University of Miami Law Review

Volume 55
Number 4 *Evidence Symposium*

Article 30

7-1-2001

Evidence of Innocence Offered by The Criminal Defendant: "Not So Fast"; Response

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"If you can think about something that is inextricably attached to something else without thinking about that to which it is attached, you have a legal mind."

"Bull" Warren

PROFESSOR KENNETH W. GRAHAM, JR.

The three provocative papers presented in this portion of the Symposium challenge the increasing bureaucratization of criminal trials—a trend the authors rightly see as a move away from the adversarial system the Founders wrote into the Sixth Amendment of the United States Constitution[1] and toward the inquisitorial system that they rejected.[2] These papers also nicely illustrate both the benefits and limitations of "jurisprudential Fordism,"[3] the reductionist mode of analysis favored by those judges and scholars still under the sway of the progressive procedural paradigm.[4] My response will vamp on these two themes.[5]

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1. U.S. CONST. amend. VI.

2. *See generally* 30 CHARLES A. WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6347 (1997) [hereinafter 30 WRIGHT & GRAHAM].

3. I use the term "Fordism" because Henry Ford can be blamed for the assembly line method of making cars. The assembly line provides a useful metaphor for the specialization of legal academics, who, like Ford, can provide you with any color jurisprudence you want—"as long as it is black."

4. "Reductionism" analyzes natural phenomena by breaking them down into smaller and smaller parts. For example, human beings can be reduced to their bodies, their bodies to organs, the organs to cells, the cells to chemicals, the chemicals into atoms, the atoms into subatomic particles, and so on. Similarly, the law can be divided into substance and procedure, procedure can be divided into civil and criminal procedure, procedure can be divided between trials and pretrial procedures, trials can be divided between evidence and argument, evidence can be reduced to a series of rules, and each rule can be broken down into elements; for example, hearsay can be defined by three elements—(1) a statement; (2) made out of court; and (3) offered to prove the truth of the matter asserted therein.

Despite its successes in the physical sciences, reductionism cannot work with every natural phenomenon. Hence, some scientists have turned to its antithesis—often called "holism"—to explain those dynamic processes that are inadequately captured by reductionist analysis. The question posed here is whether holistic analysis might be a useful supplement to reductionism in legal analysis.

5. I comment on the papers in the drafts that were presented at the Symposium. If my comments are wide of the mark, the reader can suppose this is because the papers have been edited since my comments were prepared, rather than inferring that I am unusually obtuse.

1. Polygraph and Repressed Memory Evidence Offered by an Accused

This paper comprehensively describes the admissibility of two types of evidence offered by the defense that are sometimes thought of as pro-prosecution evidence: first, evidence that a polygraph expert thinks a witness is telling the truth or lying; and, second, testimony about events that the witness could not recall until her memory was stimulated by hypnosis or psychiatric intervention.

Polygraph or "lie detector" evidence has a comparatively lengthy history of evidentiary exclusion with a fairly straightforward doctrinal basis.[6] During the regime of "precedential relevance" that preceded modern codification, polygraph evidence birthed the so-called "*Frye* rule" barring the admissibility of "novel scientific evidence" until the proponent could convince the court that the technique used to generate the evidence was accepted as legitimate by some relevant scientific community.[7] Despite massive propaganda efforts by the polygraph industry and its business and government clientele, throughout the twentieth century most courts held that the polygraph flunked the "*Frye* test" and, therefore, was not admissible in the absence of a stipulation by the parties.[8]

As Ms. Bessent correctly points out, in 1975, Federal Rule of Evidence 402 repealed the doctrine of precedential relevance by stating that relevant evidence could only be excluded if exclusion was required by constitutional provision, statutory enactment, or some rule adopted through the United States Supreme Court's rulemaking authority.[9] Since polygraph evidence satisfies the minimal standard of relevance in Federal Rule of Evidence 401, it became admissible because no constitutional provision, federal statute, or Supreme Court rule made it inadmissible.[10] While a few state and federal courts honored Rule 402 and admitted polygraph evidence, most judges refused to give up the power to create or enforce their own rules of evidence even after the Supreme Court made it clear in 1993 that Rule 402 meant what it said.[11]

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6. *See generally* 22 Charles A. Wright & Kenneth W. Graham Jr., Federal Practice and Procedure: Evidence § 5169 (1978) [hereinafter 22 Wright & Graham].

7. *See id.*

8. Norman Ansley, Admissibility of Polygraph Evidence in Civil and Criminal Cases (1978).

9. *See generally* 22 Wright & Graham, *supra* note 6, § 5192.

10. Perhaps in some cases, exclusion might be justified by Federal Rule of Evidence 403 or because the person administering the polygraph did not possess the required expertise under Federal Rule of Evidence 702.

11. New Mexico was first state to hold polygraph evidence admissible under a state version of the Federal Rules of Evidence. State v. Dorsey, 539 P.2d 204 (N.M. 1975). Later N.M. R. Evid. 707 was adopted to regulate the use of polygraph evidence.

