Case Note

Past Imperfect

Irving v. Penguin Books Ltd., No. 1996-I-1113, 2000 WL 362478 (Q.B. Apr. 11), *appeal denied* (Dec. 18, 2000).

During the course of Holocaust denier David Irving's libel action against American historian Deborah Lipstadt and her publisher, Penguin Books, press coverage frequently referred to the spectacle playing out in England's High Court as "history on trial."[1] It would be closer to the mark, though undeniably less catchy, to call it "historical methodology on trial." The judge hearing the case, Justice Charles Gray of the Queen's Bench, stressed this distinction in his opinion,[2] where he relied on an "objective historian" standard in judging Irving's scholarship. This standard had no legal precedent; instead, it was based on the report submitted by one of the defendants' expert witnesses, Richard J. Evans.[3] While this standard was crafted for a British libel suit, I argue here for its rebranding as a

1. *E.g.*, Jonathan Freedland, *Court 73 Where History Is on Trial*, GUARDIAN (London), Feb. 5, 2000, Home Pages, at 3; *see also* David Cesarani, *Irving Exposed as a Liar with No Interest in Pursuit of Truth*, IRISH TIMES, Apr. 12, 2000, at 16 ("A common misconception about the libel case brought by David Irving against the American academic Deborah Lipstadt is that history was on trial.").

2. Gray wrote:

> 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 what did not occur during the Nazi regime in Germany. It will be necessary for me to rehearse, at some length, certain historical data. The need for this arises because I must evaluate the criticisms of or (as Irving would put it) the attack upon his conduct as an historian in the light of the available historical evidence. But it is not for me to form, still less to express, a judgement about what happened. That is a task for historians.

Irving v. Penguin Books Ltd., No. 1996-I-1113, 2000 WL 362478, ¶ 1.3 (Q.B. Apr. 11), *appeal denied* (Dec. 18, 2000).

3. Richard J. Evans, Expert Witness Report, *Irving*, 2000 WL 362478 (Q.B.) [hereinafter Evans, Report]. Evans was one of a number of expert historical witnesses employed by Penguin Books. RICHARD J. EVANS, LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL 29-30 (2001) [hereinafter EVANS, LYING].

"conscientious historian" standard and for its application in American cases employing historians as expert witnesses.

I

David Irving, a British historian of Nazi Germany, brought a libel suit against Deborah Lipstadt, Dorot Professor of Modern Jewish History and Holocaust Studies at Emory University, and her publisher, Penguin Books, based on references to Irving in Lipstadt's book, *Denying the Holocaust: The Growing Assault on Truth and Memory*.[4] In her book, Lipstadt quoted other scholars who have described Irving as "a 'Hitler partisan wearing blinkers' and accused him of distorting evidence and manipulating documents to serve his own purposes."[5] Irving, Lipstadt concluded, "is one of the most dangerous spokespersons for Holocaust denial. Familiar with historical evidence, he bends it until it conforms with his ideological leanings and political agenda."[6] Irving went to court, claiming that the book was part of a "concerted attempt to ruin his reputation as an historian," and sought damages.[7] Under the peculiar libel law regime that makes England a libel plaintiff's paradise, Irving's action shifted the burden to Lipstadt and Penguin to demonstrate the truth of their assertions.[8] Penguin invested £2.5 million in an ambitious research project to prove Lipstadt's accusations, employing a team of historians to scour Irving's works.[9]

The trial was extremely controversial. At one point, Irving, who represented himself in this bench trial, referred to Justice Gray as "Mein Führer," apparently unconsciously.[10] Other testimony dealt with a nursery rhyme Irving composed for his daughter: "I'm a Baby Aryan/ Not Jewish or Sectarian/ I have no plans to marry-an/ Ape or Rastafarian."[11] While congratulating Irving for skillful presentation of his case (and politely

4. DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1993).

5. *Id.* at 161 (quoting Martin Broszat, *Hitler und die Genesis der 'Endlösung'* [*Hitler and the Genesis of the 'Final Solution'*], 25 VIERTELJAHRSHEFTE FÜR ZEITGESCHICHTE 739, 742 (1977)).

6. *Id.* at 181.

7. *Irving*, 2000 WL 362478, ¶ 1.2.

8. *See* Dennise Mulvihill, Irving v. Penguin*: Historians on Trial and the Determination of Truth Under English Libel Law*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 217, 221 (2000).

9. Vikram Dodd, *How the Web of Lies Was Unravelled*, GUARDIAN (London), Apr. 12, 2000, Home Pages, at 4.

10. Trial Transcript, Day 32, at 193 (Mar. 15, 2000), *Irving*, 2000 WL 362478; EVANS, LYING, *supra* note 3, at 224; Dodd, *supra* note 9, at 4. One observer pointed out that Gray once or twice referred to Irving as Hitler. Ian Buruma, *Blood Libel*, NEW YORKER, Apr. 16, 2001, at 83.

