

TRIALS AND TRIBULATIONS: WHAT HAPPENS WHEN HISTORIANS ENTER THE COURTROOM

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I

INTRODUCTION

Four years ago, as I was sitting at my desk in my overcrowded office, I received an odd e-mail. “Dear Professor,” it began,

I am writing to introduce you to Round Table Group [RTG], and to notify you of a specific, short-term consulting opportunity which may be of interest. Our attorney client is seeking an historian, highly credentialed, and at a prestigious university, to perform some historical research and instruct a lay jury about what was known about a particular occupational hazard (lead paint contamination) between 1950 and 1980.¹

The letter went on to explain how the historian sought “need not be a subject matter expert” but only need be a “good communicator” who could “easily communicate a story to a lay jury.”² The e-mail continued in some detail, telling me how the process would work: If I were interested, I could send in my resume, a brief explanation of my expertise, and a statement of my consulting fee. After consulting with their industry client, I would be set up on a conference call to “determine if there is mutual interest in going forward.”³ The note continued by informing me about the consulting group: it was a consortium of “several thousand professors” in “management, law, medicine, science, computer science, education, engineering, economics, and other disciplines who make themselves available . . . to law firms and companies who are clients of Round Table Group.”⁴ Historians, it appeared, were a new addition to their stable of experts.

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This Article is also available at <http://law.duke.edu/journals/lcp>.

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1. E-mail from Barb Noverini to David Rosner (Jan. 13, 2005, 16:00:05 EST) (on file with author).

2. *Id.*

3. *Id.*

4. *Id.*; see also Round Table Group, <http://www.roundtablegroup.com/litigation/experts.cfm> (last visited Aug. 21, 2008) (noting that the organization’s academic consultants now number over 65,000, including university deans and prominent professors).

What was ironic, if that's the right word, was that RTG was searching for an expert to testify on behalf of companies in a lead-paint trial, and at that very moment I was preparing to testify in a major lead-paint trial on behalf of the State of Rhode Island.⁵ I, with Gerald Markowitz, had written a book on the lead and vinyl industries⁶ based on documents we had uncovered. The documents, an affidavit we had written, and the book had all become part of a landmark case in which Rhode Island's Attorney General, along with the support of the plaintiffs' law firm, Motley Rice, were suing the lead-pigment manufacturers to get them to remove lead paint from hundreds of thousands of buildings in the state. It appeared that the lead industry was searching for someone to testify against *me*.

Clearly, this recruitment letter was part of a larger phenomenon. In recent years historians have been brought into legal cases in unprecedented numbers.⁷ As the courts have tried to adjudicate responsibility for environmental and occupational diseases, history has played an increasingly central role in decisions that affect the cases themselves and in social policy regarding risk. In suits over tobacco-related diseases, asbestosis, radiation, and other toxic substances, more historians of technology and science, social history, and public health are being sought to provide testimony aimed at assessing responsibility for damages that have arisen years—sometimes decades—after exposure. The basic questions asked were predictable: Who knew what about specific toxins and when did they know it? Did industries understand that specific substances could cause disease? If so, when did they learn of the dangers and when did they begin to warn their workers or their consumers of their products that they were at risk?

As the role of the historian has expanded, so too has the controversy surrounding historians' participation. At the annual meeting of the American Association for the History of Medicine, traditionally a collegial conclave of subspecialists, a panel on the history of childhood diseases ended up in a shouting match after a respected historian who had been a consultant for the tobacco, asbestos, soft-drink, and lead industries, presented a paper arguing that the lead industry had done nothing wrong before the 1950s, and that, in any case, the problem of childhood lead poisoning was vastly overblown.⁸ During the conference the halls were abuzz with gossip and amazement, and it soon became apparent that many more members had been consulting for industry. The then-current president of the Association and Professor of Medicine and History at Washington University had been testifying and writing affidavits for

5. *State v. Lead Indus. Ass'n*, 2007 R.I. Super. LEXIS 32 (Feb. 26, 2007), *rev'd*, 951 A.2d 428 (R.I. 2008).

6. GERALD MARKOWITZ & DAVID ROSNER, *DECEIT AND DENIAL: THE DEADLY POLITICS OF INDUSTRIAL POLLUTION* (2002).

7. See generally Robert N. Proctor, *Should Medical Historians Be Working for the Tobacco Industry?*, 363 *LANCET* 1174, 1174 (2004) (describing how "at least 29" historians of medicine have served as expert witnesses for the tobacco industry).

8. Patricia Cohen, *History for Hire in Industry Lawsuits*, *N.Y. TIMES*, June 14, 2003, at B7.

the tobacco industry for nearly fifteen years.⁹ Another Professor of Medicine and History at Duke University had worked for the tobacco industry as well as the lead industry throughout the 1990s;¹⁰ less well-known historians had been recruited by Big Tobacco and other industries.¹¹ Some fifty-seven colleagues have worked for the tobacco industry alone.¹²

Significantly, the origins of historians entering into liability cases originated with the defense bar. Efforts of the tobacco industry to recruit historians to testify for the industry began as early as 1987 when historian John Burnham, a director for “Project Cosmic,” known as Philip Morris’s “secret effort,” tried to convene “an international network of scientists and historians’ to write histories casting the industry in a favorable light.”¹³ Since at least the 1980s, the tobacco industry has been hiring historians to refute claims that it should have at least warned consumers of the dangers of their products.¹⁴ Similarly, the lead industry hired historians to develop its case that it had little knowledge of the impact of lead-paint poisoning on children until the 1950s, and that it had acted responsibly as soon as it found out.¹⁵

The industry’s response to historians entering the courtroom has thus been fairly profound, whichever side of the controversy the historians were representing. Although industry law firms have been actively recruiting historians for some time, a smaller group of historians are being called upon to provide testimony concerning the responsibility of industry in undermining the health of U.S. citizens. Allan Brandt at Harvard worked for the federal government on a suit against tobacco companies.¹⁶ Robert Proctor of Stanford has worked on the same suit and has, in the past, testified in suits on behalf of women injured by radiation experiments at Vanderbilt University.¹⁷ David Rothman has likewise worked on the Vanderbilt case.¹⁸ Industrial hygienists David Ozonoff and Barry Castleman have weighed in, offering historical documentation on behalf of workers injured by exposure to asbestos and

9. See Robert N. Proctor, *Everyone Knew But No One Had Proof: Tobacco Industry Use of Medical History Expertise in US Courts, 1990–2002*, 363 TOBACCO CONTROL, at iv117, iv118 (2006) (noting that one professor’s “work for the industry dates back to August of 1988”).

10. *Id.* at iv123.

11. See generally *id.* at iv122.

12. *Id.*

13. *Id.* at iv118. This “secret effort” was waged from 1987–1993. *Id.*

14. See generally ALLAN BRANDT, *THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA* (2007).

15. See, e.g., Aff. of Peter C. English, M.D., Ph.D., *City of New York v. Lead Indus. Ass’n*, 700 N.Y.S.2d 361 (N.Y. Sup. Ct., Sept. 14, 1999) (No. 14365/89) (where English argues that until the early 1950s, childhood lead poisoning was considered to be relatively rare in the United States in comparison with other poisoning and with major causes of childhood morbidity and mortality); see also, PETER C. ENGLISH, *OLD PAINT: A MEDICAL HISTORY OF CHILDHOOD LEAD-PAINT POISONING IN THE UNITED STATES TO 1980* (2001).

