, testifying that women would *always* take higher paying jobs but for an employer’s discrimination.²⁰³

In describing her experience testifying, Kessler-Harris wrote, “Oh, for the opportunity to explain what it was that historians did, and how they generalized from limited data!”²⁰⁴ Regarding cross-examination, Kessler-Harris complained that testimony on cross-examination “had a double-edged quality. . . . Once given and written, it had a life of its own, at the mercy of cross-examining lawyers, and not subject to qualification.”²⁰⁵ As Dr. Helen Hornbeck Tanner explained in describing her experience as an expert in legal disputes involving Native American land treaties, “The courts seem predisposed to reject history. The data and conclusions are often too subtle to be processed by a rigid ‘right or wrong’ system of decision-making.”²⁰⁶

In the preface to his book about the *Irving* trial, expert historian Robert Jan van Pelt wrote, “[A]s I listened to Mr. Justice Gray’s verdict the day before, I enjoyed an increasingly rare satisfaction in this post-historical age: namely, an awareness that the practice of history not only offers a pleasant

²⁰⁰ See Kessler-Harris, *supra* note 24, at 65. The trial was controversial in the historical community because it pitted two prominent historians, Rosalind Rosenberg and Alice Kessler-Harris, against each other. Rosenberg was attacked within the historical community for testifying on behalf of Sears. See Haskell & Levinson, *supra* note 24, at 1591.

²⁰¹ Kessler-Harris, *supra* note 24, at 72.

²⁰² See NOVICK, *supra* note 185, at 504.

²⁰³ *Id.* In the chapter of *That Noble Dream* in which he describes the experiences of Rosenberg and Kessler-Harris, Novick concludes: “The problems of feminist historians in the courtroom were not theirs alone. When committed scholars enter the legal arena, they uphold the highest academic standards when circumstances allow; when circumstances don’t, they fudge.” *Id.* at 507.

²⁰⁴ Kessler-Harris, *supra* note 24, at 73.

²⁰⁵ *Id.* at 74.

²⁰⁶ Tanner, *supra* note 190, at 698 (describing her experiences serving as an expert in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979) and other cases involving Native American land rights).

occupation, but that *the way we historians go about our business* also matters.²⁰⁷ Here lies the rub; the method historians use to arrive at their interpretations should indeed matter, as the historical testimony may, as in *Irving*, be the critical evidence.²⁰⁸ Trial procedures should facilitate both screening out the pseudo-historian, whose testimony is based on unreliable methods, and allowing the historian whose testimony is based on a reliable methodology to testify fully.

The proposed remedies are aimed at improving our legal system to ensure reliable expert historians (those sporting adequate credentials and a reliable method and conclusion) are permitted to testify in a manner that satisfies their craft (and in doing so hopefully advances the pursuit of truth) while pseudo-historians are either kept out of the courtroom or revealed as unreliable early on.

VI. PROPOSED REMEDIES

Historian expert witnesses are an invaluable resource to courts and juries, providing necessary expertise on complicated, sometimes arcane subjects. In *Irving*, Judge Gray did not have to gather, analyze, and synthesize countless historical documents (many of which were in German) concerning Auschwitz because Robert Jan van Pelt and the other defense experts did this work for him.²⁰⁹ The strain on a court would at times be insurmountable without relying on expert historians in cases involving complicated or unfamiliar historical issues such as the Holocaust.

But troubling questions arise when considering current gatekeeping measures, like whether the *Daubert* test suffices to keep the pseudo-historian off the witness stand and, if not, whether lawyers are typically equipped to cross-examine purported experts to reveal reliability problems. The flip side of this problem also exists; does the adversarial system allow a reliable historian to adequately flesh out his analysis, staying true to his

²⁰⁷VAN PELT, *supra* note 114, at xi (emphasis added).

²⁰⁸Judge Gray relies heavily on expert testimony in his judgment. Judge Gray distinguished his role as trial judge from that of the historians who acted as experts in the case: “It is important that those reading this judgment should bear well in mind the distinction between my judicial role in resolving the issues arising between the parties and the role of the historian seeking to provide an accurate narrative of past events.” *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478, (Q.B.D. Apr. 11, 2000), available at <http://www.holocaustdenialontrial.org/trial/judgement/01.01>.

²⁰⁹See VAN PELT, *supra* note 114, at 488.

craft? If not, are we comfortable with a legal system that permits the truncating and stifling of the reliable historians' testimony (that leaves historians like Alice Kessler-Harris and Robert Jan van Pelt feeling unsatisfied by their inability to explain their theories)? If a reliable historian cannot be true to her craft when testifying, is the end result, whatever version of history emerges at trial, acceptable?

I used Holocaust-related trials to illustrate these potential pitfalls because the stakes are substantial if the court's gatekeeping fails to keep the pseudo-historian from testifying, thus potentially allowing the law to reflect inaccurate facts of history. All facts of history are important; by using Holocaust-related trials I tried to show the public significance and gravity of these issues. These problems involving expert witnesses certainly relate to other types of experts, for whom *Daubert* is also an unsuitable test.

I organize proposals for improving our current system as either gatekeeping measures (for determining the reliability of a historian's methodology at the outset) or presentation methods (for either revealing a lack of reliability during trial or allowing the reliable historian to testify fully). Certain of the proposals relate to both aspects of trial. I attempt to address two separate, though related, problems: our existing system's inability to differentiate the pseudo-historian (whose objectionable methodology is motivated by a social/political agenda that informs his interpretation) from the reliable historian either at the outset or during trial, and the system's tendency to encourage (or force, according to some) overly one-sided or categorical expert testimony, thus altering the reliable historian's presentation of facts of history.