11. *Irving*, 2000 WL 362478, ¶ 9.6; David Pallister, *"He Is a Holocaust Denier. He Misstated Evidence"; The Judgment Judge Condemns Deliberate Falsification of Historical Record*, GUARDIAN (London), Apr. 12, 2000, Home Pages, at 6.

overlooking his Freudian slip), Gray nonetheless resoundingly found in favor of Lipstadt and Penguin in a lengthy opinion, concluding:

> Irving has for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence; that for the same reasons he has portrayed Hitler in an unwarrantedly favourable light, principally in relation to his attitude towards and responsibility for the treatment of the Jews; that he is an active Holocaust denier; that he is anti-semitic and racist and that he associates with right wing extremists who promote neo-Nazism.[12]

The worldwide relief following Gray's verdict was almost palpable.[13]

The verdict was widely interpreted as a defeat for Holocaust denial, but the defendants' strategy at trial emphasized Irving's methodology, not his conclusions. By focusing narrowly on Irving's evaluation of evidence, the defense laid the groundwork for Gray's sweeping verdict. First, the defense's concentration on interpretation resonated with the affinity of the judge and the historian as evaluators of documentary evidence.[14] By presenting Irving's failure as a systematic misjudgment of the historical record, the defendants encouraged Gray to contrast his own experience and instincts as a trial judge with Irving's use of evidence. The result, not surprisingly, was unfavorable to Irving. Second, by stressing evidentiary standards, the defense engaged Irving, and by extension the Holocaust deniers as a group, on his own territory. Holocaust denial over the past three decades has often presented itself in pseudoscholarly garb, clothed in footnotes and other academic niceties.[15] In particular, Holocaust denial has specialized in spurious assertions that it applies a more rigorous standard to historical evidence than do scholars who assert the Holocaust occurred.[16]

12. *Irving*, 2000 WL 362478, ¶ 13.167.

13. *See, e.g.*, Douglas Davis et al., *British Court Slams Irving as Holocaust Denier*, JERUSALEM POST, Apr. 12, 2000, at 1; Vikram Dodd, *Irving: Consigned to History as a Racist Liar*, GUARDIAN (London), Apr. 12, 2000, Home Pages, at 1; Sarah Lyall, *Critic of Holocaust Denier Is Cleared in British Libel Suit*, N.Y. TIMES, Apr. 12, 2000, at A1.

14. *Cf.* Carlo Ginzburg, *Checking the Evidence: The Judge and the Historian*, *in* QUESTIONS OF EVIDENCE: PROOF, PRACTICE, AND PERSUASION ACROSS THE DISCIPLINES 290, 290-94 (James Chandler et al. eds., 1994) (noting the long history of comparisons between history and law, and between historians and judges). Gray tried to keep distinct the roles of judge and historian. As he told a journalist before the trial, "There is some risk of one's being asked to become a historian. Judges aren't historians." D.D. Guttenplan, *Why History Matters*, GUARDIAN (London), Apr. 15, 2000, at 1. Nonetheless, his opinion is at its most assured when he criticizes Irving's use of evidence. Not being a historian for Gray seems to have amounted to not producing a historical narrative; he did not shrink from evaluating historical methodology.

15. RICHARD J. EVANS, IN DEFENCE OF HISTORY 238-43 (1997); LIPSTADT, *supra* note 4, at 24; DIANE PURKISS, THE WITCH IN HISTORY: EARLY MODERN AND TWENTIETH-CENTURY REPRESENTATIONS 70 (1996).

16. Evans, Report, *supra* note 3, ¶ 2.5.35 (discussing an article by Prof. David Cannadine reviewing Irving's work); *see also* EVANS, LYING, *supra* note 3, at 106-07 (describing the

By attacking Irving's use of evidence, therefore, the defense struck at the very heart of Holocaust denial.

II

While Gray's opinion has received extensive praise for its definitive rebuke of Holocaust denial, the route by which he reached this end has scarcely been discussed.[17] Drawing on Evans's report, Gray created an "objective historian" standard, a fictional embodiment of common sense somewhat reminiscent of the "man on the Clapham omnibus" standard traditionally used in English law.[18] Gray found that Irving's departures from the "objective historian" standard were substantial: "Irving has misstated historical evidence; adopted positions which run counter to the weight of the evidence; given credence to unreliable evidence and disregarded or dismissed credible evidence."[19]

Justice Gray did not explicitly formulate a test for "objective historian" status separate from his criticisms of Irving's conduct in particular instances.[20] Nonetheless, by putting together Gray's criticisms of Irving and Evans's summary of "generally accepted standards of historical scholarship,"[21] one can distill a code of conduct for the objective historian:

"pseudo-academic" form of Holocaust denier Arthur Butz's works, including his use of footnotes, appendices, and plates and diagrams).

17. *But see* Tony Judt, *Writing History, Facts Optional*, N.Y. TIMES, Apr. 13, 2000, at A31 ("But what of the 'objectivity' dilemma?"); Anne McElvoy, *Unfortunately, Holocaust Denial Will Not End Here*, INDEPENDENT (London), Apr. 12, 2000, at 3 ("The most intriguing question raised by the evidence was the judge's claim that Mr Irving's increasing political activism disqualified him from his claim to be a serious 'objective' historian. This is marshy ground on which to pitch an argument and a sign that legal minds do not always grasp the pitfalls of referring matters to the deceptive higher court of objectivity.").

18. 3 THE OXFORD ENGLISH DICTIONARY 272 (2d ed. 1989) (defining "Clapham"); *see also* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 15 (1965) (equating the "man in the Clapham Omnibus" with the reasonable man, and noting it is an "archaism familiar to all lawyers").

