

The Public Historian

Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing

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EXPERT WITNESSES' general reputation for veracity is not untainted. In the elegant and tasteful expression of Harold Green, director of the Law, Science, and Technology Program at George Washington University, "Expert witnesses are whores. . . ." Others interviewed for a newspaper article on science and public policy, in which Green's statement appears, were somewhat more charitable in their diction, but affirmed that expert witnesses were "chosen not for their wisdom or sagacity but for their willingness to say in the simplest, clearest, least tentative way what a particular side wants said."¹

On the other hand, some scholars who have served as experts, who are not, perhaps, entirely unbiased witnesses on the topic, claim to have retained their virtue. James Rosse, a Stanford economist who was re-

Previous versions of this paper were given at the Social Science History Association Convention in 1981, at the Association of American Law Schools Convention in 1983, and at the Caltech History Colloquium in 1983. One of the special joys of writing and giving this paper has been the chance to learn from people whose attention I would not usually be able to demand. I particularly want to thank for their comments Brian Barry, Derrick Bell, John Benton, Armand Derfner, Jim O'Fallon, Phil Hoffman, Will Jones, Dan Kevles, Steve Morse, and Ed Still. Since it seems likely that all of them retain some reservations about the paper, none should be held responsible for its remaining flaws.

1. Lee Dembart, "Science and Public Policy—Who Is Served?" *Los Angeles Times*, November 9, 1981.

portedly paid \$240,000 by American Telephone and Telegraph in 1981 to perform studies in support of that corporation's position in its anti-trust case, contended that "the legal process would tear to shreds any person who altered his views for a trial," and asserted that he informed the company that "there are things I will not testify to." Dean Henry Rosovsky of Harvard, an economist who testified for IBM during its antitrust case, insisted that scholars who do this type of consulting have a strong incentive not to distort their views or to dissimulate, because they must protect their professional reputations. "They don't have any other assets of significance," Rosovsky told a *New York Times* reporter. "If you get the reputation of being a hired gun, it won't help you."²

The question of the possible tensions between advocacy and objectivity presents somewhat different facets to the three groups most directly concerned with expert witnessing: scholars, lawyers, and judges. Responding to historian Lee Benson's 1977 *Social Science History Association* presidential address, which had the provocative title "Changing Social Science to Change the World," political scientist Warren Miller distinguished between pure and applied science and commented that "the motivation to do good—or bad—is simply different from the motivation to find out how things work, and it is the transformation of the latter motivation into action that is science."³ For historians, more particularly, the crux of the problem is not the old epistemological chestnut, "Can the study of history be objective?" but a simpler and less absolute, if longer, question: "Assuming that it makes sense to say that some analyses are more objective than others, are historians who serve as expert witnesses likely to be less objective, either because of their own commitments or because of some aspects of the legal process, than other historians are, or than the witnesses themselves are when they are doing their normal scholarship?"⁴

Lawyers see the topic from a different vantage point. If my experience with them is at all representative, attorneys tend to believe that their own experts are pure, even to the point of being too prissy to agree to state their own conclusions in a way which would be most helpful to the lawyers' clients—while the other side's are merely lying for money. Should lawyers treat expert witnesses—for either side or both—as analogues to celebrity endorsers of products? Is Dr. K's analysis of the reasons for the adoption of the Mobile city government act in the 1870s worthy of more deference than Dr. J's endorsement of a basketball sneaker?⁵

2. Fox Butterfield, "Faculty Consultants: Higher Educators Getting Higher Fees," *Los Angeles Herald Examiner*, June 16, 1982. Since historians' fees for a case are on the order of 1 percent of Rosse's, their incentives to play paladin are considerably less.

3. Benson's address and Miller's response are both in *Social Science History* 2 (1978), 427–48. The Miller quotation appears on p. 444.

Judges, whose distorted "law office" versions of history written to serve their own points of view reverberate from *Dred Scott* through *Webb v. Sanders* (the Georgia legislative reapportionment case) to *Mobile v. Bolden*, may see the problem of experts' objectivity in yet another guise.⁶ Have expert witnesses, to paraphrase Chief Justice Taney's famous phrase in *Dred Scott*, any opinions that judges are bound to respect? Is the view of a credentialled historian or other social scientist entitled to any more weight than that of a man on the street or a random law clerk, or than the judge's own "common sense"? (In two of the cases in which I've been involved—not, let it be noted, ones in which the side which I was testifying for won—the judges' answers, as implied by their opinions, have been "Yes, if the witnesses agree with my preconceived, seat-of-the-pants opinion; otherwise, no.")