Unfortunately, in the infamous *Daubert* case, the United States Supreme Court held that the *Frye* doctrine had been repealed by Rule 402, and then turned around and read a much more expansive version of *Frye* into Federal Rule of Evidence 702, which governs expert testimony.[12] As documented by Ms. Bessent, most courts have used the Neo-*Frye* doctrine to exclude defense polygraph evidence.[13] In the absence of statutory or rulemaking intervention, defense counsel are left with the argument that exclusion of defense polygraph evidence violates some constitutional provision.[14] Though Ms. Bessent makes a brave attempt to limit or distinguish it, most courts are likely to believe that the Supreme Court resolved this question against the defense in *Scheffer v. United States*.[15]

Except for the frequent assumption that it usually favors the prosecution, what Ms. Bessent calls "repressed memory evidence" differs from polygraph evidence in almost every other particular.[16] "Repressed memory evidence" is a more recent development, arising from the hysteria about child sexual abuse that swept the country in the late twentieth century.[17] Moreover, the doctrinal basis for exclusion of such evidence is far from clear, which may be why Ms. Bessent spends little time discussing it.[18] For purposes of my analysis, it may be helpful to distinguish between: (a) hypnotically refreshed recollection—where the witness had to undergo hypnosis in order to recall the events she now wants to testify about; and (b) psychiatrically refreshed recollection—where consulting with a mental health professional sufficed to trigger recollection without the use hypnosis.

Psychiatrically refreshed recollection seems admissible under mod-

12. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); *see generally* 22 WRIGHT & GRAHAM, *supra* note 6, § 5168.1 (Supp. 2001).

13. Yvette Bessent, Comment, *Admissibility of Polygraph Evidence and Repressed Memory Evidence When Offered by the Accused*, 55 U. MIAMI L. REV. 975 (2001).

14. For an early assessment of this ploy, see Paul Thomas, Comment, *Compulsory Process and Polygraph Evidence: Does Exclusion Violate a Criminal Defendant's Due Process Rights?*, 12 CONN. L. REV. 324 (1980). *But see* McMorris v. I. Israel, 643 F.2d 458 (7th Cir. 1981) (holding that a prosecutor's refusal to stipulate to admissibility for solely tactical reasons violated due process).

15. 523 U.S. 303 (1998).

16. Perhaps most salient is its narrower scope. Where virtually any witness could in theory be subjected to a polygraph test, only a handful of witnesses will require the retrieval of repressed memories.

17. California, as it frequently does, may have led the nation in overreacting. One need not take a position on the guilt or innocence of the defendants in the infamous McMartin Pre-School case to believe that school board rules barring high school football coaches from whacking players on the buttocks when sending them into the game will do little to prevent victimization of children by pedophiles. *See* McMartin v. County of Los Angeles, 202 Cal. App. 3d 848, 852-53 (Cal. Ct. App. 1988).

18. Bessent, *supra* note 13, at 1006-10.

ern codes, as it would have been at common law.[19] The witness can testify to the refreshed recollection without revealing how she came by her present recollection.[20] On cross-examination, the precise manner by which she was enabled to recall the events she is testifying to can be put before the jury for purposes of attacking her credibility.[21] Nothing in the modern codes would prevent her from testifying merely because the memory was only recently retrieved.[22] In those few states where courts retain their common law powers to create exclusionary rules, they could create a rule barring psychiatrically refreshed recollection.[23] But, in the absence of expert testimony that psychiatrically refreshed recollection is any worse than memory refreshed by any of the traditional methods, how could the court justify such a rule?[24]

Distinguish the question of whether or not the repression of memory suffices to toll the running of the statute of limitations. This is a question of substantive law as to which the way in which the repressed memory was retrieved is relevant only insofar as it may cast doubt on the claim that the memory was truly lost, or that it could not have been recalled earlier. The rules of evidence come into play only if the substantive statute of limitation turns on how the memory was retrieved. Then the court could exclude repressed memory evidence only on the ground that it was irrelevant. But, under Federal Rule of Evidence 104, relevance is a question for the jury not the judge.[25]

Hypnotically refreshed recollection, as Professor Gold has shown, differs greatly.[26] Scientists have reached no consensus on the nature of hypnosis and disagree sharply on whether the memories produced through hypnosis are "true" in the sense in which the law uses that word.[27] Courts agreeing with those who claim that hypnotically

19. The most famously expansive statement of the common law rule is Judge Frank's opinion in *Fanelli v. United States Gypsum Co.*, 141 F.2d 216, 217 (2d Cir. 1944). For a more recent reiteration, see *Baker v. State*, 371 A.2d 699 (Md. Ct. Spec. App. 1977).

20. The common law attitude permeates the so-called "restroom rule" that denied the opponent access to the refreshing material so long as it triggered the recollection of the witness when the witness was not on the stand. The "restroom rule" was partially repealed by FED. R. EVID. 612.

21. For example, jurors who are not devotees of Proust may find the witness incredible if she testifies on cross-examination that a flood of memories was triggered by a whiff of French pastry.

22. This is implicit in FED. R. EVID. 612.

23. Only a half-dozen states still have a common law system of evidence.

24. Perhaps it could be argued that hypnosis, like the polygraph test result, will be overvalued by the jurors but we know of no evidence that this is likely.

25. 22 WRIGHT & GRAHAM, *supra* note 6, § 5166.

26. 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6011 (1990) [hereinafter 27 WRIGHT & GRAHAM].

27. 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELREID, SCIENTIFIC EVIDENCE § 12.2 (3d ed. 1999).

refreshed recollection is bogus may want to exclude it; the question is how?