19. *Irving*, 2000 WL 362478, ¶ 13.140.

20. *Id.* ¶¶ 13.1-13.168.

21. In his report, Evans summarized these standards:

> [D]oes Irving give a reasonably accurate account of the documents he uses; does he translate them in a reasonably accurate and unbiased manner; does he take into account as many other relevant documents as any professional historian could reasonably be expected to read and cite when he is using one particular source to substantiate an argument; does he apply consistent criteria of source-criticism to all the original material he uses, examining it for internal consistency, its consistency with other documents, its provenance, the motives of those who were responsible for it, and the audience for which it was intended; are his arguments, his statistics and his accounts of historical events consistent across time and based on reliable historical evidence; does he take account of the arguments and interpretations of other historians who have examined the same documents; does he, in other words, advance his arguments in a reasonably objective and unbiased manner?

Evans, Report, *supra* note 3, ¶ 1.6.4.

(1) She must treat sources with appropriate reservations;[22] (2) she must not dismiss counterevidence without scholarly consideration;[23] (3) she must be even-handed in her treatment of evidence and eschew "cherry-picking";[24] (4) she must clearly indicate any speculation;[25] (5) she must not mistranslate documents or mislead by omitting parts of documents;[26] (6) she must weigh the authenticity of all accounts, not merely those that contradict her favored view;[27] and (7) she must take the motives of historical actors into consideration.[28]

III

This "objective historian" standard may in fact be more useful in America than in its country of origin. The "turn to history" in American jurisprudence[29] has created an increase in the number of prominent cases employing historical arguments.[30] This Case Note focuses on the testimony

22. See, for example, *Irving*, 2000 WL 362478, ¶¶ 13.13, 5.34-5.47, in which Gray faulted Irving for uncritical reliance on crime statistics taken from the work of Kurt Daleuge, an enthusiastic member of the Nazi party.

23. See, for example, *id.* ¶¶ 13.17, 5.40-5.72, in which Gray reprimanded Irving for being "unduly uncritical" of witness statements by Hitler's adjutants supporting Irving's account, statements which were contradicted by contemporaneous documentary evidence, including Goebbels's diary and police telegrams.

24. See, for example, *id.* ¶¶ 13.24-13.25, 5.111-5.122, in which Gray criticized Irving's selective treatment of the evidence regarding the shooting of Jews in Riga. Irving relied on an order prohibiting future mass shootings to argue that the Germans had called a halt to the shootings, while ignoring evidence from the same source that the order was limited to shootings "on that scale" and called for increased discretion in shootings, implying that the shootings were to continue.

25. See, for example, *id.* ¶¶ 13.22, 5.90-5.110, in which Gray found that Irving misled readers by presenting Himmler's notes as incontrovertible evidence supporting Irving's proposition that Hitler had prohibited the general liquidation of Jews, and that this amounted to speculation, rather than recitation of established facts.

26. *Id.* ¶ 13.31 ("Irving has seriously misrepresented Hitler's views on the Jewish question. He has done so in some instances by misinterpreting and mistranslating documents and in other instances by omitting documents or parts of them.").

27. See, for example, *id.* ¶¶ 13.117-13.125, 11.6-11.48, in which Gray condemned Irving for relying on one document to support his claims for an inflated casualty figure for the Allied bombing of Dresden, and for ignoring "powerful reasons for doubting [its] genuineness," including accusations of forgery and internal evidence of alterations.

28. See, for example, *id.* ¶¶ 13.42-13.45, 5.199-5.214, in which Gray faulted Irving for failing to consider Hitler's motives when using accounts of his meetings with Antonescu and Horthy during which Hitler was apparently motivated by a desire to control the fates of Hungarian and Romanian Jews.

29. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 132 (1996).

30. One manifestation of this shift has been the historians' briefs, or historical segments of briefs, directed at the Supreme Court. *See, e.g.*, Brief of Amici Curiae Self-Advocates Becoming Empowered at 3-10, Bd. of Trs. of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001) (No. 99-1240); Brief of 281 American Historians as Amici Curiae Supporting Appellees, Webster v. Reprod. Health Serv., 492 U.S. 490 (1989) (No. 88-605). For the debate regarding the historians' brief in *Webster*, see Estelle B. Freedman, *Historical Interpretation and Legal Advocacy*, PUB. HISTORIAN, Summer 1990, at 27; Michael Grossberg, *The* Webster *Brief: History as Advocacy, or Would You Sign It?* PUB. HISTORIAN, Summer 1990, at 45; Jane E. Larson & Clyde Spillenger,

of historians serving as expert witnesses at the trial level. Historians have testified in a range of cases: Indian rights;[31] land claims;[32] gender discrimination;[33] deportation of alleged Holocaust participants;[34] voting rights;[35] and gay rights,[36] among others. Yet, historians called upon to testify claim that the standards applied by courts in assessing their testimony are contradictory or irrational.[37]

Historians are not alone among social scientists and other non-scientific experts in confronting an absence of coherent standards.[38] The judicial guidelines for evaluation of expert testimony have undergone substantial redefinition over the past decade. Beginning with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[39] in 1993, the Court abandoned the longstanding *Frye* test, which looked to "general acceptance in the particular field."[40] Instead, the Court proposed a list of factors for the trial court to consider including: whether a technique or theory can be (or has been) tested;[41] whether it has been subject to peer review and publication;[42] its known or

"That's Not History," PUB. HISTORIAN, Summer 1990, at 33; and James C. Mohr, *Historically Based Legal Briefs*, PUB. HISTORIAN, Summer 1990, at 19.