A. *Gatekeeping*

1. Judges Should Appoint Neutral Experts or Do the Historical Research Themselves

Although this proposal does not directly involve gatekeeping, I discuss it here because it would eliminate the need to screen expert historians at the outset (they would still be subject to cross-examination). Commentators have repeatedly argued that the adversarial system alters the nature of historian expert testimony, turning the reliable historian into a one-sided,

biased witness.²¹⁰ In other words, our adversarial system—premised on lawyers' zeal to win and an expert's allegiance to one side of the case—causes otherwise reliable historian experts to stray from proper historical analysis in presenting their testimony, making it overly one-sided.²¹¹ Arguably, the pressure to win forces the historian to abandon the nuanced, complex analysis typical of his craft and present a more “black and white,” one-sided conclusion.²¹² This pressure may go so far as to turn the reliable historian into something as perilous as the pseudo-historian

While I do not necessarily agree that pressure to win (the adversarial system) is what creates the pseudo-historian, I still address this idea because it could assist with both the pseudo-historian and the reliable historian whose testimony becomes tainted by trial pressures. David Irving strays from proper historical methodology to arrive at an interpretation that satisfies his ideological objectives; he deliberately disregards the convention of putting aside his ideology when considering the convergence of evidence. Other historians stray because, at trial, lawyers control their testimony. Obviously, payment for expert testimony also causes some experts to stray.

In Justice Breyer's concurring opinion in *General Electric Co. v. Joiner*,²¹³ he suggested courts appoint special masters or a specially trained law clerk pursuant to Federal Rule of Evidence 706 to assist the court in understanding specialized knowledge.²¹⁴ Appointed historians would arguably serve more as advisors than advocates, thus adhering more faithfully to their craft.²¹⁵ Professor Samuel Gross argues for mandatory

²¹⁰ See generally Gross, *supra* note 51. See also Martin, *supra* note 9, at 1522 (calling the adversarial system “the foremost culprit in tempting historians to stray from the principles of their craft.”). In light of the trials described in this Article, I do not agree that the adversarial system is the foremost culprit in tempting experts to stray when it comes to expert historians. “Historians” may also stray from proper historical methodology to arrive at an interpretation consistent with their politics or ideology.

²¹¹ See Farber, *supra* note 9, at 1010. Farber contends the historian cannot be true to her craft in the courtroom: “The historian's fidelity is threatened by the pressures of trial.” The historian must “recast her views” when testifying in a court of law. *Id.*; see also Justin P. Murphy, Note, *Expert Witnesses at Trial: Where are the Ethics?*, 14 GEO. J. LEGAL ETHICS 217, 219–22 (2000).

²¹² Gross, *supra* note 51, at 1129–30, 1177–78.

²¹³ 522 U.S. 136 (1997).

²¹⁴ *Id.* at 520 (Breyer, J., concurring).

²¹⁵ Martin, *supra* note 9, at 1547. Martin posits courts should appoint historical experts to preserve neutrality. Martin posits the adversarial system makes historians unreliable as experts because historians typically consider, in reaching conclusions, all available evidence, including

court-appointed experts, detailing procedures for making such a change effective.²¹⁶

The suggestion for neutral court-appointed experts is not new.²¹⁷ In 1977 Professor Lawrence Rosen, in an article about anthropologists as expert witnesses, also argued for court-appointed experts to testify at trial (to be chosen from a list of potential experts prepared by the expert's professional association and from which the court could choose an expert to testify).²¹⁸ Rosen noted the obvious objection to court-appointed experts; the experts will still come to the courtroom with a bias, yet "cloaked with a false air of neutrality."²¹⁹ Under Rosen's scenario, the judge would advise the jurors that the witness was chosen "to give a second opinion on the issues."²²⁰ Both sides' counsel could cross-examine the expert (as Federal Rule of Evidence 706 contemplates).²²¹

The argument for court-appointed experts may be compelling to academics viewing the trial from outside the courtroom. But presumably most trial lawyers and judges would resist a system where the lawyer loses control over the choice of expert witness, and the judge must add to his duties finding experts to testify on particular matters. First, as a practical matter, judges complain of their backlog of cases and already unmanageable workload.²²² Adding another task to this workload makes little sense, unless it provides a hefty benefit. Second, the federal courts' power would increase,²²³ as would the potential for abuse because of

countervailing evidence. "At trial, however, the pressures of the adversary system routinely push historians toward interpretations of the part that are compressed and categorical . . ." *Id.* at 1521.

²¹⁶ See Gross, *supra* note 51, at 1221–30 (explaining that the "essential flaw in the existing schemes for appointment of experts is the absence of incentives to use them").

²¹⁷ See Festa, *supra* note 2, at 485, 543–48 (Professor Festa describes drawbacks of using court-appointed experts).

²¹⁸ See Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 AM. ANTHROPOLOGIST 555, 569–70 (1977). Many of the problems Rosen discusses arise with historian experts as well.

²¹⁹ *Id.* at 570.

²²⁰ *Id.*

²²¹ *Id.* at 571.

²²² See Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After United States v. Booker*, 41 U. RICH. L. REV. 625, 626 (2007).

²²³ See *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006) (reasoning, based on "sound principles of federalism," that allowing the First Amendment to apply to statements of public employees acting in their official duties would "commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among governments employees and their superiors").

judicial bias, a problem about which commentators already complain.²²⁴ In sum, a system of court-appointed experts could possibly exacerbate existing problems of biased experts.

