COMMENT

PAINTING THE PAST AND PAYING FOR IT: THE DEMISE OF *DAUBERT* IN THE CONTEXT OF HISTORIAN EXPERT WITNESSES

INTRODUCTION

> *What is historical objectivity? How do we know when a historian is telling the truth? Aren't all historians, in the end, only giving their own opinions about the past? Don't they just select whatever facts they need to support their own interpretations and leave the rest in the archives? Aren't there, then, many different truths, according to one's political beliefs and personal perspectives? Questions such as these continue to preoccupy historians.*[1]

In 1996, British author and revisionist historian David Irving[2] brought a libel action against American author Deborah Lipstadt and her publisher, Penguin Books, in Britain.[3] The premise of

1. RICHARD J. EVANS, LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL 1 (2001).

2. David Irving enjoyed an early career as a formidable historian; some of his earlier works, such as *Hitler's War*, were praised by leading historians in Britain and the United States, and Irving was lauded for both the thoroughness of his research and elegance of his writing. *See, e.g.*, D.D. GUTTENPLAN, THE HOLOCAUST ON TRIAL 1 (2001); Sarah Lyall, *London Trial Opens Dispute on Rewriting the Holocaust*, N.Y. TIMES, Jan. 12, 2000, at A7. However, in the late 1980s and early 1990s, critics began raising serious questions about his ideology and methodology. Sarah Lyall, *London Trial Opens Dispute on Rewriting the Holocaust*, N.Y. TIMES, Jan. 12, 2000, at A7. This questioning arose, in part, in one of his books, Irving proclaimed that Hitler had not known about the killing of Jews until 1943 and had not approved of such a plan. *See* Ray Moseley, *U.S. Writer Wins Battle with Holocaust Denier*, CHI. TRIB., Apr. 12, 2000, at A1. Furthermore, Irving denied that approximately six million Jews were destroyed systematically in death camps. Editorial, *History in Court*, N.Y. TIMES, Apr. 14, 2000, at A30.

3. Irving v. Penguin Books Ltd., [2000] EWHC (QB) 115 (Eng.); *see* Wendie Ellen Schneider, *Past Imperfect*, 110 YALE L.J. 1531, 1532 (2001). The action was brought in Britain, as opposed to the United States, because of its so-called "plaintiff-friendly" libel laws. With the First Amendment and free speech so heralded, had the action been brought in the United States, in addition to proving that the speech in question was false, Irving would have had to prove that it was published with a reckless disregard for the truth. This often can be difficult to do. Sarah Lyall, *Where Suing for Libel is a National*

Irving's libel action was that Lipstadt, in her book, *Denying the Holocaust: The Growing Assault on Truth and Memory*,[4] deemed Irving a "Holocaust denier."[5] In her defense, Lipstadt asserted that what she had written was entirely true and, as a result, she shouldered the burden of proving that Irving was, in fact, a "Holocaust denier."[6] This required her to prove that certain events related to the Holocaust had actually taken place and that Irving, as a historian, both had manipulated and misrepresented those events in his claims.[7] Thus, Lipstadt and Penguin Books faced a puzzling and expensive task:[8] how does one go about putting on evidence about the existence of the Holocaust to prove that it happened, and thus to prove that Irving was "denying" its existence? But after thousands of pages of expert testimony from four of the world's most prominent historians, Lipstadt's defense proved successful.[9]

While often referred to in the media as "history on trial,"[10]

Specialty; Britain's Plaintiff-Friendly Laws Have Become a Magnet for Litigators, N.Y. TIMES, July 22, 2000, at B7.

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

5. *See* Schneider, *supra* note 3, at 1532. In her book, Lipstadt quoted other scholars who described Irving as "a Hitler partisan wearing blinkers" and claimed he was guilty of distorting evidence and manipulating historical documents for his own purposes. She further stated that Irving was "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." *Id.* For a general overview of the Holocaust Denial movement, as well as defense documents, transcripts, judgments, and appeals from the Irving case, see Emory University, Holocaust Denial on Trial, http://www.hdot.org/trial (last visited Feb. 19, 2009).

6. *See* Lawrence McNamara, *History, Memory and Judgment: Holocaust Denial, The History Wars and Law's Problems with the Past*, 26 SYDNEY L. REV. 353, 369 n.77 (2004) ("In addition to [proving the truth of what Lipstadt had written] there also stood separately the somewhat distinct allegation that Irving was a 'Holocaust denier.'"); *id.* (referencing *Irving*, [2000] EWHC (QB) 115, [8.1]–[8.5]); Schneider, *supra* note 3, at 1532 ("Under the peculiar libel law regime that makes England a libel plantiff's paradise, Irving's action shifted the burden to Lipstadt and Penguin.").

7. McNamara, *supra* note 6, at 368.

8. GUTTENPLAN, *supra* note 2, at 2 ("Penguin Books [spent] . . . over a million pounds on lawyer's fees, and hundreds of thousands more hiring expert witnesses. Steven Spielberg . . . contribute[d] to the cost of bringing Lipstadt to London for the three-month trial, and to the cost of hiring a prominent law firm to represent Lipstadt's personal interest."); Heather Maly, *Publish at Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-guaranteed*, 14 J. L. & POL'Y 883, 900–01 (2006) ("By the time [Lipstadt] succeeded, she had run up a considerably high legal bill.").

9. *See* Schneider, *supra* note 3, at 1532; Jill Jordan Sieder, *Giant Efforts Help Emory Prof Overcome Holocaust Denier*, FULTON COUNTY DAILY REP., May 15, 2000 ("[L]ined up to speak on her behalf was a team of . . . prominent world historians and scientists who had spent the last three years assembling an arsenal of historical and forensic evidence to counter and explode a list of 30 of Irving's most outlandish and offensive historical claims.").

10. *See* Schneider, *supra* note 3, at 1531 ("[P]ress coverage frequently

Justice Gray, instead of focusing his attention on whether the events during the Nazi regime occurred as Irving claimed they had, turned his attention to Irving's methodology and historical conclusions.[11] After thoroughly examining pages of extremely complex and confusing documentation,[12] Justice Gray determined that no fair-minded historian would have drawn the conclusions that Irving reached, or, in other words, that Irving's methods as a historian were inherently unreliable.[13] Thus, the American author and her publisher were cleared.[14]

Interestingly enough, just eight years earlier, Irving walked into a Canadian courtroom, sat down, and testified before a jury as an "expert" on behalf of Ernst Zündel who, at the time, was on trial for allegedly distributing a pamphlet denying the occurrence of the Holocaust, entitled *Did Six Million Really Die?*.[15] As an expert in

referred to the spectacle playing out in England's High Court as 'history on trial.'"); Sarah Lyall, *London Trial Opens Dispute on Rewriting the Holocaust*, N.Y. TIMES, Jan. 12, 2000, at A7 ("It is a case about free speech and historical methods, and about, peripherally, the magnitude and circumstances of the Holocaust."); Ray Moseley, *Who's on Trial? Holocaust Libel Case Draws to Close*, CHI. TRIB., Mar. 11, 2000, at 2 ("In a broader sense, the trial is widely seen as a showdown between the defenders of historical truth and the small body of extremists in the United States and Europe who say the Holocaust is a Jewish invention.").

11. *See* McNamara, *supra* note 6, at 369 ("Justice Gray tried to avoid [proving the truth of the Holocaust]: '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.'"); Moseley, *supra* note 2, at A1 ("Gray said it was not his function to find what actually happened during the Nazi regime but rather to judge Irving's treatment of available evidence.").

12. *See* Anthony Julius, *London and Libel*, EXPERIENCE, Fall 2000 ("The judge took the trouble to master the complex documents and other trial material, and this is reflected in his judgment."). Anthony Julius, of the London firm, Mishcon de Reya, led Lipstadt's legal team. *Id.*

13. *See* Schneider, *supra* note 3, at 1534. In a scathing 333 page ruling, notable for its stern wording, Justice Gray stated: "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." *Id.* (quoting Irving v. Penguin Books Ltd., [2000] EWHC (QB) 115, [13.140] (Eng.)). He also declared that "Mr. Irving was a racist Holocaust denier who deliberately distorted historical evidence in order to cast Hitler in a favorable light." Sarah Lyall, *Critic of Holocaust Denier is Cleared in British Libel Suit*, N.Y. TIMES, Apr. 12, 2000, at A5.

14. Irving also lost on appeal. Tom Zeller, *Ideas & Trends; Hitler at Home on the Internet*, N.Y. TIMES, Sept. 21, 2003, at D12 ("David Irving . . . lost his appeal in a libel case against an American academic who labeled him a Holocaust denier."); *see* Warren Hoge, *World Briefing Europe: Britain: Holocaust Denier's Appeal Fails*, N.Y. TIMES, July 21, 2001, at A4.