At common law, a court could hold that a witness whose recollection is hypnotically refreshed did not meet the mental requirements of witness competency.[28] Courts governed by Federal Rule of Evidence 601, however, cannot bar the testimony on this ground because Rule 601 repeals all the mental and moral qualifications for witnesses.[29] A more promising ground is that a witness who can only recall through hypnosis lacks "personal knowledge" required by Federal Rule of Evidence 602.[30] This raises a number of interesting philosophical and scientific questions about the nature of human perception and recollection, but forget those questions for now.[31] Whether or not a witness has "personal knowledge" is a question for the jury under Rule 104 and 602.[32] The judge could exclude the testimony only by taking judicial notice that the hypnotically refreshed recollection is bogus, but given the split in the scientific community, Federal Rule of Evidence 201[33] would present a serious obstacle to this technique.[34] The court could also hold that as a matter of law a person who recalls only after hypnosis lacks personal knowledge, but this would plunge the court into the philosophical and scientific quandaries just passed over.

Judges desperate enough to adopt a fanciful route to exclusion could portray the previously hypnotized witness as an automaton—a machine like the polygraph.[35] The court could then invoke the *Frye* Rule or the Neo-*Frye* Rule and hold that given the split in the scientific

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28. At common law, all four of the testimonial assumptions—that is, the ability to perceive, recollect, and narrate sincerely—were included in the notion of competence. *See* CAL. EVID. CODE § 701 comment. Hence, a court could hold that a witness requiring hypnotic refreshment did not have a legally sufficient memory.

29. The mere fact that the doctrine of incompetence has been repealed has not stopped some courts from holding hypnotically refreshed witnesses incompetent to testify. *See* 27 WRIGHT & GOLD, *supra* note 26, § 6011, at 129.

30. *Id.* § 6023 at 204, § 6026, at 236.

31. At least for the moment. *See infra* text of note 51.

32. 27 WRIGHT & GOLD, *supra* note 26, § 6027.

33. Federal Rule of Evidence 201(b) states: "KINDS OF FACTS. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b).

34. 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5106 (1977) [hereinafter 21 WRIGHT & GRAHAM].

35. Readers who think this is farfetched should consult the psuedo-science of "evolutionary psychology," which uses genetic determinism to justify all human behavior from rape to the Holocaust. *See, e.g.*, RANDY THORNHILL & CRAIG T. PALMER, A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION (2000) and a devastating review thereof, Jerry A. Coyne & Andrew Berry, *Rape as An Adaptation: Is This Contentious Hypothesis Advocacy, Not Science?*, 404 NATURE 121 (Mar. 9, 2000).

community, the reliability of the hypnotically powered "witness machine" has not gained the requisite level of scientific reliability.[36] A less exotic tool for exclusion is Federal Rule of Evidence 403; a court might hold that allowing a hypnotically refreshed witness to testify would open the door to a battle of the experts over the credibility of such testimony, a battle the jury would be ill-equipped to resolve.[37] This approach, however, requires the court to give the hypnotically refreshed testimony very low probative value; a difficult step if the witness will provide direct evidence of a consequential fact in the case because the probative worth of direct evidence must be near the maximum and the credibility of the witness is not supposed to enter into Rule 403 balancing.[38]

In short, if the court honestly applies the modern evidence statutes it will find few grounds for excluding the testimony of a witness whose recollection has been refreshed either by psychiatric intervention or by hypnosis.[39] Hence, unlike polygraph evidence, the exclusion of "repressed memory evidence" is suspect without reaching constitutional questions. Nonetheless, revisiting those constitutional questions may open a "wormhole" into that remote part of evidentiary outer space we have previously passed over.[40] Recall that in *Rock v. Arkansas*[41] the Court held that a criminal defendant had a constitutional right to testify with a hypnotically refreshed memory, but in *United States v. Scheffer*[42] the Court held that a defendant did not have a constitutional right to introduce the opinion of a polygrapher that he was telling the truth when he testified. Given the comparative reliability of the two kinds of evidence, how can these opinions be reconciled?

The Legal Realist has an easy answer. "The Court" is a fiction; one

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36. Courts would have to use the machine analogy because, as explained above, the hypnotically refreshed witness can testify without revealing how her recollection was refreshed. If expert witnesses were called to testify about the reliability, or lack thereof, of hypnotically refreshed recollection, the Neo-*Frye* doctrine could be applied without resort to the mechanical metaphor.

37. 27 WRIGHT & GOLD, *supra* note 26, § 6011, at 135.

38. *See, e.g.*, United States v. Gatto, 924 F.2d 491, 500 (3d Cir. 1991) (finding eyewitness testimony so probative that it cannot be outweighed by hypnosis or suggestive questioning).

39. I do not mean to suggest that every judge who excludes such evidence must act dishonestly. Desperation drives some judges to readings of the evidence rules they might reject in calmer moments. A few judges may be stupid enough to honestly believe that exclusion can be justified under the rules. Once the desperate and the ill-informed constitute a majority on some appellate court, honest judges may feel compelled to follow precedents whose reasoning they doubt.

40. Readers not conversant with the astronomical worldview of the "Star Trek" television series need only know that a "wormhole" is an anomaly in space-time that enables space travellers to go "farther out" into space than might be possible using conventional modes of travel.

41. 483 U.S. 44 (1987).

42. 523 U.S. 303 (1998).

of the cases was decided by a "bleeding heart liberal" majority and the second was decided by a group of "law-and-order conservatives." Constitutional lawyers and scholars cannot accept the Realist account because this would suggest that the Court is a political body and thus endanger its "legitimacy."[43] Hence, we must cook up doctrinal reasons to explain this political stew.

