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Between Rock and a Hard Place: Polygraph Prejudice Persists After Scheffer

ROBIN D. BAROVICK†

INTRODUCTION

Seventy-six years ago, in Frye v. United States,1 the D.C. Circuit held, in a two-page decision, that a crude precursor to the polygraph2 had not gained "general acceptance"3 in the scientific community and thus could not be admitted into evidence.4 With that summary dismissal, the court effectively cast the polygraph into desuetude, with its reliability in the judicial, if not the popular, mind, falling

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1. 293 F. 1013 (D.C. Cir. 1923).
2. In Frye, the defense attempted to admit results of a systolic blood pressure deception test as exculpatory evidence, and presented scientific testimony that blood pressure would rise when the subject lied. Id. at 1013. See generally J.E. Starrs, A Still-Life Watercolor: Frye v. United States, 27 J. FORENSIC SCI. 684 (1982) (providing details concerning Frye's confession and his attempt to repudiate it by offering results of the polygraph's primitive precursor which indicated he was telling the truth when he denied committing the crime. Frye was found guilty of second degree murder and served eighteen years in prison before being paroled).
3. Just when a scientific principle or discovery crosses the line between experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained [general acceptance] in the particular field in which it belongs.
4. See id.
somewhere between snake oil and Tarot cards. Despite the Supreme Court later overruling *Frye*, and thus establishing a new federal standard for admissibility of scientific expert evidence, the Court in 1998 refused to consider the polygraph as anything more than an illegitimate offspring of the scientific revolution. Finally, in *United States v. Scheffer*, the Supreme Court gave its imprimatur to the longstanding anti-polygraph stance evinced by American courts.

It was as if time had stood still for seventy-five years. While American courts have generally exerted themselves to keep pace with the latest scientific technology, the courts

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5. One noted critic of certain types of polygraph techniques, psychologist David T. Lykken, has written, "The lie detector has no more business in the court room than a psychic or a deck of Tarot cards." David T. Lykken, *The Lie Detector and the Law*, 8 CRIM. DEF. 19, 26 (May-June 1981). For a discussion on different methods employed by various cultures to ascertain whether a person is telling the truth, see, e.g., Richard H. Underwood, *Truth Verifiers: From the Hot Iron to the Lie Detector*, 84 KY. L.J. 597 (1995-1996) (taking a negative view of the 'lie detector' as the latest in a long history of theories and gadgets purported to measure truth telling).

6. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); *infra* notes 37, 46, and Section III-C.

7. 523 U.S. 303 (1998). *Scheffer* was the Court's first direct pronouncement on the admissibility of polygraph evidence. Other polygraph cases have come before the Court in the last seventy years. The Court denied certiorari in two cases. See Israel v. McMorris, 455 U.S. 967 (1982); Masri v. United States, 454 U.S. 907 (1977). In other cases it made its ruling on other grounds. See, e.g., Wood v. Bartholomew, 516 U.S. 1 (1995) (holding that a state's failure to disclose that a witness had failed a polygraph test did not deprive the defendant of *Brady* material); Wyrick v. Fields, 459 U.S. 42 (1982) (finding that once a defendant was informed of his right to have counsel present at a polygraph examination and had waived that right, the police were not required to again advise him of his rights before questioning him at the same interrogation regarding the polygraph results).

8. See DAVID L. FAIGMAN, ET AL., 1 MODERN SCIENTIFIC EVIDENCE—THE LAW AND SCIENCE OF EXPERT TESTIMONY 554 & n.5, § 14-1.0 (1997) ("Polygraphy, as indicated by its being the subject behind the *Frye* rule, has had a long and mostly troubled history in American courts. Throughout the twentieth century, courts have been, at best, skeptical of polygraph tests, and at worst and more usual, hostile to them.").

9. The courts have ruled on a variety of scientific technologies. See, e.g., United States v. Williams, 583 F.2d 1194 (2d Cir. 1978) (ruling on admissibility of spectrographic analysis of voice); United States v. Stifel, 433 F.2d 431 (6th Cir. 1970) (discussing neutron activation analysis); Commonwealth v. Cifizzari, 492 N.E.2d 357 (Mass. 1986) (ruling on bitemark evidence). Furthermore, the
have carved an unusual niche for the polygraph,\textsuperscript{10} where its scientific basis, along with its technological advances since 1923,\textsuperscript{11} count for naught. In this context, the Scheffer holding is anomalous, and deserves close inspection.

In Scheffer, the Supreme Court reversed a decision by the Court of Appeals for the Armed Forces\textsuperscript{12} and upheld the constitutionality of Military Rule of Evidence 707,\textsuperscript{13} which dictates a per se exclusion of polygraph evidence in military court-martial proceedings.\textsuperscript{14} Airman Edward Scheffer had attempted to introduce exculpatory polygraph evidence and challenged Military Rule of Evidence (MRE) 707 as an unconstitutional infringement on his right to present a


10. "In the succeeding decades [since Frye], many courts treated the early decision as if it established that polygraph results were inadmissible regardless of any improvements in the technology." John William Strong, McCormick on Evidence, § 206, at 913 & n.44 (4th ed. 1992). James A. Matte opined that judges often misunderstand the technique, and compound that ignorance with outdated polygraph test results taken on old instruments, a combination that dictates inadmissibility. See James Alexander Matte, Forensic Psychophysiology Using the Polygraph 563 (1996).


12. See United States v. Scheffer, 44 M.J. 442 (C.A.A.F. 1996). The CAAF decision was remarkable in that it was, up until that time, the highest level court that found constitutional implications in refusing to allow a defendant to present polygraph evidence. The court limited its holding to exculpatory evidence offered to rebut an attack on the accused's credibility. See id. at 445.

13. MRE 707 provides, in relevant part: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." MIL. R. EVID. 707.

14. See id.
defense. A fractured Court, in an opinion divided into a four-justice plurality, a four-justice concurrence, and a lone dissent, held that MRE 707 did not unconstitutionally abridge that right. The Justices agreed, 8-1, that because the "scientific community remains extremely polarized about the reliability of polygraph techniques," MRE 707 was a "rational and proportional means of advancing the legitimate interest in barring unreliable evidence." Buttressed by their conclusion on the constitutional front that MRE 707 did not "implicate any significant interest of the accused," the plurality and concurring justices did not find that the accused's "defense was significantly impaired by the exclusion of polygraph evidence." However, the plurality lost their arguments that allowing polygraph evidence would diminish the jury's role in making credibility determinations and would spawn excessive collateral litigation. Here, the concurring justices agreed with Justice Stevens' sharp dissent in dismissing what had been two often-used weapons in the anti-polygraph arsenal.

16. Justice Thomas delivered the opinion of the Court, in which Chief Justice Rehnquist, Justice Scalia, and Justice Souter joined. See Scheffer, 523 U.S. at 304-17.
18. Justice Stevens dissented and filed an opinion. See id. at 320-39.
19. Id. at 309 (citing FAIMAN, supra note 8, at 565 n. 14-2.0, at § 14.3.0 (1997)); see GIANNELLI, supra note 11, at 225-27; STRONG, supra note 10, at 909.
20. Scheffer, 523 U.S. at 312.
21. Id. at 316-17.
22. Id. at 317.
23. Though numerous decisions have theorized about the devastating impact that polygraph results would have on a jury, hard evidence has been hard to come by. In McMorris v. Israel, 643 F.2d 458 (7th Cir.), cert. denied, 455 U.S. 967 (1981), the Court noted that while technology has evolved, so has the public's sophistication in dealing with it. "Scientific evidence... has become more a part of the ordinary trial so that jurors may be more likely to use polygraph evidence with discretion." Id. at 462; see STRONG, supra note 10, at 916 & n.63; Charles R. Honts & Mary V. Perry, Polygraph Admissibility Changes and Challenges, 16 LAW & HUM. BEHAV. 357, 366 (1992).
24. See Scheffer, 523 U.S. at 318-19 (finding that the polygraph does not usurp the role of the jury and stating that he does not join Part II-C of the plurality's opinion concerning collateral litigation). Interestingly, these two
Despite what at first glance would appear to be an overwhelming vote against the admissibility of polygraph evidence, a closer reading of *Scheff er* reveals that a majority of justices continue to harbor concerns about the constitutionality and rationale of a per se rule forbidding admissibility of all polygraph results, and have left the door open for another challenge.

That this case arises from the military justice system creates some unusual implications. While close similarities exist between most of the Military Rules of Evidence and Federal Rules of Evidence, many significant differences exist, not the least of which is MRE 707. Both the court-martial procedure and the statutory provision allowing the President to promulgate MREs have no counterpart in civilian jurisprudence. In addition, civilian courts have traditionally deferred to military court decisions and to arguments which were rejected by the Supreme Court were put forth as the policy reasons for adopting Military Rule of Evidence 707. "In [the opinion of the Drafters of the Military Rules of Evidence], polygraph evidence poses a real danger of misleading, confusing, and wasting the court's time. The Drafters believed that fact finders will view this evidence as infallible, unimpeachable, or conclusive of trial issues which in turn will cause courts-martial to degenerate into trials about polygraph machines, and court members into ignoring the military judge's cautionary instructions." *Stephen A. Saltzburg et al*, *Military Rules of Evidence Manual* 211 (3d ed. 1991 & Supp. 1996).

25. MRE 101 provides "If not otherwise prescribed in this Manual or these rules, and insofar as not inconsistent or contrary to the Code or this Manual, courts-martial shall apply: (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts...." *Saltzburg, supra* note 24, at 5. However, the MREs are the primary source of evidentiary law for military practice. *See id.* at 1.


27. The Supreme Court promulgates the Federal Rules of Evidence, which are approved by Congress. *See Ronald L. Carlson et al.*, *Materials for the Study of Evidence* 5-7 (1983). The President, as Commander in Chief of the Armed Forces, promulgates the MREs pursuant to Article 36(a), UCMJ. *See 10 U.S.C. § 836(a) (1994).* Congress had no part in drafting the MREs.