My own experience as an expert witness in six voting rights cases causes me to doubt the soundness of Warren Miller's observation, quoted above. Changing the world and doing normal social science or history are not such different pursuits after all. Perhaps I am blinded by good intentions or the heat of battle, but it seems to me that cases from Birmingham; Mobile; Selma; Brownsville, Tennessee; and Sumter, South Carolina; as well as an appearance before a House Judiciary Subcommittee hearing on renewing the Voting Rights Act, afforded me opportunities to *tell the truth and do good at the same time*.

Those of us who desire to bring scholarship to bear on current policy problems, moreover, need no new institutional arrangement to make our advocacy more effective. Indeed, the organization of a group of progressive scholars to produce policy-relevant studies, such as Lee Benson has proposed, might well reduce, rather than increase, its members' ability to influence policy.⁷ For not only would it call into question the scholars' reputation for objectivity—which my experience has taught me is a necessary condition for them to exert any influence at all—but by removing some of the usual professional checks on slipshod scholarship, it might also undermine their objectivity in reality as well. Changing social science might therefore leave the disciplines worse off, and the world unchanged.

Before discussing the more general question, let me explain how I got involved in testifying. Since, as a historian, I have an occupational susceptibility to genetic explanations, my story will require a detour into

4. See Alfred H. Kelly, "Chio and the Court: An Illicit Love Affair," *Supreme Court Review* (1965), 119–58; and, on *Bolden*, J. Morgan Kousser, "The Undermining of the First Reconstruction: Lessons for the Second," in *Extension of the Voting Rights Act: Hearings Before the Subcommittee on the Judiciary, House of Representatives*, 97th Congress, 1st Session (Washington: Government Printing Office, 1982), 2017–20.

5. Lee Benson, "Doing History as Moral Philosophy and Public Advocacy: A Practical Strategy to Lessen the Crisis in American History," paper delivered at the Organization of American Historians' Convention, April 1, 1981.

the history of civil rights law. It may not be straining words too much to assert that the Fifteenth Amendment contains an explicit reference to intent. The right to vote, it declares, shall not be "denied or abridged on account of race, color, or previous condition of servitude" (emphasis added). One reading of the phrase is that any law or practice adopted with a racially discriminatory intent ("on account of race") is by that fact alone unconstitutional. Despite the fact that the Fourteenth Amendment contains no language which even this clearly refers to intent, the courts have read an intent criterion into it. In fact, they have intermingled the standards of proof and lines of cases under each of the two amendments, which would no doubt be confusing enough if separated, to such a degree that the whole area of the law has become covered with a sort of constitutional kudzu, a mass of pullulating, ever more tangled, parasitic vines which have long since grown over and hidden the original constitutional saplings.

Thus, in *Plessy v. Ferguson* in 1896, the Supreme Court was content to assume that racially separate railroad cars were in fact equally comfortable and convenient, while it concentrated on denying that whites who imposed segregation intended it to be racially discriminatory. In *Williams v. Mississippi* in 1898, the Court admitted that the framers of the 1890 Mississippi Constitution intended to deny blacks the right to vote, but held that since the plaintiff had not shown that their intent was carried out, he had not proved a constitutional violation. The next year, in *Cumming v. Richmond County*, the justices shunted aside the obvious fact that the Augusta, Georgia school board discriminated when it provided two public high schools for whites, but closed the only one it had run for blacks, and focused on what Justice John Marshall Harlan took to be the crucial question—whether the school board had behaved "reasonably," or, in other words, without an intent to discriminate. Presented with evidence of both intent and effect in *Giles v. Harris*, a 1903 voting case, that great liberal Justice Oliver Wendell Holmes threw up his hands and declared disfranchisement a "political question."⁶

More recent courts have hacked no clearer path through the judicial thicket of intent and effect. In *Brown v. Board*, the Supreme Court appears to have assumed that if the National Association for the Advancement of Colored People's (NAACP's) lawyers and expert witnesses could show that segregation had had effects on black children, then they need not prove that school officials acted intentionally to bring about those consequences, but only that they had meant to segregate the schools, which of course all admitted. Where segregation was not formally es-

tablished, however, the focus shifted to the school board's actions, such moves as gerrymandering attendance zones and siting new schools only in safely segregated areas being taken as evidence of the authorities' segregative intent. Segregation because of housing patterns (patterns which were no doubt partly produced by the actions of other governmental agencies, if not by the school boards), may have been indistinguishable in its effects from so-called *de jure* segregation, but since it was allegedly not intended, it was ruled constitutional, for example, in the Detroit school case, *Milliken v. Bradley*.⁷