One jurisprudential explanation for the schizophrenic decisions invokes the Court's mode of analysis. In the *Rock* case, the majority of the Court followed a non-reductionist analysis to apply what has been called "the holistic Sixth."[44] The Compulsory Process Clause[45] at first looks most apt in giving the previously hypnotized defendant the right to testify. It looks less promising, however, when we recall—as the *Rock* majority concedes—that until very late in the nineteenth century, when the Sixth Amendment had been in effect for nearly a century, criminal defendants were not allowed to testify at all in federal courts. So, the *Rock* majority conjured up the right of previously hypnotized defendants to testify by combining the Compulsory Process Clause, the Due Process Clause[46] and the Fifth Amendment[47] into a right to a "fair adversary trial" in which reliability of the evidence was only one of the ingredients.[48]

By contrast, the dissent in *Rock* and the majority in *Scheffer* used the reductionist analysis of the Sixth Amendment that has dominated interpretation of that amendment for well over a hundred years.[49] According to this analysis, the purpose of the evidence clauses of the Sixth Amendment is solely to ensure that the jury verdict is "right" by testing evidence for its "reliability" and excluding any evidence likely to mislead the jury or to interfere with the goal of maximizing punishment. (Though not strictly relevant to the present point, we may note that the historical evidence tends to show that the Founders intended something like "the holistic Sixth"—an adversary system that they characterized as "trial by jury" in opposition to the inquisitorial systems used on the

43. In the wake of the recent election controversy resulting in *Bush v. Gore*, 531 U.S. 98 (2000), even respected constitutional law scholars from prestigious Eastern universities have publicly admitted that the function of so-called "Constitutional Law" is to preserve the legitimacy of the Supreme Court's exercise of political power. *See* Charles Fried, *A Badly Flawed Election: An Exchange*, N.Y. REV. BKS., Feb. 22, 2001, at 8, 9 (". . .we should not jeopardize [the Supreme Court's] legitimacy out of anger at one apparently indefensible decision.")

44. 30A CHARLES A. WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6366 (2000).

45. U.S. CONST. amend. VI.

46. U.S. CONST. amend. XIV.

47. U.S. CONST. amend. V.

48. *Rock*, 483 U.S. at 51 ("The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution").

49. 30 WRIGHT & GRAHAM, *supra* note 2, § 6341.

European continent.)[50]

The contrast between these two approaches may be illustrated by reversing the usual metaphor.[51] Suppose for a moment that we treat my computer as a person. If we follow Sigmund Freud,[52] the computer's memory is the "ego," I am the "super-ego," and the hardware and software are its "id." Assume that one day when I hit on Westlaw,™ the computer "id," as it is wont to do, errs and takes me instead to a kiddy porn site.[53] I, as the "superego," immediately repress this "memory" by deleting the kiddy porn. Assume further that the FBI is running the kiddy porn site to track pedophiles, that agents descend on my home with a search warrant, and cart off the computer to the FBI Crime Lab. There an expert, using a readily available commercial program, is able to reconstruct the "erased memory." If you see the FBI expert as a metaphor for the hypnotherapist in *Rock*, you are way ahead of me.

If I were prosecuted for possession of kiddy porn, I might defend by arguing that the computer the government wants to introduce into evidence is not "my" computer, but rather a different computer constructed by the FBI crime lab. "My computer"—the one seized from me—had no memory of the kiddy porn and thus I could not have possessed it. If the reader has followed this contrived analogy, she will appreciate that we have now returned to those difficult philosophical and theoretical issues that we previously passed over; namely, is the knowledge that Mrs. Rock possesses only by virtue of hypnotic intervention really "her" personal knowledge?

To put the point more prosaically, does the previously hypnotized witness really "recall" the repressed memory or is her recall something reconstructed by the hypnotist from traces in her mind? At trial, presumably no longer under hypnosis, does she now recall the event or does she simply recall what she said about the event under hypnosis? If the latter, are we now to regard her testimony as a species of "hearsay"—she is telling us what she told the hypnotist while in a trance? (If so, this may explain the Court's reluctance to extend the *Rock* doctrine to witnesses other than the defendant; e.g., witnesses for the prosecution. The defendant's confrontation rights under the Sixth Amendment are more robust than the prosecution's under the Due Process Clause.) Hearsay or not, how is the prosecution able to cross-examine her?[54] Presumably, just as

50. *Id.* § 6348.

51. That is, instead of using the human mind as a metaphor for the computer, we shall use the computer as a metaphor for the human mind.

52. *See* SIGMUND FREUD, THE INTERPRETATION OF DREAMS (Joyce Crick trans., Oxford University Press 1999).

53. This is a purely hypothetical event.

54. 27 WRIGHT & GOLD, *supra* note 26, § 6011, at 148.

the FBI expert who reconstructed my computer's "memory" had little interest in searching for the error that placed the kiddy porn there or for evidence of my prompt suppression of that memory, so the defense hypnotist is unlikely to seek recall of memories not helpful to the defense.[55]

But, if we push the computer analogy farther, we may find other grounds in the "holistic Sixth" to support the *Rock* majority. The Confrontation Clause gives the defendant a right to be "present" at trial.[56] But who is "the defendant"? Is it the "Mrs. Rock" who was indicted and has no recollection of the exculpatory evidence or the "Mrs. Rock" who now recalls her innocence? If the purpose of "presence" is only to allow the defendant to assist the lawyer in her defense, and not to make her available to counter prosecution evidence, then the dissent has a stronger case.[57] But, from the perspective of the "holistic Sixth," her "presence" serves functions other than providing evidence. Her presence under the Confrontation Clause adds to the function of the indictment in allowing her to see not only "the nature and cause" of the accusation but the evidence that supports the jury finding of guilt. Imagine for a moment the somewhat different view of the trial and verdict that would be held by the Mrs. Rock who did not recall her innocence with the response of the one who does recall—and knows that she was not allowed to present her version of "the truth."