28. *See Middendorf v. Henry*, 425 U.S. 25, 43 (1976). Concerning the matter of civilian court deference to the military court system, the Navy-Marine Corps Appellate Division, in its amicus brief in support of the Respondent (*Scheff er*), argued that, particularly on the constitutional question presented, a civilian court must undertake an analysis of the military's interests as well as constitutional principles. They urged deference to and affirmance of the decision by the court below (the Court of Appeals for the Armed Forces) as being in the
Presidential and Congressional decision making in the military context.\textsuperscript{29} Still, military courts can and do apply civilian case law.\textsuperscript{30} Despite the military's separate and specialized legal system, the "military accused\textsuperscript{31}" still enjoys many of the protections provided by the Constitution.\textsuperscript{32} Indeed, in some contexts, military members enjoy greater protections than their civilian counterparts.\textsuperscript{33}

Though acknowledging Presidential authority to promulgate the MREs, the plurality, concurring and dissenting justices analyzed Scheffer's constitutional and evidentiary arguments in a civilian setting, employing civilian rather than military case law.\textsuperscript{34} Accordingly, this

\textsuperscript{29} See Brief Amicus Curiae of United States Navy-Marine Corps Appellate Defense Division in Support of Respondent at 2, Scheffer (No. 96-1133).


\textsuperscript{31} See United States v. Ruth, 42 M.J. 730 (1995) (applying Daubert standards in holding that handwriting analysis was not a scientific technique and did not depend on factors governing admissibility of expert scientific testimony).

\textsuperscript{32} Military terminology for defendant, specifically defined as "[o]ne against whom charges have been preferred for an offense under the Code." EDWARD M. BYRNE, MILITARY LAW 744 (3d ed. 1981).

\textsuperscript{33} The Supreme Court's opinions concerning the Constitution's application to the military justice system have exhibited a theme of extending constitutional rights to service members without limitation, except where necessary due to the unique character of the military . . . . While the President and Congress may establish rules for courts-martial . . . it is axiomatic that neither is free to disregard the Constitution when acting in the area of military affairs.


\textsuperscript{34} Article 31, U.C.M.J. protects a member against compulsory self-incrimination, even if not in custody. See 10 U.S.C. § 831 (1994); see also MATTE, supra note 10, at 562 ("Our military justice system is replete with examples of safeguards for the rights of military accused which are not available to their civilian counterparts.").

Note focuses on Scheffer's applicability outside a military context, since the precedent established in civilian life by a military court-martial applying Military Rules of Evidence would be minimal.

In the context of civilian case law, the Scheffer opinion countered recent Circuit Court decisions permitting polygraph evidence in federal courts. This trend accelerated following the Supreme Court's 1993 *Daubert v. Merrell Dow Pharmaceuticals, Inc.* decision, which held that the Federal Rules of Evidence, specifically Rule 702, controlled admissibility of scientific expert evidence in federal courts. Before *Daubert*, scientific evidence had been admitted only if it could successfully overcome the "general acceptance" standard set forth in *Frye*. For more than seventy years, when confronted with an issue of polygraph admissibility, federal and state courts often formalistically applied the *Frye* "general acceptance" mantra, and, genuflecting at the *Fryean* altar, refused "to reconsider whether the polygraph had obtained general acceptance among psychophysiologists." The great

35. *See infra* pp. 1701-03 and accompanying notes.


37. Rule 702 reads, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702. Military Rule of Evidence 702, concerning "Testimony by Experts," contains exactly the same wording as Federal Rule of Evidence 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." MIL. R. EVID. 702.

38. Courts agree that "*Daubert* applies to polygraph techniques." FAIGMAN, supra note 8, at 560 & n.49.


40. James R. McCall, Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert, 1996 U. ILL. L. REV. 363, 369. Psychophysiologists study the relationship between psychological processes and bodily reactions. They measure the physiological reactions of people in controlled situations and from a knowledge of the situation and the stimulation provided, can make inferences about the psychological processes the individual is experiencing. The polygraph measures those physiological reactions. As Honts and Perry elucidated, "It is important to note that there is no one polygraph technique. There are a great many polygraph techniques known by many names, although they all have certain characteristics in common." Honts
majority of courts categorically ruled that polygraph evidence was inadmissible, with only two exceptions. Daubert appeared to have revolutionized the standard, holding that the Federal Rules of Evidence superseded the Frye rule. Reading Rule 702 in a more liberal light, the

& Perry, supra note 23, at 358.

41. In the overwhelming majority of cases after Frye that involved the polygraph, "courts relied on Frye's general acceptance test as the basis for excluding testimony about polygraph examinations. The general rule emerged that evidence of a polygraph examination was per se inadmissible." Edward J. Imwinkelried & James R. McCall, Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations, 32 Wake Forest L. Rev. 1045, 1048 (1997).

42. The Eleventh Circuit admitted polygraph evidence as early as 1989 after holding in United States v. Piccinonna, 885 F.2d 1529 (1989), that polygraph evidence could be admitted where the parties stipulated in advance as to the circumstances of the test and as to the scope of its admissibility. Four years before Daubert, Piccinonna charted new evidentiary territory by interpreting FRE 702 and finding that a complete bar to polygraph evidence was no longer defensible. The Piccinonna court pointed to the tremendous advances that had occurred in the field of polygraphy, its widespread use in military and law enforcement, and cited that in over 92% of cases, "a properly administered polygraph test is a highly effective way to detect deception." Id. at 1533 & n.12.

In State v. Dorsey, 539 P.2d 204 (N.M. 1975), the New Mexico Supreme Court allowed polygraph results, treating them no differently than other types of scientific evidence. Dorsey required that the procedure be reliable, the operator be competent, and that the polygraph tests on the subject be valid. Id. Subsequently, New Mexico incorporated these requirements, further articulated in case law, by adopting a state rule of evidence in 1983 (N.M. R. Evid. § 11-707). See infra notes 231-32.

43. Prof. Edward J. Imwinkelried, an expert on scientific evidence, posited in a 1981 law review article that the American legal system was entering a new stage in the evolution of scientific evidence, dominated by questions of weight rather than admissibility. See Edward J. Imwinkelried, A New Era in the Evolution of Scientific Evidence-A Primer on Evaluating the Weight of Scientific Evidence, 23 WM. & MARY L. Rev. 261 (1981). Though Daubert would be decided more than a decade later, he noted that the courts even then reflected a liberalizing trend in scientific evidence, given the "less than enthusiastic" view of Frye, which had already been subjected to a "drumbeat of criticism" by knowledgeable commentators. Id. at 264. In his article, he anticipated Sixth Amendment constitutional challenges for exclusion of scientific evidence. See id. at 267. Frye has been characterized as an "historical test rather than a scientific test," where "the nature of the general acceptance test almost necessarily builds in a substantial lag time between the advent of a new, valid scientific technique and the admission of testimony based on the technique." Edward J. Imwinkelried & Norman M. Garland, Exculpatory Evidence - The
Court accorded more discretion to the trier of fact, and held that if the district court judge, acting as a gatekeeper, deemed scientific evidence relevant and reliable, it could be admitted. The Court provided a list of factors to assist the judge in making that determination. Only one of the factors reflected whether the scientific technique used had gained the widespread acceptance of the competent scientific community. Oddly, however, when confronted with whether polygraph results could be admitted into

**ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE § 13-7 (2d ed. 1996).**

44. See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 597 (1993). The gate the judge keeps is that of Rule 104(a), where, faced with a proffer of expert scientific testimony, the judge must determine, at the outset, "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Id. at 592. Rule 104(a) provides, in relevant part: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . ." FED. R. EVID. 104(a).

45. In a scientific context, validity refers to a test's accuracy, the ability to measure what it says it is measuring. Reliability refers to reproducibility, or consistency of results. When referring to the polygraph, "Reliability is important, but the polygraph debate really centers around the test's validity [its ability to detect deception]." State v. Porter, 698 A.2d 739, 763 & n.46 (Conn. 1997). This Note will use the non-scientific meaning of the term "reliability" to denote the polygraph's accuracy in measuring what it purports to measure: the percentage of cases where a person's guilt or innocence is accurately determined. See infra note 203 (regarding "evidentiary reliability").

46. The Supreme Court reaffirmed its Daubert standard for scientific evidence more recently in General Electric v. Joiner, 522 U.S. 136 (1997), where it applied an abuse of discretion standard to the trial court judge's ruling that scientific evidence is both relevant and reliable. The Court cleared up a Daubert ambiguity more recently in Kumho Tire Co., Ltd. v. Carmichael, ___ U.S. __, 119 S.Ct. 1167 (1999), by holding that Daubert's gatekeeping obligation applied not only to scientific testimony, but to all expert testimony.

47. Though declining to set forth a definitive checklist, the Daubert Court listed several factors that federal judges could consider as guidelines when faced with determining whether to admit expert scientific testimony under FRE 702: (1) whether the theory/technique had been tested; (2) whether the theory/technique had been subjected to peer review and publication (a process by which other scientists could detect substantive flaws in methodology); (3) the technique's known or potential rate of error; (4) whether standards controlling the technique existed and had been maintained; (5) whether the theory/technique had gained a widespread level of acceptance within the relevant scientific community. See Daubert, 509 U.S. at 593-94.
evidence, the Scheffer Court dispensed with a Daubert analysis and reverted to the 1923 Frye "general acceptance" standard in the guise of a reliability argument. 48

The Scheffer decision thus maintained a consistency with its Frye progenitor in preserving longstanding prejudice against polygraph admissibility. Despite a rate of polygraph accuracy ranging from 70 to 90%, 49 the Supreme Court, joined by a dwindling number of circuits 50

48. The plurality and concurring judges expressed concern about polygraph reliability throughout Section II-A of the Scheffer decision, supported by citations to studies and cases that questioned or challenged polygraph accuracy. They espoused circular reasoning: because the polygraph was not reliable, it was not generally accepted, and it was not generally accepted because it was unreliable.