16. See BRANDT, *supra* note 14.

17. Robert N. Proctor, *Expert Witnesses Take the Stand*, 407 NATURE 15, 15-16 (2000).

18. See David J. Rothman, *Serving Clio and the Client: The Historian as Expert Witness*, 77 BULL. HIST. MED. 25, 25 (2003).

developing historical arguments about the culpability of Johns-Manville and other asbestos manufacturers.¹⁹ Gerald Markowitz and I have detailed the ways that silicosis, lead, and vinyl production have undermined workers' and consumers' health and have testified and been deposed in silicosis, lead, and vinyl-chloride cases. Each of us has gone through his or her own internal, moral decisionmaking process in deciding whether to work for industries or for those injured by industries, institutions, or products.

This article looks at the recent recruitment of historians into the world of toxic-tort law and examines the ways that the craft of history is used and abused in the legal system. It will identify the important ways that historians' skills can be used on behalf of people claiming to be harmed by a variety of industries as well as the ways that these same skills have been used to defend industry activities. I do not intend to provide a dispassionate analysis of the moral, ethical, and legal dilemmas that confront the historian when she or he enters the courtroom. Nor do I mean to enter into a discussion of the problem of historical ambiguity and objectivity. Rather, I will integrate a scholarly as well as a personal perspective on the concerns that will undoubtedly deepen among historians.

II

WHY HISTORIANS? WHY NOW?

The origins of historians' role in these cases are rooted in the fundamental transformation of peoples' health concerns and beliefs during the course of the past half century. For much of the first fifty years of the twentieth century, health concerns were dominated by the popular understanding of the causes of illness as being rooted in the then-emerging ideas about germs: disease was commonly understood to be linked directly to specific bacteria or viruses, or, alternatively, for the industrial worker, to specific acute exposures to a toxin.²⁰ Generally, the symptoms that affected the individual were understood to be caused by acute and specific agents—whether bacteriological or chemical—which could be identified in the laboratory using increasingly sophisticated technologies.²¹ Tuberculosis, for example, could be understood to be “caused” by a bacterium, while the palsies, tremors, or wrist-drop of an industrial worker

19. See generally David Ozonoff, *Failed Warnings: Asbestos-Related Disease and Industrial Medicine*, in *THE HEALTH AND SAFETY OF WORKERS: CASE STUDIES IN THE POLITICS OF PROFESSIONAL RESPONSIBILITY* 139 (Ronald Bayer ed., 1988); BARRY I. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* (5th ed. 2005).

20. See, e.g., David Rosner & Gerald Markowitz, *Safety and Health as a Class Issue: The Workers' Health Bureau of America During the 1920s*, in *DYING FOR WORK: WORKERS' SAFETY AND HEALTH IN TWENTIETH-CENTURY AMERICA* 53, 58 (David Rosner & Gerald Markowitz eds., 1987) (describing the health hazards that the “growing auto industry” produced both for workers within and people living “far beyond the auto plants themselves”).

21. See JOHN HARLEY WARNER, *THE THERAPEUTIC PERSPECTIVE: MEDICAL PRACTICE, KNOWLEDGE, AND IDENTITY IN AMERICA, 1820–1885* 156–57 (1986) (noting increased usage of urinalyses and other chemical tests by hospitals throughout nineteenth century).

could be identified as “caused” by exposure to lead in a battery plant or other industrial setting.²²

But, during the course of the twentieth century, basic public-health measures like improved sanitation, a purified water supply, street cleaning, and nutrition, among others, began to have a dramatic impact on the health of U.S. citizens.²³ Lower rates of infant mortality and longer life spans paralleled improvements in environmental and engineering controls over water-borne diseases such as typhoid or cholera, diseases transmitted by insect vectors such as yellow fever or malaria, and other infectious diseases such as diphtheria, transmitted through the air we breathed or through person-to-person contact.²⁴ Further, with the development of the first sulfa drugs, antibiotics, and effective vaccines against polio, measles, mumps, and other childhood diseases in the middle decades of the century, many in the U.S. believed that the dangers from infectious disease were passing.²⁵ Chronic conditions such as heart disease, cancer, and stroke replaced tuberculosis and other infectious diseases in the popular and professional imaginations as the major threats to U.S. health.²⁶ By the 1970s, many in the public-health community were seeking a different model for understanding what caused a variety of chronic diseases.²⁷ The very notion of causation was undergoing a profound transformation.

The advent of a vibrant environmental movement fed a new paradigm for understanding disease.²⁸ Chronic conditions were seen increasingly as rooted in the personal behavior of individuals or in the industrial–consumer world in which we now lived.²⁹ The emergence of the United States as the predominant world economic and military power in the years after World War II fed a growing uneasiness about what appeared to be inequality and economic disparities.³⁰ For some in the public-health community, disease was increasingly perceived as a signal of the inequalities and injustices brought about by the

22. DAVID ROSNER & GERALD MARKOWITZ, DEADLY DUST: SILICOSIS AND THE ON-GOING STRUGGLE FOR WORKERS' HEALTH 18 (2005).

23. See John H. Knowles, *The Responsibility of the Individual*, in DOING BETTER AND FEELING WORSE: HEALTH IN THE UNITED STATES 57, 61 (John H. Knowles ed., 1977) (noting the importance of these public-health measures for improving the health of U.S. citizens).

24. Gretchen A. Condran, *Changing Patterns of Epidemic Disease in New York City*, in HIVES OF SICKNESS: PUBLIC HEALTH AND EPIDEMICS IN NEW YORK CITY 27, 36 (David Rosner ed., 1995).

25. See VICTOR R. FUCHS, WHO SHALL LIVE? HEALTH, ECONOMICS AND SOCIAL CHOICE 106 (1974).

26. Knowles, *supra* note 23, at 61.

27. See *id.* (describing how accidents, lifestyle choices, and other factors may lead to chronic diseases).

28. See RACHEL CARSON, SILENT SPRING 187–98 (1962) (exploring the effects of pesticides and other toxins on humans).

29. See FUCHS, *supra* note 25, at 31 (noting “the importance of ‘life-style’ and personal behavior as major determinants of ‘who shall live’”). See generally Knowles, *supra* note 23.

30. See generally MICHAEL HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES (1970).

rampant commercialization of medicine, the poor distribution of services, and the inadequacies in the distribution of care.³¹

If the 1950s and 1960s were a period of unbridled exuberance regarding the ability of industrial production to improve our lives, the late 1970s and 1980s brought to national attention some of the negative impacts of industrial society on U.S. health.³² The neighborhood of Love Canal in Niagara Falls, New York, was found to be polluted by the waste products of the Hooker Chemical Company. A whole community of lower-middle-class homeowners had to abandon homes as the contents of leaking barrels and waste pits upon which these houses were built slowly bubbled up into basements and backyards.³³ At Three Mile Island, Pennsylvania, a nuclear plant nearly went into meltdown³⁴ just at the time when the film “The China Syndrome” made citizens all too aware of the pitfalls of nuclear energy.³⁵ In Times Beach, Missouri, an entire community was evacuated and huge areas of the town roped off after it was discovered that dioxins, known human carcinogens, had polluted the streets of the town.³⁶ In Bhopal, India, thousands of poor people were killed, blinded, and otherwise maimed by an explosion of a Union Carbide plant.³⁷ Unlike the infectious diseases of previous eras—or even their more recent appearance in the form of AIDS, SARS, and anthrax—the chronic diseases and injuries that have come to concern us most were linked in the public mind to environmental and occupational exposures.³⁸

The growing awareness of the dangers of industrial pollution and industrial products more generally have fed a widespread sense that the killer diseases of greatest concern were produced by a variety of industrial pollutants and consumer goods now a mainstay of U.S. life. These goods—cigarettes, plastic bottles, fatty foods, and sugar-laden soft drinks, to name but a few—were no longer seen solely as symbols of the good life but also as culprits in the epidemics of lung cancer, heart disease, diabetes, obesity, and other chronic

31. SPENCER KLAU, *THE GREAT AMERICAN MEDICINE SHOW: THE UNHEALTHY STATE OF U.S. MEDICAL CARE, AND WHAT CAN BE DONE ABOUT IT* 60 (1975).