By projecting ourselves into these seemingly esoteric and theoretical questions, we can eventually reach the point where substance and procedure merge.[58] Which Mrs. Rock do we punish: the one who recalls or the one who does not? Had Mrs. Rock committed her crime while in a hypnotic trance, we would have some misgivings about punishing her for the crime of murder. Part of that misgiving stems from a visceral feeling that the "Mrs. Rock" in a trance is not the "Mrs. Rock" who is to be held responsible. Without positing equivalence, I suggest that similar misgivings ought to arise when we try one "Mrs. Rock" as if she were the other one.

By tweaking the metaphor a bit, we can also shed light on the polygraph cases. In both hypnotic memory refreshment and polygraph analysis, the defendant is being used as an instrument for the creation of

55. Courts might impose an obligation on the prosecution to seek out such memories by analogy to the procedures used in lineups—another instance of prosecution construction of evidence.

56. Illinois v. Allen, 397 U.S. 337 (1970).

57. *Compare with* Drope v. Missouri, 420 U.S. 162 (1975).

58. This appears to be the point at which reductionism began. The blurring of the distinction between substance and procedure occurs with increasing frequency; e.g., under Federal Rule of Evidence 413, where under the guise of altering the Federal Rules of Evidence the United States Congress has moved the substantive law in the direction of punishing the accused for being a rapist, rather than for committing a particular rape.

evidence that lies below the level of her awareness.[59] In one case memories that have been repressed, and in the other case involuntary autonomic responses. Apparently if the hypnotist can construct a false memory, the polygrapher will be unable to deconstruct it. The defendant's autonomic responses do not constitute "testimony against" her such that their use would violate the privilege against self-incrimination.[60] But, on the other hand, neither are they "hearsay" as that term is commonly defined.[61] Nonetheless, as was the case with hypnotically induced testimony, the ability of the opponent to "cross-examine" the defendant about this "non-testimony" will be hampered, because it must be done through an expert likely to be adverse to the opponent and more skilled than the defendant in evading cross-examination that would impair the probative worth of the evidence the expert has created.

2. DEFENDANT'S PROFFERED EVIDENCE THAT A THIRD PERSON COMMITTED THE CRIME: SATISFYING THE "LEGITIMATE TENDENCY" TEST

Except for the rule that innocence is not a ground for habeas corpus relief,[62] probably no legal doctrine seems more perverse to the non-lawyer than the rule in many states that bars criminal defendants from making "the Perry Mason defense."[63] Lawyers may find it amusing that ordinary folk suppose that, like the fictional lawyer of television fame, they can exculpate their clients at the preliminary hearing by proving that another person committed the charged crime. But perhaps we ought

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59. Hence, in each case the defendant's autonomy is being impaired. Where the defendant consents to this, courts may find it acceptable. But, were concerns about the adversary position of the prosecutor to lead courts in the direction of giving the prosecution the power to use the defendant as an involuntary instrument of evidence against him, notions of party autonomy submerged in the Fifth and Sixth Amendments would surface quicker than a Polaris missile.

60. *Compare* United States v. Alexander, 526 F.2d 161 (8th Cir. 1975) *with* Hester v. City of Milledgeville, 777 F.2d 1492 (11th Cir. 1985).

61. The autonomic responses would not constitute an "oral or written assertion" within the meaning of FED. R. EVID. 801(a)(1) nor nonverbal conduct intended as an "assertion" under FED. R. EVID. 801(a)(2).

62. *See* Herrera v. Collins, 506 U.S. 390 (1993).

63. United States v. DeNoyer, 811 F.2d 436, 440 (8th Cir. 1987). The title refers to the lawyer-hero of Earl Stanley Gardner's mystery novels, later a popular television series starring Raymond Burr. Perry Mason, with the use of diligent detective work by Paul Drake and clever cross-examination, was usually able to get his client discharged at the preliminary hearing by proving that some other person committed the crime—an outcome as fictional fifty years ago as it is today.

This defense is also called "the S.O.D.D.I. defense"—for "some other dude did it." *See, e.g.*, Dennis Prater & Tammy M. Somogye, *Some Other Dude Did It (But Will You Be Allowed To Prove It?)*, J. KAN. B. ASS'N, May 1998, 28-29; *see also*, United States v. Olney, 892 F.2d 84 (9th Cir. 1989). Because of its racial overtones, that title will not be used here. *But see* United States v. Lively, 817 F. Supp. 453 (D. Del. 1993) (refusing to find racial implications in term).

to more troubled than we are when legal rules depart from notions of justice found elsewhere in our culture.

Even at common law, the cases barring the "Perry Mason defense" until some higher than normal standard of relevance was met were difficult to defend.[64] The supposed "institutional disadvantage" of the prosecution appears ludicrous to anyone familiar with the state of criminal justice in the twenty-first century when conviction rates are at an all-time high in most states.[65] As Wigmore has pointed out, if the kind of mind it takes to be a judge is capable of seeing the flaws in the evidence, there is no reason to suppose that jurors cannot see it as well.[66] Finally, it seems implausible to suggest that fabricating a case for the guilt of another person is easier than fabricating an alibi or other evidence of one's own innocence.