49. An oft-quoted 1975 decision captured the flavor of the popular prejudice against the polygraph. The decision expressed fear that a jury would imbue the polygraph with "an aura of near infallibility akin to the ancient oracle of Delphi." United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1976). A Seventh Circuit opinion voiced hostility to the polygraph in stating, "[J]udges loathe the specter [sic] of trial by machine, wherein each man's sworn testimony may be put to the electronic test." United States v. Bursten, 560 F.2d 779, 785 (7th Cir. 1977). Twenty years later, one of the Scheffer Amicus Curiae termed the polygraph "a class of evidence that is inherently dangerous to justice." Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 1-2, Scheffer (No 96-1133). Another polygraph critic, Leonard Saxe, a Brandeis University psychologist, claimed that it made no more sense to tell jurors about polygraph evidence than to tell them about the suspect's astrological chart. See David G. Savage, Let Trial Judges Decide—High Court Rejects a Per Se Rule on Polygraph Evidence, 84 A.B.A. J. 52, 53 (June 1998). Honts & Perry observed, "Public information, and very often disinformation, on the field of polygraphy virtually mandates the use of an expert witness if for nothing else then to dispel the myths about polygraphy emanating from the popular media and from overly zealous supports [sic] and detractors." Honts & Perry, supra note 23, at 363. Even military court decisions had been divided on the polygraph. See United States v. Rodriguez, 37 M.J. 448 (C.M.A. 1993) (reversing a conviction of a master sergeant who testified that he had never used drugs). The government had been permitted to introduce polygraph evidence that he had been deceptive when denying knowingly using drugs. See id. In reversing the conviction, the court said that given the government's failure "to establish the reliability of this weapon of devastation," its results were improperly admitted. Id. at 453.


51. See infra notes 254-55, 257.
and a majority of state courts, maintained the decades-long stance of many American courts that singled out the polygraph among various types of scientific evidence as a thing apart, a "pariah," while other less reliable scientific evidence has either been frequently admitted or held to less stringent standards. Proponents and opponents alike cite

52. Twenty-eight state courts plus the District of Columbia exclude polygraph evidence; fifteen states admit polygraph evidence by stipulation of the parties; two states allow polygraph evidence to be admitted in certain proceedings and Mississippi and New Mexico allow admission of polygraph evidence, with restrictions, at trial. See Brief of the State of Connecticut and 27 States as Amici Curiae in Support of Petitioner at 4-5, Scheffer (No. 96-1133); infra note 261.

53. McCall, supra note 40, at 380 (citing Witherspoon v. Superior Court, 183 Cal.Rptr. 615 (Cal. Ct. App. 1982)).

54. Justice Stevens cited a study by J. Widacki and F. Horvath. See United States v. Scheffer, 523 U.S. 303, 333-34 & n.24 (1988). This study discussed how polygraph evidence was compared to fingerprinting, handwriting analysis, and eyewitness identification. See Widak & Horvath, An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Investigation, 23 J. FORENSIC SCI., 596, 596-600 (1978). When inconclusive results from the tests were excluded, the fingerprinting expert correctly resolved 100% of cases, the polygraph expert 95%, the handwriting expert 94% and eyewitness 64%. See id. When inconclusive results were factored in, the polygrapher resolved 90% of cases correctly, the handwriting expert 85%, the eyewitness 35% and the fingerprinting expert 20%. See id.; Scheffer, supra. The study concluded, "[O]ur findings do support the claim of practitioners that relative to other methods the polygraph technique is particularly valuable for resolving criminal investigations." Widacki & Horvath, supra, at 600. For a discussion of these test results, see STAN ABRAMS, THE COMPLETE POLYGRAPH HANDBOOK 184 (1989) and MATTE, supra note 10, at 5 ("The aforesaid study supports Reid and Inbau's statement... that the accuracy of the psychophysiological veracity (PV) examination is commensurate with and even superior to most of the presently approved forms of evidence."). One scholar pointed out how prejudice against the polygraph translated legally by observing that the Frye standard had not been invoked to assess certain types of expert scientific testimony such as ballistics, intoxication tests and X-rays (allowing admissibility), while it had been consistently applied to the polygraph, rendering it inadmissible. See Honts & Perry, supra note 23, at 375 ("The continued widespread exclusion of polygraph tests appears to lie in a continued distrust of the polygraph based on concerns about logical relevance. This distrust is despite the fact that polygraph tests have been demonstrated to be more accurate than many forensic techniques routinely admitted by the courts.") (citation omitted); McCall, supra note 40, at 377 (highlighting other scientific evidence authorized for legal admission, which "raise substantial accuracy or validity questions"); Mark
the same studies by well-established scientists to confirm their positions on polygraph reliability or unreliability. The literature on polygraphs is "compendious, contentious, and of uneven quality."55 Still, despite the ongoing polygraph reliability controversy, a number of Circuit Courts, spurred by Daubert, have reassessed their previous exclusion of polygraph evidence and have admitted it, usually pursuant to stipulation or the trial judge's

McCormick, Scientific Evidence: Defining a New Approach to Admissibility, 67 IOWA L. REV. 879, 884-85 (1982); Donald F. O'Connor, Jr., The Polygraph: Scientific Evidence at Trial, 37 NAVAL L. REV. 97, 106 (1988) (discussing examples of scientific evidence, such as neutron activation analysis, based on scientific principles less reliable than polygraphy, but accepted at trial).

55. Polygraph proponents and opponents will either laud the results or criticize the methodology of the same study in an effort to prove their premise that the polygraph is or is not reliable. See, e.g., OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION 5 (1983) [hereinafter OTA REPORT]. Opponents of polygraph reliability point to the OTA REPORT concluding that "when used in criminal investigations, the polygraph test detects deception better than chance, but with error rates that could be considered significant." Id. The OTA REPORT is reprinted in its entirety in 12 POLYGRAPH 198-319 (1983). The Government's Brief cited the OTA REPORT for the proposition that "no overall measure of single, simple judgment of polygraph testing validity can be established based on available scientific evidence," and proceeded to enumerate various studies that acknowledged the raging debate on polygraph accuracy. Brief for the United States at 19-21, Scheffer (No. 96-1133). Proponents cite results that could be interpreted as in their favor, such as "the conclusion about scientific validity can be made only in the context of specific applications," which keeps the door to polygraph evidence open simply because it does not discount it altogether. IMWINKELRIED & GARLAND, supra note 43, § 6-5, at 174 (quoting OTA REPORT at 4). Proponents also vigorously criticize the methodology of the sixteen year old study as using an improper statistic and treating inconclusive test results as errors. "As such, the petitioner's reliance upon the conclusion of the OTA Study—that polygraph tests in criminal investigations have significant error rates—is undermined by the study's suspect statistic." Brief for the Respondent at 22-23, Scheffer (No. 96-1133); see Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 14-15, Scheffer (No. 96-1133). Another bone of scientific interpretive contention is how the results of surveys among members of the Society for Psychophysiological Research, designed to quantify the level of polygraph acceptance among members of the relevant scientific community, are interpreted. See infra notes 238-39.

56. STRONG, supra note 10, at 908 & n.24; see, e.g., Paul C. Giannelli, Polygraph Evidence: Post-Daubert, 49 HASTINGS L. J. 895 (1998).
discretion.  

This Note argues that if the Scheffer Court had applied a Daubert analysis to polygraph evidence, it would have been adjudged sufficiently reliable. On that basis, the per se rule excluding polygraph evidence would not have served any legitimate interest, since it would have prevented the introduction of reliable evidence. The Court would then have declared MRE 707 arbitrary and thus unconstitutional. As a result, the Court would have remanded the case to the trial court, and ordered a Daubert hearing so that Scheffer's counsel could attempt to lay a foundation for the introduction of exculpatory polygraph evidence.  

While Scheffer's facts did not prove compelling enough to wrest at least the concurring justices from their anti-polygraph position, one need not wander too far afield to predict that the time will soon be ripe for another challenge to polygraph inadmissibility in the Supreme

57. See generally United States v. Posado, 57 F.3d 428 (5th Cir. 1995) (admitting polygraph evidence on a case-by-case basis; concluding its per se rule against polygraph admissibility did not survive Daubert); United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995) (admitting polygraph evidence if stipulated to by both parties before the test is administered and trial judge determines that requirements of FREs are met); United States v. Pulido, 69 F.3d 192 (7th Cir. 1995) (stating that polygraph admissibility under FREs is left to the sole discretion of the trial judge); United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997) (holding that polygraph admissibility should be applied on a case-by-case basis). Some courts, however, have found that Daubert did not change their approach to polygraph evidence. See United States v. Black, 831 F.Supp. 120, 123 (S.D.N.Y. 1993) (“After evaluating the standard set forth in the Daubert case, premised on Rule 702 of the Federal Rules of Evidence, the Court believes that nothing in Daubert would disturb the settled precedent that polygraph evidence is neither reliable nor admissible.”).  

58. The CAAF decision described what proof was necessary to lay a proper foundation for polygraph evidence. See United States v. Scheffer, 44 M.J. 442, 446-47 (C.A.A.F. 1996). The proponent had to establish “that the underlying theory—that a deceptive answer will produce a measurable physiological response—[was] scientifically valid, . . . that the theory [could] be applied to the [accused's] case . . . , that the examiner [was] qualified, the equipment worked properly and was properly used, and that the examiner used valid questioning techniques.” Id. If the Daubert hearing resulted in the admission of the exculpatory polygraph data, this evidence would have negated the mens rea element of the knowing ingestion of methamphetamine charge, giving credence to Scheffer's claim of innocent ingestion. The panel members would then assess the proper weight to be given this evidence, and it may have been enough to reverse Scheffer's conviction on this charge.
Court. Should the anti-polygraph climate continue to abate, as reflected by post-\textit{Daubert} Circuit Court decisions allowing polygraph evidence, and by the Court's neutralizing two main arguments from the anti-polygraph arsenal,\textsuperscript{59} the Court may finally realize that counsel should at least be allowed to establish a foundation for polygraph admissibility in this, our technological age.