15. *See* ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY 1 (2004); Deborah Lipstadt, Irving v. Penguin UK *and Deborah Lipstadt: Building a Defense Strategy, An Essay*, 27 NOVA L. REV. 243, 243 (2002). In 1988, the Canadian government charged Ernst Zündel , a German émigré, with promoting Holocaust Denial. The law under which Zündel was charged was subsequently deemed unconstitutional by the Canadian Supreme Court, but a

this trial, Irving repeated his belief that "until October 1943 Hitler knew nothing about the actual implementation of the Final Solution."[16] After reading the above discussion, it probably seems quite perplexing that *any* judge would permit this man to testify as an "expert" in *any* courtroom.[17] And anyone familiar with the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* opinion likewise sees myriad contradictions—after all, not only had Irving's methodology been the subject of much criticism among his own colleagues, but a judge outright *declared* his historical methodology unreliable, albeit several years later.[18]

At first glance, one might conclude that a U.S. judge would never permit such a contradiction to take place in a federal courtroom, but, unfortunately, this scenario is not as farfetched as it seems. Part I of this Comment introduces the development and current state of evidentiary standards in American jurisprudence concerning expert testimony in federal courts. Part II addresses two unique situations in which federal district court judges have permitted certain historians to testify as experts over objections made by the litigants. After examining those cases, Part III discusses the intended role of district court judges in deciding whether to admit expert testimony, as mandated by the Supreme Court in *Daubert*.[19] This discussion will illustrate the apparent failure of certain district court judges to abide by *Daubert*'s mandate and then will highlight the possible implications of that failure. Finally, Part IV of this Comment sets forth a proposal for ensuring that district court judges comply with *Daubert*'s mandate.

guilty verdict was returned at trial, and Zündel was sentenced to fifteen months imprisonment. *See* GUTTENPLAN, *supra* note 2, at 52–55; KAHN, *supra* note 15, at 1. For David Irving's testimony at this trial, see David Irving's Testimony, 1988 Testimony, R. v. Zündel, [1992] S.C.R. 731 (Can.) [hereinafter Irving's Testimony].

16. *See* Irving's Testimony, *supra* note 15. At Zündel 's trial, Irving also stated: "I don't think there was any overall *Reich* policy to kill the Jews. If there was, they would have been killed and there would not be now so many millions of survivors." INST. FOR HISTORICAL REVIEW, THE 'FALSE NEWS' TRIALOF ERNST ZÜNDEL —1988, *available at* http:www.ihr.org/books/kulaszka /35irving.html.

17. This observation did not go unnoticed in Canada. "From a strictly legal perspective, Judge Locke looked like an obvious candidate for blame. To begin with, he allowed the testimony that critics of the *Zündel* case found so offensive." KAHN, *supra* note 15, at 8.

18. Schneider, *supra* note 3, at 1534.

19. 509 U.S. 579 (1993).

I. BACKGROUND: THE RELEVANT STANDARDS FOR EXPERT TESTIMONY IN FEDERAL COURTS AND THE INTRODUCTION OF "GATEKEEPING"

> *"Faced with a proffer of expert . . . testimony [,] . . . the trial judge must determine at the outset . . . whether the reasoning or methodology underlying the testimony is . . . valid."*[20]

A. The Frye *Decision: General Acceptance as the Standard*

In 1923, in *Frye v. United States*,[21] the Court of Appeals for the District of Columbia was confronted with the issue of whether evidence obtained from a systolic blood pressure deception test[22] (a crude precursor to the polygraph machine)[23] should be admissible.[24] At trial, counsel for defendant had offered as an expert witness the scientist responsible for administering the test to the defendant, who was to testify about the results obtained.[25] The government's counsel objected to the offer of this evidence, and the court sustained the objection.[26] The Court of Appeals for the District of Columbia disposed of the issue in a single paragraph, stating:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs.[27]

And because this systolic blood pressure deception test, being novel at the time, had not yet gained acceptance among scientific and physiological authorities, the court could not justify its

20. *Id.* at 592–93.
21. 293 F. 1013 (D.C. Cir. 1923).
22. Scientific experiments revealed that pain, rage, and fear always produce a rise of systolic blood pressure. This conscious deception or falsehood, guilt of a crime, or concealment of facts, coupled with fear of detection when the person is under examination, raises the systolic blood pressure. This then directly corresponds to the struggle taking place in the subject's mind, between fear and attempted control of that fear, as the examination touches the vital points of which he is attempting to deceive the examiner. *Id.* at 1013–14. The theory, in other words, was that the utterance of a falsehood is reflected in the blood pressure. *Id.*
23. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 585 (1993).
24. *Frye*, 293 F. at 1013.
25. *Id.* at 1013–14.
26. *Id.* at 1014.
27. *Id.* (emphasis added).

admission.[28] The test set forth by the court became known as the "general acceptance" test and, thereafter, became the dominant standard governing the admissibility of expert scientific testimony at trial for the next seventy years.[29]

B. The Daubert *Decision: The Declaration of Gatekeeping*

In 1975, however, Congress enacted the Federal Rules of Evidence into law;[30] one of those rules specifically called into question the continuing use of *Frye*'s judicially created "general acceptance" test.[31] So, in 1993, the Supreme Court decided to take a look at the old test and resolve the apparent confusion.[32] In an opinion authored by Justice Blackmun, the Supreme Court held that the Federal Rules of Evidence superseded the *Frye* test, thereby making the "general acceptance" question only one factor in the determination of whether expert scientific testimony is admissible.[33]

The Court opened its opinion by stating: "In this case we are called upon to determine the standard for admitting expert scientific testimony in a federal trial."[34] The petitioners in the case, parents

28. *Id.*

29. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 585 (1993).

30. In 1965, Chief Justice Warren appointed an advisory committee for the purpose of drafting evidentiary rules for the federal courts. Their preliminary draft was published and released for comment in 1969, 46 F.R.D. 161, 173 (1969), and a revised draft circulated in 1971. 51 F.R.D. 315, 316 (1971). Then, in 1972, the Supreme Court prescribed the Federal Rules of Evidence to be effective July 1, 1973. 56 F.R.D. 183, 184 (1973). But Justice Douglas dissented, so Chief Justice Burger, pursuant to the various enabling acts, transmitted the rules to Congress, which suspended the rules pending further study by Congress. *Id.* at 185–86; Rules of Evidence, Civil Procedure and Criminal Procedure—Approval by Congress, Pub. L. No. 93-12, 1973 U.S.C.C.A.N. (87 Stat. 9) 11, 11. After much study, Congress enacted the rules into law to become effective July 1, 1975. Rules of Evidence, Pub. L. No. 93-595, 1974 U.S.C.C.A.N. (88 Stat. 1926) 2215, 2215.

31. *Daubert*, 509 U.S. at 588. At the time of *Daubert*, both courts and commentators were divided on the issue of whether the *Frye* test was superceded by the adoption of the Federal Rules of Evidence. *Compare* Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1228–29 (1980), *with* 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 703.2 (3d ed. 1991).

32. *Daubert*, 509 U.S. at 587–89. For an illustration of the divisions existing among lower courts regarding the proper standard for the admission of expert testimony at the time the Court decided *Daubert*, compare United States v. Shorter, 809 F.2d 54, 59–60 (D.C. Cir. 1987) (adopting "general acceptance" as the relevant test to determine admissibility), with DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941, 955 (3d Cir. 1990) (noting rejection of "general acceptance" as the test to determine admissibility in the Third Circuit).

33. *See Daubert*, 509 U.S. at 589–94. "Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community.'" *Id.* at 594 (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)).

34. *Id.* at 582.

and their minor children born with birth defects, brought suit against Merrell Dow. They alleged that the childrens' birth defects had been caused by their mothers' ingestion of Bendectin, a prescription drug that Merrell Dow had marketed.[35]

In support of its motion for summary judgment, Merrell Dow offered an affidavit prepared by an expert in the field showing "risks from exposure to various chemical substances."[36] The affidavit stated that, after reviewing more than thirty published studies, the expert was unable to find one study revealing that Bendectin could cause deformities in fetuses.[37] In response, petitioners presented testimony of eight experts who concluded that Bendectin could cause birth defects.[38] These eight experts based their conclusions on pharmacological studies of the chemical structure of Bendectin, the reanalysis of previously published human statistical studies, and both test tube and live animal studies, all of which revealed a link between Bendectin and deformities.[39]

The district court, uncertain of how to apply the Rules of Evidence, simply adhered to the old *Frye* test[40] and granted Merrell Dow's motion for summary judgment, finding that the testimony of the petitioners' expert did not meet the requisite "general acceptance" standard.[41] The Ninth Circuit agreed, stating that expert testimony based on a methodology that diverges "significantly from the procedures accepted by recognized authorities in the field . . . cannot be shown to be 'generally accepted

35. *Id.*

36. *Id.* The expert offered by Merrell Dow was Steven H. Lamm, a physician and epidemiologist. *Id.* He received both his master's degree and doctor of medicine from the University of Southern California. At the time of the testimony, he had served as a consultant for the National Center for Health Statistics in birth-defect epidemiology. He also had published many articles concerning the size of risk from exposure to various biological and chemical substances. *Id.* at 582 n.1.

37. *Id.* at 582.