31. *See, e.g.*, Pueblo of Santa Ana v. Baca, 844 F.2d 708 (10th Cir. 1988); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979); Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784 (D. Minn. 1994), *aff'd* 124 F.3d 904 (8th Cir. 1997); United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979); Helen Hornbeck Tanner, *History vs. the Law: Processing Indians in the American Legal System*, 76 U. DET. MERCY L. REV. 693 (1999).

32. *See, e.g.*, Denson v. Stack, 997 F.2d 1356 (11th Cir. 1993).

33. *See, e.g.*, EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988). The *Sears* case also gave rise to heated controversy. *See, e.g.*, Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the* Sears *Case*, 66 TEX. L. REV. 1629 (1988); Alice Kessler-Harris, *Academic Freedom and Expert Witnessing: A Response to Haskell and Levinson*, 67 TEX. L. REV. 429 (1988).

34. *See, e.g.*, Kalejs v. INS, 10 F.3d 441 (7th Cir. 1993); United States v. Dailide, 953 F. Supp. 192 (N.D. Ohio 1997); United States v. Lileikis, 929 F. Supp. 31 (D. Mass. 1996); United States v. Koziy, 540 F. Supp. 25 (S.D. Fla. 1982); United States v. Linnas, 527 F. Supp. 426 (E.D.N.Y. 1981).

35. *See, e.g.*, NAACP v. City of Niagara Falls, 65 F.3d 1002 (2d Cir. 1995); Irby v. Fitz-Hugh, 693 F. Supp. 424 (E.D. Va. 1988); Dillard v. Crenshaw County, 640 F. Supp. 1347 (M.D. Ala. 1986); Bolden v. City of Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982); Peyton McCrary, *Yes, but What Have They Done to Black People Lately? The Role of Historical Evidence in the Virginia School Board Case*, 70 CHI.-KENT L. REV. 1275 (1995); Peyton McCrary & J. Gerald Hebert, *Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases*, 16 S.U. L. REV. 101 (1989).

36. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); Commonwealth v. Wasson, 842 S.W.2d 487, 489 (Ky. 1993).

37. *See, e.g.*, Peter Charles Hoffer, *"Blind to History": The Use of History in Affirmative Action Suits*, 23 RUTGERS L.J. 271, 272 (1992); N.E.H. Hull & Peter Charles Hoffer, *Historians and the Impeachment Imbroglio: In Search of a Serviceable History*, 31 RUTGERS L.J. 473, 486 (2000); Tanner, *supra* note 31.

38. *See, e.g.*, Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 AM. ANTHROPOLOGIST 555 (1977), *reprinted in* LAW AND ANTHROPOLOGY 499 (Peter Sack ed., 1992).

39. 509 U.S. 579 (1993).

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

41. *Daubert*, 509 U.S. at 593.

42. *Id.*

potential rate of error when applied;[43] existence and maintenance of standards and controls;[44] and general acceptance.[45] These factors, however, were not presented as a "definitive checklist" but rather as "observations" for the trial court to consider.[46] The inquiry, the Court noted, should be a "flexible one."[47] Moreover, it should focus on methodology rather than conclusions.[48]

The Court's decision in *Daubert*, as commentators quickly pointed out, left unresolved the question of whether the new test for expert testimony encompassed specialized knowledge or social science evidence as well as scientific evidence.[49] In *Kumho*, the Court expanded trial courts' "gatekeeping" function to all expert testimony,[50] but again emphasized the flexibility of the inquiry, concluding "we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert."[51] Most recently, the December 2000 amendment of Federal Rule of Evidence 702 codified the focus on methodology present in both *Daubert* and *Kumho*.[52]

While *Kumho* may have resolved the debate over *Daubert*'s scope, it did little to clarify how *Daubert*'s factors might be applied to social science evidence. In some cases, lower courts have been frustrated in their attempt

43. *Id.* at 594.

44. *Id*. Although this factor is not listed separately in many accounts of *Daubert*, I follow the most recent Advisory Committee's note to Rule 702 in describing it as a fifth factor. FED. R. EVID. 702 advisory committee's note.

45. *Daubert*, 509 U.S. at 594.

46. *Id.* at 593.

47. *Id.* at 594.

48. *Id.* at 595; Raynor v. Merrell Pharms., Inc., 104 F.3d 1371, 1375 (D.C. Cir. 1997) (stating that the inquiry as to the admissibility of expert testimony must focus solely on principles and methodology, not on conclusions that they generate (quoting *Daubert*, 509 U.S. at 595)); *see also* Michael H. Gottesman, *Admissibility of Expert Testimony After* Daubert, 43 EMORY L.J. 867, 869 (1994) ("It's The Methodology, Stupid!"). *But see* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (upholding the trial court's inquiry into an expert's conclusions).