The proposal may be more alluring to trial participants if the lawyers could designate choices (which the Rule currently allows), and the court would appoint from that list. Yet, with this procedure, the nature of the testimony would still be one-sided. In terms of gatekeeping, the court choosing from a lawyer's list certainly does not ensure reliability, as in a Holocaust-related trial, David Irving could certainly make it onto one side's list based on his historical writings.

A related suggestion is for judges to undertake the historical research themselves.²²⁵ In his article concerning the Siemens-Slave Labor cases, Stephen Whinston makes a compelling argument for altering the typical litigation scenario when facts of history are in dispute.²²⁶ Whinston suggests that judges should go to source materials and undertake the necessary research themselves.²²⁷ As he states, "Where history is involved, particularly with events such as the Holocaust, judges have an obligation not just to the parties but to society as a whole to get it right."²²⁸

The argument that the judge should conduct the research himself is unworkable in view of *Irving v. Lipstadt*.²²⁹ Considering the volume of documents Judge Gray would have had to collect, organize, and analyze to familiarize himself with the facts of history regarding, for example, Auschwitz, the task is simply too large.²³⁰ As discussed below, perhaps the more promising idea is for courts to use a special master from a panel previously-selected and approved by the American Historical Association

²²⁴The proposal also raises troubling questions about whether a judge's appointment of an expert could be challenged on appeal and, if so, under what standard of review. Presumably, a higher court would review the decision for abuse of discretion, an extremely difficult burden for a litigant to overcome.

²²⁵See Whinston, *supra* note 191, at 174–75. Another commentator echoes these views, advocating for and describing a procedure in which judges conduct *scientific* research themselves. See Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1265–67 (2007).

²²⁶See Whinston, *supra* note 191, at 174.

²²⁷*Id.*

²²⁸*Id.*

²²⁹See *Irving v. Penguin Books Ltd.*, No. 1996-I-113, 2000 WL 362478 (Q.B.D. Apr 11, 2000), available at <http://www.holocaustdenialontrial.org/trial/judgment/13.34>.

²³⁰*Id.*

(“AHA”)²³¹ to conduct the historical research for the court. The expert, presumably only one, would then come to court with peer approval and would not be controlled by either lawyer in the case.

2. Judges Should Appoint Special Masters as Historians (or to Examine the Historians)

In his analysis of the Siemens-Slave Labor Cases,²³² Stephen Whinston²³³ suggests judges should appoint special masters pursuant to

²³¹ See AMERICAN HISTORICAL ASSOCIATION, ABOUT US (2008), <http://www.historians.org/info/index.cfm> (last visited Oct. 18, 2008). The organization bills itself as the largest historical society in the United States. The AHA “provides leadership and advocacy for the profession, fights to ensure academic freedom, monitors professional standards, spearheads essential research in the field, and provides resources and services to help its members succeed.”

²³² See *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 276 (D.N.J. 1999); Whinston, *supra* note 191, at 174. Beginning in late 1998, groups of Jewish Holocaust survivors who had been taken from concentration camps during World War II and forced to work for German companies sued these companies in federal district courts in different parts of the country. *Degussa*, 65 F. Supp. 2d at 250. One such group sued Siemens AG in a class action on behalf of “all persons . . . taken from concentration camps and ghettos and forced to work for Siemens.” *Id.* at 254. Regarding the justiciability of plaintiffs’ claims, Siemens argued that because the claims arose during a war rather than in private dispute, the claims should be decided under the nations’ reparations policies without court interference. *Id.* at 258–59. To counter this argument, the plaintiffs submitted the declaration of a German historian, Dr. Christian Wolf, who distinguished the Jewish slave labor used by Siemens during WWII from typical wartime treatment. *Id.* at 259. According to Dr. Wolf:

[Jewish slave labor] arose from a program separate and apart from the German war effort; they were a component of the racial ideology and policies of persecution of the Nazi regime. As such, World War II forced labor claims should not be included in the term ‘reparations’ as used in the Polish and Soviet declarations of waiver.

Id. The Jews were enslaved in concentration and extermination camps as part of their systematic annihilation rather than as a part of Germany’s effort to sustain itself economically during the war. The court rejected Wolf’s distinction, dismissing the case as a non-justiciable political question. *Id.* at 282. The court’s finding of a fact of history—that the Jewish slave laborers suffered at the hands of a program that was “primarily a war related effort”—is, according to commentators, blatantly inaccurate. *Id.* at 276. The parties sought to appeal the court’s decision yet all appeals were dismissed once Holocaust-related litigation against these German companies was resolved in 2000 (a fund of approximately \$4.5 billion was created to provide compensation for involuntary labor). See Michael J. Bazylar, HOLOCAUST JUSTICE 76–77 (2003) (citing Tom Hayden, *Ex-Slave Laborers Deserve Far Better; Holocaust: Rich Firms Get Good Press with Token Payments, but What About the Victims?*, L.A. TIMES, Dec. 30, 1999, at B11).

Federal Rules of Civil Procedure 52(a) and 53²³⁴ to examine complicated historical documents and then report back to the judge. Whinston makes this suggestion based on his experience litigating these cases; he is critical of the adversarial system's ability to properly vet conclusions posited by historians resulting, as he claims it did in the Siemens-Slave Labor case, in unfounded facts of history "on the books."²³⁵ As such, he recommends judges interpret historical data with the help of a special master.²³⁶

A special master could also be used to assist a trial judge in gatekeeping expert historians. One commentator complains that the trial judge, to properly use *Daubert*, must understand the science as well as the expert.²³⁷ If, for argument's sake, only someone accustomed to historical methodology can properly screen historians for reliability because of insight into the process, the trial court could appoint as special master, from a list created by the American Historical Association, a historian who is well-equipped to assess a proposed expert historian's methodology. This proposal has substantial merit because it aids in truth-finding without adding to the court's workload.