38. *Id.* at 583. The eight experts offered by the plaintiffs also had impressive credentials. One of them obtained his bachelor's degree in chemistry from the University of Chicago, was a professor at New York Medical College, and had spent over a decade studying the effect of chemicals on limb development. Another had received a master's degree in biostatistics from Columbia University and a doctorate from the University of California at Berkley. She had served as a consultant to the World Health Organization, the National Institutes of Health, and the Food and Drug Administration. She was also the chief of the section of the California Department of Health and Services that determine causes of birth defects. *Id.* at 583 n.2.

39. *Id.* at 583.

40. Daubert v. Merrell Dow Pharm., Inc., 727 F. Supp. 570, 572, 575–76 (S.D. Cal. 1989), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *rev'd*, 509 U.S. 579 (1993). "A necessary predicate to the admission of scientific evidence is that the principle upon which it is based 'must be sufficiently established to have general acceptance in the field to which it belongs.'" *Id.* at 572 (quoting United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978)).

41. *Id.* at 575–76.

as a reliable technique.'"[42]

The Supreme Court, however, was displeased with this result. Neither of the lower courts had engaged in a substantial discussion of the Federal Rules of Evidence. And, furthermore, "there [was] a specific Rule that spoke to the contested issue."[43] Rule 702, which governs expert testimony, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[44]

In noting that the drafting history of Rule 702 made no mention of *Frye* and nothing in the text of the Rule established "general acceptance" as an absolute prerequisite to admissibility, it was easy for the Court to conclude that "[the] austere [*Frye*] standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials."[45]

But just because the Federal Rules of Evidence displaced the *Frye* test, trial judges were not prevented from screening purportedly scientific evidence.[46] In fact, to the contrary, the Court actually stated that trial judges have an affirmative, gatekeeping responsibility to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but *reliable*."[47]

This brings another Rule of Evidence into play: Rule 104.[48] That Rule provides, in pertinent part: "Preliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court."[49] Thus, this Rule requires that, when faced with a proffer of expert scientific testimony, the trial judge must assess, *at the outset*, whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can be properly applied to the facts at issue.[50] To

42. Daubert v. Merrell Dow Pharm., Inc., 951 F.2d 1128, 1130 (9th Cir. 1991), *rev'd*, 509 U.S. 579 (1993) (quoting United States v. Solomon, 753 F.2d 1522, 1526 (9th Cir. 1985)). The court went on to say: "Plaintiffs' reanalyses do not comply with this standard; they were unpublished, not subjected to the normal peer review process, and generally solely for use in litigation." *Id.* at 1131.

43. *Daubert*, 509 U.S. at 588.

44. FED. R. EVID. 702.

45. *Daubert*, 509 U.S. at 588–89. The Court also discussed the fact that the "general acceptance" requirement was out of step with the "liberal thrust" of the Federal Rules of Evidence. *Id.* at 588.

46. *Id.* at 589.

47. *Id.* (emphasis added). The phrase "gatekeeping" came from one of the footnotes in the case which states: "The Chief Justice 'do[es] not doubt that Rule 702 confides to the judge some gatekeeping responsibility,' . . . but would neither say how it does so nor explain what that role entails. We believe the better course is to note the nature and source of the duty." *Id.* at 589 n.7.

48. *Id.* at 592.

49. FED. R. EVID. 104(a).

50. *Daubert*, 509 U.S. at 592–93.

reiterate, this assessment is to be conducted "at the outset."[51]

The Court, however, did not stop with this mandate. It offered some guidance to trial judges faced with this determination by enumerating a number of factors for consideration, none of which, standing alone, were to be determinative on the issue.[52] Those factors included whether the theory or technique can and has been tested, whether the theory or technique has been subjected to peer review and publication, the known or potential rate of error in the case of a particular scientific technique, the maintenance of standards controlling the technique's operation, and, finally, the old "general acceptance within the community" test.[53] The Court stressed that the inquiry was to be a flexible one and that the focus must be solely on principles of *methodology*, not on the conclusions these principles yield.[54] "We are confident that federal judges possess the capacity to undertake this review."[55]

Additionally, the Court noted Merrell Dow's concern that abandoning the "general acceptance" test would create a "'free-for-all' in which befuddled juries [would be] confounded by absurd and irrational pseudoscientific assertions."[56] And the Court addressed this concern by highlighting the strength of the adversarial system:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence . . . . These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.[57]

But, in a footnote, the Court limited its discussion to evidence of a *scientific* nature, since that was the nature of the expertise presently offered.[58] And Chief Justice Rehnquist, foreseeing potential problems in the future with this limitation, stated: "[C]ountless more questions will surely arise when hundreds of district court judges try to apply [*Daubert's*] teaching to particular offers of expert testimony. Does all of this *dicta* apply to . . . other

51. *Id.* at 592.

52. *See id.* at 593–94. The Court made clear that many factors would bear on this inquiry, so that the Court's suggested guidance was not intended to be a "definitive checklist." *Id.* at 593.

53. *Id.* at 593–94. "Widespread acceptance can be an important factor in ruling particular evidence admissible, and a 'known technique which has been able to attract only minimal support within the community' . . . may be properly viewed with skepticism." *Id.* at 594 (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)).

54. *Id.* at 594–95.

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

56. *Id.* at 595–96.

57. *Id.* at 596.

58. *Id.* at 590 n.8.

types of expert knowledge . . . ?"[59]

C. The Kumho *Decision: The* Daubert *Factors Apply to All Experts*

In 1998, the Supreme Court answered the question Chief Justice Rehnquist posed; the Court granted certiorari for *Kumho Tire Co. v. Carmichael*,[60] a case coming out of the Eleventh Circuit. In *Kumho*, the Court—still confident in trial judges' ability to exclude experts who might prove unreliable—declared that the "gatekeeping" function enunciated in *Daubert* applied to *all* expert testimony, not just to that which is scientific in nature.[61]

The plaintiffs in the case brought suit against a tire manufacturer after the rear tire of a minivan driven by one of the plaintiffs blew out, causing an accident.[62] The plaintiffs primarily relied on testimony offered by Dennis Carlson, an expert in tire-failure analysis.[63] Carlson concluded that a defect in the tire's manufacture or design was the cause of the blow out.[64] The defendants, the tire-maker and tire distributor, moved the district court to exclude Carlson's testimony on the ground that his methodology failed Rule 702's reliability requirement.[65]

The district court agreed with the defendant that, even though Carlson's testimony was "technical" and not "scientific," the court still had a responsibility to act as a reliability "gatekeeper" under *Daubert*.[66] So, the district court used the guidance offered by the Supreme Court and, after finding that all of the *Daubert* factors[67] argued against the reliability of Carlson's methods, granted the defendant's motion.[68] However, the Eleventh Circuit disagreed. It noted that, when the Supreme Court decided *Daubert*, it specifically limited its holding to testimony that was *scientific* in nature.[69] The Court of Appeals held that, because Carlson's testimony was

59. *Id.* at 600 (Rehnquist, C.J., concurring in part and dissenting in part).
60. 526 U.S. 137 (1999).
61. *Id.* at 141.
62. *Id.* at 142.
63. *Id.* At the time, Carlson held a bachelor's and a master's degree in mechanical engineering from the Georgia Institute of Technology. From 1977 to 1987, he worked for Michelin Americas Research & Development as a research engineer, where he was involved in tire testing for the majority of his tenure. Following that, Carlson became a senior project engineer at S.E.A., Inc., where he served as a tire failure consultant from 1987 to 1994. Carmichael v. Samyang Tire, Inc., 131 F.3d 1433, 1434 n.2 (11th Cir. 1997).
64. *Kumho*, 526 U.S. at 143.
65. *Id.* at 145.
66. *Id.*
67. The factors the district court examined were: the theory's testability, whether it had been a subject of peer review or publication, the known or potential rate of error, and the degree of acceptance within the relevant scientific community. *Carmichael*, 923 F. Supp. at 1520–21.
68. *Kumho,* 526 U.S. at 145.
69. *Id*. at 146 (emphasis added).

experience-based rather than scientific, it clearly fell outside *Daubert*'s ambit, and thus the district court erred in applying the *Daubert* factors to the case.[70]

Upon writ of certiorari, the Supreme Court first noted that the language of Rule 702 makes no distinction among "scientific," "technical," or "other specialized" knowledge.[71] Rule 702 is "clear that *any* such knowledge might become the subject of expert testimony."[72] The Court also revealed a practical concern, noting that, "it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge."[73] Therefore, the Court concluded that *Daubert*'s general gatekeeping function applies to *all* matters—not just scientific matters—described in Rule 702.[74]

In looking at the facts of *Kumho*, the Supreme Court concluded that the lower court acted reasonably in excluding Carlson's testimony.[75] The Court examined the transcript and agreed that the methodology Carlson employed in drawing his conclusion was unreliable and fell outside the range in which experts might reasonably differ. Because Carlson's testimony failed to satisfy the *Daubert* factors or other reasonable-reliability criteria, the trial court did not abuse its discretion in excluding the testimony.[76]