32. SAMUEL S. EPSTEIN, *THE POLITICS OF CANCER* 21 (1978).

33. See generally ROBERT P. WHALEN, GOVERNOR'S LOVE CANAL INTER-AGENCY TASK FORCE, *LOVE CANAL: PUBLIC HEALTH TIME BOMB* (1978).

34. See generally MITCHELL ROGOVIN, NUCLEAR REG. COMM'N SPECIAL INQUIRY GROUP, *THREE MILE ISLAND: A REPORT TO THE COMMISSIONER AND TO THE PUBLIC* (1980).

35. *THE CHINA SYNDROME* (IPC Films 1979) (This popular movie, starring Jane Fonda, Michael Douglas, and Jack Lemmon, detailed the meltdown of a nuclear reactor's core and the attempted cover-up by the plant's owners and managers. In the midst of the crisis, one of the characters utters that “an area the size of Pennsylvania” might become permanently uninhabitable, bringing home the fact that the Three Mile Island reactors were located in Pennsylvania.).

36. Tom Uhlenbrock, *Crews Begin Cleanup of Dioxin Site; Old Truck Terminal is “Hottest” in Region*, ST. LOUIS POST-DISPATCH, Oct. 21, 1995, at 1A.

37. *Gas Deaths in India Exceed 1,000, with Thousands Hurt; Gandhi Seeks Compensation*, N.Y. TIMES, Dec. 5, 1984, at A1.

38. See MARKOWITZ & ROSNER, *supra* note 6, at 211 (describing the public's perception of diseases linked to vinyl-chloride exposure).

conditions.³⁹ Increasingly, many diseases were seen as reflections of the world we had built and the environments we had created.⁴⁰

The growing concerns about the price we pay in health and well-being for the pleasures of our unrestrained industrial and post-industrial society has created new arenas in which history will play a growing and important role. Especially in the context of the two decades during which the regulatory agencies OSHA, MSHA, and the EPA have seen their powers curtailed,⁴¹ we can expect more and more toxic-tort cases to be brought to the courts where lay juries will be asked to judge responsibility for emerging consumer and environmental problems.

III

HISTORIANS IN THE COURTROOM

It is not the case that historians are only now being called upon to testify. Beginning in the late 1950s with the landmark case *Brown v. Board of Education*,⁴² expert historical testimony has been employed in courts of law. In recent decades, historians have testified in a variety of civil cases: claims brought under the Voting Rights Act of 1965,⁴³ water-rights disputes,⁴⁴ suits against schools systems for proposing to teach “creation science” in classrooms,⁴⁵ sex-discrimination lawsuits,⁴⁶ libel cases brought by Holocaust deniers,⁴⁷ and, perhaps most famously, suits against the tobacco⁴⁸ and lead

39. See, e.g., MARKOWITZ & ROSNER, *supra* note 6, at 208–09 (identifying various consumer goods affected by vinyl-chloride residues, which were linked to various health problems).

40. See generally MARKOWITZ & ROSNER, *supra* note 6.

41. For example, since the early years of the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH), severe limitations have been placed on the activities of these two agencies. Their budgets have been slashed and OSHA in particular has issued few new standards. See, e.g., Steven Labaton, *OSHA Leaves Worker Safety in Hands of Industry*, N.Y. TIMES, Apr. 24, 2007, http://www.nytimes.com/2007/04/25/washington/25osha.html?_r=1.

42. 349 U.S. 294 (1955) (citing historian C. Vann Woodward, author of *THE STRANGE CAREER OF JIM CROW* (1957), in the decision); see also Rothman, *supra* note 18, at 25.

43. See, e.g., Press Release, Asian American Legal Defense and Education Fund, AALDEF Files Voting Rights Act Lawsuit Against the NYC Board of Elections, available at http://www.aaldef.org/articles/2006-02-06_27_AALDEFFilesVot.pdf.

44. See, e.g., Jonathan D. Martin, Note, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1519 (2003) (listing the various types of cases in which historians have testified).

45. See, e.g., S. Charles Bolton, *The Historian as Expert Witness: Creationism in Arkansas*, 4 PUB. HISTORIAN, Summer 1982, at 59, 60–67.

46. See, e.g., *Equal Employment Opportunity Comm'n v. Sears, Roebuck and Co.*, 111 F.R.D. 385 (N.D. Ill. 1986); see also Rothman, *supra* note 18, at 26–27 (describing *Sears* as “the most controversial case in the 1980s that pitted historian against historian”).

47. See, e.g., Martin, *supra* note 44, at 1519.

48. See, e.g., Laura Maggi, *Bearing Witness for Tobacco*, AM. PROSPECT, Mar.–Apr. 2000, at 23 (describing the testimony of historian Stephen Ambrose in a Louisiana lawsuit against “the big four tobacco companies and their lobbying arm”); see also Proctor, *supra* note 7.

industries.⁴⁹ The prominence of historians in these cases has led members of the profession, especially those who have served as expert witnesses, to reflect in various articles on how expert testimony has affected the practice of history.

These articles have first addressed that perennial “objectivity question”—specifically, whether representing one side or another in the adversarial process has compromised the historian’s duty to seek historical truth. Have historians in these cases been pressured to distort the facts in order to win? This question, which has persistently dogged historians in general and legal cases in particular, has led to numerous exchanges in professional journals and newsletters over the past few years.⁵⁰ Some, like Brian Martin, a historian working at History Associates Inc., a consulting service,⁵¹ argue that historians can remain dispassionate observers of historical truth, despite their participation in legal proceedings.⁵² In fact, Martin argues, the needs of the legal system to uncover data both useful and harmful to a client demand this dispassionate objectivity from historians working as consultants.⁵³

The idea that the courtroom corrupts the practice of history generally rests on the assumption that epistemological processes of history and litigation contradict one another, making it impossible to remain faithful to the one while becoming engaged in the other. J. Morgan Kousser, a California Institute of Technology historian who has testified in numerous voting-rights cases,⁵⁴ describes this ostensible clash of knowledge-production cultures as beginning with the image of the scholar’s pledge to seek and report objective truth:

The image of the lonely scholar, or perhaps, to modernize it a bit, of the lonely research team, seeking truth by applying their open but careful minds to the appropriate evidence, is pervasive among social scientists and humanists. Scholars may make mistakes . . . but they don’t, goes this standard stereotype, purposely distort.⁵⁵

In contrast to this image of deliberate objectivity, the courtroom is an adversarial environment where lawyers “are not to pursue some abstract truth or social good, but only the very relative interests of the people who hire their

49. See, e.g., *State v. Lead Indus. Ass’n*, 2007 R.I. Super. LEXIS 32 (Feb. 26, 2007), *rev’d*, 951 A.2d 428 (R.I. 2008).