That there were close parallels between the school cases and those in the voting rights and other areas is hardly surprising. Tuskegee, Alabama gerrymandered its town boundaries so blatantly as to leave no question as to its racially discriminatory intent; therefore, the Supreme Court could fess up the issue.⁸ In the initial reapportionment opinions, too, intent played little role, and attempts to achieve legislative ends which would in other cases have induced judicial obsequiousness were blithely shunted aside in the drive for a population equality effect.⁹ Yet in the Indianapolis at-large voting case, *Whitcomb v. Chavis*, the Court ruled that evidence of a racially unequal impact, by itself, was not enough; whereas, a week later in the Jackson, Mississippi municipal swimming pool closing case, *Palmer v. Thompson*, it concluded that an overwhelming case based on intent was insufficient.¹⁰

The lines between intent and effect crossed and re-crossed in what now seems to be the leading Supreme Court case on at-large voting in multi-member districts, *White v. Regester*. Since the Voting Rights Act and the Twenty-fourth Amendment suspended literacy tests and poll taxes, at-large elections have been perhaps the major device for abridging or "diluting" minority political power. In *White*, a 1973 case from Dallas, the Supreme Court held that there is no constitutional right to proportional representation, and that at-large systems are not, *per se*, unconstitutional. They are illegal, however, if combined with other electoral devices which reduce the chances of minorities to elect per-

7. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Milliken v. Bradley*, 418 U.S. 717 (1974).

8. *Connolly v. Lightfoot*, 364 U.S. 339 (1960). Justice Stevens apparently years for those earlier simpler days when discrimination stood out like a crudely drawn twenty-eight-sided figure. See his dissents in *Mobile v. Bolden*, 446 U.S. 55 (1980), and *Rogers v. Lodge*, 50 U.S.L.W. 5041 (U.S. July 1, 1982).

9. *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Webb v. Sanders*, 376 U.S. 1 (1964). In some more recent reapportionment cases, such as the 1982 Georgia Congressional redistricting case, *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C., 1982), the question of racially discriminatory intent has received central attention. On the contradictions between the Court's stance in reapportionment and racial vote dilution cases see James U. Blacksher and Larry T. Mendez, "From *Reginald v. Sims* to *City of Mobile v. Bolden*: Have the White Suburbs Commandered the Fifteenth Amendment?" *Hastings Law Journal* 34 (1982): 1-64.

10. *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Palmer v. Thompson*, 403 U.S. 217 (1971).

6. The citations are: *Plessy*, 163 U.S. 537 (1896); *Williams*, 170 U.S. 213 (1898); *Cumming*, 175 U.S. 528 (1899); *Giles*, 189 U.S. 475 (1903). On these cases, see J. Morgan Kousser, "Undermining of the First Reconstruction," 2020-21, and "Separate But Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools," *Journal of Southern History* 46 (1980), 17-44.

sons of their choice, and if they occur in areas with a history of racial discrimination which is currently manifested in racially discriminatory slating groups, racial bloc voting, and a lack of responsiveness by officials to minority desires, or at least some of these. Further, direct evidence that the system had been established or maintained for a racial purpose, if such evidence were available, would, insofar as one can be sure of any doctrinal consistency in this area of the law, be held to be probative. In the leading Appeals Court decision, *Zimmer v. McKeithen*, the *White* indicia were restated and refined, while in a series of mid- to late-1970s Supreme Court cases not directly related to multi-member districts, the Court emphasized with increasing insistence that intent was central to all racial discrimination cases.¹¹

White and *Zimmer* made clear that expert testimony by historians might be useful to paint a general picture of the history of racism, in order, at the least, to educate judges or to remind them of social facts which they might otherwise prefer to forget.¹² And such testimony might be determinative if the historian could produce credible circumstantial or direct evidence that the intent of the framers of laws passed some time ago, now under challenge, was discriminatory. But whereas civil rights lawyers seem to have been well connected to a network of sociologists and political scientists who did research on voting rights, neither they nor the social scientists knew many historians, and historians were almost wholly ignorant of the relevant developments in the law. I was "discovered," if that is the correct word, by Edward Still, a particularly assiduous Birmingham lawyer with a pronounced historical bent (who has since gone on to do graduate work in history as a sideline) who read my book, called and recruited me, and mentioned my name to others. Thus, by the fateful day of April 22, 1980, I had been engaged as an expert witness in two cases, in one of which I was to serve mainly the "educational" purpose of recounting the history of racism in South Carolina politics, and in the other of which my role was to show the discriminatory intent behind a particular provision of the 1901 Alabama Constitution.