II. HISTORIANS EMERGE IN THE COURTROOM: THE *DAUBERT* ANALYSIS SUDDENLY DISAPPEARS

> *I join the opinion of the Court, which makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function. I think it worth adding that it is not discretion to perform the function inadequately. Rather, it is discretion to choose among reasonable means of excluding expertise that is* fausse *and science that is junky. Though, as the Court makes clear today, the Daubert factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.*[77]

No one disputes the importance of the role a historian can play in a trial when serving as an expert witness. This is because

70. *Id.*
71. *Id.* at 147.
72. *Id.* (emphasis added).
73. *Id.* at 148.
74. *Id.* at 149. (emphasis added).
75. *Id.* at 153.
76. *Id.* at 158.
77. *Kumho*, 526 U.S. at 158–59 (Scalia, O'Connor, & Thomas, JJ., concurring).

historians have proven necessary in the courtroom in many different types of cases, including those involving American Indian rights, land claims, deportation of alleged Holocaust perpetrators, voting rights, gender discrimination, and gay rights.[78] But, in many cases in which one party attempts to use a historian as an expert, the opposing party makes an unsuccessful motion to have that expert excluded under the *Daubert* standard, alleging that the historian's testimony is not, or will not be, reliable.[79]

The following two sections provide illustrations of such unsuccessful motions. While, again, these cases come in a variety of colors and flavors,[80] the following sections examine only two: a dispute over aboriginal title and a labor union dispute. The common denominator between these cases is that trial judges—allegedly wearing their "gatekeeping hats"—have concluded that the particular historian's testimony *was* sufficiently reliable for admission without an extensive analysis highlighting the reasons for such findings. The following discussion will thus reveal that when district court judges, sitting in federal courtrooms, are confronted with a proposed historian to serve as an expert, these judges seem to disregard or breeze over the methodological aspect of the *Daubert* standard. This discussion is in no way attempting to show or claim that any of the historians who testified in these cases were not qualified, but rather that the trial judges either did not properly examine the methodology employed by each, as *Daubert* so boldly mandated, or did, but failed to record their findings.

A. Aboriginal Title Dispute

In *New York v. Shinnecock Indian Nation*,[81] the United States District Court for the Eastern District of New York was confronted with the issue, inter alia,[82] of determining whether aboriginal title to

78. Schneider, *supra* note 3, at 1536. Historians also have served as experts in cases brought against cigarette manufacturers. The theories under which those cases are brought usually are based on a variety of tort and other common law theories, including failure to warn and defective design. The historian is necessary either to prove or disprove that there was common knowledge throughout the twentieth century that cigarette smoking could cause serious life-shortening diseases. *See, e.g.*, Alvarez v. R.J. Reynolds Tobacco Co., 405 F.3d 36, 39 (1st Cir. 2005) ("Both parties sought to establish their position on common knowledge through expert evidence.").

79. *See, e.g.*, United States v. Blaine County, Montana, 363 F.3d 897, 915 (9th Cir. 2004); United States v. Newmont USA Ltd., No. CV-05-020-JLQ, 2007 U.S. Dist. LEXIS 96264 (E.D. Wash. Nov. 16, 2007) (motion to exclude the testimony of a historian denied) (noting that the district court failed to determine the reliability portions of the expert's testimony, but deeming error "harmless").

80. *See supra* note 78 and accompanying text.

81. 523 F. Supp. 2d 185 (E.D.N.Y. 2007), *aff'd*, 560 F. Supp. 2d 186 (E.D.N.Y. 2008) (upholding injunction but limiting its scope).

82. The other two issues in the case were: (1) whether, even if aboriginal

certain land had been extinguished in the seventeenth century.[83] In support of their propositions, both parties offered expert testimony from historians pertaining to historical facts and circumstances regarding the issue of extinguishment.[84] This use of expert testimony then prompted both parties to make a series of *Daubert*-like motions and objections to the opposing party's use of the historian's expert testimony.[85]

In the opinion, the district court judge began by recognizing, correctly, that *Daubert* imposed a gatekeeping function upon district courts to ensure that testimony not only is relevant, but also *reliable*.[86] And, under Rule 702, the district court must make several determinations before allowing an expert to testify, one of which is that the opinion must be based upon reliable data and methodology.[87] However, before a court considers the issue of methodology, it first must ensure that the expert is qualified. Otherwise, an "analysis of the remaining *Daubert* factors 'seems almost superfluous.'"[88]

Thus, in *Shinnecock Indian Nation*, the district court judge addressed the qualifications of the historians first. He stated that all of the experts possessed sufficient qualifications to testify about certain colonial-era documents at issue and to provide historical context for those documents.[89] He noted that the experts had earned various degrees, authored various theses, taken courses in title searching, conducted research, published works, given presentations on related issues, acquired years of experience as private ethnohistorical consultants on related matters, and previously qualified as experts in lawsuits.[90]

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title had not been extinguished, the Shinnecock Indian Nation was barred from asserting sovereignty at Westwoods, a parcel of nonreservation property; and (2) whether there was any legal basis to allow gambling at Westwoods in non-compliance with New York's anti-gaming laws if the proposed casino development was not within the parameters of federal law as set forth in the Indian Gaming Regulatory Act. *Id.* at 188.

83. *Id.* at 187–88. The dispute arose when New York State, state agencies, and a town sued Shinnecock, an Indian nation, and its tribal officials to enjoin them from constructing a casino and conducting certain gaming on a parcel of nonreservation property.

84. *Id.* at 259–61.

85. *Id.* at 258.

86. *Id.* (emphasis added).

87. *Id*. The other determinations that must be made are whether the witness is qualified to be an expert and whether the expert's testimony on a particular issue will assist the trier of fact. *Id.* at 258–59 (quoting Nimely v. City of New York, 414 F.3d 381, 396–97 (2d Cir. 2005)).

88. *Id.* at 259 (quoting Zaremba v. Gen. Motors Corp., 360 F.3d 355, 360 (2d Cir. 2004)).

89. *Id.* at 260.

90. *Id.* at 260–61. These qualifications are a combination of James P. Lynch and Alexander von Gernet, both witnesses for the plaintiff.

The district court judge next turned his focus to the historians' methodology.[91] However, this focus was rather brief. According to the judge, the experts had considered and analyzed the pertinent historical documents, which included patents, deeds, confirmations, and other colonial-era documents.[92] One of the experts, James Lynch, had spent a great deal of time researching and compiling the historical record that was outlined in his report.[93] Then, without any elaboration, the district court judge stated that the "other experts . . . utilized a similar methodology" and, "[b]ased upon a review of the methodologies, the Court found that the experts' testimony was sufficiently reliable."[94] Any "weaknesses complained of by the parties regarding methodology were the proper subject of cross-examination and went to the weight of these witnesses' testimony, not its admissibility."[95]

The judge then made reference to the oft-quoted *Daubert* statement in an attempt to justify his decision: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[96]

B. Labor Union Dispute

In *Baker v. Buffenbarger*,[97] the district court judge faced the same determination as in *Shinnecock*: should a particular historian be excluded from serving as an expert witness? And, again, the judge answered in the negative.[98] The facts of *Baker* are as follows.

The defendant, the president of an international labor organization, International Association of Machinists ("IAM"), raised the idea of trying to engage in "coordinated bargaining" with UPS to various local unions representing UPS employees.[99] This agreement would have resulted in the various local unions that represent the employees of a single employer joining forces to bargain toward a single, national contract covering all IAM-represented employees in the country.

After IAM and UPS signed a tentative agreement, the plaintiffs, business representatives for Local 701, attempted to renegotiate

91. *Id.* at 261.
92. *Id.* at 261–62.
93. *Id.* at 262.
94. *Id.*
95. *Id.*
96. *Id.* (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993)).
97. No. 03-C-5443, 2006 U.S. Dist. LEXIS 2911, at *1 (N.D. Ill. Jan. 13, 2006).
98. *Id.* at *20–21.
99. *Id.* at *4.

certain aspects of the agreement with UPS.[100] However, IAM called a halt to those negotiations, and the contract ultimately took effect. The president-defendant then placed Local 701 under trusteeship.[101] One plaintiff was suspended with pay but without any written documentation specifying the reasons for the suspension. In opposition to the trusteeship, plaintiffs spoke out against it, held meetings, and distributed fliers.[102] Based upon this conduct, the trustee filed charges against the plaintiffs, who were found guilty and suspended from the union for five years.[103] The plaintiffs then brought an action against IAM and the president seeking a preliminary injunction against the trusteeship to prevent defendants from interfering with their rights to vote, to engage in free speech, and to be free from improper discipline.[104]

So, why the need for a historian? The defendants retained Dr. Ray Marshall, a labor historian who served under President Reagan as the Secretary of Labor[105] to provide expert testimony on two issues: (1) the implications of coordinated bargaining if locals were permitted to withdraw from the coordinated process and negotiate separate contracts on all issues; and (2) whether, in this case, the internal processes leading up to the trusteeship and the conviction of the plaintiffs on insubordination charges were properly conducted.[106] The plaintiffs filed a motion to exclude Dr. Marshall's testimony arguing, inter alia, that his opinions were unreliable because they were derived without any accepted methodology and were based upon an incomplete and skewed version of the evidence.[107]

The district court judge correctly recognized that Rule 702 governs the admissibility of expert testimony in federal courts and that, under *Daubert* and *Kumho*, he was to act as a "gatekeeper" by looking to a variety factors intended to gauge the reliability and relevancy of the evidence.[108] So, the district court judge, heeding this mandate, put on his "gatekeeping hat." In focusing his

100. *Id.* at *5.

