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## Trying Times: The Courts, the Historian, and the Contentious Struggle to Define Disease

DAVID ROSNER

It's such an honor to be here tonight to speak with my colleagues and friends about my work over four decades! I would like to dedicate this talk to my mentor, Barbara Rosenkrantz, who died last year and had a profound influence on me and many others in this room (Figure 1). I am very proud of the professional and academic honors which Margaret [Humphreys] just mentioned. But tonight I'd like to talk about another aspect of my professional life that is rarely mentioned in academic settings but of which I am equally proud.

As many of you know, Jerry Markowitz, a distinguished professor at the City University of New York (and my former brother-in-law, friend, and colleague for over fifty years) and I have been deeply involved in lawsuits brought by workers, states, and cities against companies accused of exposing workers and the public to industrial pollutants. We have testified in cases brought on behalf of workers suffering from mesothelioma, lung cancer, and asbestosis; and people with lymphomas possibly caused by exposures to PCBs. We have testified and consulted in major suits in Rhode Island, Missouri, and California on behalf of children poisoned by lead in paint and emissions from smelters in Missouri and Peru. We have testified and consulted in cases in both the United States and South

This was delivered as the Fielding H. Garrison Lecture at the annual meeting of the American Association of the History of Medicine in 2015. It has been edited slightly for publication. I would like to thank my co-author and long-time colleague, Gerald Markowitz, as well as Kathy Conway who edited this talk. Also, my colleagues at Columbia University who have been so supportive of our joint effort to establish what is a unique intellectual environment at our Center for the History & Ethics of Public Health and History Department: Ron Bayer, Merlin Chowkwanyun, James Colgrove, Amy Fairchild, Kavita Sivaramakrishnan, Gerald Oppenheimer, Betsy Blackmar, and Lisa Metsch. Most important, I want to acknowledge the joy that Owen Alexander Rosner has brought into my life.



Figure 1. Barbara Rosenkrantz and David Rosner, Cape Cod, Mass., summer 2015.

Africa where American workers and African miners are suffering from silicosis. These plaintiffs, both individuals as well as state and local governments, have sought both financial compensation for personal injuries and money to clean up environmental toxins. Some cases have resulted in massive verdicts sometimes measuring in the hundreds of millions—even billions—of dollars against major corporations. In one case, for example, major mining and smelting companies were ordered to both detoxify the town of Herculaneum, Missouri, and to buy out residents' now-worthless properties poisoned by years of lead emissions (Figure 2).<sup>1</sup> We have also been witnesses in major trials aimed at providing money to public health departments to remove the lead from the walls of the cities of Rhode Island, as well as Los Angeles, San Diego, San Francisco,

1. Todd C. Frankel, "\$320 Million Verdict in Lead Smelter Case Sends Clear Message," *St. Louis Post Dispatch*, July 30, 2011, [http://www.stltoday.com/news/local/metro/million-verdict-in-lead-smelter-case-sends-clear-message/article\\_12f7e0ba-29ab-5894-8067-9a45ad255cfa.html](http://www.stltoday.com/news/local/metro/million-verdict-in-lead-smelter-case-sends-clear-message/article_12f7e0ba-29ab-5894-8067-9a45ad255cfa.html).

Oakland, and San Jose. In the California case, the court ordered the lead pigment manufacturers to provide the state with \$1.15 billion to remove lead paint from the homes of millions of residents where small children live.<sup>2</sup> When we are on the stand we speak to the jury about the history of public health, particularly what was available in the medical and public health literature about the dangers of lead, PCBs, dioxins, or asbestos at different moments of time.



Figure 2. Snapshot of a sign posted outside The Doe Run Company in Herculaneum, Miss.

2. As will be discussed, this case is presently on appeal before the California Appeals Court. See Kira Lerner, "Lead Paint Makers Must Pay \$1.15B in Hiked Judgment," *Law 360*, January 8, 2014, <https://www.law360.com/articles/499460> (accessed July 19, 2017); see also, David Rosner and Gerald Markowitz, "How to End Lead Wars in America," *Huffington Post*, January 13, 2014, [http://www.huffingtonpost.com/david-rosner/how-to-end-lead-wars-in-america\\_b\\_4590931.html](http://www.huffingtonpost.com/david-rosner/how-to-end-lead-wars-in-america_b_4590931.html) (accessed July 19, 2017).

As Charles Rosenberg said in the book he edited with Janet Golden, in a sense, disease doesn't exist until we decide it does.<sup>3</sup> Right now, we can witness the deepest meaning of Golden's and Rosenberg's point. In the courts, newspapers, websites, and in the broader culture a massive struggle is taking place over the naming of new physiological conditions. Courts around the country are evaluating endocrine disruptions, cancers, and subtle neurological changes possibly caused by exposures to a host of chemicals and synthetic materials. Juries and judges are evaluating responsibility for the damage done to humans and the environment by a century of unrestrained industrialism. These struggles are going on largely outside of the professional worlds of public health, medicine, and history. I have been honored to be a part of this through my work on the history of occupational and environmental health.

What I would like to do today is give you a sense of how I came to this work: how my development as a historian of public health parallels conflicts that have played out within the history of medicine, particularly the conflicts between those doing more traditional studies in history of medicine and those pushing to expand the breadth of the field. I will then describe how Jerry's and my scholarship came to be useful in jury trials and what those trials were like for me as a historian. Then, I will address the conflicts that arise for the historian testifying in the courtroom. Finally I will look at the possibilities that exist today for historians not only in the courtroom but in other nontraditional settings as well.