49. *See* Edward J. Imwinkelried, *The Next Step After* Daubert*: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271 (1994); *see also* Teresa S. Renaker, *Evidentiary Legerdemain: Deciding When* Daubert *Should Apply to Social Science Evidence*, 84 CAL. L. REV. 1657 (1996) (questioning the applicability of *Daubert* to psychological evidence).

50. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999); Marc N. Garber, *Opening* Daubert*'s Gate: Testing the Reliability of an Expert's Experiences After* Kumho, CRIM. JUST., Summer 2000, at 4; 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 (2000).

51. 526 U.S. at 150. The Court went on to say that it also consciously refrained from making a definitive judgment of the applicability of *Daubert* factors "for subsets of cases categorized by category of expert or kind of evidence. Too much depends on the particular circumstances of the particular case." *Id.*

52. The recent amendment of Rule 702 provides, in part, for the admission of expert testimony 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." FED. R. EVID. 702. The Advisory Committee's note indicates that the revision was prompted by *Daubert* and *Kumho*. *Id*. advisory committee's note.

to apply the *Daubert* factors to certain disciplines, including the social sciences.[53] The listed factors appear to be particularly ill-suited to evaluation of historical expert testimony.

Consider, for a moment, an evaluation of Irving's work under the *Daubert* factors. The decision in *Daubert* was motivated in part by a desire to exclude "junk" science. Would its factors exclude "junk" history as well? Testability, the first factor, does not apply to historical scholarship in anything like the traditional controlled laboratory sense no doubt envisioned by the Court. At best, another historian could (as the Penguin team did) revisit all of the sources a colleague cited. In the Irving case, testing of this sort revealed a pattern of questionable interpretations, but did so at an impractically great cost, in both time and money.[54] *Daubert*'s second factor, publication and peer review, does not help separate Irving's work from acceptable historiography. Irving's books have been released by reputable publishing houses and have received favorable reviews from other German historians.[55] The third factor, a known or potential rate of error, meanwhile, is completely inapplicable as a standard for evaluating historical scholarship. History's focus on past events means that it does not generate predictions that can be verified or disproved. The fourth *Daubert* factor, existence of standards, requires further development before it can be used to distinguish Irving's work. History, unlike professions such as law or medicine, does not have widely recognized codes of conduct. Its methodological standards are more implicit than explicit. The Irving case, however, showed that it is possible to arrive at a serviceable definition of these standards for legal purposes. Finally, the fifth factor, general acceptance, raises further questions. While scholarly reviews may be pressed into service as a gauge of general acceptance, the Irving example demonstrates their failings as a test for methodological reliability.

This exercise reveals that the *Daubert* factors cannot be applied to historical scholarship without a great deal of assistance from historians. As in the Irving case, *Daubert* inquiries would depend on participation by members of the historical profession, who would need to make their own methodological standards explicit, and to enumerate specific instances in which the testimony in question departs from those standards. Making

53. *See, e.g.*, Tyus v. Urban Search Mgmt., 102 F.3d 256, 263 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony by a sociologist).

54. Also, the thorny question of distinguishing between fact and interpretation limits the usefulness of testing. *Cf.* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 683 (1987) ("History yields interpretations, not uninterpreted facts."). *Daubert*'s mandated focus on methodology, not conclusions, would tend to insulate conclusions from scrutiny. In the Irving case, however, it was only by considering interpretations in tandem with evidence that the Penguin team could demonstrate Irving's errors.

55. EVANS, LYING, *supra* note 3, at 8-9. Evans does note, however, that few of these reviews came from scholars whose expertise was precisely in Irving's specialty.

sense of *Daubert*, in short, requires discipline-centered methodologies and standards.[56] The standard developed in *Irving v. Penguin Books*, therefore, can fill a new niche in American evidence law because historians, particularly Evans, were instrumental in shaping it.[57]

But to use the standard developed in the Irving trial necessarily transforms it from an expert witness's testimony in a libel trial about a historian's reputation to a standard for evaluating expert evidence on historical questions. While Gray's "objective historian" standard may have been used to judge Irving as a historian,[58] that is not the use I envision for it in cases in which historians appear as expert witnesses. Gray's standard should not be used for settling scholarly controversies[59] or for establishing a benchmark outside which historians might fear legal liability. Instead, as presented in this Case Note, it is intended as a guide for judges. Given that *Daubert* places increased responsibility on judges to serve as gatekeepers by excluding questionable expert testimony, Gray's standard would enable them to make better-informed assessments of historical evidence before them.[60] Application of Gray's standard should have inclusionary, not exclusionary, consequences: As long as a historian's methodology satisfies its criteria, his or her testimony should be considered by the judge.

Like many immigrants of an earlier era, however, Gray's standard may find its passage into American society eased by a name change. In keeping with Gray's own language, a better name would be the "conscientious

56. *See* Imwinkelried, *supra* note 49, at 2274; Michael J. Saks, *The Aftermath of* Daubert*: An Evolving Jurisprudence of Expert Evidence*, 40 JURIMETRICS J. 229, 238-41 (2000); *Standards and Procedures for Determining the Admissibility of Expert Evidence After* Daubert, 157 F.R.D. 571, 578-80 (1994); *see also* Hoffer, *supra* note 37, at 273 ("Judges should read historical evidence and assess historical argument the way that historians fashion historical evidence and construct historical arguments."); Rosen, *supra* note 38, at 569, *reprinted in* LAW AND ANTHROPOLOGY, *supra* note 38, at 513 (suggesting discipline-authored standards for anthropological testimony).