101. *Id.*

102. *Id.* at *6. Two of the plaintiffs organized what became known as "the Committee to Defend Local 701." The committee held a meeting with the purpose to criticize the trusteeship and to encourage the members to picket the union hall before the next meeting. *Id.*

103. *Id.* The charges brought by the trustee were presented at IAM's convention where the delegates in attendance found one of the plaintiffs guilty on all charges and another guilty on only some of the charges. *Id.* The district court's opinion does not go into any of the details or specifics of those charges.

104. *Id.* at *6–7.

105. *Id.* at *8.

106. *Id.* at *10.

107. *Id.* at *8, *12. The plaintiffs also alleged that Dr. Marshall's opinions were unreliable because they conflicted with what he said at his deposition. *Id.* at *12.

108. *Id.* at *8–9.

attention on Dr. Marshall's methodology, he stated: "[I]t is true that Dr. Marshall did not apply any sort of standardized or generally accepted test or method in arriving at the conclusions he reached. Indeed . . . he testified that . . . he . . . did not rely on any kind of methodology or testing procedure."[109]

However, according to the district court judge, Dr. Marshall had extensive experience, and "experience alone may be enough."[110] The judge based this statement on particular language from the advisory committee's notes to Rule 702, stating that "[n]othing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony."[111] But, he went on to state that "the Court cannot simply 'take the expert's word for it,'" and that, if the expert wanted to rely solely on experience, he or she must explain "*how* that experience leads to the conclusion reached, why the experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."[112]

After these statements, the judge devoted an entire paragraph to Dr. Marshall's experience[113] in the labor field, but conceded that the defendants did not address *how* Dr. Marshall employed this experience in order to answer the various questions presented.[114] Turning to Dr. Marshall's deposition testimony, the judge noted that Marshall had listed a number of reasons why he was qualified to give opinions, including research and writing he had done, that he had been a close observer of collective bargaining and union growth for the past fifty years, and that he had been a mediator and arbitrator.[115] In effect, the judge repeated Marshall's qualifications, albeit in Marshall's own words this time.

Still, leaving the question of *how* Dr. Marshall's experience led him to reach his conclusions, the judge next turned to the plaintiff's contention that Dr. Marshall's opinions were unreliable because they were based upon an incomplete account of evidence, specifically a version that was skewed in favor of the defendants. Plaintiffs

109. *Id.* at *12–13.

110. *Id.* at *13.

111. FED. R. EVID. 702 advisory committee's note.

112. *Baker*, 2006 U.S. Dist. LEXIS 2911, at *13 (emphasis added) (quoting FED. R. EVID. 702 advisory committee's note).

113. *Id.* at *14. Dr. Marshall was then serving as the Bernard Centennial Chair in Economics and Public Affairs at the University of Texas at Austin, was the former Secretary of Labor, was one of the leading figures in labor studies, and was a scholar involved in various aspects of labor and economic policy including coordinated bargaining and internal union governance. *Id.*

114. *Id.* "Although the defendants did not specifically address the question of how Dr. Marshall employed his experience and expertise to answer the questions posed, using the evidence they provided to him, Dr. Marshall's deposition testimony does shed some light on the subject." *Id.*

115. *Id.* at *14–15.

claimed that Dr. Marshall formed his opinions after having only reviewed the documents provided to him by the defendants.[116] The court also conceded:

> Certainly, there is some truth to this. At his deposition, Dr. Marshall admitted that, in reaching the conclusions he reached, he looked exclusively at the materials [the defendants] had provided to him; and he admitted that, to get a complete understanding of the issues and the case, it would have been helpful for him to "interview people and cross-examine and get information from other sources."[117]

But, according to the district court, the fact that Dr. Marshall's opinions might have stood on shaky ground was not reason enough to exclude them.[118] The judge referenced the *Daubert* opinion, noting that, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[119] Also, the court indicated that Dr. Marshall's experience in the labor field far exceeded that of both the court and the jury, and, therefore, held that Dr. Marshall should be allowed to testify.[120]

III. THE PROBLEMS WITH DISTRICT COURT JUDGES' TREATMENT OF HISTORIAN EXPERTS AND WHY IT MATTERS

> *Conjectures that are probably wrong are of little use . . . in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past.*[121] *Is it appropriate to use expert opinion to establish any and all historical facts?*[122]

After *Daubert*, lawyers, judges, and commentators tend to blurt out the word "gatekeeper" any time a litigant seeks to introduce expert testimony in a federal court.[123] What that word might mean to any one of those individuals, however, likely largely depends upon

116. *Id.* at *15.
117. *Id.* at *15–16.
118. *Id.* at *16.
119. *Id.* (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)).
120. *Id.* at *17. However, the court forbade Dr. Marshall from testifying about whether the steps IAM took concerning Elam and Baker were consistent with or appropriate under IAM's constitution, as these were questions for the factfinder. *Id.* at *18. Additionally, Dr. Marshall was forbidden from testifying on the issue of whether the IAM's decision to file charges against the plaintiffs and its decision to suspend the plaintiffs were motivated by their speech against the trusteeship. *Id.*
121. *Daubert*, 509 U.S. at 597.
122. Kalejs v. INS, 10 F.3d 441, 457 (7th Cir. 1993) (Eisele, J, dissenting).
123. *See* William G. Childs, *The Overlapping Magisteria of Law and Science: When Litigation and Science Collide*, 85 NEB. L. REV. 643, 649 (2007).

the type of expert who is standing at the gate. If it is a historian, as illustrated by the cases discussed above, chances are strong that the word "gatekeeper" might not have much meaning. This can be explained either by the apparent reluctance on the part of district court judges to conduct full and thorough examinations into the proposed historian's methodology, or at least by their failure to include this examination in their court opinions. Either way, district court judges are failing to comport with *Daubert*'s "gatekeeping" mandate.

A. The Intended Focus: Reliable Methodology

Daubert stressed the need to focus more precisely on the expert's methodology rather than the acceptance of the expert's general field of work.[124] Under *Daubert*, the appropriate mechanism for this task is Rule 104(a), which requires that trial judges, at the outset, conduct a preliminary assessment of whether the methodology underlying the testimony is scientifically valid and whether that methodology properly can be applied both to the facts at issue[125] and to Rule 702, discussed above.[126]

In an attempt to give some guidance to district court judges, the Court enunciated factors, but steered clear of setting out any type of test or checklist.[127] The "guidance" factors included whether a theory or technique can be and has been tested; whether the theory or technique has been subjected to peer review and publication; whether, with respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique has been generally accepted in its relevant field. After listing the factors, the Court insisted that, while the inquiry was intended to be a flexible one, the focus "must be solely on principles and methodology."[128]

In *Kumho*, the Court ruled that the "guidance" factors identified in *Daubert* also apply to the testimony of experts outside the scientific arena. The *Kumho* Court reiterated that these factors were not to be regarded as checklists or tests,[129] and in keeping pace with *Daubert*'s strong emphasis on methodology, the *Kumho* Court held that the trial court did not abuse its discretion in determining that the particular expert testimony at issue should be excluded due

124. *Id*. at 650.
125. *Daubert*, 509 U.S. at 592–93.
126. *See supra* note 47 and accompanying text.
127. *Daubert*, 509 U.S. at 593.
128. *Id*. at 595.
129. Jeffrey M. Schumm, *Precious Little Guidance to the "Gatekeepers" Regarding Admissibility of Nonscientific Evidence: An Analysis of* Kumho Tire Co. v. Carmichael, 27 FLA. ST. U. L. REV. 865, 865–66 (2000) (discussing the dangers of lumping all experts together under the *Daubert* regime).

to its faulty methodology.[130] The trial court noted the expert's qualifications, but despite those qualifications, the methodology simply was too unreliable to place the testimony before a jury.[131]

B. The Disregard or Lack of Documentation for Methodology in the Context of Historian Experts

After *Daubert* and *Kumho*, it should be clear that district court judges, sitting in federal courtrooms, need to thoroughly analyze the methodology employed by proffered experts in order to adequately fulfill their gatekeeping role. The Supreme Court was clear on this issue—not once, but twice. The *Daubert* Court was "confident that federal judges possess the capacity to undertake this review."[132] Perhaps, though, if the *Daubert* Court realized what was actually taking place today in district courts across the country, its confidence would be somewhat shaken.