First, I want to bring you back in time. In 1973, I entered the History of Science Department at Harvard as a Ph.D. student. It was a rude awakening. I had a master's degree in public health and a few years' experience working in the trenches as an administrator for the State Department of Mental Health in New York. I hoped the study of history could shed light on the contemporary organization of health services and thereby affect policy. This notion, however, did not jive with the views of historians of medicine in 1973. As Susan Reverby and I noted in *Health Care in America*, most of the senior scholars of the time were focused, narrowly, we thought, on the great men and discoveries of medicine.<sup>4</sup> There was a tendency among historians of medicine to look down on public health practice as an "allied," but clearly subordinate, field of medicine and its practitioners as doctor wannabes.

3. Charles E. Rosenberg and Janet Golden, eds. *Framing Disease* (New Brunswick, N.J.: Rutgers University Press, 1992).

4. Susan Reverby and David Rosner, eds. *Health Care in America: Essays in Social History* (Philadelphia: Temple University Press, 1979).

I and my contemporaries, not yet professionalized into the field, were coming out of the antiwar, student, and civil rights struggles of the 1960s and were attracted to the work of historians like Eric Hobsbawm, E. P. Thompson, and David Montgomery, who provided a politic and an approach in keeping with our admittedly class- and race-conscious concerns. We became interested in topics like women and minorities in medicine, patients, nurses, medical technicians, and orderlies. Our desire to write history from the “bottom up,” as we said, placed us at the center of impassioned debates, even screaming matches, at the American Historical Association and History of Medicine annual meetings.<sup>5</sup>

It's difficult to convey how vitriolic these meetings and even discussions in our professional journals became. Here are a few headlines from the *Bulletin* and the *Journal* (see Figure 3).

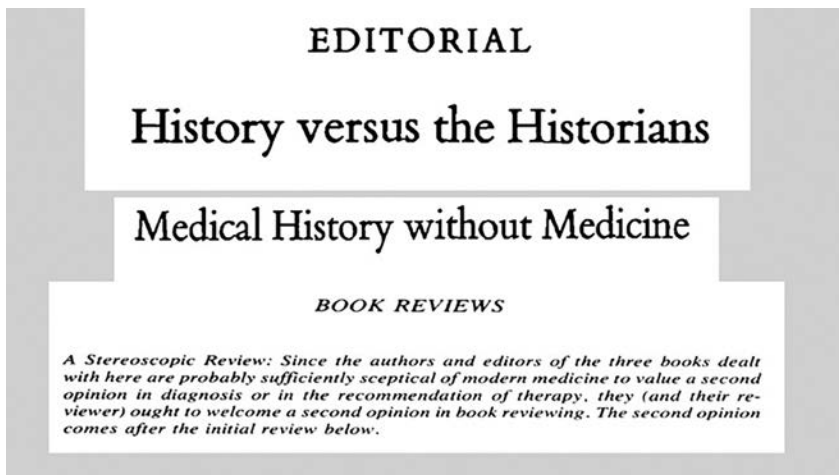


Figure 3. “History versus the Historians,” *J. Hist. Med. & All. Sci.* 33, no. 2 (1978), 127; “Medical History without Medicine,” *J. Hist. Med. & All. Sci.* 35, no. 1 (1980), 5–7. From this editorial: “In a strict sense the social history may not even be medical history. If such social history be considered medical history, it is medical history without basic medical sciences and clinical methods and concepts; that is, it is medical history without medicine,” p. 7. Lloyd G. Stevenson, “A Second Opinion,” review of *Rockefeller Medicine Men: Medicine and Capitalism in America*, by E. Richard Brown; *Sickness and Health in America: Readings in the History of Medicine and Public Health*, by Judith W. Leavitt and Ronald L. Numbers; and *Health Care in America: Essays in Social History*, by Susan Reverby and David Rosner, *Bull. Hist. Med.* 54, no. 1 (1980), 134–40.

5. See Jesse Lemisch, “Bailyn Besieged in His Bunker,” *Radical Hist. Rev.* 3 (1976): 72–83, and Lemisch’s review of Bailyn’s *Ideological Origins of the American Revolution* (Cambridge, Mass.: Harvard University Press, 1968), “What Made Our Revolution?,” *New Republic*, May 25, 1968, 25–28.

In the early 1980s, editorials appeared attacking critics of modern medicine, affirmative action within medical schools, and even Ph.D.s who wrote history. Forty years later this battle seems largely settled. Now the AAHM annual meeting includes many panels on patients, women, minorities, and workers, as well as physicians, nurses, and lab scientists. There are even luncheon meetings about capitalism and health. The Sigerist Circle, once an alternative structure for some of the “radicals” in the association, is now a yearly event and, this year (2015), even attracted C-SPAN! Who would have thought!! Yet, I would argue, there are still tensions over what subjects are appropriate for historians and whether the historian has a role in the world outside the academy.

Let me take you through the journey that led to Jerry Markowitz’s and my involvement in lawsuits. After my early work on the history of hospitals,<sup>6</sup> I began, in 1983, to work with Jerry on what seemed to be the ideal project for joining together social history and the history of medicine—the history of workers’ health and safety. With the exception of George Rosen’s *History of Miners’ Diseases* and the attention paid by some labor historians to the Triangle Fire and the fight for workers’ compensation, little serious work had been done on the impact of industry on the health of workers.<sup>7</sup> In 1987 we edited *Dying for Work*, a collection that was so unusual at the time that it was named a Choice “Outstanding Academic Book,” and *Slaves of the Depression*, a collection of heart-felt letters from workers and their families to Eleanor Roosevelt and Frances Perkins describing their lives and asking for help during the Depression.<sup>8</sup> While spending time in Washington, D.C., researching those books at the National Archives we met Loren Kerr, a physician with the United Mine Workers who was instrumental in shaping legislation to cover what became known as black lung as a compensable disease. Because Loren was housebound we visited him at his apartment whenever we were doing research at the National Archives in D.C. During those visits we would take him (and, as he called it, his “friendly oxygen tank”) to lunch. Kerr insisted that to really understand anything about black lung or asbestosis we needed to understand the struggles around silicosis, a disease that in 1984 we had

6. See David Rosner, *A Once Charitable Enterprise: Hospitals and Health Care in Brooklyn and New York* (New York: Cambridge University Press, 1982).