But now that most states have adopted some statute or rule like Rule 402, cases barring evidence of third person guilt are indefensible.[67] As we saw in the previous section, Rule 402 abolishes the doctrine of "precedential relevance," depriving courts of the common law power to create new exclusionary rules of evidence.[68] One can argue, as Mr. Powell does, that in a few cases the codified character evidence rules appears to bar some evidence of the guilt of another, but as he rightly points out, given the free rein courts have given prosecutors under these rules, it is difficult to defend applying a more stringent standard to the defense.[69] Thus, after *Daubert*[70] and similar cases, the *Alexander* dictum[71] is not good law, even in federal courts, and thus a far less persuasive authority for state judges.[72] But, as Mr. Powell demonstrates at

64. Particularly when that standard was higher than the one that the prosecution had to meet to put the defendant on trial.

65. Brett Powell, Comment, *Perry Mason meets the "Legitimate Tendency" Standard of Admissibility (and doesn't like what he sees)*, 55 U. MIAMI L. REV. 1023 (2001) (mentioning "institutional disadvantage."); *see generally* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 460 (1993).

66. 1A JOHN H. WIGMORE, EVIDENCE §139 at 1724 (Tillers rev. 1983).

67. *See, e.g.*, United States v. Crenshaw, 698 F.2d 1060, 1064 (9th Cir. 1983); People v. Hall, 718 P.2d 99, 104 (Cal. 1986).

68. *See infra* text at note 9.

69. Powell, *supra* note 65, at 1047-51.

70. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (holding Federal Rule of Evidence 402 repeals common law rules of exclusion).

71. *See* United States v. Alexander, 526 F.2d 161 (8th Cir. 1975).

72. I am not as certain as Mr. Powell seems to be that the *Alexander* opinion had that much influence in shaping the anti-Perry Mason rule in state courts. Most of the early cases I have read seem to take the doctrine from a legal encyclopaedia rather than from the United States Supreme Court. I also think that the shape of the doctrine is more diverse than might appear from Mr. Powell's discussion. For my views, see the next supplement of 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5180.1 (forthcoming in 2002).

length, state courts, including those in my own state of California,[73] treat legislative rules of evidence as only slightly more authoritative than law review articles.[74]

Thus, while I agree with Mr. Powell that the "holistic Sixth" gives defendants a constitutional right to make the "Perry Mason defense," it seems a bit like firing a cannonball at a gnat.[75] If, as Mr. Powell says, federalism is "admirable," then shouldn't we be insisting that state courts follow the rules of evidence laid down in statutes and court rules?[76] This would not only save the Sixth Amendment for cases in which there is no other remedy, but by getting state judges to take the modern evidence statutes seriously it would have an effect far beyond the cases that rightly draw Mr. Powell's fire.[77]

To do this requires us to understand just why it is that so many judges feel that the modern evidence statutes are merely advisory.[78] Power explains much of this. The Progressive Proceduralists, whose ideas shaped much of the modern evidence statutes, favored increasing the discretionary power of trial judges.[79] Lawyers rightly saw that the shift from fixed rules to discretionary ones would lessen their power and were able to block reform until the discretion of the court was limited by what is now Rule 403.[80] What they failed to foresee was that appellate judges, who also lose power to the trial court under a discretionary system, were willing to forego that power if it would save them work.[81] Thus, even when evidence opinions are not written by clerks, they tend

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73. David A. Garcia, *Third Party Culpability Evidence: A Criticism of the California* Mendez-Arline *Exclusionary Rule—Toward a Constitutional Standard of Relevance and Admissibility*, 17 U.S.F. L. REV. 441 (1983).

74. *See* Powell, *supra* note 65.

75. Nonetheless, some courts have brushed off the constitutional claim. *See, e.g.*, Watson v. United States, 612 A.2d 179 (D.C. Ct. App. 1992); Keith v. State, 612 P.2d 977, 982 (Alaska 1980); State v. Thomas, 847 P.2d 1219, 1225 (Kan. 1993).

76. Powell, *supra* note 65, at 1056 (discussing federalism).

77. Remember that both of the other papers under discussion would not have been written had courts not continued to apply rules that were supposedly repealed by Federal Rule of Evidence 402.

78. There are so many examples of this, it is hard to select the paradigm case. Let's take Federal Rule of Evidence 601 because so many evidence scholars are complicit. That Rule abolishes all forms of witness incompetence, except in cases where the *Erie* doctrine requires federal courts to follow state law. The Rule could hardly be clearer: "[e]very person is competent to be a witness." FED. R. EVID. 601. Yet, aided and abetted by the authors of the leading evidence treatises, courts go on their merry way, disqualifying children and those with low mental skills as if the United States Congress had never enacted FED. R. EVID. 601. The shameful story is told in 27 WRIGHT & GOLD, *supra* note 26, § 6005.

79. *See generally* Kenneth W. Graham, *The Persistence of Progressive Proceduralism*, 61 TEXAS L. REV. 929 (1983).

80. 22 WRIGHT & GRAHAM, *supra* note 6, § 5211.

81. Enforcing the rules of evidence ranks rather low on the agenda of most appellate courts. An anonymous informant with personal knowledge once explained the low quality of the evidence

to make every one of the Federal Rules of Evidence, not just Rule 403, a matter for a wide, if not unchecked, discretion in the trial judge.[82]

Having gutted the statutory rules with the knife of discretion, when appellate courts want to exercise power over trial courts, they are often forced to resort to new exclusionary rules of their own making rather than relying on the ones adopted through the rulemaking power.[83] Thus, we find courts reviving old common law doctrines supposedly repealed by Rule 402—everything from competence of witnesses to "no impeachment on a collateral matter." This does not seem to be what the Progressive Proceduralists had in mind.[84]

Why courts want to continue enforcing the anti-Perry Mason doctrine is another matter.[85] One possibility is that courts take a more holistic view of the question.[86] If we ask ourselves how many defendants would be able to avail themselves of the Perry Mason defense if it were more widely available, we may speculate that only wealthy defendants like O.J. Simpson and the Menendez brothers will be able to hire private detectives like Perry Mason's Paul Drake to hunt up evidence of the guilt of another person.[87] Or, courts may be more cynical than Mr. Powell, who seems to suppose that the purpose of the criminal justice system is to discover the truth about the charged offense. A judge who thinks that the purpose of the judicial system is to produce guilty pleas rather

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opinions in one federal circuit by stating that most of the judges in that circuit let their clerks do their evidence opinions so they could devote their time to "the really important stuff."