As mentioned above, it is a rare occasion for a district court judge to exclude a historian from testifying in federal court.[133] This fact, however, is not the problem. It could very well be that every historian ever summoned to testify in federal court will provide conclusions that are both relevant and reliable. Assuming this to be true only for a moment, federal judges still must undertake a thorough examination of that historian's methodology, as applied to the facts of the case, to find out for themselves. Again, back to *Daubert*—"the focus, of course, must be solely on principles and methodology, *not on the conclusions* that they generate."[134]

Because district court judges recognize that they must perform some sort of gatekeeping function, the pattern has been that judges will make an announcement that they are "gatekeeping," but instead of actually digging into the methodology employed by the proffered historian, they will give various justifications for why the historian's testimony should be admitted, thereby skirting the issue of methodology. While the justifications given have been wide-ranging, common justifications have emerged from these cases. The most widespread appear to be that: (1) a particular historian has impressive credentials and proper experience (or is qualified); (2) cross-examination is the proper tool by which to test shaky but still

130. Kumho Tire v. Carmichael, 526 U.S. 137, 153, 158 (1999).

131. *Id.* at 153.

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

133. *But see* Waterhouse v. R.J. Reynolds Tobacco Co., No. 05-1482, 2006 U.S. App. LEXIS 655, at *6–7 (4th Cir. Jan. 11, 2006) (holding that an expert reached his conclusion without establishing what his mode of historical analysis was or whether that mode is generally acceptable); United States v. Washington, No. CV-9213, 2007 U.S. Dist. LEXIS 596, at *24 (D. Wash. Jan. 4, 2007) (disregarding certain historians' testimony as useless and criticizing the methodology they employed because neither had consulted what the court deemed to be highly reliable sources).

134. *Daubert*, 509 U.S. at 595 (emphasis added).

admissible testimony from an expert; and (3) the jury needs to hear the evidence to make an ultimate conclusion in the case.[135] Each will be examined in turn.

1. Credentials and Experience as Qualifiers

In both *Baker* and *Shinnecock*, the district court judges used the topic of qualifications to sidestep the topic of methodology. In other words, the judges felt that if they included a long listing of the historian's credentials and relevant experience, they either could escape diving into a thorough analysis of the historian's methodology, or they could hold that such an analysis was unnecessary.

For instance, in *Shinnecock*, the judge first listed the historian's *credentials*, which included a bachelor's degree and a master's degree, and, while the historian did not obtain his Ph.D., he had completed all of the required coursework for it.[136] The judge decided to examine qualifications first because of a 2004 case in the Second Circuit, which stated: "where the witness [lacks] qualifications, an analysis of the remaining *Daubert* factors seems almost superfluous."[137]

The judge went on to list the relevant *experience* that qualified each historian to testify on the subject: one of the historians had taken courses in title searching and conducted research, published works, and given presentations on many issues relating to Indian tribes of New York and New England. Additionally, this historian had thirteen years of experience as a private ethnohistorical consultant on Indian-related matters, particularly land claims, historical title searching, and petitions for federal acknowledgment as an Indian tribe. He also had qualified to testify as an expert in another lawsuit.[138]

Finally, with regard to another of the historians, the judge found that he, too, was "qualified" and listed all of his relevant experience. For instance, he had qualified as an expert witness in numerous jurisdictions on related matters and had written reports in three New York land-claim cases.[139] The judge also found him qualified based upon his educational background, training, experience, publications, and teaching.[140] Additionally, as mentioned earlier, the judge did conduct a *brief* analysis of the

135. New York v. Shinnecock Nation, 523 F. Supp. 2d 185, 260–62 (E.D.N.Y. 2007), Baker v. Buffenbarger, No. 03-C-5443, 2006 U.S. Dist. LEXIS 2911, at *13–*18 (N.D. Ill. Jan. 13, 2006).

136. *Shinnecock*, 523 F. Supp. 2d at 260.

137. *Id.* at 259 (quoting Zaremba v. Gen. Motors Corp., 360 F.3d 355, 360 (2d Cir. 2004)).

138. *Id.* at 260.

139. *Id.* at 261.

140. *Id.*

methodology employed by each.[141]

In *Baker*, the district court judge took a somewhat different approach. He focused on the historian's *experience* with regard to the issue of methodology. Because the historian had extensive experience in the labor field, the judge was willing to overlook the fact that he had not applied any sort of generally accepted test or method in arriving at his conclusions.[142] The judge seemed to believe that experience alone may be enough to qualify an expert because of the advisory committee's notes to Rule 702, which state that "nothing in this amendment is intended to suggest that experience alone . . . may not provide sufficient foundation for expert testimony."[143]

The judge also drew attention to the historian's qualifications, however, by reiterating the historian's description of his own qualifications: he had done research and writing, had been a close observer of collective bargaining and union growth for the past fifty years, and had been a mediator and arbitrator for many years.[144] The judge also noted that, while he had never testified in court before about the relevant issues, courtroom experience was not the relevant inquiry; *experience* in the field is what counts.[145]

While the judges' approaches in *Baker* and *Shinnecock* differed, both judges seemed to believe that experience and credentials were sufficient indictors, not just of the historians' qualifications, but also of their reliability. Again, *Daubert* and *Kumho* did not create any sort of definitive checklist or test, so the fact that these two judges went about their analyses in slightly varied manners is irrelevant. But, what is important is the amount of emphasis placed on credentials and/or experience by both judges. And it is almost as though the judges read their own test into the *Daubert* opinion: the more qualifications the historian has, the less there is a need for a discussion about reliable methodology—even to the point of nonexistence. Thus, the more emphasis the judge placed on the historian's qualifications, the less a discussion about reliable methodology was needed, even to the point of its nonexistence.

Baker provides the clearest example of this read-in test. The judge, acknowledging that methodology had not been established, boldly stated that methodology could be disregarded because of all the experience that the historian possessed.[146] According to the *Baker* judge, the fact that the historian had not used any real methodology in drawing his conclusions did not make his testimony

141. *See supra* text accompanying notes 87–96.
142. *See supra* text accompanying notes 109–10.
143. *See supra* text accompanying notes 110–12.
144. *See supra* text accompanying note 115.
145. Baker v. Buffenbarger, 2006 U.S. Dist. LEXIS 2911, at *15 (N.D. Ill. Jan. 13, 2006).
146. *See id.* at *13.

unreliable. Experience would suffice.

In *Shinnecock*, the judge acknowledged the *Daubert* requirement to engage in a discussion about the historian's methods.[147] And the judge actually listed what the historian had done to draw his conclusions: he had analyzed and considered pertinent historical documents in the context of contemporary historical understanding.[148] But, while the judge listed these methods with regard to one of the historians, the judge failed to list any methodology employed by the others, instead stating that "[t]he other experts . . . utilized a similar methodology."[149] Furthermore, the judge failed to state why the methodology was reliable, both generally and with regard to these particular sets of facts.

2. The Need for Evidence to Assist the Trier of Fact

Another justification often given by district court judges for why historical testimony should be admissible is that the finder of fact, be it judge or jury, truly needs to hear the evidence being proffered. And like qualifications, here, too, judges seem to use this justification in place of a thorough analysis of the historian's methodology, as required by *Daubert*.

Shinnecock is illustrative. The judge in that case engaged in a lengthy discussion concerning the special importance in Indian land disputes of allowing the court to consider expert historical testimony to assist in the court's determination of the meaning and interpretation given to historical events.[150] According to the judge, expert testimony from historians and ethonohistorians assists the court in identifying ancient documents and historical events that may be relevant to the issue. This information, in turn, ensures that the passage of time does not lead to a misinterpretation of the

147. *See supra* text accompanying notes 90–93. "Second, the Court found that the methodology used by the various experts was sufficiently reliable to be admissible after considering the *Daubert* factors relating to this requirement." New York v. Shinnecock Nation, 523 F. Supp. 2d 185, 261 (E.D.N.Y. 2007).

148. *Shinnecock*, 523 F. Supp. 2d at 261–62.

149. *Id*. at 262.

150. *See id.* at 262–64.

> The Court recognizes that . . . in deciding [the] issue [of whether aboriginal title was extinguished] the Court is required to analyze centuries-old documents and historical events. It is the Court's conclusion that the consideration of expert testimony in the form of historians and ethnohistorians clearly assists the Court as the trier of fact, at a minimum, in identifying the ancient documents and historical events that may be relevant on this issue and providing testimony about the historical context for these documents and events to ensure that the meaning of the documents and/or events are not being misunderstood due to the substantial passage of time. In fact, the Second Circuit has emphasized, in the context of litigation involving disputes about title to Indian land and extinguishment of Indian title to that land, that it is critical that the Court consider expert historical testimony . . . .

Id. at 262.

documents or events at issue.[151] Immediately after this discussion, the court stated, "[i]n sum, as set forth in the trial record, the Court found that each party provided a sufficient basis for the admissibility of the expert testimony under *Daubert*."[152] Thus, it is clear that the judge's focus on the *need* for this particular evidence substantially outweighed any focus on the historian's methodology and why it was reliable.