3. The Supreme Court Should Adopt a Separate Reliability Standard for Historian Expert Witnesses

Perhaps the answer lies in a separate gate keeping test for expert historians (or other "soft science" experts). Just as the Supreme Court set

²³³When he wrote his article, Mr. Whinston was a shareholder at Berger & Montague, P.C. He was one of the lawyers who sued Siemens on behalf of a group of plaintiffs. Whinston, *supra* note 191, at 164.

²³⁴The rule provides that a court may appoint a master to "make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by . . . some exceptional condition." FED. R. CIV. P. 53(a)(1)(B)(i).

²³⁵See Whinston, *supra* note 191, at 167–74. In reaching its conclusion that no distinction existed between Jewish slave labor (part of Final Solution) and non-Jewish forced labor (part of wartime effort), the court rejected the testimony of historian Dr. Wolf. *Id.* Thus, the historical errors "on the books" were not corrected because the parties settled before appeal was decided. *Id.* at 167. Specifically, all Holocaust-related litigation against German entities was resolved in July 2000, prior to an appellate decision. *Id.* Whinston complains about the impact of the court's inaccurate decisions of facts of history. *Id.* at 173–74.

²³⁶*Id.* at 174.

²³⁷See Blinka, *supra* note 63, at 187 (citing the North Carolina Supreme Court for the idea that "despite their many talents and gifts, trial judges are ill-suited to resolve disagreements among experts, particularly scientific disputes.").

forth a test for medical experts to bar junk science, the Court could outline a factors test courts should use to eliminate junk history. For example, the test could focus on whether the historian has relied on “a convergence of sources” and how he or she has treated contrary sources. Trial courts undertaking a *Daubert* test have at times focused on specific reliability factors like whether the expert has “unjustifiably extrapolated from an accepted premise to arrive at an unfounded conclusion”²³⁸ and whether the expert has accounted for obvious contrary explanations.²³⁹ The American Historical Association would presumably be well-suited to assist in crafting a test geared toward reliability in the “soft sciences.”

One commentator²⁴⁰ urges courts to adopt Judge Gray’s “objective historian” standard as the prevailing test for screening expert historians. Schneider draws a code of conduct from Judge Gray’s opinion, which requires the objective historian to adhere to seven rules.²⁴¹ She renames this test the “conscientious historian” standard.²⁴²

Although the idea of courts’ adopting this standard for historian experts is terrific, the problem with Schneider’s conscientious historian standard as

²³⁸ See *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995); see also *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997)).

²³⁹ See *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478 (Q.B.D. Apr 11, 2000), available at <http://www.holocaustdenialontrial.org/trial/judgment/13.11>. Judge Gray stressed this factor in his “objective historian” assessment. *Id.*

²⁴⁰ Schneider, *supra* note 72, at 1531–32 (proposing the renaming of the standard the “conscientious historian” standard and the using of it in American courts).

²⁴¹ Schneider extracts the following rules from Judge Gray’s opinion: (1) treat sources with “appropriate reservations;” (2) refrain from dismissing countervailing evidence without proper consideration; (3) be even-handed and avoid “cherry-picking” the evidence; (4) indicate when speculating; (5) refrain from mistranslating or omitting sections of documents; (6) “weigh the authenticity of all accounts, not merely those that contradict her favored view;” and (7) consider the motives of the historical actors. *Id.* at 1535 (citing *Irving*, 2000 WL 362478, available at <http://www.holocaustdenialontrial.org/trial/judgment/13.11>) (for each rule, Schneider cites parts of Judge Gray’s opinion in which he criticizes Irving for his one-sided approach to his historical scholarship). She describes the benefits of this standard as follows:

It would discourage dismissal of evidence based simply on the historian’s holding convictions about his or her subject matter; it would give judges a more nuanced understanding of what historians should and should not be expected to testify to on the stand; and it would combat the tendency of historians on either side of a case to present unduly one-sided conclusions.

Id. at 1540.

a gatekeeping mechanism for testifying experts is that a historian's methodology may not be revealed until well into the trial and only after rigorous cross-examination by a competent lawyer. On initial examination, the alleged historian may answer that she followed conventional historical methods in conducting her research. In recent terrorism trials, for example, the experts are well-versed at describing an appropriate methodology.²⁴³ Only if the opposing lawyer or judge has done fairly extensive research into the history itself (including gaining a significant understanding of the historical evidence) will problems with the methodology be revealed. The proposal is thus impractical as a gatekeeping measure.

Perhaps a better approach is to admit expert historians to testify at trial (unless the historian faces a serious credibility problem) and challenge their reliability during trial using Schneider's conscientious historian standard.²⁴⁴ The standard would certainly prove useful to a lawyer seeking to cross-examine a historian expert to unearth problems with his methodology.