\section*{II. Analysis of \textit{Scheffer} Decision}

\subsection*{A. Facts}

In March, 1992, Edward Scheffer, an airman stationed at March Air Force Base, California, volunteered to work as an informant for the Air Force Office of Special Investigations (OSI). The OSI informed Scheffer that, as a condition of his role as informant, he would be required to provide urine samples and submit to polygraph examinations on a random basis. On April 7, 1992, OSI requested such a urine sample from Scheffer. On April 10, before the urinalysis result was known, Scheffer submitted to a polygraph examination conducted by a government polygrapher. In the opinion of the polygraph examiner, "the test 'indicated no deception' when [Scheffer] denied using drugs since joining the Air Force."\textsuperscript{60} On April 30, Scheffer left the base and was absent without leave until May 13, when he was arrested and returned to the base. Shortly thereafter, the urinalysis report, dated May 20, indicated that Scheffer tested positive for methamphetamine.\textsuperscript{61}

Scheffer was tried by general court-martial "on charges of using methamphetamine, failing to go to his appointed place of duty, wrongfully absenting himself from the base for 13 days, and, with respect to an unrelated matter, uttering 17 insufficient funds checks."\textsuperscript{62}

During the court-martial, Scheffer testified in his own defense, relying on an "innocent ingestion"\textsuperscript{63} theory. He

\begin{itemize}
\item \textsuperscript{59} See infra notes 94, 105, and 128-30.
\item \textsuperscript{60} United States v. Scheffer, 523 U.S. 303, 306 (1998).
\item \textsuperscript{61} See \textit{Scheffer}, 44 M.J. at 443.
\item \textsuperscript{62} 523 U.S. at 306.
\item \textsuperscript{63} See \textit{generally} United States v. Graham, 50 M.J. 56 (C.A.A.F. 1999) (discussing an innocent ingestion defense).
\end{itemize}
denied that he had knowingly used drugs while working for OSI. On cross-examination, the prosecution attempted to impeach Scheffer's testimony based on prior inconsistent statements. The government's closing arguments referenced Scheffer's lack of credibility. The prosecution argued, "He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him. He knowingly used methamphetamine, and he is guilty of Charge II and "[t]he only way you can find him not guilty of these offenses, is if you believe his story." The Military Judge instructed the panel members that "use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary.

Because MRE 707 precluded polygraph testimony, the trial judge denied Scheffer's motion to introduce the exculpatory polygraph result. Unable to buttress his defense of innocent ingestion, Scheffer was convicted. On appeal, the United States Air Force Court of Criminal Appeals affirmed. The U.S. Court of Appeals for the Armed Forces (CAAF) reversed, holding that MRE 707 was unconstitutional, since "a per se exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility, without giving him an opportunity to lay a foundation under Mil.R.Evid. 702 and Daubert, violates his Sixth Amendment right to present a defense." The CAAF noted that "the truth-seeking function [of adversary

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64. See Scheffer, 523 U.S. at 306.

65. 44 M.J. at 444.

66. Respondent's Brief at 14, Scheffer (No. 96-1133). “Twenty-one times, in closing argument alone, [Scheffer] was called a liar or [the Government] said his credibility was lacking....” Transcript of Oral Argument Before the Supreme Court at 42, Scheffer (No. 96-1133).

67. Military terminology for a jury at a court-martial. “A person subject to the Code who is detailed to a court-martial has to determine whether an accused has been proven guilty and to determine an appropriate sentence if the accused is found guilty.” Byrne, supra note 31, at 751.

68. Respondent's Brief at 14, Scheffer (No. 96-1133) (emphasis added).

69. Scheffer was “convicted on all counts and was sentenced to a bad-conduct discharge, confinement for 30 months, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.” Scheffer, 523 U.S. at 307.


72. Id. at 445.
proceedings] is best served by keeping the door open to scientific advances, and although the court could not determine whether the polygraph technique constituted the type of "scientific, technical, or other specialized knowledge envisioned by Rule 702 and Daubert," that inquiry would never be answered if the accused was not allowed to lay the foundation for such testimony.

The Supreme Court reversed the CAAF holding.

B. Ruminations on Rock

Divergent interpretations of the holding in Rock v. Arkansas lie at the heart of both the Scheffer plurality's and dissent's constitutional arguments concerning the per se rule against polygraph admissibility. Rock was the latest in a line of modern cases that articulated the precedence of a defendant's constitutional rights to present a defense over evidentiary rules requiring reliability. Rock also evidenced the Court's clear trend away from per se rules in an effort to assess facts on a case by case basis.

In Rock, the Supreme Court found unconstitutional an Arkansas evidentiary rule that excluded all hypnotically-

73. Id. at 446.
74. United States v. Posado, 57 F.3d 428, 433 (5th Cir. 1995).
75. See Scheffer, 523 U.S. at 308.
78. The Supreme Court has manifested a decided aversion to per se rules in a variety of contexts, as indicated in recent decisions. See also IMWINKELRIED & GARLAND, supra note 43, at 494 (noting that the accused's right to present evidence "is accentuating the modern trend to place greater stress on logical relevance and the concomitant tendency to devalue exclusionary evidentiary rules."); see, e.g., Minnesota v. Carter, 525 U.S. 83 (1998) (declining to apply a per se rule of home protection in the context of the exclusionary rule); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (rejecting three per se rules of employer liability or immunity in Title VII cases); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564 (1997) (holding tax exemption clause which singled out institutions serving mostly in state residents for beneficial tax treatment, pursuant to a per se rule, unconstitutional); Ohio v. Robinette, 519 U.S. 33 (1996) (rejecting per se rule concerning voluntariness of consent to search, and emphasizing fact-specific nature of the reasonableness inquiry); Florida v. Bostick, 501 U.S. 429 (1991) (reversing a Florida Supreme Court decision which adopted a per se rule that questioning aboard a bus always constituted a seizure).
refreshed testimony. The case concerned a domestic dispute between Vicki Lorene Rock and her husband. During the altercation, Mrs. Rock grabbed a gun, which discharged, killing her husband. Mrs. Rock could not remember the details of the killing. Following hypnosis sessions, she recalled that her finger had not been on the trigger, and that the gun had discharged when her husband seized her arm. An expert witness corroborated that the gun had malfunctioned. However, Mrs. Rock, the only eyewitness, was prevented from testifying about the accidental nature of the gun discharge because of an Arkansas per se evidentiary rule prohibiting all hypnotically refreshed testimony.

Rock stood for the right of an accused to call witnesses whose testimony was material and favorable to the defense. The right of the accused to testify in her own defense was a subset to the broader constitutional guarantee. The Supreme Court held that the exclusion of Mrs. Rock's testimony violated her Sixth Amendment right to present a defense, by preventing her from calling "witnesses in her favor." The Court also expressed a strong aversion to per se rules against the admission of evidence, which did not allow for flexibility in individual cases. Commenting on Arkansas' blanket rule that prohibited hypnotically refreshed testimony, the Rock Court said, "[a] State's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case."

In grappling with the issue, the Court conceded that "there is no generally accepted theory to explain the [hypnosis] phenomenon, or even a consensus on a single definition of hypothesis." Despite its amorphous scientific foundation and acknowledged potential for unreliability, the Court found that hypnosis had been recognized as an important investigative tool. Given that finding, the Court

79. See 483 U.S. at 61.
80. See id. at 53.
81. Id. at 52.
82. Id. at 61.
83. Id. at 59.
84. Hypnosis had been credited with obtaining investigative leads that had later been independently confirmed. See People v. Hughes, 453 N.E.2d 484, 488 (N.Y. 1983).
was loathe to reject its evidentiary value altogether, since the circumstances presented by Rock provided a compelling argument against a per se rule. In an attempt to legally circumscribe the admissibility of hypnotically-induced evidence, the Court pointed out that implementing various procedural safeguards could reduce inaccuracies engendered by the nebulous nature of hypnosis. The Court recommended utilizing “traditional means of assessing accuracy, [such as] . . . corroborating evidence, . . . expert testimony, . . . cross-examination . . . and cautionary instructions.”

Though not endorsing hypnosis, the Court found the facts in Rock compelling enough to announce that a per se rule forbidding a defendant’s hypnotically-refreshed testimony did not serve a state’s legitimate interest. The State had failed to show that “hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of events . . . .”

The Rock Court acknowledged that there may be limitations on admissibility of evidence, since “a defendant’s right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions.” In this context, a defendant’s interest in presenting relevant evidence would be subject to accommodating “other legitimate interests in the criminal trial process.” These restrictions would not unconstitutionally infringe on the defendant’s “right to present a defense so long as they [were] not ‘arbitrary’ or ‘disproportionate to the purpose they are designed to serve.’” They would be arbitrary if they encroached upon “a weighty interest of the accused.”

85. Rock, 483 U.S. at 61. Other safeguards mentioned by the Rock Court included: adopting rules providing that hypnosis affects credibility, not admissibility; allowing individualized inquiries in each case; and establishing procedural prerequisites in order to reduce risks associated with hypnosis. See id. at 59 & n.16.