50. The issue of scholarly objectivity has vexed historians for decades, well before this recent spate of lawsuits. In fact, it is among the oldest and most well-worn issues in the historical literature. See generally ROBERT NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* (1988) (outlining the long, contentious history of battles over the term and its varied, politically charged uses over the course of the past century).

51. History Associates, Inc., is a consulting service “in historical research and writing, litigation research, and archives and records management” whose clients include “more than 300 corporations, government agencies, and professional and nonprofit organizations worldwide.” <http://www.historyassociates.com/> (last visited Aug. 21, 2008).

52. See Brian Martin, *Working with Lawyers: A Historian’s Perspective*, OAH NEWSLETTER, May 2002, <http://www.oah.org/pubs/nl/2002may/Martin.html> (arguing that historians risk damaging both the case and their integrity by testifying contrary to historical truth).

53. *Id.* (noting that attorneys must have “the most complete stories regardless of how that information might support or counter the client’s interests.”)

54. E.g., *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002).

55. J. Morgan Kousser, *Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing*, 6 PUB. HISTORIAN 5, 14–15 (1984).

services.”⁵⁶ But, contrary to corrupting historical truth, the courtroom encourages “an Invisible Hand [that] guides the process toward the maximum production of truth.”⁵⁷

For many, the way that courts and lawyers in particular use evidence and historical events changes the historian’s role. Columbia University historian David Rothman, himself an expert witness, argues that the historian should be involved in using his expertise in trials if the cause is just and the impact significant, but that the historian should recognize that whatever he or she does in the courtroom is something other than history.⁵⁸ Arguing from his experience in the Vanderbilt radiation cases, Rothman observes that lawyers frame narrow questions for the historian to answer, and this ultimately undermines the historian’s autonomy and ability to cast a wide net, to contextualize or to place events in a deeper historical context.⁵⁹ He argues that his testimony retained “the integrity and soundness” of his scholarship and that any additional research conducted in preparation for that testimony altered none of the findings offered in his exhibits and depositions in the Vanderbilt case. “To focus an inquiry,” he insists, “does not distort the results.”⁶⁰ Like Kousser, he argues that expert witnesses “dare not contradict their prior positions[,] [for,] if they did, opposing counsel would immediately pounce on them.”⁶¹

It is not accurate, says Rothman, that, as some argue, “expert witnesses are too committed to their side of the case to remain objective, [for] historians are no more or less ‘objective’ in the courtroom than they are in the lecture hall or in print.”⁶² Yet, because of the constricted nature of work in the courtroom, a distinction needs to be made: “To enter the courtroom is to do many things, but it is not to do history. The essential attributes that we treasure most about historical inquiry have to be left outside the door. The scope of analysis is narrowed, the imagination is constrained, and the curiosity, curtailed.”⁶³

Historians’ concern about the relationship between the legal process and the distortions that undermine their objectivity is revealing. After all, the same critique can be applied to all other disciplines and individuals who serve as expert witnesses. Certainly no expert practices his or her craft in a court setting—physicians do not practice medicine; engineers, engineering; biologists, biology. But because of historians’ own self-reflection, they are particularly concerned about the distortions the legal process might effect on their discipline, perhaps because part of their creed is to respect diverse opinions and to see historical events through many lenses. Since the 1970s, particularly with

56. *Id.* at 15.

57. *Id.*

58. Rothman, *supra* note 18, at 44.

59. *Id.* at 43–44 (“Lawyers . . . would find the broader issues [that historians would prefer to elicit both] irrelevant and inadmissible.”).

60. *Id.* at 44.

61. *Id.*

62. *Id.*

63. *Id.*

the growth of social history and post-modernist theory and the emphasis on viewing history through the lenses of women, African Americans, the working class, gays, and others, such issues have only magnified the discomfort of historians in the courtroom. Integrating the viewpoints and respecting the perspectives of a wide variety of social actors has become a hallmark of historical scholarship.⁶⁴

Attorneys have recognized this tendency to value complexity and nuance, sometimes at the expense of clarity and precision, and have exploited it in various ways. For example, lawyers for industries accused of exposing workers needlessly to dangerous materials, and faced with uncomfortable historical data (such as minutes of meetings in which the toxicity of a substance is discussed or other evidence of industry knowledge of harm done), argue that history is an implicitly subjective discipline, one lacking in a methodology that allows for replication of results or tests of reliability.⁶⁵ Some have argued that history is not a science and that historians are incapable of providing “expert” opinion on par with the biologist, the chemist, or even the doctor.⁶⁶ Yet, for the most part, such arguments have fallen on deaf ears, since similar arguments could be brought against physicians whose clinical methodologies are often the very subject of court cases and against other sciences whose Popperian notions of falsification and reliability are rarely, if ever, tested.⁶⁷ One judge and historian has written,

Historians who testify are often presented by their lawyers as paragons of objectivity, however, judges . . . seem to realize that there is no such thing as true objectivity. Ultimately, the bench looks for the same qualities [in historians as witnesses] that are required of all experts: appropriate specialization, thorough research, and conclusions that are well supported by the record.⁶⁸

In other words, it is up to the judge and jury to decide on the reliability of the historian–witness, just as it is up to the judge and jury to evaluate the testimony of experts in other fields.

64. For an extended discussion of the development of historians’ concerns over objectivity and subjectivity, see generally NOVICK, *supra* note 50. Novick worries throughout this book that our concerns with presenting the various perspectives of the multiplicity of historical actors and constituencies has led to a confusing cacophony of voices, which has undercut the cohesiveness of the historical narrative.

65. THOMAS O. MCGARITY & WENDY E. WAGNER, *BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH* 128 (2008).

66. *See id.* at 60–78 (examining ways in which industry seems to demand more from scientists who challenge their claims than society should be prepared to accept).

67. *See id.* Philosopher of science Karl Popper established a set of benchmarks for evaluating “good” science. Falsification, the process by which scientists try to disprove reported observations, is a central element of the scientific method. This idealized notion of how scientists establish their results as truths is contested.

68. John Neuenschwander, *Historians as Expert Witnesses: The View from the Bench*, OAH NEWSLETTER, Aug. 2002, <http://www.oah.org/pubs/nl/2002aug/neuenschwander.html>.