57. *See* EVANS, LYING, *supra* note 3, at 192 ("Despite the fact that the defense case was conducted in masterly fashion by one of Britain's top defamation Q[ueen's] C[ounsel]s, who seemed to know what was in the expert reports better than we did ourselves, the main role in drawing up the defense case was ultimately played by the historians.").

58. Gray rejected outright Evans's argument that Irving was not a historian at all. Evans had argued that Irving's abuses of evidence meant that he could not be considered a historian. Evans, Report, *supra* note 3, ¶ 1.6.11. But Gray instead gave Irving qualified praise for his work in military history. *Irving*, 2000 WL 362478, ¶ 13.7.

59. Many commentators on the Irving trial expressed discomfort with the spectacle of scholars resorting to court. *See, e.g.*, EVANS, LYING, *supra* note 3, at 6 ("Historians do not usually answer such criticisms by firing off writs. Instead, they normally rebut them in print."); Neal Ascherson, *Holocaust Denial: The Battle May Be Over but the War Goes On*, OBSERVER (London), Apr. 16, 2000, News, at 19 ("[A]n English libel court is for justice, not for history.").

60. Other scholars have attempted to teach courts how to do history. *See, e.g.*, Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377 (1998); Powell, *supra* note 54; *see also* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (trying to teach constitutional scholars how to do history). The "conscientious historian" standard, however, directs attention to the specific details and protocols of dealing with historical evidence, rather than historical thinking on a more general level.

historian" standard.[61] The quest for absolute historical objectivity has been called into question convincingly,[62] and, as a result, the label "objective" appears both naïve and misguided. But the idea of objectivity is not at all central to Gray's standard. Gray's use of the word "objective" results from the specific requirements of the libel defense in the Irving case. The components of Gray's standard do not, in fact, call for the historian to be without personal opinions or inclinations; they merely require him or her to make a balanced assessment of the evidence.[63] Moreover, in their own scholarly publications, both Evans and Lipstadt make it clear that historians can and will have political convictions regarding their fields of study.[64]

IV

How might the newly rebranded "conscientious historian" standard work in practice? Its main benefit would be to focus analysis of historical testimony more clearly on the historian's use of evidence.[65] In this capacity, the "conscientious historian" standard could serve several purposes: 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. Most of the abuses described below are no doubt outliers, but they suggest the dangers inherent in operating without any type of standard at all.

American historians and legal scholars have wrestled with the question of whether serving as an expert witness inevitably compromises a historian's objectivity.[66] Some judges, meanwhile, have taken a particularly

61. *E.g.*, *Irving*, 2000 WL 362478, ¶ 13.51.

62. *See* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION (1988); Ginzburg, *supra* note 14, at 294-96; *see also* JOYCE APPLEBY ET AL., TELLING THE TRUTH ABOUT HISTORY 241-70 (1994) (discussing the "many-pronged attack" on objectivity since the 1960s).

63. *Cf.* Guttenplan, *supra* note 14 ("Irving's problem wasn't detachment but dishonesty.").

64. EVANS, *supra* note 15, at 249-52; EVANS, LYING, *supra* note 3, at 249-50; LIPSTADT, *supra* note 4, at 25-26 ("[T]here is increasing recognition that the historian brings to this enterprise his or her own values and biases.").

65. Theoretically, it could be used both in the decision whether an individual historian should be considered an expert, and in the assessment of the historian's testimony; however, it seems unlikely to be used to prevent historians from testifying in the first place. Under the Federal Rules of Evidence, the standards for qualifying as an expert are extremely inclusive: "a witness qualified as an expert by knowledge, skill, experience, training, or education." FED. R. EVID. 702.

66. *See, e.g.*, Carl M. Becker, *Professor for the Plaintiff: Classroom to Courtroom*, PUB. HISTORIAN, Summer 1982, at 69, 77; S. Charles Bolton, *The Historian as Expert Witness: Creationism in Arkansas*, PUB. HISTORIAN, Summer 1982, at 59; Daniel A. Farber, *Adjudication of Things Past: Reflections on History as Evidence*, 49 HASTINGS L.J. 1009 (1998); Peter Irons, *Clio on the Stand: The Promise and Perils of Historical Review*, 24 CAL. W. L. REV. 337, 349-54 (1988); J. Morgan Kousser, *Are Expert Witnesses Whores? Reflections on Objectivity in*

stringent approach to the question of objectivity, rushing to discount the testimony of historians as expert witnesses based on their political commitments. In the remanded Virginia Military Institute case,[67] for example, it appears that the judge completely disregarded a prominent and well-qualified historian's testimony on women's history because he admitted membership in a profeminist group on cross-examination.[68] The "conscientious historian" standard would caution judges against such an approach, directing attention away from the historian's political convictions. Given the prominence of Irving's political and racial beliefs at his trial, this result may appear paradoxical. The decision in *Irving*, however, turned on the pattern of Irving's errors.[69] His personal beliefs and political engagements were never taken as conclusive evidence of historical unreliability. Similarly, in the absence of any demonstrated errors, the feminist historian's testimony should have been considered.