7. George Rosen, *The History of Miners’ Diseases: A Medical and Social Interpretation* (New York: Schuman’s, 1943).

8. David Rosner and Gerald Markowitz, *Dying for Work: Workers’ Safety and Health in Twentieth-Century America* (Bloomington: Indiana University Press, 1987); Gerald E. Markowitz and David Rosner, *Slaves of the Depression: Workers’ Letters About Life on the Job* (Ithaca, N.Y.: Cornell University Press, 1987).



never heard of. Serendipitously, we had been collecting a huge cache of material at the archive exactly on the topic: documents from the 1930s and 1940s that detailed debates between the Department of Labor and the U.S. Public Health Service about this disease. Our conversations with him led us to write *Deadly Dust* in 1991 (Figure 4).<sup>9</sup>

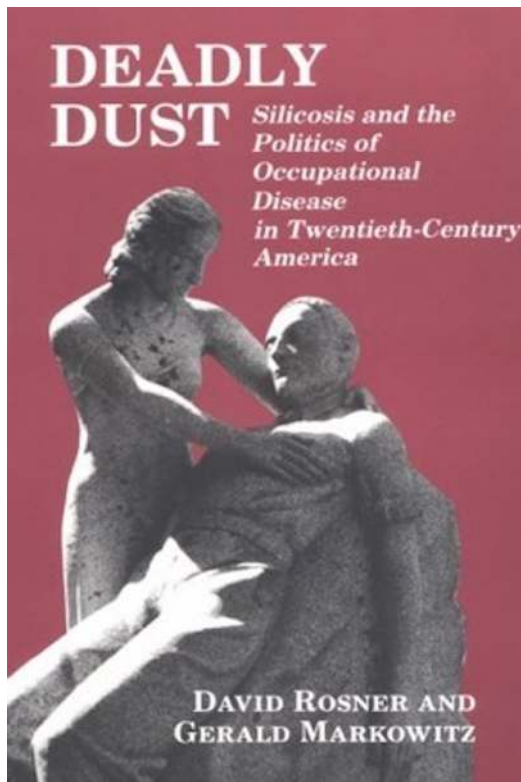


Figure 4. The cover of *Deadly Dust*.

The book was narrowly focused: it asked how a disease whose symptoms took decades to appear could be considered epidemic in one era and virtually ignored in the next. We hoped a few scholars would be interested in it and that, for historians of medicine, it might shed light on the impact of twentieth-century industrializing America on our understanding of chronic disease in the way that *Cholera Years* shed light on our understanding

9. David Rosner and Gerald Markowitz, *Deadly Dust, Silicosis and the Politics of Occupational Disease in Twentieth Century America* (Princeton, N.J.: Princeton University Press, 1991).



of epidemic disease in the nineteenth.<sup>10</sup> So imagine our surprise when our editor at Princeton University Press called after only a few months to say that the hardcover run had sold out and they were putting the book out in paperback. “Who bought it?” we asked. “Medical historians?” the editor suggested. “No,” we answered; our work was still on the outer edges of medical history. “Labor historians?” No again. After a call to the mail room, the editor informed us that the book was being bought by lawyers and, it seemed, government agencies in D.C. and in Cincinnati.

We were soon contacted by some of these lawyers representing silicotic workers in Texas, Louisiana, and other pretty remote areas of the country. Then officials in the U.S. Department of Labor, OSHA, NIOSH, and MSHA called us asking us for help planning the “second” National Silicosis Conference to be held in Washington, D.C., in 1997. The government had learned through our book of the “first” silicosis conference nearly sixty years before in 1937, and they wanted to plan a “second” in 1997 as silicosis was still a major concern.

The conference, attended by over six hundred people, kicked off the Department of Labor’s “It’s Not Just Dust” campaign to end silicosis, announced by Robert Reich, then the Department of Labor Secretary. Soon, law firms all over the country were calling us. Workers in a host of industries—primarily in Texas, Louisiana, and other Gulf states—were still coming down with silicosis and were suing a variety of suppliers for negligence.<sup>11</sup> We were asked to testify about what industry leaders knew of the dangers to sandblasters, foundry workers, construction workers, and granite cutters who had inhaled silica.

At first, we were hesitant to get involved. By the 1990s, we had been socialized into academia and saw ourselves as scholars, not “interested parties.” Despite our belief that we had a great deal to say outside of the academic world, we had come to operate within the academic community and were nervous about moving outside it.

Nonetheless, we decided to get involved after one Texas lawyer came to New York and showed us a haunting video of one of her clients: a thirty-four-year-old Mexican worker. In the 1970s, following the OPEC oil crisis, when west Texas crude was again in demand, a huge oil company recruited hundreds of Mexican workers to the area around Odessa, Texas, to sandblast old oil-storage tanks. The company had given the workers paper

10. Charles E. Rosenberg, *The Cholera Years: The United States in 1832, 1849, and 1866* (Chicago: University of Chicago, 1962).

11. David Rosner and Gerald E. Markowitz, “From Dust to Dust: The Birth and Re-birth of National Concern about Silicosis,” in *Illness and the Environment*, ed. Steve Kroll-Smith, Phil Brown, and Valerie J. Gunter (New York: New York University Press, 2000), 162–70.