11. *White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (1973). The other leading relevant cases were *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 97 S.Ct. 555 (1977); and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). The best discussion I have read on the topic is Larry G. Simon, "Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination," *San Diego Law Review* 15 (1978), 1041-1130.

12. That social science expert witness testimony is often used to "educate" judges is shown in Joseph Sanders *et al.*, "The Relevance of Irrelevant Testimony: Why Lawyers Use Social Science Experts in School Desegregation Cases," *Law and Society Review* 16 (1981-82), 403-28.

The event of April 22, 1980, which threw the civil rights forces into what turned out to be a productive tizzy and which made historians, temporarily at least, not only window-dressing but necessary participants in voting right cases, was the Supreme Court's decision in *Mobile v. Bolden*.¹³ Writing for a four-man plurality, Justice Potter Stewart, without explicitly overruling *White v. Regester*, reinterpreted its holding as requiring proof of discriminatory intent and denied that the so-called "Zimmer factors," which had been derived chiefly from *White*, added up to evidence of intent. To some observers, it appeared that the Court, or at least the prevailing opinion, was demanding production of a gun still smoking after fifty years or more; that is, that plaintiffs had to prove that legislators who passed laws, often as long as a half-century ago, were actuated by racially discriminatory motives.¹⁴ If this interpretation struck, the Justice Department, the NAACP Legal Defense Fund, the Mexican-American Legal Defense Fund, the American Civil Liberties Union, and private attorneys for minority groups had little choice but to call in the historians. The facts of Reconstruction, Redemption, and the Progressive Era became as relevant in the courtroom as regression analyses of racial bloc voting had been since 1973.

At the time the Supreme Court heard *Bolden* and a companion school board case from Mobile, *Brown v. Board*, the lawyers for neither side had done all their historical homework. They traced the at-large systems back to 1911 and 1919, respectively, and stopped there. When the Supreme Court remanded *Bolden* and *Brown* back to the federal district court, the Justice Department and the Mobile counsel who had handled the case for the NAACP-LDF, assisted by a historian located in Mobile, Peyton McCrary, discovered that the at-large features of the election systems dated not from the teens, after most blacks had been disfranchised in Alabama, but from the 1870s, when the threat of black politi-

13. The chief danger for the 1982 renewal of the Voting Rights Act (VRA) was apathy. Since it represented a clear and present danger, and not just a potential threat to minority voting rights, particularly in the classic center of racism, the small-town South, *Bolden* made it much easier for the civil rights forces to work up enthusiasm for the VRA among the membership of their organizations as well as among editorial writers. Thus, Justice Stewart was for the VRA what Interior Secretary James Watt was for the Clean Air Act.

14. The Fifth Circuit Court of Appeals, in *Neveitt v. Sides*, 571 F.2d 209 (5th Circuit 1978) had tried, by combining some of the language and reasoning from *Washington v. Davis* and *Arlington Heights* with the *Zimmer* list, to bring the two approaches into conformity with each other. The "Zimmer factors" could be read as indicative, if not of the motives of the framers of the law, then of those of the ethnic majority and the elite leaders who maintained the political system at the time. It now appears that *Neveitt* was a better predictor of the Court's eventual position (in *Rogers v. Lodge*) than was Stewart's *Bolden* opinion. For a "smoking gun" reading of *Bolden*, see Aviam Soifer, "Complacency and Constitutional Law," *Ohio State Law Journal* 42 (1981), 403.

ical power was much more palpable.¹⁵ I was brought in principally to provide "full period coverage," as one would say in the history job market, since McCrary's scholarly research had been on the Civil War and Reconstruction, while my specialty has been the post-Reconstruction and "Progressive" eras.