IV

THE DARK SIDE: HISTORIANS CHOOSING SIDES

The courts are both an important and a troubling arena into which historians are being thrust. Often bookish by nature, most historians have been brought up in a professional culture that reinforces individual research, often performed alone in archives that few others have ever visited. Although the image of the monastic scholar is certainly overblown, there is a grain of truth in such a stereotype. Scholars in the humanities and in some social sciences often prize individual effort in what many outside of academia might consider arcane subjects. Also, in the wider world of academic historians, there is a tendency to look with a certain skeptical eye at those who popularize, simplify, or even clarify complex historical events such as the Civil War or the life of Lincoln. In part, this reticence is due to a concern that popular renderings of complex historical events are necessarily superficial. But there is also an element of jealousy involved, for popularizers reach audiences beyond those imaginable for academic historians, many of whom write for tiny audiences numbering in the tens, or at most, hundreds.⁶⁹

In many cases historians are recruited because of their highly specialized knowledge. This was certainly the case when Jerry Markowitz and I first became involved in silicosis cases following the publication of our book about silicosis, nearly two decades ago.⁷⁰ As historians of occupational disease, we knew that silicosis, a disabling lung condition caused by the inhalation of silica dust, had struck down thousands of workers in the decades before World War II. It was labeled “the king of occupational diseases” by commentators at the time.⁷¹ We had written our book not knowing that the disease was still of great concern; rather, we saw the book as of interest to labor- and medical historians, one that could illuminate the ways that discovery of disease was rooted in very special historical circumstances of economic depression, social dislocation, and medical change. Interestingly, we had traced the heated debates around silicosis that had occurred among workers, organized labor, government, and industries that exposed workers to silica, such as foundries, steel mills, construction, and sandblasting.⁷² Shortly after the book’s publication, we learned that the hardcover version of the book was in short supply and that the press was considering a paperback edition. How, we asked, could such a book with a seemingly select and, indeed, small audience be in short supply? Who had bought it? Its purchasers were certainly not labor- or medical historians, for the

69. Many historians have disdain for those involved in studies of recent events.

70. DAVID ROSNER & GERALD MARKOWITZ, *DEADLY DUST: SILICOSIS AND THE POLITICS OF OCCUPATIONAL DISEASE IN 20TH CENTURY AMERICA* (1991). This book was recently updated and republished as DAVID ROSNER & GERALD MARKOWITZ, *DEADLY DUST: SILICOSIS AND THE ONGOING STRUGGLE FOR WORKERS’ HEALTH* (2005).

71. See ROSNER & MARKOWITZ, *supra* note 22, at 75–104.

72. *Id.* at 13–104.

subject was narrow and out of the mainstream of concerns for most scholars in these sub-disciplines.

After a cursory investigation, the publisher discovered that the book was being bought by law firms. Soon, we were being called by firms all over the country, asking us to consult with them about their cases. It appeared that workers in a host of industries—primarily in Texas, Louisiana, and other Gulf states—were still coming down with silicosis and were suing a variety of suppliers for negligence.⁷³ We were asked if we might testify about the historical understanding of the disease and about what industry leaders themselves knew of the dangers to workers associated with inhaling silica among sandblasters, foundry work, granite cutting and polishing, and a host of other jobs we had written about.

At first, we were hesitant to get involved. It seemed repellent to us to testify in court, to appear at depositions, and to subject ourselves to possible pressures to meet the demands of courtrooms. We were scholars, not interested parties; we were removed from the events of the day by training and inclination, and were not in the business of testifying, at least not in court. Memories of the contentiousness that affected the historical profession following the engagement of two of our colleagues on different sides of the *EEOC v. Sears*⁷⁴ case in the 1980s made us especially wary of getting involved.

Yet, after one lawyer came to New York and presented the haunting story of one of her clients, we changed our minds. She told of her client, a thirty-four-year-old Mexican worker who had learned of a relatively lucrative job in the oil fields of west Texas. In the 1970s, following the OPEC oil crisis, when west Texas crude was once again in demand, a huge oil company had contracted to have sandblasters come clean out old oil-storage tanks. The company had shipped hundreds of Mexican workers to the area around Odessa, Texas, had given them paper “3M” masks and a sandblasting unit, and had had them enter small, enclosed tanks and blast sand at the layers of tar and oil that had accumulated on the tanks over the decades. Not surprisingly, several years later, workers began to die, suffocating from silicosis caused by the inhalation of finely ground silica dust that had slowly destroyed their lungs.⁷⁵

It was clear our book could be important in providing financial relief to some of these workers and their families. In court cases the industry had been arguing successfully that since virtually “no one” had ever heard of silicosis, “no one” could be held accountable for a disease that was unexpectedly killing workers. Our book offered evidence to directly contradict the central tenet of these arguments: we had documented in minute detail what was medically

73. David Rosner & Gerald E. Markowitz, *From Dust to Dust: The Birth and Re-Birth of National Concern about Silicosis*, in *ILLNESS AND THE ENVIRONMENT* 162, 170 (Steve Kroll-Smith, Phil Brown & Valerie J. Gunter eds., 2000).

74. *Equal Employment Opportunity Comm'n v. Sears, Roebuck and Co.*, 111 F.R.D. 385 (N.D. Ill. 1986).

75. ROSNER & MARKOWITZ, *supra* note 22, at 222–24.

known about the disease in the early twentieth century and the industry's actions when faced by major lawsuits in the 1930s and after.⁷⁶ We had documented that the industry had known of the disease as early as the 1910s.⁷⁷ We agreed to become "expert witnesses" in two cases.

Whereas our book on silicosis preceded our experience with the legal system, our next book on industrial pollution grew out of another lawsuit. In 1996 we were called by two lawyers from the City of New York Law Department. It appeared that the City had been sued by some families whose children had been injured by lead contained in the paint of some of the city's public housing. The city, in turn, had begun a suit against the lead industry, claiming that the industry bore some responsibility for injuries to these children. Over a number of years the city had accumulated a moderate-sized roomful of documents that were drawn largely from the Lead Industries Association, the trade association for manufacturers of lead paint and other lead-bearing products. What, the city wanted to know, was in these hundreds of thousands of pages it had accumulated?

The city had contacted us because of an article we had published in 1985 on the controversies around lead poisoning,⁷⁸ we were therefore among, perhaps the only, historians that had ever studied the industry in any depth. In that article we traced the history of the controversies around lead poisoning due to automobile exhaust.⁷⁹ Coming as it did while the EPA was determining whether to demand that the industry remove lead from gasoline once and for all, the article had caused a bit of a stir in the public-health community, even provoking an editorial from the *Journal* apologizing for its role sixty years before in creating such a public-health tragedy.

We were asked to evaluate the roomful of material the city had received through the discovery phase of the trial. That material became the first part of our book *Deceit and Denial: The Deadly Politics of Industrial Pollution*.⁸⁰ This book, an analysis of the role of industry in creating a public-health tragedy, could not have been possible without litigation, which freed up literally hundreds of thousands of pages of company documents. In fact, without the cases, historians would never have seen internal memos and minutes of meetings in which company representatives from the Dutch Boy or Sherwin Williams companies, among others, discussed among themselves the dangers that leaded paint posed to children as early as the late 1920s.⁸¹ Nor would we have been able to learn of marketing campaigns aimed at counteracting public

76. See generally ROSNER & MARKOWITZ, *supra* note 22.

77. See generally *id.*

78. David Rosner & Gerald Markowitz, "A Gift of God"? *The Public Health Controversy over Leaded Gasoline During the 1920s*, 75 AM. J. PUB. HEALTH 344 (1985).