²⁴³In *United States v. Paracha*, the government prosecuted Uzair Paracha for his purported role in providing material support to al-Qaeda. No. 03 CR. 1197(SHS), 2006 WL 12768, at *1 (S.D.N.Y. Jan. 3, 2006). To establish its case, the government sought to present Evan Kohlmann as an expert on terrorism. *Id.* at *18. Kohlmann, President and Founder of www.Globalterroralert.com (a clearinghouse for information regarding terrorism), has degrees in law, foreign service, and Islamic studies. *Id.* at *20. He described his work as a study of the micro-history of al-Qaeda and its involvement in regional conflicts. *Id.* The government offered Kohlmann to testify regarding the roles of other alleged al-Qaeda members or associates Paracha had mentioned in statements to law enforcement and al-Qaeda interrogation techniques. *Id.* at *21. After a full day evidentiary hearing on Paracha's *motion in limine* to preclude Kohlmann from testifying, the court admitted him as an expert but limited the scope of his testimony. *Id.* at *31. The court applied *Daubert*, assessing Kohlmann's methodology in gathering information to reach his conclusions. *Id.* at *19–21. At the hearing, Kohlmann described his methodology for gathering information as obtaining multiple sources, including original and secondary sources, cross-checking new information against existing information and evaluating new information to determine whether his conclusions comported with his most reliable sources. *Id.* at *20. Paracha challenged this methodology as "a mere culling from a handful of cases and internet reports information that the user deems reliable." *Id.* The court admitted Kohlmann, finding his methodology "more reliable than a simple cherry-picking of information from websites and other sources." *Id.* The court noted that the hearing demonstrated that Kohlmann's opinions and conclusions were subjected to various forms of peer review and his opinions were generally accepted within the relevant community. *Id.* Kohlmann's methodology, as he described it, was similar to that used by experts who had testified about terrorist organizations in other federal courts. *Id.*

²⁴⁴Schneider, *supra* note 72, at 1531.

The Supreme Court could also return to the “general acceptance” standard as a gatekeeping test for historical methodology. Although already part of the test, federal courts could emphasize this factor when applying *Daubert* to historian testimony (rather than focusing on credentials), seeking outside confirmation from a special master or the AHA that a potential expert’s historical method—not the interpretation (which presumably would logically follow from the methodology), but the method of arriving at that interpretation—is common to the craft. This would allow for admission of novel historical interpretations, like historical revisionist theories,²⁴⁵ as long as such theories were properly supported by a reliable methodology.

4. The Supreme Court Should Eliminate Judicial Gatekeeping for Historian Expert Witnesses, as in England, or Require only Credibility Gatekeeping (for Competence), as in Canada

Daubert/Kumho Tire, as currently used by federal courts,²⁴⁶ does not help courts assess the reliability of expert historian expert witnesses’ methodology. David Irving or Robert Faurisson would probably be admitted to testify on Auschwitz in a United States federal courtroom if the court used *Daubert/Kumho Tire* to test reliability. Both Irving and Faurisson are authors with substantial credentials in terms of writing and historical research. In fact, historian Richard Evans noted that Irving’s research had not been subjected to a rigorous review of his methodology by his historian peers before Irving sued Lipstadt.²⁴⁷ Presumably, a cursory review of Irving’s work would not reveal the significant flaws underlying much of his historical methodology.

²⁴⁵The point here is not to stifle historical interpretations from schools of thought like historical relativism, post-modernism, and critical legal studies. Rather the point is to ensure the methodology underlying the interpretation, whether novel or conventional, is reliable.

²⁴⁶See generally *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995); *Kumho Tire Co., Ltd., v. Carmichael*, 526 U.S. 137 (1999). Under *Kumho Tire*, federal courts are given leeway to decide how best to assess reliability; yet, courts do not typically stray from the standard considerations outlined in the cases. See *Kumho Tire*, 526 U.S. at 141.

²⁴⁷EVANS, *supra* note 78, at 33 (“[F]ew historians had actually gone to the trouble of subjecting any of Irving’s publications to a detailed analysis by taking his historical statements and claims and tracing them back to the original and other sources on which he claimed they rest. Doing so was an extremely time-consuming exercise, and most historians had better things to do with their time.”).

Perhaps in view of *Daubert/Kumho Tire's* limited ability to test an expert historian's methodology, gatekeeping should involve only credibility and relevance. This would be similar to certain state practices in the United States and not unlike what is actually happening with expert historians in federal courts. Wisconsin, for example, relies on a "relevancy test," rather than reliability test, for admitting expert witnesses.²⁴⁸ Expert testimony is admissible if "it is relevant, the witness is qualified based on his or her 'specialized knowledge,' and the testimony will assist the trier of fact in better understanding the evidence or determining a fact issue."²⁴⁹ Wisconsin procedure entrusts the adversary system to reveal, by cross-examination and impeachment, flaws in the expert's testimony.²⁵⁰ The Wisconsin system allows for only limited gatekeeping by the trial court.²⁵¹

Changing existing practice to one with limited gatekeeping of historian experts (only for relevance and credibility) would be more true to current practice and probably more practical. The reality is that judges may be ill-equipped at the beginning of a case to discern subtle flaws in a historian's methodology (or it would be impractical given the time it would take to unearth these flaws in a *Daubert* hearing). As one commentator notes, trial judges are asked under Rule 702 to be "better equipped than an honestly-testifying expert to know whether the expert's opinion is reliable. [This] is an unlikely premise."²⁵²

As shown by the post-September 11th terrorism trials, federal courts using *Daubert/Kumho Tire* typically scrutinize only peer review (after reviewing the expert's credentials). For example, in *United States v. Hammoud*,²⁵³ the trial court admitted testimony from the government's expert, Matthew Levitt, a specialist on terrorist organizations and Hizballah. Levitt testified about the structure of Hizballah and identified its leaders.²⁵⁴ He testified as to Hizballah's funding activities and the defendant's related activities.²⁵⁵ The trial court conducted a *Daubert* hearing at which Levitt

²⁴⁸ Blinka, *supra* note 63, at 174.