Researching the cases felt familiar. I started with some general but not unshakable beliefs about how the world works and how historians should seek to explain things, a hypothesis to test, and some prior knowledge of election laws and of the place and period. After culling through the evidence, I tried to organize it to bring it to bear on the question of why the Alabama legislature passed a law providing for at-large elections for Mobile in a certain year. It was only in preparing for and going through cross-examination and watching others be cross-examined that the question of biases different from those encountered in more traditional scholarly pursuits arose. (How *dare* opposing counsel imply that I would shade the truth to make a point for the sake of money or ideology!) But once opened, the question of objectivity would not will not—recede entirely from my consciousness. Somewhat different research experiences in three other cases, in which I worked with and against different lawyers and before different judges, expanded my experience, but did not change the nature of the questions or answers about objectivity.

What does scholarly objectivity in history consist in, how do one's values enter into one's normal scholarship, and is the situation any different for one preparing to testify as an expert witness? First, values, tastes, talents, and circumstances guide one's initial choice of topic. What seems interesting to one person may bore another—I like tables and equations, and narrative puts me to sleep, but I recognize that other people's views differ, though I cannot account for their egregious preferences. As a southern white liberal with a life-long interest in politics, I naturally gravitated toward political history, more specifically southern political history, and even more particularly the politics of race and

class in the South. Others with different burdens or penchants would consider such topics dull, but sex or death or women fascinating. I find all three subjects absorbing—but not to read about. Much good history, too, is written by people caught up in special circumstances or surroundings. Local history examples too numerous to detail spring to mind, but other cases would include Trevor-Roper's work on Hitler's last days, occasioned by his participation in a British intelligence task force, and C. Vann Woodward's *Battle for Leyte Gulf*, a product of his wartime Washington navy job of consolidating and making sense of battle reports.¹⁶

The prevailing research agenda determines other choices of topics. A subject closely related to a currently "hot" topic in a field may get a scholar a grant, and will nearly guarantee a longer vita, perhaps a prize, and maybe even tenure. Equally good work far from conventional interests will saddle one with a reputation (if any) as a person who may be "solid," but who works on dull or strange topics, or (if one is very lucky, or insightful) eventual, possibly posthumous recognition as a "pioneer." Similarly, the whims of funding agencies are not entirely irrelevant to the activities of academics or at least to the packaging of those endeavors. It was no coincidence that when the Nixon administration began pouring money into the National Cancer Institute, cancer research became a growth area in biology. As all these examples show, value-laden or self-interested reasons for choosing research topics are so omnipresent that it is difficult to imagine someone who could not be faulted for having a bias in choice of topics. Indeed, it is hard to understand what it would mean to say that someone had chosen his topic "objectively." As a consequence, any charge on this ground of a lack of objectivity for a historian doing legal casework must be *not-prossed*.

A second consideration related to objectivity is in the assumptions a historian or any other social scientist makes and in the ways in which he or she formulates the chief questions. Here, I must confess to bias. I believe in making assumptions, reasoning processes, and conclusions as clear and explicit as possible. Some historians practice and even preach obfuscation for art's sake, and many social scientists purvey muddledness in the name of science. I intend otherwise, even if I do not always attain the desired result.¹⁷ Furthermore, I am an unabashed Occamite

16. Hugh R. Trevor-Roper, *The Last Days of Hitler* (London: Macmillan and Company, 1947); C. Vann Woodward, *The Battle for Leyte Gulf* (New York: Macmillan and Company, 1947).

17. Caltech colleagues have pointed out to me that this set of beliefs may partially account for my being chosen as an expert witness: that if I were less inclined to generalize and to state conclusions baldly, or, conversely, felt less compelled to spell out the steps in my arguments, lawyers would not have chosen me. This observation does not, however, reflect adversely on the case for comparative objectivity in expert witnessing. It merely suggests that the decision rule for lawyers choosing experts should be to pick those experts who, in their scholarly work, openly state their results and the process by which they arrived at them. It implies nothing about the further remark, quoted at the beginning of this paper, about choosing witnesses who will say "what a particular side wants said."