79. See *id.*

80. MARKOWITZ & ROSNER, *supra* note 6.

81. See *id.* at 64-107.

concerns over the dangers of lead—ads claiming lead paint was safe and sanitary and useful on children’s walls, furniture, and the like.⁸²

The documents divulged through the lead-paint and related lawsuits gave us a new perspective on the history of this terrible public-health tragedy. The immediate result of our work with the documents was a long affidavit that became part of the New York City case and that was quickly integrated into numerous other legal actions underway around the country by the end of 2002, brought by Chicago, New York, Buffalo, San Francisco, St. Louis, Milwaukee, and other cities. Some of these were quickly dismissed by judges, but others were allowed to go forward.⁸³

The first state action against the lead industry was brought by the Attorney General of Rhode Island, alleging that the industry had knowingly created a public nuisance by using lead paint on the walls of up to eighty percent of the state’s housing, thereby putting thousands of children at risk of developing lead poisoning.⁸⁴ The trial was intense, but it let the jury see for itself documents that demonstrated the industry’s knowledge of childhood lead poisoning going back a century.⁸⁵ The power of the documents was impressive, and the jury found for the state, ultimately ordering the lead-pigment manufacturers to “abate” the lead hazard throughout Rhode Island.⁸⁶ The potential cost for cleaning up the State of Rhode Island is immense, as estimates range from \$1 to \$4 billion.⁸⁷ Most recently, however, the Rhode Island Supreme Court undid years of litigation when it overturned the jury verdict, reasoning that the case had been brought to court under the wrong law.⁸⁸

82. *Id.*

83. *See, e.g.,* County of Santa Clara v. Atlantic Richfield Co., 40 Cal. Rptr. 3d 313 (Ct. App. 2006) (listing various cases from around the country); Ryan J. Foley, *Milwaukee Loses Appeal in Lead Paint Lawsuit*, CHI. TRIB., Nov. 25, 2008, <http://archives.chicagotribune.com/2008/nov/25/local/chi-ap-wi-leadpaint>; *Chicago's Suit Over Lead Paint Dismissed*, LEAD POISONING NEWS, Oct. 8, 2003, <http://www.lead-poisoning-news.com/articles/illinois.html>.

84. *See* State v. Lead Indus. Ass’n, 2007 R.I. Super. LEXIS 32 (Feb. 26, 2007), *rev’d*, 951 A.2d 428 (R.I. 2008).

85. *Id.*

86. *See* State v. Lead Indus. Ass’n, 951 A.2d 428, 434–35, 40 (R.I. 2008) (reciting case history). That verdict was upheld on appeal and the judge in the case rejected the defense’s plea to overturn the verdict, writing a 197-page decision in which he often referred to the historical record as presented by myself and Dr. Markowitz. Peter Lord, *Judge Refuses to Overthrow Lead-Paint Conviction*, PROVIDENCE J., Feb. 27, 2007, at A1, A6. But on July 1, 2008, the Rhode Island Supreme Court overturned the jury verdict in a stunning decision. *See* Lead Indus. Ass’n, 951 A.2d at 435 (reversing most of the appellate ruling).

87. Immediately after the case was settled the stock market responded to the verdict by forcing Sherwin Williams stock to plunge and BUSINESS WEEK announced that “Estimates on Lead Paint Clean-Up Soar.” Michelle Smith, *Estimates on Lead Paint Clean-Up Soar*, BUSINESS WEEK ONLINE, Mar. 26, 2007, <http://www.businessweek.com/ap/financialnews/D8O42J401.htm>. Although the legal maneuvering by the industry to delay the jury verdict continues, BLOOMBERG.COM announced that in light of the Rhode Island decision the Attorney General of Ohio has initiated a similar suit. Jef Feeley, *Sherwin-Williams, DuPont Sued by Ohio Over Lead Paint*, BLOOMBERG.COM, Apr. 3, 2007, http://www.bloomberg.com/apps/news?pid=email_en&refer=&sid=aQb5ogfWCWQk.

88. *See* Lead Indus. Ass’n, 951 A.2d at 455–59 (holding that the defendants’ actions were not cognizable as a public nuisance, but suggesting that they might sound in products-liability law).

The second part of the book detailed records we had gone through regarding the vinyl-chloride misnomer and what the industry knew about its potential dangers.⁸⁹ It was this portion of the book that taught us a big lesson that we are only now beginning to analyze and understand. Around 1998 we had been asked if we would be willing to take a look at an enormous store of company documents from the chemical industry that had been turned over during the course of an ongoing lawsuit concerning a vinyl-chloride worker dying from angiosarcoma of the liver.⁹⁰ We were asked by the plaintiffs' lawyers to help evaluate what was in this store of materials and whether there was reason to believe the chemical industry had acted knowingly regarding these workers' safety.⁹¹ Our efforts with these records resulted in a three-hundred-page timeline of knowledge and activities by the Chemical Manufacturers Association that has become the basis for a number of lawsuits against the industry.⁹²

V

DEFENDANTS DISCREDIT PLAINTIFF'S HISTORIANS AND HIRE THEIR OWN EXPERTS: WHO KNEW WHAT, WHEN, AND DID IT MATTER?

Throughout the nation, toxic-tort cases are leading companies to seek their own historian-experts to argue that the companies bear no responsibility for a host of conditions that appear associated with exposure to implants, asbestos, pharmaceuticals, and the like. Tobacco, mining, paint, plastics, and chemical companies have begun to hire historians to use their skills in what some critics have called an effort to obscure and to confuse the historical record about responsibility, knowledge, and risk.⁹³ In some sense, the role of historians of medicine and science, some argue, has been to create confusion rather than to illuminate history.⁹⁴

Although many historians have decided to enter the fray on behalf of injured parties,⁹⁵ others have been hired by tobacco, lead, and other industries as "experts" to defend the actions of a variety of companies.⁹⁶ These historians have often sought to "contextualize" unseemly past activities including the

89. See generally MARKOWITZ & ROSNER, *supra* note 6.

90. Angiosarcoma of the liver is extremely rare, occurring in as few as two dozen people in the United States in any given year. Nicholas J. Vianna, Judith Brady, Philip Harper, *Angiosarcoma of the Liver: A Signal Lesion of Vinyl Chloride Exposure*, 41 ENVTL. HEALTH PERSP. 207, 207 (1981).

91. We travelled to Lake Charles, Louisiana on a number of occasions to review documents and identify those that we needed copied and shipped back to us in New York.

92. The timeline is available at <http://www.deceitanddenial.org/docs/timeline.pdf>. Dr. Markowitz has agreed to testify and has been deposed but, for a number of personal reasons, I have not participated in the cases.

93. See generally Rothman, *supra* note 18 (arguing to the contrary that "historians can serve clients without subverting the canons of the discipline [of history]").

94. DAVID MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH 9 (2008).

95. See, e.g., Proctor, *supra* note 7, at 1175.

96. *Id.*

knowing, direct sale or marketing of tobacco, lead, and other toxins to children, despite industry knowledge about their dangers.⁹⁷ Historians of great and lesser renown have used their expertise and prestige on behalf of lead and tobacco⁹⁸ or for industries in a host of other toxic-tort suits.⁹⁹

How, then, can we begin to evaluate the place of the historian in the courtroom? First, we might ask what the basis for the historian's testimony is. Nathan Schachtman, a defense attorney in toxic-tort cases, argues that whatever the historian can do, the lawyer can do better, or at least as well.¹⁰⁰ In his depiction, historians are little more than presenters of abstracted data that Schachtman calls "facts"—dates, documents, statements, events.¹⁰¹ As such, there is little reason for considering them experts.¹⁰²

But the historian's skills include an ability to contextualize, to weave together and make sense out of many discrete pieces of information that, alone, usually contain ambiguous and unintelligible random facts. By placing such facts in a broader historical context and drawing from a variety of sources both directly and indirectly related to the subject, the historian takes what may seem to be idiosyncratic events and makes them intelligible, part of a continuous stream of information that reveals infinitely more than any one document can possibly reveal. Hence, the skilled historian can take many documents and tie them together or take a single document and make it intelligible. Obviously, recent twentieth-century historians often have a huge store of information to work with, summarize, and contextualize,¹⁰³ whereas a medievalist might have only a single primary document, such as an illuminated manuscript, with which to work. But both have the ability to draw out meaning, whether through the words, pictures, or sounds in the document itself or from the events and literature that the document itself speaks to.