²⁴⁹ *Id.* (noting "reliability of the expert's reasoning, methodology, or tests are left to the trier of fact as matters of weight.").

²⁵⁰ *See id.* at 175.

²⁵¹ *Id.*

²⁵² Michael Gottesman, *From Barefoot to Daubert to Joiner: Triple Play or Double Error?*, 40 ARIZ. L. REV. 753, 758 (1998).

²⁵³ 381 F.3d 316, 335 (4th Cir. 2004).

²⁵⁴ *Id.* at 337.

²⁵⁵ *Id.* at 338.

testified to his qualifications and methods of research.²⁵⁶ He described his methodology as involving the following steps: “[T]o collect as much information as possible and to balance each new incoming piece of information against the body of information that you’ve built to that point. . . . So, it’s a constant vetting process. And the more rigorous you are, the better your information will be.”²⁵⁷

He spoke of peer review, saying “his work was subject to ‘tremendous peer review.’”²⁵⁸ The trial court allowed the testimony, and the Fourth Circuit held the court did not abuse its discretion in doing so.²⁵⁹ With regard to his methodology, the appellate court remarked: “Levitt identified his methodology as one generally employed in the social sciences, and Hammoud did not challenge this testimony. Additionally, Levitt testified that he actually applied this methodology in reaching his conclusions regarding this case.”²⁶⁰ This satisfied both the lower and appellate courts. Irving’s theories would easily pass this test. Thus screening Irving to reveal flaws in his methodology would require the court to undertake a more meaningful assessment of methodology by adding or stressing existing factors or adopt a wholly different test to scrutinize historical methodology. Adhering to current practice is unacceptable if our objective is to assess an expert historian’s reliability before he takes the stand. Yet, perhaps the answer lies not in gatekeeping but in how we present expert historians.

B. Methods of Presenting Experts

This Section proposes solutions aimed at improving our trial procedures to advance two goals: revealing flaws in an admitted historian’s methodology during trial and presenting the historian whose methodology is reliable in a way that preserves the integrity of her interpretation (ensuring her testimony is not skewed by pressures the adversary system exerts). The problem, obviously, is that many of the presentation methods a lawyer uses to reveal the pseudo-historian on the witness stand, like rigorous cross-examination regarding historical methodology, may skew the

²⁵⁶ *Id.* at 337.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *See id.* (finding the information’s source was reliable, as it originated from Levitt’s FBI work and on unclassified surveillance evidence the Government obtained during its investigation of Hammoud).

²⁶⁰ *Id.*

reliable historian's testimony, possibly making the testimony inconsistent with the historian's professional standards.

1. We Should Continue To Allow the Adversarial System To Remedy Any Possible Problems.

The Supreme Court described “vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” as the primary means of “attacking shaky but admissible evidence.”²⁶¹ Perhaps the way to ensure reliability of historian expert witness testimony lies in doing nothing different regarding gatekeeping and permitting the adversarial process to separate the wheat from the chaff in terms of expert historians. The strong advocate could presumably reveal reliability problems with an expert's methodology (as well as an expert's credibility problems if they exist) during cross-examination. Effective cross-examination could provide, “an excellent buffer against those who would abuse historical truths in the interests of their client. . . [L]awyers put historians' testimony through a crucible that uncovers biases, flawed data, laughable interpretations, and outright deceit.”²⁶² The fact finder, otherwise lured into believing the expert has knowledge of mythical proportions, would see the flaws.

Yet, this proposal has obvious drawbacks. First, some courts are unwilling to allow rigorous cross-examination (particularly concerning an unfamiliar area like historical methodology). In certain of the recent terrorism trials, courts have limited counsel's ability to cross-examine the expert historian.²⁶³ For example, in the recent *Padilla* case, in which the government prosecuted Padilla and two co-defendants for supporting terrorism, Judge Cooke chastised a defense lawyer for persisting in cross-examining Dr. Gunaratna,²⁶⁴ the government's expert, regarding interviews he conducted that purportedly formed the basis of his knowledge.²⁶⁵

²⁶¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993).

²⁶² Reuel Schiller, *The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witness*, 49 HASTINGS L.J. 1169, 1176 (1998).

²⁶³ *Hammoud*, 381 F.3d at 339.

²⁶⁴ Gunaratna has testified as the government's expert in several other cases against alleged terrorists. In *United States v. Abdi*, the court noted that Dr. Gunaratna had spent much of his career authoring and editing twelve books about the inner workings of world terrorist groups. 498 F. Supp. 2d 1048, 1069–70 (S.D. Ohio 2007). Notwithstanding Dr. Gunaratna's academic pedigree, Abdi set forth a number of sources questioning Dr. Gunaratna's credibility and disputing

Similarly, in *United States v. Hammoud*,²⁶⁶ another case against an alleged terrorist, the court refused to allow counsel for defendant Hammoud to cross-examine the government's expert witness, Matthew Levitt, regarding classified matters relating to Levitt's employment at the FBI. Defendant Hammoud argued the Classified Informations Procedures Act ("CIPA") was violated by the nondisclosure.²⁶⁷ The district court disagreed, holding the CIPA was not implicated because the classified information related to Levitt's work at the FBI and thus was not relevant.²⁶⁸ The Fourth Circuit upheld the lower court's ruling.²⁶⁹ Thus, existing trial procedures may not reveal flaws in a historian's methodology if a trial court is unwilling to permit cross-examination regarding an expert's sources.