“3M” masks and sent them with sandblasting units into small, enclosed tanks to blast sand at the layers of tar and oil that had accumulated over the decades. Several years later, workers began to suffocate and die from silicosis.<sup>12</sup>

We had entered into a world academics had not prepared us for. Allan Brandt, in his extraordinary book *Cigarette Century*, eloquently captures the tensions that he, Jerry and I, and other historians like Robert Proctor initially felt about our participation in legal cases:

I saw no reason why a historian’s perspective would carry much weight in a courtroom, where the combat scarcely resembles the staid academic debates I had become accustomed to. It would be best for me to present my work not in the adversarial context of tort litigation, but in the form of a book, where I could lay out my arguments in detail. . . . I did not want to become a combatant in the tobacco wars; I much preferred my role as a war correspondent and military historian.<sup>13</sup>

I remember my first deposition at the ritzy Plaza Hotel in New York. It lasted over five days. I had been told the objective of a deposition is to allow opposing law firms to learn what you, as an expert witness, would offer in your testimony. I had been prepared to talk about the book, particularly about the fact that a great deal of medical and public health information about the dangers of silica dust was available early in the twentieth century. I expected to speak about the history of industrial society, about the transformation of the work process from skilled labor to unskilled work, about scientific management and the effect of speed-ups, high speed drills, and power tools on dust production and workers’ health. I envisioned something akin to a graduate seminar on the history of work and its impact on health.

But depositions are not seminars. Often, very aggressive lawyers ask intrusive or offensive questions in an attempt to discredit your testimony before a jury. I have been asked about my social background, my politics, even my religious beliefs. During a trial in rural Odessa, Texas, one lawyer asked me whether Mt. Sinai Medical School, where I have an appointment, is part of Yeshiva University (which it wasn’t) and followed up the question by making it clear to the jury that it was a Jewish school. In a deposition, I was questioned about my relationship with Gerald Markowitz, how we wrote together, and even how we got to work in the morning! It

12. David Rosner and Gerald E. Markowitz, *Deadly Dust: Silicosis and the On-going Struggle to Protect Workers’ Health*, 2nd ed. (Ann Arbor: University of Michigan Press, 2006), 222–24.

13. Allan Brandt, *The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product that Defined America* (New York: Basic Books, 2007), 494–95.

was clear that the stakes were high and that I, as a historian, could affect the outcome of trials.

It became clear that powerful historical testimony posed a threat to industry lawyers. Previously, industry had argued successfully in court cases that since virtually “no one” had ever heard of silicosis, “no one” could be held accountable. Our book and testimony offered evidence to the contrary: industry had known of—or could easily have found out about—the disease and the means to prevent it as early as the 1910s. If the jury learned that industries had ignored the medical, public health, and popular information that was in the historical record, they might come to a different conclusion as to culpability. So the industry lawyers had to alter their argument, claiming that since “everyone” knew of the disease, the industries should not be the ones held accountable.

Sometimes we would learn of the personal ramifications of a trial. During one trial recess, I met the plaintiff, a sandblaster in an oil field who had been sent into a storage tank to sandblast it with only a bandana to keep the dust out of his lungs. His family came over to me thanking me for testifying on his behalf. I felt quite terrible as I could see from the faces of the largely Anglo jury that there was little sympathy for their husband and father, a Mexican by birth, and there was little hope that they would decide in his favor. Nonetheless, his daughter told me how important my testimony was to the family. She kept translating for her mother, who said that she was grateful that I, a professor from New York, was willing to testify, for all she wanted was that people hear that her husband was “someone too.”

We wrote our book on silicosis using traditional archival research. But, the court cases had opened up to us a new source of primary documents: the testimony and depositions as well as industry memos, letters, and minutes of meetings revealed through the “discovery” process central to legal disputes. *Deceit and Denial*, our next book about industrial pollution, could not have been written *without* lawsuits, that is, *without* the documentary evidence that the suits had forced into the open.<sup>14</sup> Plaintiffs’ lawyers are able to obtain internal company documents from corporate file draws and storage facilities previously unavailable even to the most diligent historian. In 1996 two lawyers called us from the City of New York Law Department. The city had accumulated a moderate-sized roomful of documents drawn largely from the trade association for manufacturers of lead paint and other lead-bearing products and they wanted to know what was in them. The lawyers were involved in a case involving children in public housing

14. Gerald Markowitz and David Rosner, *Deceit and Denial: The Deadly Politics of Industrial Pollution* (Berkeley: University of California Press, 1982).

poisoned by lead paint. The city's lawyers were intent on suing the paint manufacturers for selling the city such a defective, dangerous product and thereby putting the children in danger.

The city had contacted us because of an article we had published in 1985 entitled "Gift of God?" which traces the controversies about lead poisoning due to automobile exhaust.<sup>15</sup> As it turned out, we were later told, copies of our article were on the table while the EPA was determining whether to end the use of lead in gasoline once and for all. Our article played a role in the professional world of public health as well. In our 1985 article, we demonstrated that an *AJPH* editor, doubling as a consultant to the Ethyl Corporation, had written an editorial in 1925 reassuring professionals that lead in gasoline was safe. In an editorial written in the journal in 1985 in response to our article, the editor apologized for the journal's role in the failure sixty years earlier to prevent the public health tragedy that resulted from the use of lead. "This sad tale, recounted by Rosner and Markowitz in this issue of the *Journal*, is only part of the story of a missed opportunity to prevent widespread contamination of the environment with lead," he noted.<sup>16</sup>

This roomful of documents at the Law Department led us to realize that the courts and legal wrangling around occupational and environmental dangers were an incredible new source of primary sources that historians had never before seen. Through the court proceedings, letters, memos, minutes of meetings, studies, and reports from the files of major corporations had become available with the potential for transforming our understanding of environmental and occupational health and even corporate history. We began to write books and articles about the history of lead, vinyl, chlorinated hydrocarbons, asbestos, and other industrial products linked to deadly diseases.