86. Id. (emphasis added).

87. Id. at 55. The Scheffer plurality emphasized the importance of limiting evidentiary rules by citing additional cases on point, including Taylor v. Illinois, 484 U.S. 400, 410 (1988) and Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

88. Chambers, 410 U.S. at 295.


90. Id. (citations omitted).
The Court adjudged the interest of the accused in presenting a defense, underscored by her right to testify in her own defense, a weighty interest. In sum, the Court reasoned that "the evidence was admissible because it was not so inherently unreliable that a jury could not rationally evaluate it."\(^{91}\)

C. Scheffer Plurality Opinion

However, even the constitutional shadow cast by *Rock* over per se exclusionary rules of evidence was not enough to dissuade the *Scheffer* plurality from its holding that MRE 707 was constitutional. As the bedrock of its constitutional reasoning, the *Scheffer* plurality chose to focus on *Rock*’s ancillary argument that relevant evidence can be limited by reasonable restrictions,\(^{92}\) and concluded that MRE 707 *did* serve a number of non-arbitrary, legitimate interests, such as "ensuring that only *reliable* evidence is introduced at trial, preserving the court members’ role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial.\(^{93}\)

The plurality’s constitutional argument hinged upon polygraph reliability (because the five concurring and dissenting justices dismissed the two other legitimate interests they had cited). Echoing *Frye*, the plurality pointed to the lack of consensus on polygraph reliability, observing that "the scientific community remains extremely polarized about the reliability of polygraph techniques."\(^{94}\) They noted the wide divergence on polygraph reliability estimates, with proponents claiming accuracy in the 87-90% range, and detractors citing reliability of little better than

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91. IMWINKELRIED & GARLAND, supra note 43, § 2-4, at 52.
92. See Scheffer, 523 U.S. at 308.
93. Id. at 309 (emphasis added).
94. The two legitimate interests cited by the Court were preserving the jury’s function of determining the weight and credibility of witnesses, and avoiding collateral litigation. See id. at 313-14. One commentator wryly noted that “Justice Thomas... concluded that the avoidance of litigation over issues other than the guilt or innocence of the accused was a legitimate consideration of judicial economy.” John T. Winemiller, Note, Criminal Law—Constitutional Right to Present a Defense—Per Se Rules Against the Admission of Exculpatory Polygraph Evidence, 66 TENN. L. REV. 331, 344 (1998).
95. Scheffer, 523 U.S. at 309.
Though acknowledging that some Circuit Courts have begun to move away from excluding polygraph evidence following *Daubert*, the plurality observed that most state courts continue to exclude polygraph evidence. Because the scientific community continues to express doubts about polygraph reliability, the Court asserted that MRE 707 barring polygraph admissibility was "a rational and proportional means of advancing the legitimate interest in barring unreliable evidence."

Based on this line of reasoning, it was but a short step for the *Scheffer* Court to distinguish the three cases upon which the Court of Appeals for the Armed Forces relied, demonstrating that they did not support a constitutional right to introduce polygraph evidence "even in very narrow circumstances." But how were they to circumvent *Rock*? To distinguish it, the plurality subtly shifted emphasis. Instead of highlighting *Rock*’s salient holding that a state per se rule barring certain evidence violated the defendant’s constitutional right to present a defense, the *Scheffer* plurality interpreted the violation of that right as having deprived the jury of the defendant’s testimony, which infringed Mrs. Rock’s "interest in testifying in her own defense."


100. *Id.* Under the Sixth Amendment, the accused’s right to present a defense—to call witnesses—is more fundamental than the right to testify in one’s own defense. *See* Brief for the Respondent at 9-10, *Scheffer* (No. 96-1133). “The Sixth Amendment, on its face, is silent about an accused’s right to testify on his own behalf.” *Id.* at 9. At the time the Constitution was adopted, the common law rule prevented a defendant from testifying in his own behalf, but allowed the defendant to call witnesses. *Id.* *Rock* considered the right to testify in one’s own defense as a subject to the more fundamental right to present a defense by calling witnesses. *See*, e.g., *Nix v. Whiteside*, 475 U.S. 157 (1985); *Jones v. Barnes*, 463 U.S. 745 (1983); *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Harris v. New York*, 401 U.S. 222 (1971); *see infra* Section II-A.
In a one-paragraph summation of the substantive constitutional issue under review, the plurality concluded that “Rule 707 does not implicate any significant interest of the accused.” Because Scheffer had been able to testify in his own defense and present factual evidence, the plurality found that he was “barred merely from introducing expert opinion testimony to bolster his own credibility.” Though the exclusion of exculpatory polygraph evidence went to the heart of the accused’s case, buttressing his innocent ingestion defense, where credibility was of utmost importance, the Court regarded its exclusion as insignificant.

Still, the plurality expressed some misgivings. Backtracking on their position that the polygraph was unreliable ab initio, they muted their criticism by noting that the degree of polygraph reliability may fluctuate depending on a variety of factors. Since “there is simply no way to know in a particular case whether a polygraph examiner’s conclusion is accurate, ... certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted.” The plurality thus maintained the status quo, allowing those Circuits and state courts which admit or exclude polygraph evidence to continue to do so, indicating they were limiting the Scheffer holding. Though they did not invite another challenge, as did the concurring justices, they did not discourage it, which the 8-1 holding on polygraph admissibility would otherwise have signaled.

D. Concurring Opinion

The four concurring justices provided the four member plurality with a total of eight votes to uphold the military’s per se rule against admissibility of polygraph evidence. They reasoned that since the polygraph was unreliable, it was not unconstitutionally arbitrary to uphold a per se rule forbidding its admission. However they did not agree with

101. Scheffer, 523 U.S. at 316-17.
102. Id. at 317 (emphasis added).
103. Id. at 312.
104. The concurring justices observed, “The continuing good-faith disagreement among experts and courts on the subject of polygraph reliability
the plurality that polygraph evidence would interfere with the function of the jury or that it would spawn collateral litigation. 105

The tenor of the concurring justices' opinion on the reliability issue was tentative at best. They clearly harbored doubts about the wisdom of upholding the per se exclusionary rule, and anticipated that in the future, they may decide differently. Justice Kennedy wrote, "I doubt, though that the rule of per se exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does."106 He indicated another concern that may have prompted the concurring justices to decide with the plurality, despite their reservations. "If we were to accept respondent's position, of course, our holding would bind state courts, as well as military and federal courts."107 The concurring justices were demonstrably reluctant to make such a sweeping change in so many jurisdictions. This position was likely underscored by the fact that twenty-eight State Attorneys General submitted an amicus brief in support of the Government's position against polygraph admissibility.108

Justice Kennedy acknowledged two troublesome shortcomings in the plurality's opinion. Referring to counsels against our invalidating a per se exclusion of polygraph results . . . ." 105. The concurring opinion did not discuss the collateral litigation issue, but on the issue of the polygraph impinging on the province of the jury, Justice Kennedy criticized the principal opinion as "overreaching" when it rested its holding on the ground that "the jury's role in making credibility determinations is diminished when it hears polygraph evidence," and expressed surprised that the plurality had invoked the ultimate issue argument. Id.

106. Id.

107. Id.

108. Brief of the State of Connecticut and 27 States as Amici Curiae in Support of Petitioner, Scheffer (No. 96-1133). Describing polygraph evidence as "unreliable and overly prejudicial," the Brief warned that allowing such evidence would "obliterate the years of experience that the States have had with this type of evidence and force them to abandon their well-developed policy considerations for excluding it." Id. at 2-3. Among the policy reasons cited were that the validity of test results had not been established, trial court resources utilized to address and supervise such evidence rendered it too burdensome (lengthening trial time), and the polygraph usurps the function of the jury to assess credibility. See id.
Daubert, he acknowledged that "[t]hough the considerable discretion given to the trial court in admitting or excluding scientific evidence is not a constitutional mandate . . . there is some tension between that rule and our holding today." Realizing that Daubert did not necessarily require the inclusion of scientific evidence, the concurring justices observed that its exclusion could have constitutional implications in a criminal case, and that a Daubert analysis would adversely impact a per se rule excluding an entire domain of scientific testimony. Though those implications were evident in Scheffer, for the concurring justices they only created a tension, not a constitutional victory, for the accused.

Secondly, Justice Kennedy joined the dissent in pointing to the "inconsistency between the government's extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests," a point so obvious that he only made a glancing reference to it.

E. Justice Stevens' Dissent

Justice Stevens' forceful dissent strongly criticized the Court's reasoning and conclusions. He questioned whether the President had complied with statutory authority when he promulgated MRE 707, and tentatively determined that he did not. Not resting his dissent on that ground, he embarked upon an analysis of MRE 707. Focusing on the Sixth Amendment issue that an accused has a constitutional right to present a defense, he cited numerous

109. Scheffer, 523 U.S. at 318.
110. Id.; see infra pp. 1679-80.
111. See infra notes 132-35. In his dissent, Justice Stevens commented on this irony. See Scheffer, 523 U.S. at 337-38 (Stevens, J., dissenting).
112. See Scheffer, 523 U.S. at 320 (Stevens, J., dissenting); see also 10 U.S.C. § 836(a) (1994) (allowing the President to promulgate evidentiary rules "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts . . ."). This issue was not briefed in the courts below. It appears settled that the MREs can be viewed as "sufficiently procedural or evidentiary to withstand challenge." Saltzburg, supra note 24, at xi. But see, e.g., United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).
113. See Scheffer, 523 U.S. at 320 (Stevens, J., dissenting) (noting that this statutory issue had not been briefed).
Supreme Court opinions which described that right as fundamental to the due process of law,\textsuperscript{114} and noted that the Court had previously "recognized the potential injustice produced by rules that exclude entire categories of relevant evidence that is potentially unreliable."\textsuperscript{115} He commented on the recent trend where strict, categorical exclusionary rules in rulemaking, constitutional and non-constitutional decisions have been "replaced by rules that broaden the discretion of trial judges to admit potentially unreliable evidence and to allow properly instructed juries to evaluate its weight."\textsuperscript{116}

Justice Stevens observed that the holding in Rock was directly on point with Scheffer, given that both cases concerned per se rules against admission of evidence which impacted on a defendant's ability to present a defense. In Scheffer, given that the accused's credibility was at issue, and his "uncorroborated testimony is certain to be less persuasive than that of a third-party witness,"\textsuperscript{117} the per se rule impaired a meaningful opportunity to present his innocent ingestion defense. Stevens reasoned that since "evidence of... [an] innocent state of mind is critical to a fair adjudication of criminal charges,"\textsuperscript{118} and because the exclusion of the polygraph test results may have affected the outcome of the trial, it "unquestionably 'infringed upon a weighty interest of the accused.'"\textsuperscript{119} Against that standard, the per se rule against polygraph inadmissibility was unconstitutional.

