

7-1-2001

Response

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Recommended Citation

Yvette J. Bessent, *Response*, 55 U. Miami L. Rev. 1119 (2001)
Available at: <https://repository.law.miami.edu/umlr/vol55/iss4/31>

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Response

One of the cornerstone principles of American jurisprudence is the idea that every defendant has a right guaranteed by the United States Constitution to present his or her defense. Often the defense involves evidence that may be connected to relatively novel or potentially questionable scientific theories. Examples of such theories form the basis of my Comment: viz., polygraph evidence and repressed memory evidence. Unfortunately, although the defendant deserves the right to present a defense, courts have often refused to admit polygraph or repressed memory evidence on the grounds that both are too unreliable and lack validity.

The history behind the refusal to allow evidence like polygraph and repressed memory has its basis in the *Frye* rule. The *Frye* rule barred the admissibility of any novel scientific evidence if the proponent of the evidence failed to convince the court that the technique or theory underlying the evidence was generally accepted in the scientific community. After Federal Rule of Evidence 402 was adopted, the general acceptance rule was abandoned. Rule 402 states that relevant evidence can only be excluded if it is required by a provision of the Constitution, a statute, or a rule of the Supreme Court. Polygraph evidence is obviously relevant, and so it would therefore appear that such evidence would be admissible, unless barred by the provisions of Rule 402. Unfortunately, courts are divided on whether to follow Rule 402, or the precedent of general acceptance instead.

In response to the confusion, the Supreme Court attempted to resolve the dilemma in *Daubert*. There, the Court relaxed the general acceptance burden of *Frye* while simultaneously giving trial judges an additional responsibility, or perhaps a more defined responsibility, to act as gatekeepers in preventing the admission of unreliable evidence. This, of course, gave rise to another problem within itself—giving trial judges a responsibility of making decisions almost blindly, considering the novel scientific nature that many types of evidence often present.

Using their gatekeeping role, trial judges often exclude polygraph and refreshed memory evidence because of the questionable reliability and validity of the techniques and methodologies involved. However, depending on the party offering the evidence, the extent of exclusion varies considerably.

With regard to polygraph examinations, the Supreme Court attempted to shed some light in *Scheffer*. In *Scheffer* the Court refused

to admit polygraph evidence offered by the defendant, stating that the evidence was too unreliable and unsubstantiated. The Court also noted that allowing such evidence may create Federal Rule of Evidence 403 problems such as unfair prejudice, issue confusion, misleading the jury, etc. The majority refused to admit the evidence although the polygraph results reported that the defendant was being truthful in his denial of the charges. While the Supreme Court was quite clear in its decision and rationale, the problem, as I see it, is that *Scheffer* was a military case and does not control civilian cases. As a consequence, although *Scheffer* provides some guidance, it does not set a clear universal precedent. This is evidenced through the arbitrary adaptation of the *Scheffer* holding in some courts, in some cases, all over the country.

Some judges follow *Scheffer* and refuse to admit polygraph evidence. Other courts have refused polygraph evidence based on the fact that there are no universal standards for polygraph procedures and result interpretation or training examiners. All of these reasons are valid for not allowing polygraph evidence, but the reasons do not appear to present such an insurmountable barrier when the polygraph evidence is being offered by the prosecution.

Repressed memory evidence has also fallen under the category of questionable reliability or validity. Repressed memories are those that are hidden in the sub-conscious in order to protect the mental health of the individual. Memories that are uncovered, or unhidden, are considered to be refreshed. There are three main methods of refreshing one's memory: a memory that is triggered by an event, by hypnosis, or by a psychiatrist without hypnosis. Although the methodologies differ for the refreshing techniques, the underlying questions of reliability are consistent in each.

Repressed memories are often the result of having experienced something traumatic—usually, sexual abuse. The theory of memory refreshing emerged when sexual abuse cases became commonplace in American jurisprudence. Courts did not embrace this doctrine readily because of concerns that there was very little empirical data on the theory that repressed memory recovery, in an unaltered state, is possible. Further, there is even less data that gives credibility to any method of memory recovery.

While there have been many decisions explaining the refusal for each type of recovery technique, the most troublesome of the courts appears to be the psychiatrically refreshed memory recovery without hypnosis. This is because there is a very real possibility that the psychiatrist, whether intentionally or not, may have altered the memory of the patient during recovery. Of course this evidence should be excluded

because the personal knowledge requirement of Federal Rule of Evidence 602 would be missing. However, personal knowledge is a jury issue, not a judge issue, and, therefore, the evidence should not be excluded on this ground. Then again, because refreshed memory testimony is normally coupled with expert testimony on the theory, exclusion may also be warranted because Federal Rule of Evidence 403 confusion and misleading concerns emerge as with polygraph evidence. Arguably, using the gatekeeping role, judges should probably exclude this evidence based mainly on the lack of reliability and validity of the theory itself.

Even though options remain available to judges to exclude repressed memory testimony, several courts have allowed the testimony in spite of the problems stated earlier. Unlike that of polygraph evidence, there is not an apparent trend in decisions regarding repressed memory. It appears that the decision to admit the evidence turns on factors such as the length of time that elapsed between the memory's creation and the recovery of that memory and the descriptiveness of the event.

Despite a clear pattern, there are more reported cases where the defendant's repressed memory evidence is excluded than with the exclusion of pro-prosecution evidence. This may be because of the relatively few number of cases where the defendant offers such evidence. Ironically, the Supreme Court in *Rock* decided to allow such evidence because there was no other testimonial evidence that could be introduced for the defendant. This one factor significantly limited the *Rock* decision because the court carefully noted that if there had been other evidence available, the trial judge could have excluded the evidence based on the reliability issues.

After *Rock*, as before, courts are still divided on the admissibility of this evidence, and decisions are often unpredictable as a consequence. This leaves the defense attorney no other choice but to reach for a constitutional ground that would force admission, as was the case in *Rock*. Incidentally, this was how most of the defense attorneys were successful in having the evidence admitted.

Both polygraph evidence and repressed memory evidence present problems because of their questionable reliability. Even so, there are rules that bar the admittance of evidence where the fact-finder could be led, or misled, to reach the wrong conclusion. While I agree with the reasons for exclusion of both types of evidence, this exclusion should be universal and not arbitrarily applied. I fail to see how the rigid boundaries of admitted evidence become more flexible when the prosecution or plaintiff offers it.

Unfortunately, until a controlling precedent is decided, defendants will continue to be treated differently from plaintiffs and prosecutors to their peril. In a country where our symbol of justice is blindfolded so that only the truth will result, these inconsistencies are in direct contradiction and must be corrected. That is, if it is truly justice that we seek.

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