In *Deceit and Denial* we examined the role of industry in promoting the use of lead paint even when the industry knew children were being poisoned. The industry had profited from their promotion of lead paint, and, in the process, created a public health tragedy. Without litigation, historians would never have seen the internal memos and minutes of meetings in which company representatives from Dutch Boy or Sherwin-Williams, among others, discussed the dangers that leaded paint posed to children.<sup>17</sup>

15. David Rosner and Gerald Markowitz, "A 'Gift of God?': The Public Health Profession and the Controversy over Tetraethyl Lead during the 1920s," *Amer. J. Pub. Health* 75 (April 1985): 344–52.

16. Editorial, "One Man's Meat, Another Man's Poison," *Amer. J. Pub. Health* 75 (April 1985): 338–40, quotation on 338.

17. Markowitz and Rosner, *Deceit and Denial* (n. 14).

We found ads claiming lead paint was safe, sanitary, and useful on children's walls and furniture.<sup>18</sup> In 1930, at the same moment the internal discussions of children's poisoning are going on, Dutch Boy produced a coloring book for children in which they are shown how to use lead paint on every object in their rooms. The paint companies distributed these to children at hardware and paint stores in order to get parents to buy paint and to train children to love it. The illustrations were accompanied by a poem, jingle, or story line that conveyed the message to the child that his or her gloomy, depressing environment would be brightened by using lead paint to banish the Dickensian figure of "Old Man Gloom" from their home. Using the documents, Jerry and I created a long affidavit that outlined the evolution of medical and corporate knowledge concerning the dangers of lead to children which became part of the New York City case. By the end of 2000 the affidavit had been integrated into legal actions brought by the cities around the country. Some of these cases were dismissed by judges, some lost before juries, but others were allowed to go forward.<sup>19</sup>

Then came a new stage in actions against the lead industry. In 1999 Sheldon Whitehouse, then the Attorney General of Rhode Island, now U.S. Senator, brought suit against lead pigment manufacturers including giant companies like National Lead and Sherwin-Williams. The suit alleged that the industry had knowingly created a public nuisance by using lead paint on the walls of up to 80 percent of the state's housing, thereby putting thousands of children at risk of developing lead poisoning.<sup>20</sup> This was an extremely important case. For the first time, suit was being brought not on behalf of children already damaged by lead but on behalf of a community, the entire state, that would eventually find their citizens damaged if the lead was left on the walls of its cities and towns. The suit was innovative, seeking not damages for past harms but demanding resources to *prevent* future harm to children by demanding that the companies clean up their mess before their product harmed *future* generations of children.

18. Ibid.

19. See, e.g., AboutLawsuits, "Lead Paint Lawsuit Against Sherwin-Williams Results in \$7 Million Verdict," June 30, 2009, <http://www.aboutlawsuits.com/lead-paint-lawsuit-7m-verdict-4638/>; Bruce Vielmetti, "U.S. Appeals Court Reinstates Wisconsin Lead Paint Suit," *Milwaukee Journal Sentinel*, July 24, 2014, <http://archive.jsonline.com/news/statepolitics/appeals-court-reinstates-wisconsin-lead-paint-suit-b99317605z1-268494482.html>.

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

The trial was intense and lasted more than four months. Every day, families with their children gathered outside the courtroom demonstrating. The jury heard voluminous testimony from epidemiologists, public health officials, toxicologists, and parents of poisoned children. They learned that three to five thousand children in Rhode Island were poisoned every year; that even low level exposures cause everything from IQ loss and learning problems to behavioral problems leading to a host of social problems. They learned about blood lead levels in children, about exposure routes and the means for abating lead paint hazards. From us they learned of the long history of knowledge that the companies possessed about childhood lead poisoning. We were not allowed to show some documents to the jury because they were so inflammatory. One speaks of the racism that infected policy decisions. Here, in a 1956 letter to Felix Wormser, assistant secretary, United States Department of the Interior (and previous secretary of the Lead Industry Association [LIA]), Manfred Bowditch of the LIA used racist arguments to justify future generations being poisoned.

Sure, I'm irritated, but more than that, I'm baffled. Aside from the kids that are poisoned (and we still don't know how many there are), it's a serious problem from the viewpoint of adverse publicity. The basic solution is to get rid of our slums, but even Uncle Sam can't seem to swing that one. Next in importance is to educate the parents, but most of the cases are in Negro and Puerto Rican families, and how does one tackle that job?<sup>21</sup>

These documents also revealed marketing campaigns aimed at countering public concerns about the dangers of lead.

Jerry and I testified for a total of eleven days, and for eleven days lawyers for major corporations examined every aspect of our argument, research methods, analytic framework, and assumptions. A few headlines illustrate how important the historical testimony was in this trial (Figure 5). It was wonderful for us to read these headlines that indicated that people throughout the state were learning from history and that they got the point: that what these companies said in public did not jive with what they said in private.

We were ordered by the court not to discuss the case with anyone, especially not the lawyers. Holed up in the Courtyard Marriott reviewing thousands of documents, I was going slightly mad. I fretted over my answers to certain questions that I worried I got wrong: what was the

21. Letter from Manfred Bowditch of the Lead Industry Association to Felix Wormser, Assistant Secretary of the Interior and previous Secretary of the association. July 11, 1956. Available at: [toxicdocs.org](http://toxicdocs.org).



Figure 5. Peter B. Lord, "Lawyer, Historian Spar Over Lead Paint," *Providence Journal*, January 19, 2006; Lord, "Lead-Paint Historian Testifies for 3rd Day," *Providence Journal*, January 20, 2006; Lord, "Paint Lawyers Work to Discredit Historian," *Providence Journal*, January 18, 2006.

population of Rhode Island in 1900 and what year was the Rhode Island Colony established?