The *Baker* judge took a different approach here, as well, by discussing the *need* for the testimony in conjunction with the historian's experience and credentials. The judge stressed the fact that the historian's credentials and experience in the area of coordinated bargaining far exceeded that of the jury or the court.[153] "The Court will, therefore, allow him to testify."[154] Again, here, the judge seemed to be allowing the *need* for the evidence to justify its admission, forgetting the important reliability-of-methodology requirement that *Daubert* placed upon district court judges confronted with expert testimony.

3. Vigorous Cross-Examination as the Tool

Finally, district court judges often justify their admission of historian expert testimony by reminding the opponent of the evidence that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[155] But judges relying on this single sentence from *Daubert* to justify admission have taken it entirely out of context.

This sentence was used in *Daubert* to address the concern that, by abandoning the *Frye* "general acceptance" test, juries would be confronted with all sorts of absurd evidence.[156] When the Court made this statement, it was responding to a fear that novel "irrational pseudoscientific" types of expert testimony, which had not necessarily gained acceptance in the experts' relevant field, would constantly be placed in front of befuddled juries.[157] The *Daubert* Court was, by no means, suggesting that *all* expert testimony be admissible as long as the opponent is provided ample time to cross-examine the witness. Rather, the Court was suggesting that, so long as the expert testimony passes the threshold requirements as laid out in the *rest of the opinion* (that

151. *Id*. at 262.
152. *Id*. at 265.
153. Baker v. Buffenbarger, 2006 U.S. Dist. LEXIS 2911, at *17 (N.D. Ill. Jan. 13, 2006).
154. *Id.*
155. *Id.* at *16 (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993)).
156. *Daubert*, 509 U.S. at 595–96.
157. *Id*.

the methodology employed is reliable), the testimony should be admitted, even if not generally accepted in the field. And if not generally accepted in the field, the opponent always has cross-examination in his arsenal to attack the expert's character. Nonetheless, district court judges have continued to cite this sentence as if it were the core holding of *Daubert* and have continued to rely on it as a justification to admit the testimony and side-step any analysis of the historian's methodology.[158]

C. The Dangers in Failing to "Gatekeep" by Daubert *Standards in the Context of Historian Experts*

Even if the justifications given by district court judges do not specifically comply with the requirements of *Daubert*, there is a strong argument to be made that any error in admitting the expert testimony is harmless. When the three justifications described above are taken as a whole, they should be sufficient to warrant the admission of the expert testimony. And this very well could be true in other settings. But when it comes to this very narrow, limited situation of historian experts, there are specific reasons why each justification given, even when taken together, cannot overcome the need for a thorough analysis into the methodology employed by the historian. This, however, involves a deeper look into the implications involved when a historian takes the stand in a courtroom.

These implications are best understood by reexamining the *Irving* case alluded to in the Introduction to this Comment.[159] There, David Irving brought a libel action against Deborah Lipstadt after she called him a "Holocaust Denier" in her book, *Denying the Holocaust: The Growing Assault on Truth and Memory*. In her defense, Lipstadt asserted "truth" or, in other words, that the words she had written were accurate: David Irving was, in fact, a "Holocaust Denier."[160] This defense was accompanied by a need to prove the truth of the Holocaust on the one hand, and the fact that Irving had denied it on the other, which would boil down to Irving distorting, falsifying, or misrepresenting the historical record surrounding the Holocaust.[161]

While the justice deciding the case tried to avoid making any findings of fact as to what did and did not occur during the Nazi regime in Germany,[162] the verdict in the case either was going to be

158. *See, e.g.*, United States v. Newmont USA Ltd., 2007 U.S. Dist. LEXIS 96264, at *5 (E.D. Wash. Nov. 16, 2007) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence") (quoting *Daubert*, 509 U.S. at 596).

159. *See* notes 3–5 and accompanying text.

160. McNamara, *supra* note 6, at 368.

161. *Id.* at 369.

162. *Id.*

a victory or a defeat for Holocaust deniers and the Holocaust Denial movement in general.[163] Likewise, the verdict either was going to be a victory or a defeat for Holocaust survivors and their families because it was "almost inevitable that the major focus of the case [would] be the crimes of the Holocaust and whether they took place and how they're interpreted."[164]

In the eyes of the public, if Lipstadt had been unsuccessful in proving that Irving had, in fact, distorted the historical record, the justice essentially would have been conceding that certain events surrounding the Holocaust did not take place, giving his imprimatur to Irving's version of the events.[165] The outcome, therefore, had ramifications reaching farther than anyone could possibly imagine: it could impact the way the public interpreted and explained the Holocaust. One scholar stated that "the ways in which present concerns determine what of the past we remember, and how we remember it."[166] Or, in other words, "the issues at hand are concerns not only of the present, but also of the future."[167]

So, while the focus of the *Irving* case was not about excluding a certain historian from taking the stand, and while I am not attempting to extrapolate any evidentiary standard from this highly charged, emotional litigation, the case is useful to this discussion because the ramifications and concerns in *Irving* are present when any historian takes the stand. Any time history enters any sort of case, this very idea of a judge or justice making a factual determination as to certain events that have already taken place is worrisome.

And, actually, whatever ramifications were at stake in *Irving* are sure to be stronger in the context of the present discussion. In *Irving*, the justice deliberately attempted to avoid making any factual findings about events that surrounded the Holocaust for that very reason: he was a judge, not a historian. "But it is not for me to form, still less to express, a judgment about what happened. This is a task for historians."[168] In the context of historians testifying as expert witnesses, the judge or jury will be forced to make factual findings concerning the events to which the historian is testifying. It is those findings that will then impact the way in which the public

163. *See* Schneider, *supra* note 3, at 1533.

164. EVANS, *supra* note 1, at 35–36 (quoting Sarah Lyall, *At War Over the Holocaust*, INT'L HERALD TRIB., Jan. 12, 2000, at 5).

165. *See* EVANS, supra note 1, at 38 ("[T]he trial had a direct bearing on how the Holocaust would be regarded and how it was debated and discussed in public."); GUTTENPLAN, *supra* note 2, at 2 ("If David Irving won, a British court would have lent its imprimatur to his version of events, in which the survivors of Auschwitz are branded as liars, and the suffering of the victims of the gas chambers is simply erased from the pages of history.").

166. PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE 3 (1999).

167. McNamara, *supra* note 6, at 394.

168. *Id.* at 369.

at large comes to interpret and understand the past.

Additionally, courtrooms are enticing to historians for a number of reasons, which are themselves dangerous. One of those reasons is that the legal process affords historians prominent opportunities to affect the dominant issues of the day.[169]

Another relevant issue is that many historians see the witness stand as a chance to advocate for a particular thesis.[170] On the stand, it is these historians who are likely to paint the past for the judge or jury in accordance with his or her own thesis, and that, in turn, can affect the way the public interprets the past and understands its events. When based on faulty methodology, or when the historian stretches the facts of the case to fit within his or her thesis, the past is painted inaccurately.

D. Why the Common Justifications Are Not Sufficient

After understanding all that is at stake once a historian testifies in court, it is next important to understand *why* the common justifications given by district court judges are not sufficient to warrant overlooking the topic of reliable methodology as emphasized in *Daubert*.[171] While the first common justification asserted, "credentials and experience," may be a good place to begin a *Daubert* analysis, these justifications are not a good place to end. In fact, credentials and experience truly are only a foundation that needs to be laid before diving into the rest of the *Daubert* factors.[172] There are cases to this effect, illustrating that, without credentials and experience, a historian cannot qualify as an expert.[173]

To provide context, take the fact that David Irving served as an "expert." The case was *R. v. Zündel* , and, in Canada, it was both highly publicized and highly controversial.[174] At the time of the

169. Jonathan D. Martin, *Historians at the Gate: Accomodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1532–49 (2003) (arguing that historians should be appointed by the court rather than the parties).

170. *Id.* at 1532 ("The courts are often historians' closest link to practical political power . . . [and] [t]hat link is a source of both temptation and vulnerability: it tempts historians to exercise influence and renders them vulnerable to lawyers and judges who merely deploy historical scholarship as a weapon of persuasion.") (quoting Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 538 (1989)).

171. *See* text accompanying notes 45–49.

172. Zaremba v. Gen. Motors Corp., 360 F.3d 355, 360 (stating that, where the witness lacked qualifications, an analysis of the remaining *Daubert* factors "seem[ed] almost superfluous").

173. *See, e.g.*, Alvarez v. R.J. Reynolds Tobacco Co., 405 F.3d 36, 40 (2005) ("In sum, to grant the status of expert to one at the outset of an academic career, with such a variegated and unfocused record of scholarly efforts . . . would threaten the effective functioning of the gatekeeper process.").