Justice Stevens also delved into an analysis of polygraph reliability. He cited studies establishing its accuracy at 85 to 90%.\textsuperscript{120} Noting that a variety of factors

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\item \textsuperscript{115} Scheffer, 523 U.S. at 327 (Stevens, J., dissenting) (citing Washington, 388 U.S. at 20-21); see also Hawkins v. United States, 358 U.S. 74, 75-76 (1958); Benson v. United States, 146 U.S. 325, 335 (1892).
\item \textsuperscript{116} Scheffer, 523 U.S. at 328 (Stevens, J., dissenting).
\item \textsuperscript{117} Id. at 331.
\item \textsuperscript{118} Id. at 332 (citing United States v. Biaggi, 909 F.2d 662, 691-92 (2d Cir. 1990)); see Imwinkelried & McCall, supra note 41, at 1058, 1060-62.
\item \textsuperscript{119} Scheffer, 523 U.S. at 332 (Stevens, J., dissenting).
\item \textsuperscript{120} See id. (citing The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests, in FAIGMAN, supra note 8, at 572; ABRAMS, supra note 54, at 190-91).
\end{itemize}
such as "the examiner's integrity, independence, choice of questions, or training in the detection of deliberate attempts to provoke misleading physiological responses."\textsuperscript{121} may factor into a test's result, he advocated disposing of those concerns during the adversary proceeding by "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."\textsuperscript{122} Endorsing the plethora of safeguards available to the trial court to place polygraph evidence in the proper legal context (similar to the \textit{Rock} Court's handling of hypnosis), he contended that the potential problems associated with polygraph admissibility fell "far short of justifying a blanket exclusion of this type of expert testimony."\textsuperscript{123}

In one of his more interesting arguments that highlighted the anomalous evidentiary status of the polygraph, Stevens asserted that "There is no legal requirement that expert testimony must satisfy a particular degree of reliability to be admissible."\textsuperscript{124} In the context of the word "particular," he referred to another Supreme Court case where expert testimony concerning a defendant's future dangerousness, even if wrong "most of the time," was routinely admitted in determining eligibility for the death penalty.\textsuperscript{125} He also referred to a study where

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\item \textsuperscript{121} \textit{Scheffer}, 523 U.S. at 333 (Stevens, J., dissenting). Polygraph opponents emphasize the danger that people could be taught to undermine polygraph test results by employing a variety of physical or mental countermeasures. The government's brief mentions hypnosis (an interesting point, given its supposed unreliability as articulated in \textit{Rock}), ingestion of drugs and subtle muscular movements as confounding polygraph results. Yet the brief goes on to admit that "no good evidence as to how well these countermeasures work under real life conditions" has been amassed. Brief for the United States at 25, \textit{Scheffer} (No. 96-1133). While acknowledging that people can be trained to use countermeasures to fool the polygraph, Justice Stevens emphasized that that possibility was not enough to justify a per se ban. \textit{Scheffer}, 523 U.S. 335, n.25 (Stevens, J., dissenting). For further discussions on the issue of countermeasures, see, \textit{e.g.}, \textit{Abrams}, supra note 54, at 185-86; \textit{Faigman}, supra note 8, at 576-79, 595; \textit{Giannelli \& Imwinkelried}, supra note 11, at 229-30; \textit{Lysken}, supra note 96, at 230-32, 273-77, 292-93; see \textit{infra} note 247.
\item \textsuperscript{122} \textit{Scheffer}, 523 U.S. at 335 (Stevens, J., dissenting) (citing \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}, 509 U.S. 579, 596 (1993)).
\item \textsuperscript{123} \textit{Id.} at 334.
\item \textsuperscript{124} \textit{Id.} (emphasis added).
\item \textsuperscript{125} \textit{Barefoot v. Estelle}, 463 U.S. 880, 898-901 (1983). In \textit{Barefoot}, the Court came to the opposite conclusion on a per se rule of admissibility, and refused to bar evidence that was clearly unreliable. Although the American Psychiatric...
customarily admitted handwriting analysis, eyewitness identification, and fingerprint identifications proved to be less accurate than polygraph evidence in particular situations. In raising this issue, Justice Stevens echoed the views of numerous commentators who have referred to the uneven caliber of scientific evidence admitted by courts, despite an absence of proven scientific validity and reliability.

Stevens dismissed the arguments that admitting polygraph evidence would interfere with the role of the jury to make credibility determinations, and would spawn excessive collateral litigation. He expressed confidence in the ability of the jury to properly weigh all evidence, particularly when buttressed by proper instructions, adding that “testimony of disinterested third parties [the polygraph examiner] that is relevant to the jury’s credibility determination will assist rather than impair the jury’s

Association (APA) in their amicus brief strongly rejected predictions of future dangerousness, the Supreme Court stated, “We are no more convinced now that the rule of the APA should be converted into a constitutional rule barring an entire category of expert testimony ... Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time.” Id. at 899, 901. This almost flippant attitude towards accuracy, in a case where the defendant faced the death penalty as a result of a psychiatrist predicting future dangerousness, makes a mockery of the Court’s apparent requirement of extremely high reliability for the polygraph. In addition, the Barefoot Court expressed confidence in the adversary process as the cauldron where reliable and unreliable evidence could be sorted out. See id. at 901.

126. See Widacki & Horvath, supra note 54, at 596-600.

127. See, e.g., Erica Beecher-Monas, Blinded by Science: How Judges Avoid the Science in Scientific Evidence, 71 Temp. L. Rev. 55, 56-57, 66 (1998) (pointing out that certain “time-honored” prosecutorial tools such as fingerprinting have found their way into courtrooms with hardly any demonstration of their scientific bases, and that virtually no empirical data on error rates is available for such routinely admitted evidence as voiceprints and handwriting analysis); Lloyd C. Peeples, III et al., Note, Exculpatory Polygraphs in the Courtroom: How the Truth May Not Set You Free, 28 Cumb. L. Rev. 77, 95-96 (1997-1998) (discussing how courts should exclude rape trauma syndrome evidence for the same reasons that courts routinely refuse to admit polygraph evidence) [hereinafter Exculpatory Polygraphs]; Brief of the United States Army Defense Appellate Division as Amicus Curiae in Support of Respondent at 5, n.6, Scheffer (No. 96-1133) (noting that other expert evidence of controversial scientific reliability has been admitted in courts, such as post-hypnotic identification).
deliberations.\footnote{128} Stevens pointed out that the plurality's misgivings about the potential for collateral litigation was an "insufficient justification for a categorical exclusion of expert testimony."\footnote{129} If such critical testimony could be excluded for that reason, "the right to a meaningful opportunity to present a defense would be an illusion."\footnote{130} The collateral debates argument would be better addressed in a rule "prescribing minimum standards that must be met before any test is admissible, but it surely does not support the blunderbuss at issue."\footnote{131}

Justice Stevens also commented on the juxtaposition of military and civilian rules of evidence and criminal procedure. He pointed out that the "lie detector plays a special role in the military establishment."\footnote{132} As a result, the military is more favorably disposed to its admissibility, particularly since it has long utilized the polygraph and "maintains very stringent standards for polygraph examiners."\footnote{133} The irony of the military arguing against

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\item \textit{Scheffer}, 523 U.S. at 337 (Stevens, J., dissenting); \textit{see also} Honts & Perry, supra note 23, at 366-67 (noting that "[s]udies tend to show that juries are more inclined not to give extraordinary weight to polygraph evidence," a finding supported in both field and laboratory studies); IMWINKELRIED & GARLAND, supra note 43, § 6-5, at 174.
\item \textit{Scheffer}, 523 U.S. at 337 (Stevens, J., dissenting).
\item \textit{Id.}
\item \textit{Id.} at 338 (citing N.M. R. EVID. § 11-707).
\item \textit{Id.} at 323. Stevens cited Reports from the Department of Defense Polygraph Program, which indicated that between 1981 and 1997, the Department of Defense had conducted over 400,000 polygraph examinations to resolve counterintelligence, security, and criminal issues from State and federal law enforcement rely extensively on the polygraph. \textit{Id.} at 324-25.
\item There are 400 polygraph examiners on the federal payroll alone and many more working for state and local law enforcement. The fact that they rely on polygraph results in making important decisions about people's lives and liberty raises serious questions about their credibility when they argue the polygraph is so unreliable that the accused in a criminal case should not be allowed even to let the jury hear about it. Charles W. Daniels, \textit{New Frontiers in Polygraph Evidence: Law & Tactics}, CHAMPION, July 1997, at 16, 62. \textit{See also} Honts & Perry, supra note 23, at 358 (observing that inadmissibility of polygraph evidence "seems to be a most peculiar situation in that we have a nearly universally applied law enforcement technique that, more often than not, has been rejected as reliable evidence by our courts of law."). Fifty-seven countries administer polygraph examinations. \textit{See MATTE, supra} note 10, at 5.
\item \textit{Scheffer}, 523 U.S. at 323 (Stevens, J., dissenting) (quoting Department of Defense Polygraph Program, Annual Polygraph Report to Congress, Fiscal
polygraph admissibility was not lost on Justice Stevens. He commented that "the Government is in no position to challenge the competence of the procedures that it has developed and relied upon in hundreds of thousands of cases." In a conclusion arguably more balanced than that of the plurality, Justice Stevens admitted that the government's concerns "would unquestionably support the exclusion of polygraph evidence in particular cases," but again reaffirmed his opinion that the government's concerns were "plainly insufficient" to support a blanket exclusion in all cases.

Year 1996, pp. 14-15). Outside the trial context, admission of unstipulated polygraph results "has become relatively commonplace. In hearing motions and other nontrial proceedings, lower court judges in a number of jurisdictions have been allowed to hear evidence of polygraph results." McCall, supra note 40, at 378-79. Further, law enforcement has used polygraph testing for crime investigation for decades; private industry has used testing to detect employee theft and screen job applicants and the federal government expanded its use of polygraph testing for pre-employment screening purposes. "The rapid growth of polygraph testing both within and outside the federal government led to federal polygraph legislation in the late 1980s." Id. at 379-80.