But one morning on my way to the courthouse for my fifth day on the stand I passed a demonstration of mothers and children outside the courthouse. I saw one kid holding a sign saying "they knew for decades." I realized that my trivial mistakes about dates no longer mattered. From the newspaper, radio, and television reports about the trial the public had come to understand that these companies had known about the dangers of lead and done nothing about it.

The jury ultimately ordered the lead pigment manufacturers to "abate" the lead hazard throughout Rhode Island,<sup>22</sup> at an estimated cost of one to four billion dollars.<sup>23</sup>

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

23. Immediately after the case was settled the stock market responded to the verdict by forcing Sherwin-Williams stock to plunge, and *Business Week* announced "Estimates on



Ultimately, however, what had been the proudest moment of our professional lives for all those involved in the case turned into our saddest: the Rhode Island Supreme Court overturned the jury verdict, reasoning that the case had been brought to court under the wrong law. The hundred-plus-page decision by the court argued that until the children were injured, neither the children nor the state, as guardian of the public's health, had any "standing" to sue the companies.<sup>24</sup>

This decision seemed out of line with the evidence. But, in a small, old industrial state undergoing severe economic strains, the power of corporations, chambers of commerce, and even the press is enormous. The headlines following the jury's verdict should have given us a heads-up. "The Nuisance That Could Cost Billions," blared the *Times Sunday Business Section*.<sup>25</sup> The *Wall Street Journal* condemned the suit as frivolous, a scam by the Motley Rice law firm, simply to reap a rich reward. The editorial made no mention that the law firm had committed all of its resources, lawyers and staff—even setting up an office in Providence—for ten years at no charge to the state.<sup>26</sup> They had dedicated themselves to developing the perfect public health argument: that if you create a danger you must clean it up before someone gets hurt.

But, that was not the end. The next year we were asked to help prepare another, potentially even more important suit for the State of California. The cities of San Francisco, Los Angeles, San Diego, Oakland, and Berkeley, along with Alameda and other counties, were suing the same companies using the same theory of nuisance law, but in a huge, economically diverse state with more of a history of holding industry responsible for their actions. The state's attorneys had already obtained a preliminary

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Lead Paint Clean-Up Soar." Michelle Smith, "Estimates on Lead Paint Clean-Up Soar," *Business Week*, March 26, 2007, <http://www.businessweek.com/ap/financialnews/D8O42J401.htm>. Although the legal maneuvering by the industry to delay the jury verdict continues, Bloomberg.com announced that in light of the Rhode Island decision the Attorney General of Ohio has initiated a similar suit. Jeff Feeley, "Sherwin-Williams, DuPont Sued by Ohio over Lead Paint," *Bloomberg*, April 3, 2007, [http://www.bloomberg.com/apps/news?pid=email\\_en&refer=&sid=aQb5ogfWCWQk](http://www.bloomberg.com/apps/news?pid=email_en&refer=&sid=aQb5ogfWCWQk).

24. See *State v. Lead Indus. Ass'n*, A.2d 428 (R.I. 2008), Supreme Court of Rhode Island, Filed July 1, 2008, at 455–59 (holding that the defendants' actions were not cognizable as a public nuisance, but suggesting that they might sound in products-liability law). <https://www.courtlistener.com/opinion/1470023/state-v-lead-industries-assn-inc/>.

25. Julie Creswell, "The Nuisance That May Cost Billions," *New York Times*, April 2, 2006, <http://www.nytimes.com/2006/04/02/business/yourmoney/the-nuisance-that-may-cost-billions.html> (accessed June 2017).

26. Editorial, "Motley Paint Crew," *Wall Street Journal*, February 3, 2009, p. A14; Editorial, "Motley Legal Crew," *Wall Street Journal*, February 27, 2006, p. A14.

ruling from the state's highest courts that the case could go forward. They held that if the logic of the Rhode Island court prevailed, public health departments could have all their regulations challenged as all public law was aimed at preventing disease. If polluters could not be challenged until harm was proven, no public health statute could be enforced until after damage was done and the public would therefore be inevitably harmed. In California, this logic did not make sense.

Jerry and I read trade association materials, corporate documents from companies selling lead products, and a century's worth of newspaper and magazine advertisements from around California, and we each testified for about three days. Ultimately, the historical evidence, along with the massive documentation of the damage that lead had caused children in the state, convinced the judge that the companies involved should pay \$1.15 billion to remove lead from the walls of some of the nation's largest cities. The companies appealed the decision, and we await the appeals court decision which should be issued by December, 2017.<sup>27</sup> Like the Rhode Island case, this case was significant in that it was not about injury to individuals but about environmental exposures.

As public health historians we need to be aware that there is a transformation going on in the ways we as a society think about disease. The public already knows that they are being affected by low-level exposures to chemicals and pollutants, resulting in problems. But professionals in public health too often ignore "citizen scientists" or reject community observations without "statistically significant" epidemiological evidence. Often this evidence is unavailable or even methodologically incapable of capturing the subtle, sometimes rare, impacts of exposures to a host of synthetic substances. We need to pay more attention to new concerns and not write off these debates as unfounded or naïve.

So what are the issues for the historian testifying in court? First, there is the notion that lawsuits are about money, about greedy lawyers and uneducated clients, about redistribution of wealth; in the case of malpractice suits critics speak of practitioners and hospitals that are "targeted" by trial lawyers, of insurance companies and industries with "deep pockets" forced out of business by ambulance-chasing lawyers, of patients or clients who don't understand that "things go wrong, that medicine is fallible."