A second problem is the inconsistency in the trial bar's ability to cross-examine historian experts, especially for reliability of a historian's methodology. Trial advocacy courses would certainly benefit from increased attention to historian expert witnesses and historical methodology. Treatises on examining experts are mostly silent on historian expert witnesses. In a contemporary treatise on expert witnesses, the cross-examination checklist advises the lawyer to consider whether the expert is the talkative type and whether the expert is evasive or forgetful.²⁷⁰ Nothing in the treatise would assist the lawyer seeking to glean tips for revealing the

the reliability of Dr. Gunaratna's methods. *Id.* at 1069. Abdi also questioned Dr. Gunaratna's qualifications or credibility as an expert witness by showing that Dr. Gunaratna had no pre-September 11th experience with the Arab world and, moreover, that Dr. Gunaratna had misrepresented his credentials. *Id.* The court rejected defendant's challenge. *Id.* at 1070.

²⁶⁵ Associated Press, *Padilla Defense Questions Terror Expert*, USA TODAY, July 2, 2007, http://www.usatoday.com/news/nation/2007-07-02-padilla-terror-charges_N.htm (last visited Oct. 18, 2008) (Judge Cooke "sharply rebuked" defense counsel for examining the witness about the source of his information).

²⁶⁶ 381 F.3d 316, 338 (4th Cir. 2004).

²⁶⁷ *Id.*

²⁶⁸ *Id.* Although the Fourth Circuit opinion contains only a brief discussion of this issue, it is hard to imagine how Levitt's testimony regarding his work at the FBI and how it impacted his opinions could not be relevant for purposes of the *Daubert* inquiry.

²⁶⁹ *Id.* at 357.

²⁷⁰ MARK A. DOMBROFF, *EXPERT WITNESSES IN CIVIL TRIAL, EFFECTIVE PREPARATION AND PRESENTATION* (1987). The two volume *Expert Witness Checklists* by Douglas Danner and Larry L. Varn, published in 1993, provides sections of information on handling experts in the following fields: products liability, economic loss, real estate appraiser, psychiatrist, psychologist, accounting, accident reconstruction, securities valuation, questioned documents, construction, pathologist, and copyright. Social science experts are not included.

pseudo-historian or for presenting the reliable historian. Thus, while it is easy to imagine a competent lawyer revealing a historian's credibility problems or impeaching her with a past writing, the difficulty lies in imagining the lawyer revealing flaws in the historian's methodology, if any.

The final problem with allowing the adversarial system to remedy problems with how we present expert historians lies in the virtues of cross-examination. A vigorous cross-examination could reveal the true colors of the pseudo-historian; yet, it could also pervert the reliable historian's testimony. As noted above, a forceful cross-examination may eliminate the nuance and ambiguity (often necessary to the expert historian's discourse) from his testimony, resulting in testimony not true to his craft. Also a witness like David Irving, comfortable with the courtroom and manipulating evidence, seems especially well-suited to handle a vigorous cross-examination while an expert less experienced at witnessing, like Robert Jan van Pelt, may struggle to remain composed under the rigors of cross-examination. Perhaps, as described below, the "historian bar" should assist its members at improving their ability to handle rough trial tactics from an opposing counsel.

2. The "Historian Bar" Should Strengthen its Members' Ability To Handle Testifying at Trial

As a related proposal, perhaps the historian bar, in this case the American Historical Association, could play a role in assisting courts with these issues. First, because joining is voluntary, courts could use participation in the professional association as a significant credibility factor. Then, the association could assist the judicial system in several ways, including, for example, better preparing its members to serve as experts (to understand impeachment, cross-examination, and the impact of expert testimony).²⁷¹ As a former trial lawyer, I was surprised to learn of expert historians, acclaimed in their fields, feeling unable to handle cross-examination. Alice Kessler-Harris described feeling "bullied" by the opposing lawyers. To a lawyer, it seems unfathomable that historians with credentials like Kessler's would not feel comfortable with the process, particularly if she was well-prepared. Within the association, historians, especially those who either aspire to or are asked to serve as expert

²⁷¹See Rosen, *supra* note 218, at 569 (suggesting that the professions devise standards for judges in evaluating expert testimony).

witnesses, should spend time with their historian peers who have served as experts, preparing for and understanding the goals of cross-examination and impeachment.²⁷²

The association could also implement ethical and disciplinary standards²⁷³ relating to expert testimony. So, aside from taking an oath to tell the truth making them subject to perjury claims, historians could be subject to a more stringent peer review²⁷⁴ under professional guidelines whereby one historian could file a grievance under the guidelines for flaws in another historian's methodology. This obviously could raise serious academic freedom concerns, as feminist experts might have filed a grievance, if this procedure had existed, against Rosalind Rosenberg for her testimony in *Sears* (based on their dislike of her conclusions, not her methodology). However, including guidelines regarding methodology (obviously, not conclusions) would certainly help lawyers and judges better understand the historians' craft.

Before entering the courtroom, historians should know what to expect in terms of trial methods²⁷⁵ and understand how their testimony impacts precedent and judicial reasoning.²⁷⁶

²⁷²Currently the Association does not provide any such advice or assistance. Interview with Robert Townsend, Research Editor, AHA (Jan. 28, 2008).

²⁷³The AHA's Statement on Standards of Professional Conduct (adopted January 6, 2005) mentions historians serving as expert witnesses in the section on "History in the Public Realm." The Standards provide that historians serving as experts "may face a choice of priorities between professionalism and partisanship." The Standards recommend these historians "seek advice from other experienced professionals." Nothing in the standards speaks to the reliability of their methodology. AMERICAN HISTORICAL ASSOCIATION, STATEMENT ON STANDARDS OF PROFESSIONAL CONDUCT (2005), <http://www.historians.org/PUBS/Free/ProfessionalStandards.cfm> (last visited Oct. 18, 2008).