The "conscientious historian" standard would also prevent confusion resulting from the multiple roles historians play in the witness-box, ranging from authenticators of old newspapers to experts testifying on the basis of years of wide-ranging research in the sources of a particular historical period. While newspaper authentication is one role performed by historians, historical expertise should not be misinterpreted as a generalized ability to recreate the past from isolated clippings. In a particularly egregious abuse of expert testimony in one voting rights case, a historian, whose specialty was Civil War and Reconstruction-era constitutional history, concluded, solely on the basis of newspaper clippings shown to him on the stand, that the adoption of at-large elections in the 1960s was not racially motivated.[70] The "conscientious historian" standard would have barred this testimony on several grounds: First, the testimony violated the principle of consideration of as much of the relevant evidence as possible; second, it invited speculation; and, third, it failed to give due consideration to the motives of historical actors.

Scholarship and Expert Witnessing, PUB. HISTORIAN, Winter 1984, at 5; *see also* Paul Soifer, *The Litigation Historian: Objectivity, Responsibility, and Sources*, PUB. HISTORIAN, Spring 1983, at 47, 48-53 (discussing the risks to objectivity of historians doing research under contract to lawyers).

67. United States v. Virginia, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 518 U.S. 515 (1996).

68. Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the* Virginia Military Institute *Case*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189, 279 (1996) (describing the judge's decision to disregard Michael Kimmel's testimony in the remand hearing of the Virginia Military Institute case); *see also* NAACP v. City of Niagara Falls, 65 F.3d 1002, 1020 (2d Cir. 1995) (agreeing with the district court's decision to disregard the evidence of plaintiff's expert historian based, in part, on her "vehement opposition to at-large districts under any circumstances").

69. *See infra* note 78 and accompanying text.

70. McCrary & Hebert, *supra* note 35, at 115-16.

Another benefit of the "conscientious historian" standard would be to discourage historians from being unduly one-sided in their interpretations. One-sidedness in historical testimony need not result from an attempt to mislead; it may very well represent an understandable response to the perceived adversarial norms of the courtroom that are reinforced through the process of selecting expert witnesses.[71] One historian who participated in writing the *Webster* brief, for example, recounted deliberately avoiding topics that would complicate the historical narrative being presented.[72] The critique of one-sidedness has a long history in American legal scholarship. Alfred Kelly, in one of the pioneering discussions of historiography in the Supreme Court, famously called it "law-office history," explaining that "[b]y 'law-office history,' I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the data proffered."[73] Irving's manipulation of history, by this standard, represents a paradigmatic example of law-office history. Traditionally, cross-examination has been advanced as the proper counterweight to one-sidedness in expert testimony.[74] But cross-examination itself is likely to encourage violation of the "conscientious historian" standard; for example, by pulling quotations out of context for impeachment purposes.[75] Moreover, *Daubert* seems implicitly to move the obligation to ensure reliability away from cross-examination and toward the judge.

Responsibility for law-office history in the form of expert testimony should not be placed on the litigants and their expert witnesses alone, however. As long as judges expect a winner-take-all adversarial presentation of history, they must share the blame. Judges and litigants alike must revise their expectations of what a historical narrative would look like under the "conscientious historian" standard. Taking into account all of the evidence, and eschewing cherry-picking, means that parties should not be expected to present cases in which all the historical evidence unproblematically supports their legal position.[76]

71. For a description of how the selection of expert witnesses reinforces and inculcates one-sidedness, see Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1126-36.

72. Freedman, *supra* note 30, at 28-31.

73. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13. *See generally* William Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988) (expanding Kelly's typology).

74. Gross, *supra* note 71, at 1165-76.

75. Alice Kessler-Harris, a prominent women's historian, complained after the controversial *Sears* case that opposing counsel had tried to discredit her analysis of gender relations in the 1970s with quotations from Kessler-Harris's previously published work. Those quotations, however, described American society in the antebellum period. Kessler-Harris, *supra* note 33, at 432.

76. *Cf.* Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 538 (1989) (praising Eric Foner for refusing to draw politically convenient but simplistic conclusions from a historical record that is "muddled and provides no clear answer in favor of

V

Adopting any standard of this sort would raise questions. Some of these can be considered fairly briefly. For example, it is worth considering what the standard would *not* do. It would not transform the trial into a witch hunt through a scholar's footnotes in search of the inevitable error.[77] The Irving trial was not about making mistakes; it was about the pattern of those mistakes and what it revealed about Irving's intent.[78] Nor would the standard involve evaluation of scholarship by canons of interpretation entirely different from those employed within the academy; in fact, Evans concluded that "[a]s it turned out, the rules of evidence in court were not so different from the rules of evidence observed by historians."[79] Nor, finally, should it be taken as an exhaustive listing of possible methodological problems.[80] Other criticisms, however, merit more extended consideration, including a possible bias toward the status quo and against progressive uses of history, and doubts about the standard's practicality.

The decision in *Irving* validated a widely accepted conventional history and criticized an idiosyncratic and controversial challenge to that account. Is the "conscientious historian" standard therefore biased in favor of maintenance of the status quo? To the extent that recent progressive use of history in legal controversies has often been "history from below," that is,

either side"); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437 (1995) (suggesting that history does not yield unproblematic conclusions).