82. 22 WRIGHT & GRAHAM, *supra* note 6, § 5166, at 45.1 (Supp. 2001).

83. Some scholars have accused the Advisory Committee on the Federal Rules of Evidence of implicitly endorsing this practice by refusing to make amendments to the Rules that might meet legitimate need for change and reduce the power of appellate courts to engage in illegitimate lawmaking. *See* Paul R. Rice & Neals-Erik Deiker, *The Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000). It is hardly surprising that evidence scholars would want the river of reform to run through the Advisory Committee since they can suppose that their influence is more strongly felt there than in appellate courts.

84. Progressive Proceduralists, past and present, have been notoriously naive about matters of judicial power. Perhaps, they actually believe that judges are not politicians in robes.

85. *See* discussion *infra* p. 1119 for another take on this.

86. That is, they look at evidence doctrine in the context of the criminal trial. Since evidence teachers seldom emphasize the relationship between, say, the rules of criminal discovery and the rules of evidence, it would be unfair to tax student authors for failing to think about how their favoured reforms might play out in a criminal justice system that tends to resist, if not undermine, procedural change.

87. The police have little interest in doing this and criminal discovery in most states and in federal courts affords few tools by which defense lawyers can do this. Recent cases of wrongfully convicted capital defendants has fixed the media's childlike attention span on the inadequate defense afforded people of modest means, at least in supposedly benighted states like Texas and Florida. But similar exposes would turn up equally scandalous practices in states that like to look down their noses when they look across their borders. *See, e.g.*, Jane Fritsch & David Rohde, *Legal Help Often Fails New York's Poor*, NEW YORK TIMES, Apr. 8, 2001, at 1.

than trials of truth, may apply 'Posnerian' reasoning to argue that if the anti-Perry Mason rule prevents even the innocent from gaining acquittals, this will encourage defendants who, like most of us, are guilty of something (if not the charged crime) to accept the prosecutor's plea bargain, rather than be convicted of some more serious crime and suffer penalties disproportionate to their true guilt.

3. Admissibility of Expert Testimony on Eyewitness Identification in Courts

Calling psychological experts to testify about the pitfalls of eyewitness identification both resembles and differs from the kinds of defense evidence discussed in the previous two papers. Expert testimony on eyewitness identification testimony, like polygraph evidence, is relevant and meets the standards for the admissibility of expert testimony in Rule 702. Similarly, the exclusion of this evidence looks like another triumph of precedential relevance over Rule 402; that is, many courts are simply continuing to apply rules supposedly repealed by the Federal Rules of Evidence.

But, unlike hypnotically refreshed testimony, the weaknesses of eyewitness identifications have been so extensively established by sound psychological science that expert testimony about them would seem capable of meeting the *Frye-Daubert* doctrine.[88] If this is true, it appears that the defense's claim to a constitutional right to introduce expert testimony is stronger in the case of eyewitness identification than in the case of hypnotically refreshed recollection. Moreover, testimony about the weaknesses of eyewitness identification seems far more helpful to the jury than the evidence of bias that was held to be admissible under the Confrontation Clause of the Sixth Amendment in *Davis v. Alaska*.[89] Given the notorious fact that faulty eyewitness identifications is one of the leading causes of erroneous convictions, the jury needs all the help it can get in cases where eyewitness identification is controverted.

The reasons given for exclusion of expert testimony on eyewitness identification seem weak by comparison. Mr. Dillickrath rightly points out the falsity of the claim that jurors are already aware of the psychological literature on eyewitness identification.[90] Moreover, if it were literally true that "everybody knows it," then presumably the court could take judicial notice of this literature in determining what cross-examina-

88. Thomas Dillickrath, Comment, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. Miami. L. Rev. 1059 (2001).

89. 415 U.S. 408 (1974).

90. Dillickrath, *supra* note 88, at 1062.

tion and jury arguments to allow and how it should instruct the jury and comment on the evidence. Mr. Dillickrath suggests fear of a "rash of unjust acquittals" as at least a subliminal cause for exclusion.[91] But, the constitutionally required burden of proof in criminal cases is supposed to produce "unjust acquittals," especially with regard to evidence that has been the cause of so many "unjust convictions."[92]

Power is a more likely explanation for judicial reluctance to admit such evidence. As Mr. Dillickrath suggests, permitting expert testimony on the weakness of eyewitness identification cedes control of the jury's consideration of the probative worth of eyewitnesses from the judge to the expert and from law to science. Furthermore, as in the case of other kinds of evidence discussed above, it is a further example of the reluctance of modern judges to expand the adversary system to encompass psychological truth—hence, the notion that instructions to the jury are an adequate substitute.

Judges may also fear for their ability to limit the principle supporting the admission of expert testimony on eyewitness identification—the infamous "slippery slope" argument. The author seems to accept the notion that similar experts could be called by the prosecution, though he is rather vague on what their testimony might add. But, what about an expert who wants to testify that this eyewitness's identification is true (or false)? Or, suppose the defense wants to call an expert to testify about the psychological weaknesses of excited utterances or lay opinions of intoxication? These, too, are efforts to use science to undermine legal rules and the power of judges.