15. The opinion on remand is *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S. D. Alabama 1982). In his first *Bolden* opinion (*Bolden v. City of Mobile*, 423 F. Supp. 384, 397 (S. D. Ala. 1976)), Federal District Court Judge Virgil Pittman, who decided in favor of the black plaintiffs, characterized the situation after passage of the Alabama Constitution as "race-proof," by which he meant that race could not have been a motive for legislative action in 1901 because most blacks were disfranchised then. In the remand, the plaintiffs produced evidence, put together primarily by McCrary, which showed that enough blacks were registered to vote in the years following 1908 in Mobile to pose a threat to carry or seriously influence at least one ward. Had a ward system been adopted. Even if this had not been so, however, the "race-proof situation" argument has always struck me as curious. If blacks were excluded for reasons of race from participating in a decision which even be thrown out? If it be feared that this would result in the overturning of all laws passed during the whole period, the answer is that those which have no present discriminatory effect are therefore not unconstitutional.

(that is, I have a strong preference for parsimonious explanations); a confirmed believer in rational, maximizing behavior, especially by those calculating persons, politicians; and a person with very low Bayesian priors about unintended consequences. If I find blacks—or poor whites—shut out of politics, I immediately suspect that it didn't just happen to turn out that way, and I have faith that if I find the means employed and the wills involved in perpetrating the causal act or acts, the protagonists and their weapons in one geographical area will closely resemble those in other places, and the basic reasons for their activities will be simple.

Yet in speaking of this as a "bias," I mean "predisposition" or "proclivity" rather than "unalterable presupposition." All scholars begin with some proclivities such as these, and nearly all scholars alter their predispositions little by little as they accumulate more experience. Some, either as neophytes or at some stage in their lives before (or after) senility, prefer complexity, assume irrationality, and deny intent a priori. It is to be hoped, however, that both forest people and trees people, while they might be attracted to different facets of the scenery, would at least be able to agree roughly on what trail to follow through a particular wood. Less metaphorically, a modeler might admit the inadequacies of his schema in representing a certain situation, while a person of idiographic propensity might agree that uncomplicated explanations are sometimes correct. In any event, differences in such assumptions color scholarly and contracted work equally. If I sin, it is in monographs as well as in testimony. Yet since one inevitably must make some such leaps of faith, since one cannot escape these fundamental epistemological issues even by ignoring them, making them cannot rob one of objectivity unless objectivity is never possible. The directed verdict on count two must therefore be acquittal.

Third, did the procedure for examining evidence, which admittedly differs from that I would normally adopt, bias my conclusions, therefore robbing the project of objectivity? Generally, after deciding what to study, picking out, in a preliminary fashion at least, what principal questions to ask, and ransacking the secondary literature, I would go through as many primary documents as are available—newspapers, manuscripts (if any), official documents, voting returns. This procedure reflects a professional tradition in history which stretches back at least to the establishment of the first American graduate programs a hundred years ago. The image of the lonely scholar, or perhaps, to modernize it a bit, of the lonely research team, seeking truth by applying their open but careful minds to the appropriate evidence, is pervasive among social scientists and humanists. Scholars may make mistakes, study uninteresting topics, fail to express themselves well, or even reflect unconsciously the popular world view or disciplinary paradigm dominant at the time

they're working, but they don't, in this standard stereotype, purposely distort. Truth is produced by what might be called a "linear" process.

In the adversary tradition, on the other hand, truth is assumed to emerge, if at all, as part of a dialectical process. The lawyer's ideal world is, in this respect, rather like Adam Smith's: when every lawyer seeks simultaneously to maximize the chances of his or her own client, assuming that each abides by some fundamental rules of fairness, an Invisible Hand guides the process toward the maximum production of truth. Hand guides the process toward the maximum production of truth. Lawyers are supposed to be advocates, to represent their clients. They are not to pursue some abstract "truth" or "social good," but only the very relative interests of the people who hire their services. Graduate schools and law schools may often cohabit on the same campus, but in their self-conceptions, they have long since divorced. This separation breeds deep suspicion on each side of the other's pretensions and processes.

Despite suspicions, I have had to accept the fact that in the cases I have worked on, others—the Justice Department, the EDF or other lawyers for the plaintiffs, and the lawyers and experts for the localities whose electoral systems are being challenged—perform most of the culling of primary sources. I read what they send me and what I specifically ask for. This would worry me more if the documents were secret or private, or if the lawyers with whom I've worked denied requests for papers or documents I asked them to look for, or if the lawyers on each side didn't have a strong interest in confronting the court with all the evidence which could possibly buttress their positions. In fact, none of the material is private; and every request I've made for information—and I've been bothersome, in order to insure that I look at everything which might be relevant—has been complied with. Moreover, it appears to be in the nature of research for such litigation that the lawyers (exactly like scholars in this respect) don't know just how to put together the facts or which facts will turn out to be of relevance until very close to the last moment. They do the research when they can, drib and drab it out to prospective experts, put it all together the last night. Thus, time pressures and lack of complete foresight guard against their stacking any but the most obvious evidence.