In contrast, attorneys, as often as not, see the historical record very differently: they attempt to find discrete documents that either "tell the whole story"—"smoking guns," so to speak—or that reveal the true intent or knowledge of individuals. When asked for "one or a handful of documents that tell it all," I have to explain the complexity of historical narratives. Certainly, some individual documents can, and do, stand on their own. But more typically it is the accretion of information, the development of knowledge, the sequential accumulation of meetings, minutes, advertisements, scientific, or medical

97. *Id.*

98. *See* Proctor, *supra* note 9, at iv118.

99. *See id.* at iv122.

100. *See* Nathan Schachtman, *On Deadly Dust and Histrionic Historians: Preliminary Thoughts of History and Historians as Expert Witnesses in Products Liability Cases*, in MEALEY'S LITIGATION REPORT: SILICA 1 (2003) (arguing that trial lawyers try cases by the same "researching, documenting and adducing evidence of historical fact" that historians do).

101. *Id.* at 2.

102. *See id.* at 1–2 (arguing that historians' claims cannot be proven by "admissible evidence," and that lawyers can argue anything that a historian could bring up).

103. *See, e.g., supra* note 90 and accompanying text.

articles, speeches, and more, that require explanation by historians trained in piecing together necessarily incomplete historical materials.

Historians are sensitive to the incomplete nature of the historical record. Records are, from the historian's perspective, never complete. This does not mean historians can never reach conclusions, but it does mean that—within limits—there are reasonable, differing ways to interpret data. We could not say that someone “really knew” that she was making false statements, misleading the public, or lying to others, for we cannot give a lie-detector test to the historical figure. For the historian, the accumulation of data, of information, allows limited statements. We can “know” that company representatives were present at a string of meetings when childhood lead poisoning was discussed, but were they paying attention? Were they out of the room when these issues were discussed? What was going through their minds when they interjected a statement into the record? Were they completely out to lunch except when their own words are specifically mentioned in the transcript of a meeting? Were they full participants?

For the lawyer, such acknowledgement of gaps in the historical record amounts to uncertainty and is useful in creating doubt and discontinuity. The very complexity of history often provides openings to create ambiguity or even to undermine the historian's craft. A skilled lawyer can present the world as a series of discrete events and, when interested in undermining testimony, can often disconnect, rather than connect, the dots. The ambiguity or limited scope of a particular piece of information will become the means of dividing and decontextualizing the historical record, leaving the argument disassembled, in pieces, incomprehensible.

To illustrate, during one of my depositions in the Rhode Island lead suit, I had presented a listing of the times in the 1930s when the Lead Industries Association had talked about lead poisoning and childhood lead poisoning in particular. The statements in the industry-association minutes seemed clear enough, coming, as they were, after many hours of discussion of the early twentieth-century medical literature on childhood lead poisoning (from children nibbling on lead-painted toys, cribs, woodwork, et cetera) and numerous mentions in trade and other publications of lead poisoning (among workers, including children working in lead-pigment-manufacturing plants), movements to ban the use of lead by twenty-one countries, and numerous others instances identifying lead pigment as a “deadly, cumulative poison,” whose use should be banned or limited to the outdoors. Those collecting data, providing information to the public about lead, and systematically following all that affected the market for their product, could not reasonably claim, we believed, to know nothing at all about the evidence pouring out.¹⁰⁴ We could understand the industry-trade-association minutes' proclaiming that lead

104. For a summary of the available documentary materials, see ROSNER & MARKOWITZ, *supra* note 6.

poisoning consumed immense amounts of the association's time as meaning that the industry was unquestionably aware of the issue, no less than when the association's annual meetings reported on "Lead Poisoning."¹⁰⁵

From my perspective, there was little question that one could connect the dots, most of which, for a historian, were the size of stains. But this was not the case for all, as illustrated when the lawyer for one of the companies sought to separate each statement, to identify the gaps in knowledge rather than the continuities. Noting that the annual-meeting minutes mentioned lead poisoning in general over a number of years without identifying "childhood" lead poisoning in particular, the lawyer asked me whether it was possible that the industry just "wasn't aware" or "didn't know" that childhood lead poisoning was an issue in those years. Was it possible that by this question these lawyers thought the issue "resolved?"

In a related splitting of epistemological hairs, the historian is also sometimes asked if he or she can "really know what's in a person's mind." One lawyer, for example, faced with letters saying that a physician had been visited by the trade-association head to dissuade him of his belief that lead was poisoning children in Baltimore, wanted me to "admit" that the head of the trade association might really have "believed" that lead was not really a problem:

Lawyer: Do you have any evidence that Mr. Wormser [the secretary of the trade association] was other than sincere in his stated views that lead toxicity was exaggerated in the public press?

I: Other than sincere?

Lawyer: Yes. Do you have any evidence that he did not believe the things he was saying?

I: (*How does one answer that question?*) Well, I'm certainly not in his mind. It seems very odd that a man who lived through this entire period, and who had access to the kind of information he had access to, and who continually sought to calm apprehension and had enormous amounts of information surrounding him, did not suspect that there might be a problem here. . . .

Lawyer: (*But did I "know" that he "knew," understood, believed differently?*)

I: (*I had to "admit" that.*) Whether he's sincere, I just don't know. . . . I have no idea how to get to the soul of that man.¹⁰⁶

Asking the expert witness, a historian, what he knows about what the defendant knows, in his soul, is as absurd as it sounds.

105. *Id.*

106. Deposition of David Rosner at 35–36, *Rhode Island v. Lead Indus. Ass'n, Inc.*, (No. 99-5226) (July 6, 2005) (from vol. III, videotaped at the law offices of Arnold & Porter, N.Y., N.Y.).

VI

FROM “HOW CAN THE HISTORIAN KNOW WHAT INDUSTRY KNEW?” TO
“HOW CAN ANYONE KNOW ANYTHING”?

When faced with the client’s evidence that industry representatives tried to influence doctors to reverse themselves regarding diagnoses, to influence legislators to stop regulations that might inhibit the use of lead paint, or to prod school and other officials to buy lead paint, a lawyer for the industry might argue that, despite that evidence, there is no reason to suspect that the industry representative was “successful” in changing behavior.

I was specifically asked,

Lawyer: Do you have any evidence of any doctor being visited who withheld information or changed [his or her] opinion?

I: No . . . I don’t have any writing that says “I changed my opinions on the basis of this person’s decision or this person’s visit.”

Lawyer: You also don’t have any LIA [Lead Industry Association] document indicating that they changed anyone’s mind, do you?

I: Well, we have a number of LIA documents in which Wormser claims that he’s changed [the] opinions of numerous people, from state legislators, to people writing warning labels, to physicians who[m] he felt visits to were very profitable . . .

Lawyer: [But do you “know” he changed peoples’ minds?]