134. See Scheffer, 523 U.S. at 337-38 (Stevens, J., dissenting).
135. Id. at 339. The Department of Defense maintains the highest standards for polygraph examiners in the nation, providing a curriculum that meets the requirements of a master's degree of study. The minimum requirements for Department of Defense polygraph examiners are

(1) Be a United States Citizen. (2) Be at least 25 years of age. (3) Be a graduate of an accredited four-year college or have equivalent experience that demonstrates the ability to master graduate-level academic courses. (4) Have two years of experience as an investigator with a Federal or other law enforcement agency . . . (5) Be of high moral character and sound emotional temperament, as confirmed by a background investigation. (6) Complete a Department of Defense-approved course of polygraph instruction. (7) Be adjudged suitable for the position after being administered a polygraph examination designed to ensure that the candidate realizes, and is sensitive to, the personal impact of such examinations.


136. Scheffer, 523 U.S. at 338 (Stevens, J., dissenting). He also admitted the same logic would be relevant to admit inculpatory polygraph evidence, and pointed out that according to certain studies, exculpatory tests are more reliable than inculpatory ones. See id. at 338 n.29.
III. CRITICISM OF SCHEFFER DECISION

A. The Constitutional Issues

Before President Bush promulgated Military Rule of Evidence 707 prohibiting admissibility of polygraph evidence, the CAAF had recognized the due process implications of a polygraph inadmissibility rule and had been one of the more liberal jurisdictions in allowing polygraph evidence. In United States v. Gipson, the Court permitted the accused to attempt to lay the foundation for admission of favorable polygraph evidence. Should it be admitted, the expert at trial would opine, "whether the examinee was being truthful or deceptive in making a particular assertion at the time of the polygraph exam." With that opinion as a basis, the fact finder could decide whether to infer that the examinees' trial testimony was also truthful. A later military case concerning polygraph admissibility, United States v. Williams, broached but did not address the constitutional issue. The Williams Court anticipated that it might have to rule on polygraph reliability in determining whether the automatic exclusion under MRE 707 "violates the accused's constitutional trial rights."

139. Id.
140. Id. at 253.
141. See id.; see also McCall, supra note 40, at 391 (stating that the analysis supplied by the new Rule "cites no scientific or field studies and refers only to [opinions denying polygraph admissibility] handed down prior to Gipson.").
142. 43 M.J. 348 (1995). Williams held that an accused did not have the right to introduce polygraph results without first taking the stand and testifying. See id. at 355. In not reaching the issue whether automatic exclusion of polygraph evidence violated the accused's constitutional rights, the court concluded its decision by asking whether polygraph evidence was collateral evidence of the same constitutional magnitude as the types of evidence the Supreme Court has constitutionally required. See id. That question was left unanswered. See id.
143. Id. at 353. While the Williams Court declined to comment on the constitutional implications of the per se exclusion on the federal level, at the state level, courts have found that per se rules did not violate a defendant's Sixth Amendment rights. See e.g., State v. Porter, 698 A.2d 739 (Conn. 1997); Perkins v. State, 902 S.W.2d 88 (Tex. App. 1995).
In cases where the credibility of the accused is at issue, testimony that supports the accused's credibility assumes utmost importance. The Sixth Amendment's Compulsory Process Clause and the Fifth Amendment's Due Process Clause form the basis of the right to present evidence in one's defense. A per se rule against the admissibility of exculpatory polygraph evidence impedes the accused's ability to persuade the members of his or her veracity. In Scheffer's case, the accused's credibility on the knowing ingestion of methamphetamine charge was integral to his defense. In a line of cases spanning thirty years, the Supreme Court ruled that evidentiary or procedural rules excluding potentially exculpatory evidence implicated a defendant's constitutional rights and struck the rules down. However, when faced with a similar evidentiary rule applied to the polygraph, the Court eschewed that constitutional lineage, ignored Daubert, and issued the anomalous Scheffer decision.

In addition to Rock, the plurality and dissent alike relied upon Washington v. Texas and Chambers v. Mississippi in formulating their constitutional arguments. In Washington, a state statute had prevented co-defendants from testifying for one another. The Supreme Court held that the defendant's Sixth Amendment rights had been violated since "the State arbitrarily denied

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144. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.  
145. "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.  
146. See Brief for Respondent at 14, Scheffer (No. 96-1133).  
147. See id.  
148. See infra notes 149-50. The Scheffer holding appears to counter a statement made by two legal scholars who evaluated the Supreme Court's decisions concerning a defendant's rights over the last thirty years. 523 U.S. at 303-05. "It is still fair to say that the Court has 'consistently' protected the accused's constitutional right to present important exculpatory evidence." IMWINKELRIED & GARLAND, supra note 43, at 493.  
149. 388 U.S. 14 (1967).  
151. See Scheffer, 523 U.S. at 308, 315-17 (plurality opinion), 326-30 (Stevens, J., dissenting).  
152. 388 U.S. at 14, 16.
[the accused] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed.\textsuperscript{153} In so doing, the \textit{Washington} Court "gave new impetus to the right of compulsory process by equating it with the right to present a defense and by characterizing compulsory process as a ‘fundamental element of due process of law.’"\textsuperscript{154} This decision served to revitalize the Compulsory Process Clause which had lain dormant since the early days of the republic, "by placing it on an equal footing with such other Sixth Amendment guarantees as the right to confrontation . . . .\textsuperscript{155} The gravamen of the \textit{Washington} decision anticipated the advent of the liberal Federal Rules of Evidence. \textit{Washington}'s holding emphasized that the truth would be reached by allowing testimony of all competent persons who would provide relevant and crucial evidence, even if the testimony might be somehow tainted.\textsuperscript{156} The jury would be responsible for ferreting out how much weight and credibility to give the testimony.\textsuperscript{157}

The third case distinguished by the \textit{Scheffer} plurality, \textit{Chambers v. Mississippi}, concerned a due process violation where two state rules prevented the defendant from impeaching his own witness and excluded testimony from three people to whom the witness had confessed to the crime.\textsuperscript{158} In further cementing a defendant's Sixth Amendment rights, \textit{Chambers} stood for the proposition that a rule of evidence that "prevents a criminal defendant from presenting a complete defense by excluding material parts of his testimony is constitutionally impermissible."\textsuperscript{159} However, in circumscribing the breadth of the \textit{Chambers'} holding, the \textit{Scheffer} plurality confined \textit{Chambers'} holding to "the ‘facts and circumstances’ presented in that case . . . , [refusing to broaden it to] stand for the proposition that the accused is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable

\textsuperscript{153} \textit{Id.} at 23.
\textsuperscript{154} GARCIA, supra note 77, at 116 (quoting \textit{Washington}, 338 U.S. at 19).
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{See Washington}, 338 U.S. at 22, 23.
\textsuperscript{157} \textit{See id.} at 22 (citing \textit{Rosen v. United States}, 245 U.S. 467, 471 (1918)).
\textsuperscript{159} GARCIA, supra note 77, at 127.
Once again the Scheffer plurality subtly reinterpreted constitutional precedent in order to distinguish its holding from the case at bar. Regarding exculpatory polygraph results, the Court viewed the matter solely as an evidentiary issue, rather than a constitutional one, which allowed it to narrowly construe Chambers and Washington, if not Rock.\textsuperscript{61}

In further distinguishing Scheffer from the three Supreme Court precedents\textsuperscript{162} upon which the CAAF had relied, the plurality argued that the witnesses who were prevented from testifying in Rock, Chambers and Washington would have provided relevant details of the charged offense (i.e., they were at the scene of the crime).\textsuperscript{163} Accordingly, the failure to admit such testimony under various state evidentiary or procedural rules prevented the defendant from presenting a defense, and implicated constitutional issues. With a surprisingly thin analysis, the Court maintained that because Scheffer took the stand in his own defense and presented his version of events, the holdings in Chambers, Washington and especially Rock were inapposite.\textsuperscript{164} At that point, it was a simple step for the Scheffer Court to conclude that “unlike the evidentiary rules at issue in those cases, Rule 707 does not implicate any significant interest of the accused.”\textsuperscript{165} In minimizing the importance of Scheffer’s inability to present exculpatory polygraph evidence,\textsuperscript{166} the Court concluded that Scheffer’s defense was not significantly impaired by the per se rule, that the rule was not arbitrary\textsuperscript{167} and that his constitutional

\textsuperscript{161} See id. at 308, 315-17.
\textsuperscript{163} See Rock, 483 U.S. at 46; Chambers, 410 U.S. at 287; Washington, 388 U.S. at 15-16.
\textsuperscript{164} See Scheffer, 523 U.S. at 316-17.
\textsuperscript{165} Id.
\textsuperscript{166} The Court observed that Scheffer was merely barred from “introducing expert opinion testimony to bolster his own credibility.” Id. at 317.
challenge resultanty failed.\footnote{168}

This invalid syllogism lies at the heart of the plurality's holding on the constitutional issue. It raises numerous questions about the allowable scope of expert testimony offered by a defendant. Was it the Court's position that unless the defendant's eyewitness testimony is precluded by a per se rule, all other preclusions are constitutional? That the presentation of credibility or expert evidence to buttress the defense is not protected under the Sixth Amendment? Since the Court allowed the prosecution's urinalysis and disallowed the defendant's polygraph results, what standard were they using to admit scientific evidence as material fact?\footnote{169} What does material fact, or factual evidence, mean?\footnote{170} Since all scientific tests (urinalysis, polygraph, and fingerprints) must be interpreted by experts, is there a constitutionally cognizable difference between the physical results from a polygraph and from urinalysis? How can excluding expert opinion testimony that bolsters the credibility of a defendant (in a case where the main charge concerns the defendant's intent or knowledge, and no other witness can testify to that intent),

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\footnote{168} See Scheffer, 523 U.S. at 317.

\footnote{169} This issue was not appealed by Scheffer from the trial level.