174. *See supra* notes 15–16 and accompanying text. The trial, which lasted eight weeks, saw Canadian newspapers run a series of headlines that cast

Zündel trial, Irving had spent years in the archives researching the German side in the Second World War and was the author of numerous books, some of which were bestsellers, on historical subjects.[175] However, he had never held a post in any academic institution.[176] But, according to the *Baker* court, experience alone is enough to qualify as an expert, [177] and at the time of the *Zündel* trial, Irving had been researching and writing for close to thirty years.[178] Additionally, many of his works had received great praise,[179] which likely would further bolster his credentials in the eyes of a district court judge. So if a judge had stopped his analysis here, Irving's testimony likely would be admitted. But, as was revealed years later, when Irving brought suit against Lipstadt and ended up exposing his own historical methods to scrutiny, the judge stated, "no objective, fair-minded historian"[180] would have reached the conclusions that Irving had. In other words, based on *Daubert*, Irving's testimony would have been excluded *at the outset*.[181]

Next, turning to the second justification commonly asserted by district court judges as to why certain historical testimony ought to be admitted—that testimony is necessary to assist the trier of fact—if testimony is based on faulty methodology, it is not going to assist the trier of fact, but rather waste time. The *Daubert* opinion also made this clear: "Conjectures that are probably wrong are of little use . . . in the project of reaching a quick, final, and binding legal judgment" and "[l]aw . . . must resolve disputes finally and *quickly*."[182] This notion of conserving judicial resources is partly what led the *Daubert* court to impose this gatekeeping role on judges in the first place: to screen out the testimony based on faulty methodology, thereby placing only reliable testimony before the

doubt on the Holocaust. KAHN, *supra* note 15, at 85.

175. EVANS, *supra* note 1, at 4. Those books include: *The Destruction of Dresden*, *The Mare's Nest*, *The Virus Home*, *The Destruction of Convoy PQ17, Accident—The Death of General Sikorski*, *Hitler's War*, *The Trail of the Fox*, *The War Path*, *The War Between the Generals*, *Uprising!*, *Churchill's War*, *Rudolpf Hess: The Missing Years*. *Id.* at 4–5. *See also* GUTTENPLAN, *supra* note 2, at 43, 45.

176. EVANS, *supra* note 1, at 5.

177. *See* text accompanying note 138.

178. *See, e.g.*, DAVID IRVING, THE DESTRUCTION OF DRESDEN (1963).

179. *Id.* at 45. John Keegan, a military historian referred to "*Hitler's War* [as] 'Irving's greatest achievement . . . indispensable to anyone seeking to understand the war in the round.'" *Id.* And historian Hugh Trevor-Roper's review in the London Sunday Times stated: "No praise can be too high for Irving's indefatigable scholarly industry . . . . I have enjoyed reading his long work from beginning to end." *Id.*

180. Transcript of Trial Judgment at 311, Irving v. Penguin Books Ltd., [2000] EWHC QB 115 (Eng.), *available at* http://www.holocaustdenialontrial.org.

181. *See* text accompanying note 50.

182. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (emphasis added).

finder of fact. This justification too, like the last, strikes against all of the principles that are at the heart of the *Daubert* opinion. And to reiterate, testimony that is based on sound, reliable methodology should, and does, in fact, usually assist the trier of fact. So, if district court judges would like to use this statement as a justification for admission, they certainly can do so, but only after conducting a thorough examination into the expert's methodology.

Finally, the argument suggesting that cross-examination is the appropriate tool by which to test "shaky," but admissible, expert testimony is not a plausible justification, either standing alone or in conjunction with the others, but judges tend to rely on it nonetheless in lieu of probing the historian's methodology. As mentioned above, with regard to conserving judicial resources, when testimony is based on faulty methodology, it shouldn't have the chance to make its way to the finder of fact; it is a waste of time, as is spending time cross-examining these witnesses.

But also, district court judges should not be describing testimony based on faulty methodology as merely "shaky." When the *Daubert* Court used the word "shaky" it was referring to testimony that otherwise met the standards of Rule 702, but perhaps had not yet gained general acceptance in the field.[183] The court made this statement as part of its justification for doing away with the *Frye* test and was not suggesting that all expert testimony be admitted because cross-examination is always there as a backstop.

But, assuming that this testimony does come before a finder of fact, cross-examination still is not a cure-all in this specific context. Commentators have suggested that cross-examination makes historians more steadfast in their testimony, rather than more balanced.[184] Historians themselves have lent some credence to this assertion by noting: "[T]here is a natural tendency for a witness to stick to his guns when challenged . . . . No one wants to look foolish or contradictory."[185] And this goes back to some of the inherent differences, discussed above, between a historian testifying and other types of experts testifying (i.e., courtrooms are enticing for historians "to affect the dominant issues of the day").[186] So, while it would be nice and convenient if district court judges could just quote this single sentence from *Daubert*, admit the testimony, and move on, this was not the intention of *Daubert*, and cross-examination

183. *Id.* at 596 ("These conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.").

184. Martin, *supra* note 169, at 1543–44.

185. J. Morgan Kousser, *Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing*, PUB. HISTORIAN, Winter 1984, at 5, 17.

186. *See supra* Part III.C.

may have its own problems in this setting.

IV. PROPOSAL TO IMPROVE THE ADMISSION OF RELIABLE HISTORICAL TESTIMONY: GO ON THE RECORD

> *Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public.*[187]

The best place to turn for a solution is always the source of the problem: the district court judges themselves or their judicial opinions. Either district court judges are not performing thorough examinations of historians' methodologies, or they are choosing not to reflect those examinations in their opinions. Either way, this is problematic. It is no surprise that practitioners turn to case law when seeking to admit expert testimony of any kind. To enable them to find a historian who will pass through the gate the first time (or at all), the case law should be clear: proffered historians will have to demonstrate the reliability of their methodology, whatever that may be. However, if any practitioner were to examine the case law in this area, this standard would not be so clear. The Ninth Circuit acknowledged this noticeable lack of clarity in a recent opinion:

> As is apparent from the above recital, the district court said nothing about the *reliability* of Dr. Wellman's testimony. It appears that the district court was concerned only with whether the expert witnesses would testify on an "ultimate issue" that is properly for the jury to decide. In fact, the only indication we have that the district court found Dr. Wellman's testimony reliable is the fact that it was admitted over CSUH's reliability objections. Surely *Daubert* and its progeny require more.[188]

The Ninth Circuit has since interpreted this statement as imposing a requirement on district courts to make *some* kind of reliability determination in order to fulfill their gatekeeping function.[189] Indeed, the Tenth Circuit has come to the same conclusion: "While . . . the trial court is accorded great latitude in determining how to make *Daubert* reliability findings before admitting expert testimony, *Kumho* and *Daubert* make it clear that

187. WILLIAM CRANCH, *Preface* to 1 REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES iii, iii–iv (1804).

188. Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053, 1065–66 (9th Cir. 2002), *amended by* 319 F.3d 1073.

189. *See* United States v. Blaine County, 363 F.3d 897, 915 (9th Cir. 2004) (citing *Mukhtar*, 299 F.3d at 1066).

the court must, *on the record*, make *some* kind of reliability determination."[190]

The cases discussed in this Comment demonstrate that, unfortunately, district court judges have not heeded *Daubert*'s mandate that district court judges make *some* kind of reliability determination when evaluating historians' expert testimony. The best way to fix this would be to require that district court judges make those findings *on the record*, as some of the Circuits have already required.[191] This not only would force judges to undertake the actual examination of the historian's methodology, but also would create a record for appellate review and case law to guide practitioners. And, more fundamentally, this would fulfill the requirements of *Daubert*, which seem to have been abandoned in the years following the opinion.

This Comment does not begin to suggest how the examination into methodology must be undertaken, nor does it suggest that a proper analysis will be an easy task for district court judges; it has been said that historians generally resist exposing the nuts and bolts of their profession.[192] Additionally, historians take a variety of approaches to their discipline, which likely will make the judge's task more difficult.[193] But, this Comment does suggest that, whichever route a judge takes to examine the historian's methodology in order to fully comply with *Daubert*, the judge should take some route and then document his findings.

CONCLUSION

As highlighted above, there has been a trend among federal district court judges to admit expert testimony from historians without employing a thorough *Daubert* analysis. Whatever accounts for this apparent failure to take a probing look at the methodology being employed by historians has led to a demise of *Daubert* in this context. The implications are sure to be far-reaching: when a historian, whose methodology is unsound, is placed before a jury, the historian has the ability to paint a picture of the past as he or she so desires. And this, in turn, has the potential to change and shape the

190. United States v. Velarde, 214 F.3d 1204, 1209 (10th Cir. 2000) (emphasis added).

191. *See, e.g.*, Goebel v. Denver & Rio Grande W. R.R. Co., 215 F.3d 1083, 1088 (10th Cir. 2000) ("For purposes of appellate review, a natural requirement of [the gatekeeping] function is the creation of a 'sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law.'") (quoting United States v. Nichols, 169 F.3d 1255, 1262 (10th Cir. 1999)); United States v. Lee, 25 F.3d 997, 999 (11th Cir. 1994) ("We encourage district courts to make specific fact findings concerning their application of Rule 702 and *Daubert* in each case where the question arises.").

192. *See, e.g.*, JOHN LEWIS GADDIS, THE LANDSCAPE OF HISTORY: HOW HISTORIANS MAP THE PAST (2002)).

193. *Id.*

way the public views, interprets, and understands the past.

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