²⁷⁴See Gross, *supra* note 51, at 1213-14 ("The most thorough method of achieving this result would be a system of peer review of expert evidence, a modified version of the process that is already used by scholarly publications in most fields other than law.").

²⁷⁵Dr. Helen Hornbeck Tanner, an expert historian in the Native American land rights cases was "shocked" when the opponent sought to strike her testimony as "incompetent," yet this is a fairly standard advocacy tactic. See Tanner, *supra* note 190, at 697. She should have been prepared to expect such a move from her opponent.

²⁷⁶Professor Rosen, in *The Anthropologist as Expert Witness*, begins with this idea:

Regardless of personal affinity to the position argued by the party calling him as a witness, the anthropologist may not understand exactly how expert testimony fits together with judicial reasoning and legal precedent, and precisely how the court's investigation of the facts articulates with the form of knowledge he possesses.

3. Procedures Should Be Altered for Presenting Historian Expert Testimony

The following solutions are aimed at allowing a reliable historian expert sufficient latitude in the courtroom to express his opinion in a manner that comports with his craft.

Richard Evans, in his article describing his experiences as an expert historian and reasons for testifying in Holocaust-related trials, recommends expert historians always provide evidence in written form, by affidavit or expert report.²⁷⁷ Other ideas come from Lawrence Rosen's article on anthropologists as experts. Presumably, these suggestions would translate well to historians, as many of the problems he addresses are similar to those encountered by historian experts. These suggestions would improve the system to allow reliable historians to testify; thus, gatekeeping measures must first be improved to reduce the likelihood of admitting a pseudo-historian to testify at trial.

Professor Lawrence Rosen describes the problem with the question and answer format of trial examination as follows: "[Question and answer format] may interfere with the expert's full explication of his findings and opinions and may stifle the need to explain why qualified and limited assertions appropriate to much social scientific knowledge are nonetheless informative and important."²⁷⁸

Historian expert Alice Kessler-Harris expressed the same sentiment, describing her frustration at feeling her testimony was truncated by this format.²⁷⁹ Rosen recommends allowing experts to testify in narrative form, reading portions of their report. Otherwise, the expert should work with counsel to ensure the direct-examination elicits as complete an analysis as possible.²⁸⁰ Finally, Rosen recommends the court ask the expert before his testimony concludes whether he has any final comments (whether he was able to adequately convey his testimony).²⁸¹ These simple procedures

Rosen, *supra* note 218, at 555.

²⁷⁷ EVANS, *supra* note 78, at 342 ("Writing at length and with due time for preparation allows the historian to give a considered view and to take into account every relevant aspect of the subject in a way that is not necessarily possible in the heat of the forensic debate under quick-fire questioning in the witness box.").

²⁷⁸ *Id.* at 572.

²⁷⁹ Kessler-Harris, *supra* note 24, at 430.

²⁸⁰ Rosen, *supra* note 218, at 572.

²⁸¹ *Id.*

would allow the reliable expert historian to better satisfy his professional standards when testifying at trial.

If gatekeeping is not improved, and the pseudo-historian threat continues to exist, the other possibility is relaxing the evidentiary rules so that lawyers can delve into how historians obtain sources for purposes of examining historical methodology. Obviously, this suggestion is wholly at odds with the ideas above for allowing reliable historians greater leeway to testify. Yet, perhaps using both techniques—allowing more leeway on direct examination (a narrative presentation) and then permitting more rigorous cross-examination as to historical methodology—would serve to allow the historian to testify fully but reveal the pseudo-historian, if necessary.

VII. CONCLUSION

In his article about testifying in Holocaust-related proceedings, historian Richard Evans notes that “the era of high-profile trials involving crimes against humanity committed in the Second World War”²⁸² may have ended. Yet, he continues, “[T]here will be other trials relating to human rights violations, and not all of them will deal with history that is recent enough to be fresh in the memory.”²⁸³ Evans questions how historians serving as experts at trial will handle this challenge. Presumably, historians will testify in future trials involving land rights, gay rights, voting rights, and any number and variety of other socially-significant cases. Recently, experts have testified in criminal trials against alleged terrorists about the formation and operation of al Qaeda. The end of Holocaust-related trials certainly will not mean the end of trials at which facts of history are paramount.

This Article questions not only how historians will handle this challenge but also whether our existing trial system can screen and present these experts so that truth emerges. As shown in *Irving v. Lipstadt*, the pseudo-historian stands ready at the gate, eager (and seemingly well-qualified) to testify as an expert historian to facts of history crafted to satisfy her political ideology or social agenda.²⁸⁴ Are trial lawyers and judges knowledgeable

²⁸²EVANS, *supra* note 78, at 342.

²⁸³*Id.*

²⁸⁴I used David Irving to exemplify the pseudo-historian; yet, a historian could also take the stand and deliberately distort the historical facts to promote a social agenda we believe in.

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enough about historical methodology to reveal this threat at trial (either at the outset or during examination)? And, by beefing up procedures to reveal the pseudo-historian, do we undermine the reliable historian's testimony?

Ultimately, trial lawyers, judges, and historians should work together to establish ways to maximize the potential good (of which there is plenty) and minimize the potential harm (again, potentially great) which may come from historians serving as expert witnesses. The stakes—incorrect facts of history either “on the books” or affecting a trial outcome (or both)—are too high to allow existing procedures to govern screening and presenting expert historians at trial.

Arguably, promoting a sound agenda does not justify a historian's conduct in deliberately distorting historical facts when on the witness stand.