77. One of Irving's ambivalent defenders, Donald Cameron Watt, a retired professor of diplomatic history at London School of Economics and editor of *Mein Kampf*, raised this specter in an editorial published immediately after the verdict suggesting that no historian's scholarship could stand up to the searching examination directed at Irving's publications. Evans argued in response that Irving's errors were distinctive in their pattern of manipulation, and outstripped mere carelessness. EVANS, LYING, *supra* note 3, at 245-48.

78. Penguin's solicitors emphasized that evidence of a pattern of distortions, "all tend[ing] in one direction—the exculpation of Hitler and the sanitisation of the Nazi regime," was crucial to supporting Lipstadt's writings. Anthony Julius & James Libson, *Losing Was Unthinkable, the Rest Is History*, INDEPENDENT (London), Apr. 18, 2000, Features, at 11. Their evaluation was confirmed by Lord Justice Stephen Sedley in his refusal of Irving's appeal. Sedley noted that "[w]hat might, in another historian have been casual misreadings of evidence, emerge in the applicant's case as sedulous misinterpretation all going in the direction of his racial and ideological leanings. Hence the verdict for the defendants." Denial of Permission To Appeal, Irving v. Penguin Books (Dec. 18, 2000), *available at* http://www.fpp.co.uk/Legal/Penguin/Appeal/refusal.html (Irving's website).

79. EVANS, LYING, supra note 3, at 190. Evans also noted, however, that his observation applied specifically to civil suits. *Id*. The experience of recent war crimes trials suggests that historians may find a greater disparity between legal and historical standards regarding evidence in criminal trials. *See* DAVID BEVAN, A CASE TO ANSWER: THE STORY OF AUSTRALIA'S FIRST EUROPEAN WAR CRIMES PROSECUTION 223-26 (1994); Vera Ranki, *Holocaust History and the Law*, 9 CARDOZO STUD. L. & LITERATURE 15, 32-35 (1997).

80. One addition to the "conscientious historian" standard might read "(8) she must be aware of the specific time frame of all evidence, and must not support propositions solely with evidence derived from other time periods." Irving, for all his flaws, largely maintained such a sensitivity to chronology. Unfortunately, the same cannot be said for all American judges and lawyers. *E.g.*, *supra* note 75.

attempts to recover overlooked narratives and the historical experience of the less powerful,[81] the "conscientious historian" standard may impede the use of historical evidence for progressive causes. This conservative tendency, however, could and should be counterbalanced by an equally rigorous application of the standard to "traditional" narratives. The "conscientious historian" standard calls for the searching consideration of all the evidence a historian can feasibly consult—not simply all the evidence that supports the dominant narrative. Irving embodies the danger of illegitimately excluding evidence that may conflict with a researcher's hypothesis. By contrast, the "conscientious historian" should embrace complexity, and courts should follow suit.[82]

One might also wonder how easy it would be to apply the "conscientious historian" standard in practice. Penguin's research effort took some four years.[83] While the extent of Irving's collected works (thirty books and numerous articles and speeches) and the difficulty of the sources involved (Nazi documents, for example, deliberately employed euphemism to conceal the extermination program) arguably made the Irving case particularly complex, other cases would doubtlessly pose thorny issues as well. The judge's ability to inquire into these questions is also limited by a dependence on the parties to provide a documentary record.[84] Faced with practical dilemmas on this scale, trial courts may very well revert to pre-*Daubert* practice,[85] and restrict their investigation to the question of the expert's formal qualifications. Indeed, the imperative of inquiry into methodology may prove to be a millstone for the Court's attempted reform in *Daubert* and *Kumho.*

Until the moment of retrenchment arrives, however, the Irving trial's "conscientious historian" standard represents one of the only judicially

81. *See, e.g.*, William E. Forbath, Martha Minow & Hendrik Hartog, *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759. *See generally* Robert W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, *in* THE HISTORIC TURN IN THE HUMAN SCIENCES 339, 350-53 (Terrence J. McDonald ed., 1996) (describing the "bottom up" perspective of radical-populist historians and radical legal historians); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POLITICS 809, 817 (1997) (discussing the influence of "hidden histories").

82. One historian who frequently testified as an expert witness in Indian cases offered an example of how an attentive approach to historical methodology might have led to a more progressive outcome: In Indian cases, courts have frequently expressed a preference for government documents over other sorts of historical evidence, apparently heedless of government agents' tendency to conceal misbehavior in these reports. Tanner, *supra* note 31, at 698-99. Attention to motive, as well as to the range of available evidence, as called for by the "conscientious historian" standard, would enable courts to avoid this pitfall.

83. Dodd, *supra* note 9.

84. *See, e.g.*, PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 131-32 (1997) (noting that "[t]he judge in the courtroom differs from the historian in one fundamental aspect: he is not in charge of the research. The parties decide which materials are presented").

85. *See* Garber, *supra* note 50, at 6.

recognized guidelines for evaluating historical research. While not specifically designed for the purpose of evaluating expert testimony, the "conscientious historian" standard could serve a pedagogical function even if it were rarely employed as a do-it-yourself guide to historical investigation. Encouraging judges to follow historians' own standards would both realize the methodological focus of *Daubert* and prevent ill-conceived exclusion of historical evidence.

—Wendie Ellen Schneider