Only two things about the process are bothersome. In the first place, even if the adversary process leads to truth, it's less likely to if the legal talent on each side is unequal. And I'm afraid that the acumen of counsel on the side of those charging discrimination has almost always been superior, in the cases I've been in, to that of the defenders of at-large voting. In other words, I can't be sure that the other side would recognize evidence for their cases if it jumped off the page at them. In the second place, despite the extensive discovery procedures which drag out modern litigation, lawyers have a gaming tendency which leads them to hold

back evidence until cross-examination. And there is a natural contrary tendency for a witness to stick to his guns when challenged, to consider cross-questioning a combat, and therefore to disregard evidence offered at this time against his case. No one wants to look foolish or contradictory, or to conclude that he wasted his time.

These doubts are connected with a fourth consideration, that of advocacy: Does the fact that one is making a case, is part of a team with a particular value-laden objective, by itself undermine the usual standards of scholarly objectivity? In all but one respect, I think it doesn't. After all, scholars do get committed to particular arguments—the Civil War was or was not irrepressible, the living standard of the working class in England rose or fell in the nineteenth century, the American Revolution was primarily an intellectual or alternatively a social movement—and they rarely change their minds. (One might note, parenthetically, that the same state of affairs characterizes the physical sciences, for as Thomas Kuhn has pointed out, defenders of old paradigms rarely switch, they just retire.)¹⁸ Nonetheless, scholars sometimes modify their stands, particularly on relatively minor points. They circulate papers and accept criticisms, alter some treatments in subsequent editions of books, at times even confess error. The trouble with a trial is that it's a one-shot affair that one goes from expression to publication without circulation, copy editing, or galley proofs. Since one can hardly call up the judge six months later and say "I've changed my mind; I was wrong," the process of lengthy contemplation of one's interpretation, a usual part of scholarship, is necessarily private and naturally truncated for an expert witness.

A fifth point follows closely in train. It is the core of the objectivity question. Did one pick only those pieces of evidence which fit one's case, and did one twist the story to bypass evidence which could not be ignored? Here, the adversary process seems to provide a safeguard at least equal to those in academia. To most judges, the most credible expert witnesses are persons who have published fairly widely on the topic or on kindred ones. To most lawyers, risk-averse souls who prefer not to be surprised during trials, the best witnesses are experienced ones. Since books, articles, and previous testimony, affidavits, and depositions are matters of public record, an expert who takes contradictory positions on two similar pieces of evidence or similar positions on two contradictory pieces of evidence is placing his reputation at risk in a bet not only on the stupidity of opposing counsel in the instant case, but in every other case to come.

Furthermore, it is somewhat easier, indeed, it is unavoidable in witnessing, to make oneself conscious of contrary cases. Even if the other

side's barristers are inferior, at least in this rather specialized area of the law, one always overprepares for cross-examination, and one is pressed in the moot court tradition by one's own side. No doubt lawyers might pull their punches to avoid unsettling their own witnesses, but that's a dangerous course, because the witness might sense duplicity or the contending lawyers might pull off lucky shots. Moreover, the witness, more frightened of a courtroom than the lawyers are, naturally tries to think of every possible question. The whole process, therefore, encourages the questioning and testing of interpretations much more than do normal scholarly procedures.

The sixth and final question breaks the analogy with regular scholarship, and rests on a counterfactual thought experiment. If I were testifying for the other side, would my conclusions differ? I feel certain that, at least in the cases in which I have been involved, they would not: I would find evidence of an intent to discriminate in the passage or maintenance of the system. I also recognize that if my analysis did vary depending on whom I was working with, my days as a credible expert witness would be over. I even half wish that some local government would retain me—they seem to pay better than the LDF or Legal Services or even the Justice Department, and it would be satisfying to take their money and then upset their case. Still, one aspect of the question bothers me: assuming that if I did appear I would speak truthfully and fully, *would I testify for the other side?*

The difficulty is that expert witnesses generally do more than testify. Unless they are brought in at the very last moment or are working with extremely overbearing, absurdly self-confident lawyers, witnesses usually have some role in organizing cases and especially in planning research on the facts. For if they do not understand their case, they cannot know what is relevant, and if they don't assist in and partly direct the gathering of the facts, they cannot be sure they have seen all the important evidence. Even if, as "educational" witnesses, experts are chiefly used to report on the state of research in some academic field, they will have to know enough to know when to stop talking—a difficult thing for professors in the best of circumstances—and they will probably be asked for advice on other aspects of the case, on other witnesses' reputations, on how to rebut their testimony, and so on. Expert witnesses do not merely give opinions; they join a company.