What is lost is that these lawsuits are about real people and their families who have suffered terribly as a result of the actions of some unscrupulous companies. You can even make the case that in these lawsuits repre-

27. Associated Press, "California Judge Ups Lead Paint Verdict to \$1.15B," *San Diego Union Tribune*, January 7, 2014, <http://www.sandiegouniontribune.com/sdut-ca-judge-increases-lead-paint-fund-to-115b-2014jan07-story.html>.

sent the ongoing struggle over who should bear responsibility for injury and disease caused by a century or more of industrial and environmental accidents and pollution. In a sense the fight for workers' rights that led to the formation of unions and brought people out of the factories and into the street is now being waged in courtrooms around the country around disease and the impact of disease on working people.

Second, there is the fact that, by its very nature, the historical record is never complete, but historians have the skills to make sense out of incomplete data. And we have the obligation to do so. A skilled lawyer can use this incompleteness to present the world as a series of discrete events and, when interested in undermining testimony, can often disconnect, rather than connect, the dots. The historian has a choice. He or she can hide behind the fact that knowledge is never complete to avoid coming to conclusions about what the data say.

For example, one historian who was hired by lawyers for the asbestos industry provided a timeline of important events from the 1930s through the 1960s.<sup>28</sup> The timeline was used to argue to the jury that asbestos-related diseases were "insignificant" in the grand scheme of the Depression, World War II, and the Cold War. When the plaintiffs' lawyers asked whether he had an opinion about whether a company should have warned workers about their knowledge regarding the dangers of asbestos exposure in the 1930s, the historian responded with a hairsplitting discussion of what it meant to "know" something in science.<sup>29</sup>

Another historian for industry provided an analysis of why asbestos was "insignificant," accompanying his narrative with a very official looking "chart!" Despite the fact that the medical literature reported on cases of asbestos from early in the twentieth century and was well documented by 1930, and that cancer was identified as a risk in 1935 and confirmed by epidemiological evidence in the 1940s and 1950s, this information was, according to him, unimportant.

Nevertheless, asbestos disease was a minor topic in the overall landscape of American medical research. This is illustrated by the fact that the number of pages in articles published by two of the nation's most esteemed and widely read medical journals—*JAMA* and *The New England Journal of Medicine (NEJM)*—

28. For a discussion of the role of historians in the courtroom and the possibilities and pitfalls see: David Rosner, "Trials and Tribulations: What Happens When Historians Enter the Courtroom," *Law & Contemp. Probs.* 72 (Winter, 2009): 137–58. In addition, go to [www.toxicdocs.org](http://www.toxicdocs.org) for a voluminous collection of materials about childhood lead poisoning, including the exhibits in the case. See Deposition of Philip Scranton, *In re W. Va. Asbestos Litig.*, No. 02-C-9004 (Cir. Ct. Kanawha Cty., W. Va.).

29. Rosner, "Trials and Tribulations" (n. 28).

was fewer than one page in 1,000 for *JAMA* and fewer than one in 700 for *NEJM* for all issues published from 1945 to 2000.<sup>30</sup>

What the historian needs to do is not obscure the truth but connect the dots in a straightforward way. When juries see documents of corporate misconduct, or notes that indicate complete insensitivity to the deaths of workers, they understand. Here we have an internal company note from a Bendix executive to one administrator for the asbestos giant Johns Mansville discussing an article critical of the industry that appeared in the trade journal *Chemical Week*. After taking solace in the fact that the article also “assesses [a] share of the blame on trees,” the director of purchases for Bendix says: “My answer to the problem is: if you have enjoyed a good life while working with asbestos products why not die from it. There’s got to be some cause.”<sup>31</sup>

A third issue is that historians fear being seen as advocates, as if that means they are not objective. To this I would argue that a good historian in the court cannot help but tell a jury where the historical narrative leads. For example, if he or she provides documentation that company executives discussed the danger of a product and how to hide that danger from the public, the historian must illuminate the company’s culpability.

It would be remiss of me not to mention the personal stress that is involved in testifying, in having to answer questions about thousands of documents, in being questioned about your personal life, your education, your finances.

And it is stressful to be attacked in public. In 2002 a law journal article warned defense attorneys of the dangers of allowing our testimony to go unchallenged. The author, a defense lawyer, argued in a piece entitled “On Deadly Dust and Histrionic Historians” that as long as we just talked to other “academicians and historians” there was no reason to bother with us or our book. But, the problem was that our history had begun to affect the longer narrative over the causes of disease. He argued that Jerry’s and my “opinions . . . have become part of the passion play that we call silico-

30. Expert Report of David B. Sicilia, January 5, 2015, p. 4, [www.toxicdocs.org](http://www.toxicdocs.org). Similar arguments are made by historians in other toxic tort litigations. See, for example, Aff. of Peter C. English, M.D., Ph.D., *City of New York v. Lead Indus. Ass’n*, 700 N.Y.S.2d 361 (N.Y. Sup. Ct., Sept. 14, 1999) (No. 14365/89), where English argues that until the early 1950s, childhood lead poisoning was considered to be relatively rare in the United States in comparison with other poisoning and with major causes of childhood morbidity and mortality.

31. E. A. Martin to Noel Hendry, Canadian Johns Manville, September 12, 1966. See also Gerald Markowitz and David Rosner, “‘Unleashed on an Unsuspecting World’: The Asbestos Information Association and Its Role in Perpetuating a National Epidemic,” *Amer. J. Public Health* 106 (May 2016): 834–40.

sis litigation.”<sup>32</sup> Soon, industry mobilized to discredit us. In one example major chemical companies hired other historians to write attacks on us. They also took actions that felt to us like harassment: subpoenaed our universities for payroll records and correspondence, demanded records of foundations (which had funded our work), and even subpoenaed the records and emails of colleagues who were peer reviewers of our book in an effort to intimidate us.<sup>33</sup> The Milbank Memorial Fund, which co-published *Deceit and Denial* and *Lead Wars*, responded to such a subpoena by objecting that it was “overly broad, unduly burdensome” and sought documents “neither relevant to the litigation nor reasonably calculated to lead to the discovery of admissible evidence.”