In theory, the proposed substitutes for expert testimony on eyewitness identification are plausible; in practice, they are unlikely to provide an adequate substitute. The ability of the jurors to absorb the instructions thrown at them by the judge at the end of the case has long been questioned and none of the instructions quoted in the Comment seems adequate to attract the jury's attention and foster their understanding.[93] Argument looks like a better solution, but how many lawyers will be able to make a good argument without the assistance of an expert that they cannot afford to hire, and that the judge is not required to obtain for them?

Cross-examination is the traditional safeguard and in the hands of a good lawyer may very well communicate more to the jury than the testimony of an expert. One can imagine, as Mr. Dillickrath suggests, a string of "were you aware that psychologists have found. . ." questions

91. *Id.*
92. 21 WRIGHT & GRAHAM, *supra* note 34, § 5142.
93. Dillickrath, *supra* note 88, at 1093-95.

to bring the witness to a less confident opinion of her identification. Indeed, one can propose an in-court line-up in which the over-confident witness is asked to pick out the bailiff who called her in from the hall or an investigator who came in to speak to defense counsel while she was on the stand. But courts, like those in Los Angeles, that will not allow defense counsel to test an officer's opinion that he saw "marijuana," by asking him which bottle contains "marijuana" and which contains oregano, are not likely to sit still for such in-court testing of the ability of lay witnesses.[94]

Judicial comment is another alternative suggested by Judge Easterbrook's remarks.[95] Rather than have the judge read boilerplate instructions to the jury, we might ask judges to use the psychological insights of the experts to comment specifically on the testimony of the eyewitnesses in the present case, highlighting those features that tend to detract from the accuracy of the identification and those that may enhance it. But, this requires judges as sensitive to the dangers of false identification as they are sensitive to the interest of the state in punishment and to their own interest in the size of their dockets.

4. Some Final Ruminations

Each of the three papers stands alone quite well. The standard reductionist techniques serve well to dissect the reasoning of the courts and expose inconsistencies, even fallacies, in judicial thinking. Reductionist thinking, however, falls short because of its inability to put the cases and doctrines into a broader context. At one level, these separate papers can all be seen as chapters in a book about the increasing bureaucratisation of criminal justice, with its move away from the adversarial system mandated by the Sixth Amendment toward an inquisitorial system of the sort the Founders hated. At the very least, looking at the cases in this broader panorama might have chastened the modest optimism of the authors.

On the other hand, and perhaps perversely, a deeper view makes these seemingly disparate doctrines more explicable, if not more justifiable. In each of the papers, we see judges being asked to undermine one or more of the basic assumptions of our system of trial evidence. The notion that jurors are able to assess the reliability of direct evidence without outside assistance is undermined by the psychological evidence

94. A better analogy may be the cases in which counsel brings in a actor or a relative to sit next to her at the counsel table and reveals the true identity of the impostor after witnesses have confidently identified him as the person they say commit the crime. This dramatic illustration of the weakness of identification seems to be almost universally condemned by the courts.

95. Dillickrath, *supra* note 88, at 1097-99.

on the unreliability of eyewitness testimony. The notion that human memory is unitary and not subject to outside intervention becomes dubious if the repressed memory gurus are right. The concept of party autonomy that is the bedrock of the adversary system is weakened, when we accept the notion that conscious deception can be detected by an examination of unconscious responses.

Though less clear, the case of the "Perry Mason defense" is the most telling. As far back as Sherlock Holmes, detective stories have featured bumbling police officers set right by amateur outsiders. The lawyer who wants to present a "Perry Mason" defense conjures up this cultural prejudice against constituted authority. Whether or not they are consciously aware of this, courts that bar the defense defy this subversive culture and strike a blow in favor of bureaucratic regularity. Contrary to the presumption of innocence, there is a presumption that if the police and the prosecutor say that the defendant "did it," he did. Hence, courts are going to insist that the defendant produce some evidence to prove that the police erred before evidence of an alternative perpetrator of the crime will be admitted.

This is admittedly a rather depressing picture. But, we should not assume that the slide toward a bureaucratic system of criminal justice runs downward from some Edenic past. Some of the participants in this seminar can remember when the criminal justice system so celebrated individual autonomy that criminal defendants could be convicted without the assistance of counsel that was supposedly guaranteed by the Sixth Amendment. We have come some distance since then, and the contributions of these student authors offers grounds for hope that the future will look back at us, much as we look back at critics and apologists for the criminal justice system in the mid-twentieth century. Watching these law students struggle to use reductionist analysis to make sense of decisions that fly in the face of the announced values of the law of evidence, ought to make law professors uneasy about the way we teach the subject. By being less than realistic about criminal trials, are we pointing our students down the short path from disillusionment to cynicism?[96]

96. I hasten to add that one teacher's realism can be another teacher's cynicism. For example, I think that rather than a single *Daubert* rule, there are in fact four; one for civil defendants, another for prosecutors, another for civil plaintiffs, and a special rule for criminal defendants. Yet, when I suggested at the Symposium that federal judges regularly admit "junk science" against criminal defendants that would be excluded if it were offered by criminal defendants or civil plaintiffs, some people thought this suggestion was "cynical." For evidence in support of this "cynical" view, see 22 WRIGHT & GRAHAM, *supra* note 6, § 5168.1 (Supp. 2001).