Since, as a person, I believe strongly in racial equality, and since, as a social scientist, I find the empirical and theoretical evidence of the racially discriminatory impact of at-large systems overwhelming, could I work with lawyers who were attempting to preserve an at-large system in a jurisdiction which included a large and geographically separate minority group? (Other, analogous questions would occur to other potential expert witnesses or to me in other contexts.) Should the answer depend on the degree of oppression in each individual case, and how can

18. Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970).

that be gauged, especially before one knows much about the particular facts? Or should every situation be analogized to that of a chemical engineer in Nazi Germany being asked to perform experiments to determine the least costly but most efficient combination of gases lethal to humans—an objective, value-free scientific question in a sense, but a request which few, in hindsight at least, would agree to honor.

This last question is but a variation on the Faustian quandary: should one compromise with evil, and, if so, how far? While I am not pretentious enough to hazard a general answer, I do have some observations. First, the learned alchemist's dilemma was one-sided. It wasn't the Lord, but the Devil who offered him fame and fortune in exchange for his soul. Presumably, if the proposition had originated in the upper, instead of in the nether regions, the good doctor would have had no second thoughts. Likewise, an expert who bears witness truthfully and for the side he or she favors as a citizen does not, on this count, jeopardize his or her virtue. Second, to the extent that scholarship, however intended, is ever usable, either as a direct influence on current policy or by providing a general background, a context, or a part of the learning experience of the makers of present or future policy, the dilemma is inescapable. The scholar publishes, and, having done so, loses control over the uses to which his or her material can be put.

Let me illustrate this last point with a personal anecdote. For a congeries of empirical and value-laden reasons, I favor abolition of the electoral college. This age-old question was debated seriously and actually voted on by the U. S. Senate in July of 1979. In an extension of remarks section of the *Congressional Record* which dates from that time, I had the honor, if that is the proper phrase, to be cited a dozen times in a report prepared by the Congressional Research Service which was inserted into the record by a senator.¹⁹ This was the first time that my name appeared in the *Congressional Record*, and it may well be the last. Although I am not a daily devotee of that publication, a friend who noticed it was kind enough to send it to me. The trouble was, I was cited to support the case *against* abolishing the electoral college, and, as if to heap on the insults, the senator who requested the study and had it put into the *Record* was one whose actions rarely fail to outrage me, Orrin Hatch. To top it off, shortly after I had posted a response to a sympathetic senator, in which I tried to show that my work and other evidence, while cited correctly, had been employed superficially, and that a deeper analysis of southern voting patterns in the nineteenth and twentieth centuries really supported the case for abolition, rather than the converse, I learned that the vote on the electoral college had just taken place, and that my small contribution could no longer even add a historical grace note to the debate. Although I had hatched no Faustian

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bargain, and gained neither glory nor remuneration from this episode of scholarly "influence" on public policy, my words had done the Devil's work just as surely.

The process by which a fundamentally honest expert witness arrives at conclusions, I have tried to argue, differs less from that which honest scholars employ in their everyday work than is sometimes charged. Insofar as they do diverge, moreover, it is by no means clear that the normal procedures guarantee more objective results than those a witness uses. Warren Miller's statement about the different motivations involved in trying to "do good" and to "find out how things work," quoted at the beginning of this paper, is not in accord with my experience. For potential assaults on a scholar's objectivity are possible anywhere. Social scientists' virtue is no more at stake as they walk down the dark alleys of policy relevance than it is on the brightly-lit streets of the campus. Further, if, instead of confining themselves closely in their ivory towers, they broadcast their thoughts, like paper airplanes, down into the popular mists, they can no longer control whether their fragile crafts are wafted on winds of change or on counter-currents of reaction. To return to the metaphor with which I began, historians should regard themselves, and should be regarded by lawyers and judges, neither as virgins nor as members of that other ancient profession. Testifying and scholarly are about equally objective pursuits.

19. *Congressional Record—Senate* (June 13, 1979), S7604–S7615.