So what is to be gained by historians in the courtroom? As the result of the discovery process required in court cases, a treasure trove of material on the knowledge and activities of a vast number of industries is now available. We are all aware of the extraordinary cache of tobacco industry documents available through the UCSF tobacco archive. Our Center for the History & Ethics of Public Health at Columbia, and the City University of New York Graduate Center recently launched toxicdocs.org, a website that makes available literally four to six million corporate documents. This will allow students, scholars, and journalists interested in environmental health and industrial pollution to look into the history of corporate dealings with government, unions, and the public over diseases related to their products. We expect it will generate many dissertations, research papers, and even journalistic exposés by providing a hitherto untapped source of information.

Participation in lawsuits can open academics to a host of new topics of relevance to public health. When Susan Reverby and I published *Health Care in America* we included an introduction entitled “Beyond the Great Doctors.” In it we called for an “engaged” history, a history that was methodologically excellent but not fearful of grappling with complicated social issues. It was later called a “manifesto” of social history by Ted Brown and Liz Fee and was considered radical.<sup>34</sup> It is hardly radical today although, Susan has recently published a gripping editorial that brings up to date some of the issues we have been grappling with.<sup>35</sup>

32. Nathan A. Schachtman, “On Deadly Dust and Histrionic Historians: Preliminary Thoughts on History and Historians as Expert Witnesses,” *Mealey’s Litigation Report: Silica* 2 (November 2003): 1–2.

33. Jon Weiner, “Cancer, Chemicals and History,” *The Nation*, January 20, 2005.

34. Elizabeth Fee and Theodore Brown, *Making Medical History: The Life and Times of Henry E. Sigerist* (Baltimore: Johns Hopkins University Press, 1997), 5.

35. Susan Reverby, Editorial, “Historical Malfeasance: Immorality to Justice in Public Health,” *Amer. J. Pub. Health* 107 (January 2017): 14–15.

I believe that those of us who testify in court are part of a huge public rethinking about what chronic, environmental, low-level exposures represent: Should they be understood as largely a biological disruption in which specific, individuated, "personalized" treatments should be developed? Or do they represent a much more fundamental social disruption that demands a broader understanding of industrial America and the polluted world we have created? Does it demand more research into genetics and individual risk factors that make some of us succumb and others thrive, or does it require that we address the social and economic inequalities that lead to some classes and groups of people being at greater risk than others? Should we be asking questions about responsibility for the chronic conditions caused by a variety of environmental dangers rooted in a century of unrestrained industrial exploitation of our environment? The ways we frame the arguments about human suffering go to the deepest recesses of American traditions and history. This rethinking is occurring largely outside of professional meetings, conferences, or even the university. One of the primary locales is in courtrooms around the country where judges, juries, and witnesses argue over the most fundamental questions of health and disease.

This is not the first time this association has been forced to face the question about our responsibilities in court hearings. Over a dozen years ago, David Rothman raised it in his *Garrison*, and in 2003 the issue burst to the fore at this meeting, and it periodically causes upset at the annual meeting.<sup>36</sup> The court, with all its myriad flaws, is a major venue of a broad discussion of science and its meaning—a venue that we ignore, demean, or underestimate, at our peril.

In addition to the very real intellectual excitement of these debates, the most meaningful reward is working on behalf of people who suffer chronic illnesses or face death from occupational exposures or environmental toxins. I have had the opportunity over the last few years to meet many hardworking people like Mr. Dominik, people who are dying from terrible illnesses like mesothelioma, caused by the inhalation of asbestos. Once a hulking man who worked a forklift, he is now a fraction of his former weight. Or the three women who are suffering from non-Hodgkin's lymphoma possibly the result of the high levels of PCB in their bloodstreams. When these people win their cases, if they are dying, they are able to feel that their family will have some financial security. When they lose, as the Mexican worker I described earlier did, they are still grateful to have had their cases heard.

If we pay attention to the questions the public and other professionals are focused on there is an enormous opportunity for students to do

36. David J. Rothman, "Serving Clio and Client: The Historian as Expert Witness," *Bull. Hist. Med.* 77 (2003): 25–44; Patricia Cohen, "History for Hire, in Industry Lawsuits," *New York Times*, June 14, 2003, B7.

impactful research not envisioned by you or your mentors. Each university program will address the issues differently. At Columbia we are trying to build a truly interdisciplinary program of scholars engaged with the public health issues of the modern world through our joint undertaking with the School of Public Health and the History Department. Our students leave the program as excellently trained historians who are well versed, even expert, in epidemiology, statistics, policy, environmental science, and ethics. Many have gone on to publish important work and to become faculty in history departments and schools of public health. Others have taken policy jobs or worked in foundations or NGOs. My hope is that universities will, as Drexel University is now doing, establish programs where students can have the opportunity to become historians engaged in the pressing issues of contemporary public health.

Finally, I would argue that as historians we not only have an opportunity but also a responsibility to be involved in the world outside of the academy. If we do not offer our skills and expertise to help the public understand the history of occupational and environmental disease, who will? Other social scientists have no trouble engaging with the outside world. Why should we? It is our responsibility to engage in these issues even if we need to do so under parameters that are unfamiliar and even uncomfortable.

In conclusion I want to end with a quote from my good friend, Allan Brandt:

“Historians are hardly exempt from the common duty to contribute to public life and civil society. It seems to me now after the hopes and disappointments of the courtroom battle that we have a role to play in determining the future. . . . If we occasionally cross the boundary between analysis and advocacy, so be it. The stakes are high, and there is much work yet to do.”<sup>37</sup>



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37. Brandt, *The Cigarette Century* (n. 13), 505.