I: [No.] I don’t have any writing that that says “I changed my opinions on the basis of this person’s decision or this person’s visit.”¹⁰⁷

The point of the exchange was to get me to state that the actions of the industry, no matter how reprehensible, might not have had any effect whatsoever and to show that the historical evidence of the industry’s efforts to shape the outcome through mass advertising as well as through visits to doctors, legislators, and administrators was irrelevant to the legal proceedings. Further, the questioning was aimed at undermining any affirmative answer I might give regarding the defendants’ intent or what they understood regarding the dangers of their product.

The ambiguity of the historical record can work to the advantage of industries not only in its lawyers’ attempts to undermine the testimony of the plaintiffs’ historians. In fact, instances of historians emphasizing the difficulties of making historical judgments in the context of testimony for both sides abound. Philip Scranton, for example, a historian of business and technology at Rutgers,¹⁰⁸ was hired by lawyers for the asbestos industry to write a timeline of

107. *Id.* at 28.

108. Scranton also wrote and signed the chemical industry’s attack on my colleague Gerald Markowitz and myself. For a complete transcript of his attack on us, reviews of our book, and our response to his attack, see www.deceitanddenial.org. In addition, we provide a link to nearly 20,000 documents that were the basis for much of our research in the parts of our book that he attacked.

important events from the 1930s through the 1960s.¹⁰⁹ He gave depositions in which he literally argued that the knowledge of others is itself difficult to discern, if ever even attainable.¹¹⁰ In nine pages of his deposition, he outlined an arbitrary set of events in the history of technology that he deemed worthy of inclusion, none of which mentioned asbestos or asbestos-related disease.¹¹¹ I can only guess at the purpose for including him as a witness in a case regarding asbestos exposure, other than to illustrate that people had many other things on their minds than disease in the period between the Depression and the 1960s.

But at the deposition, the questioning by plaintiffs' lawyers took an interesting turn. Scranton was asked whether he had an opinion about whether a company should have warned workers about their knowledge regarding the dangers of asbestos exposure in the 1930s. To this he gave a long answer regarding what it meant to "know" something in science.¹¹² Before definitive statements could be made, he argued, information had to be tested, confirmed, retested, and subjected to years of examination.¹¹³ So even if the company said something in 1936 indicating it "understood" that asbestos could injure the workforce, this was something different from "knowing" it was dangerous; the company therefore had no responsibility to inform the workers of information that it was not sure of.¹¹⁴ "The problem with the question," Scranton began,

is the ambiguity about what "knowing" means. . . . In the history of science and technology, there are multiple stages of knowing before action in sort of a grand sense can be taken. You can know, for example, that there's a problem. And when a problem is identified, multiple participants will assess the severity of the problem, trying to figure out how bad it is. They'll disagree. And after a period of time, some kind of consensus comes about the challenges this problem presents. And then there's a problem that has to be addressed about how to measure it, and that goes through a series of discussions among scientists or technologists and engineers. And there are a lot of proposals about how to measure the issue that's at hand. And after some work on that front and some agreement or at least debate about terms of measurements, scientists and engineers and technologists focus on what will fix the problem, and that involves a period of work because it's not obvious, often, what will fix the problem, and there are a whole bunch of proposals for that. And then after another period of time, some kind of consensus is reached on figuring out how to get the problem fixed. All of those are stages of knowing, one after another.¹¹⁵

Such a process can take years, even decades, and apparently, in the intervening period of time, Scranton seemed to be saying, there was no responsibility to warn. Obviously, historians have no trouble making their testimony obscure.

109. See Deposition of Philip Scranton, *In re W. Va. Asbestos Litig.*, No. 02-C-9004 (Cir. Ct. Kanawha Cty., W. Va.).

110. See, e.g., *id.*

111. For example, he identifies a series of technological events from atomic bomb through the launching of satellites as examples of the types of issues (other than asbestos) the broader population was paying attention to. See *id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 33–34.

So historians have been valuable in lawsuits to obscure the past, as well as to illuminate it. It appears that the legal strategies of the law firms have been more or less the same, following a common pattern and a common rationale. David Michaels has argued that one of industry's goals in civil actions is to produce uncertainty and doubt about the reliability of scientific information.¹¹⁶ Historian Robert Proctor has coined the term "agnatology," to describe a new "science" for the creation of historical doubt and ignorance about actions in the past.¹¹⁷ Proctor, Michaels, and more recently, Allan Brandt, Gerald Markowitz, and I argue that lawyers for the tobacco, lead, and asbestos industries, among others, appear to have adopted a few basic techniques that promote these goals. In general, these lawyers have argued that (1) whatever the evidence that industries had past knowledge of a product's dangers, any information was insufficient to definitively prove real danger; so (2) more research was always needed before doubt could be eliminated, and questioning that a material was dangerous meant that there was a "controversy" about whether it was; (3) causation is extremely difficult to prove and requires years, if not decades, of careful experimentation and observation in order to quiet any "controversy" about the sources of disease. (4) Hence, without certainty, and in the context of any ongoing controversy about the danger of a product or substance, industries are under little or no obligation to remove their products from the market or to lower exposures to toxic materials within the factory.

Industry's argument about our book, our depositions, and our testimony in vinyl, lead, and silica cases, closely parallels this structure:

1. There was always a reason to gather more and more information before telling government, workers, or the public of the possibility that a substance was carcinogenic in humans at low doses.
2. Science is a slow, cumulative process that demands that information about danger not be revealed until scientific proof exists and after "controversy" over that proof is laid to rest.
3. Industry always had valid reason to doubt the accuracy of any finding of carcinogenesis.
4. History is a complex process in which clarity is rare and confusion the norm.
5. Historians who draw conclusions indicating industry malfeasance are sloppy, simplistic or biased.
6. Objectivity" in historical analysis requires that
 - a. equal weight of plausibility be provided to all sides in an argument and that no judgments be made, and
 - b. even disinformation, including all self-serving statements, be presented as legitimate.

116. MICHAELS, *supra* note 94, at 9.

117. Proctor, *supra* note 9, at iv118.

7. Every conflicting piece of information should be reported, irrespective of its importance to the historical questions being asked.
8. Incomplete knowledge is equivalent to controversy about that knowledge.
9. One should ignore evidence of responsibility in favor of evidence of ambiguity or innocence.
10. Positive peer reviews or post-publication reviews are invalid unless the reviewers have read all the primary documents.
11. Any sign of “presentism”¹¹⁸ is bad, except when it exonerates the industry.
12. When all else fails, quibble endlessly about adjectives, nouns, or adverbs used to describe or summarize corporate behavior, then seek to sidetrack arguments and raise phony issues.

Industries are playing on our professional propensity to see complexity and ambiguity in human events.

VII

WHY HISTORIANS IN THE COURTROOM?

In this context, it is important to recognize the growing demand for the historian’s skills. We may be dragged kicking and screaming into moral dilemmas in which we are forced to determine the boundaries of our involvement in public disputes. In part, this will be an unwelcome circumstance. Yet we owe society a great deal and we owe those who are often without voice a great deal more. The demands from the legal system will force us to crystallize our sense of purpose and the humanistic traditions that lend legitimacy to our field. A greater relevance and involvement of historians will force us to define what is “good” history, both methodologically as well as morally.

118. “Presentism” refers to historians’ work that addresses, or is influenced by, questions emerging from contemporary problems or issues. Some see this style as an intrusion on the “objectivity” of the historian, as it often imposes on the past modern questions that may or may not have been issues then. *See generally* NOVICK, *supra* note 50; DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* (1970).