\footnote{170} For a definition of "material," see Kungys v. United States, 485 U.S. 759, 770-71 (1988). Concerning factual evidence, the plurality (joined by the concurring justices) did not regard polygraph results as factual evidence (where a witness could testify to events personally observed), but rather as expert opinion testimony. See Scheffer, 523 U.S. at 316-17. Justice Stevens, on the other hand, opined at length on how the results of the polygraph test constituted "independent factual evidence." Id. at 331. Quoting Dean Wigmore, Justice Stevens discussed how conduct and utterances "may constitute factual evidence of a 'consciousness of innocence'..."—and exclusion of such test results would infringe upon "a weighty interest of the accused." Id. at 331-32. Though Justice Thomas (author of the plurality opinion) is technically correct that only the polygrapher's opinion of truthfulness or deception is generally offered into evidence at trial (and not the "factual" blood pressure etc. readings from the polygraph instrument), this view is unduly limited in scope. Id. Factual evidence is not merely restricted to eyewitness testimony about the crime itself, but may be presented about other matters if it is relevant, material, and reliable. See id. Arguably, Justice Stevens' approach, equating Scheffer's polygraph results to "consciousness of innocence" appears more reasoned on this issue. Id.
be viewed as a minimal imposition on the accused? In Scheffer, exclusion of polygraph evidence did strike at the heart of the defense’s case. The plurality’s tortured and shocking interpretation of a defendant’s rights, where formulaic limitations on one’s rights are upheld at the expense of substance, strips the Sixth Amendment Compulsory Process Clause of its protections.

One commentary on the constitutional implications of this case noted “[w]hat seems more likely is that the Court meant to exclude from [constitutional] protection only expert testimony bearing on credibility. In other words, only polygraph evidence and a narrow range of similar and possibly questionable expert testimony are constitutionally insignificant under Scheffer.”

It would appear that once again, the Court singled out the polygraph, allowing neither a constitutional nor a scientific challenge to disturb the seventy-five year prejudice against its admissibility. The Scheffer Court’s restrictive view of the rights of criminal defendants prompted one writer to observe, “[t]he Sixth Amendment’s right of Compulsory Process is meaningless if a state rule of evidence can categorically serve to withhold useful and outcome-determinative evidence from the trier of fact.”

B. Daubert Analysis

The plurality essentially upheld the per se rule against polygraph admissibility based on the flawed premise that because the polygraph was accorded a mixed reception in the scientific community, it was not generally accepted and therefore unreliable. That premise supported their conclusion that MRE 707 excluding polygraph evidence was not arbitrary. The constitutional issue hinged specifically on the scientific foundation of polygraph reliability, and generally on the standard used in Federal Court to admit scientific evidence under FRE 702, articulated in Daubert. It is noteworthy that the plurality all but omitted a Daubert analysis of the polygraph. It is also noteworthy that a majority of the justices questioned the per se rule and inferred that under a Daubert analysis, a different result

172. Id. at 109-10.
173. See Scheffer, 523 U.S. at 309.
might have been obtained.\textsuperscript{174} The plurality relegated its treatment of \textit{Daubert} to a footnote.\textsuperscript{175} There, although the Court referred to \textit{Daubert} as superseding \textit{Frye}'s general acceptance standard for scientific evidence, the thrust of the plurality's observation concerned the lack of constitutional challenges to excluding polygraph evidence under the \textit{Frye} standard.\textsuperscript{176} The plurality observed, "[n]othing in \textit{Daubert} foreclosed, as a constitutional matter, per se exclusionary rules for certain types of expert or scientific evidence."\textsuperscript{177} But because \textit{Daubert} did not discuss the matter, it could not foreclose it. Also, because \textit{Daubert} unequivocally liberalized the admission of scientific evidence,\textsuperscript{178} which would conflict with upholding a per se exclusionary rule, it appears as if the \textit{Scheffer} Court was attempting to indirectly limit \textit{Daubert} in a reversion to the overruled \textit{Frye} standard.\textsuperscript{179} That result would likely have been acceptable to the \textit{Scheffer} Court, since after all, the source of the evidence in this case was only the polygraph.

Why didn't the Court apply a \textit{Daubert} analysis to the polygraph?

C. \textit{Daubert}'s Holding

After determining that Federal Rule of Evidence 702, and not \textit{Frye}, provided the standard for admitting expert scientific testimony in a federal trial, \textit{Daubert} required that the trial judge as "gatekeeper"\textsuperscript{180} assess whether the

\begin{footnotes}
\item[174] See id. at 318, 322.
\item[175] See id. at 311 n.7.
\item[176] See id.
\item[177] Id.
\item[178] The \textit{Frye} "'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.' \textit{Daubert} v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 588 (1993) (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1984)). \textit{Daubert} was clear "[t]hat [the] austere [\textit{Frye}] standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials." 509 U.S. at 589.
\item[179] For a discussion that tracks how judges have been attempting to avoid or evade \textit{Daubert} in a "kind of back-door endorsement of \textit{Frye}," see Beecher-Monas, supra note 127, at 73.
\item[180] See \textit{Daubert}, 509 U.S. at 597. The judge's role is as a gatekeeper under Federal Rule of Evidence 104(a), focusing on preliminary questions of
expert's testimony was both relevant and reliable and could thus be admitted. The relevance prong echoes the theme permeating all Federal Rules of Evidence: the evidence must bear directly on the issue in dispute, and have a tendency to make a material fact more or less probable pursuant to Rules 401 and 402. In order to be helpful, the testimony must be capable of being understood by a jury and useful to them in making their decision. The expert testimony would not be admissible unless it proved relevant to the facts of the case, what the court termed "fit."

The Daubert reliability prong required that expert's testimony be grounded in "scientific knowledge," which would in turn provide a basis for the trial judge to determine the evidentiary reliability, or trustworthiness, of the testimony: "whether the reasoning or methodology underlying the testimony is scientifically valid." Rather than emphasizing results, Daubert emphasized the scientific rigor of the methodology and the techniques employed in arriving at the conclusions. Daubert thus provided an opportunity for courts to rethink and re-evaluate the evidentiary status of the polygraph, which

qualifications of witnesses and evidence, rather than a "screener" of evidence. FAIGMAN, supra note 8, at 533.

181. See Daubert, 509 U.S. at 589.

182. Rule 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Rule 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

183. See Daubert, 509 U.S. at 591.

184. Id. (citing United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)). The relevancy inquiry required the expert testimony to be "sufficiently tied to the facts of the case" to aid the jury in resolving the factual dispute. Id.

185. Id. at 590. Parsing the phrase into "scientific" and "knowledge," the Court instructed that "'scientific' imply[ed] a grounding in the methods and procedures of science," while "'knowledge' connote[d] more than subjective belief or unsupported speculation." Id. This grounding would provide the basis for the evidentiary reliability the Court was seeking in juxtaposing legal and scientific standards. See id.

186. Id. at 592-93.

187. See id. at 595. Here the Court assesses the evidence's "empirical validity." Imwinkelried & McCall, supra note 41, at 1046.
allowed the legion of studies concluded over past decades at least to be assessed rather than dismissed offhand.

Though the Daubert Court did not provide a dispositive test for admissibility of scientific expert testimony, it did offer a nonexclusive checklist of five factors by which a judge should assess reliability.\(^{188}\) One of the Scheffer Amici proposed that Daubert's applicability in a criminal case would require that judges should additionally take into consideration constitutionally-based protections when applying Daubert reliability factors.\(^{189}\) "[A] trial judge should consider the nature of the purported exculpatory evidence as an additional factor of the Daubert/Rule 702 expertise analysis," and in considering possible exculpatory evidence, should accord it "more weight than other items on the non-exclusive Daubert list."\(^{189}\)

Daubert incorporated the Frye "general acceptance" standard as "widespread acceptance."\(^{190}\) This factor became one amongst many, losing its previous status as the lynchpin. One commentator noted the Daubert acceptance factor indicated more than a semantic twist, and in fact provided a qualitative difference from the standard relied upon in Frye.\(^{191}\) The Daubert Court limited the widespread acceptance factor's applicability by noting that it did not require, but did permit "explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community."\(^{192}\) The Court left the quantitative degree of acceptance to be

\(^{188}\) See supra note 47.

\(^{189}\) See Brief of the Army Defense Appellate Division as Amicus Curiae in Support of Respondent at 23, Scheffer, 523 U.S. 303 (No. 96-1133).

\(^{190}\) Id.

\(^{191}\) Daubert, 509 U.S. at 594.

\(^{192}\) Law Professor James R. McCall regarded the use of the "adjective 'widespread,' as opposed to 'general,' " as significant. McCall, supra note 40, at 400. Widespread implied that a "prevalent or widely diffused acceptance, rather than a more universal level of acceptance [would] be adequate." Id. This "lower level of acceptance" was consistent with the Federal Rules of Evidence which liberalized the admission of evidence. Id.

\(^{193}\) Daubert, 509 U.S. at 594 (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)). Of course, how narrowly or broadly that 'community' was defined became a source of heated controversy in the post-Daubert generation of debates on admissibility of polygraph evidence. See infra notes 238-39.
determined on a case by case basis. Other commentators have noted the Daubert Court reduced general acceptance from a "test to that of a pertinent factor."

In applying a Daubert analysis to the polygraph, I will analyze the factors strand by strand to demonstrate that the polygraph would pass a Daubert test. Though our nation's highest appellate court likely would not have delved into an extensive review of polygraph studies conducted over the past thirty-five years to determine if it would finally pass scientific evidence muster, it could have explored the issues, even in an abbreviated manner, as the foundation for its constitutional analysis of MRE 707. Doing so would have provided the basis for remanding the case to the trial court.

1. Relevance. In assessing the relevance prong of scientific evidence admissibility, the baseline inquiry is whether the polygraph examiner's testimony is helpful to the trier of fact in determining a fact at issue. In cases involving exculpatory polygraph admissibility, testimony by an examiner as to whether the defendant indicated deception or no deception in his or her answers is relevant to a defendant's consciousness of guilt—or innocence—of the crime at the time the test is given. The jury would then decide what weight to give the results in determining the defendant's credibility. Some writers dispute the polygraph's premise that deception can be indicated by

194. See Daubert, 509 U.S. at 594.
195. Imwinkelried & McCall, supra note 41, at 1054.
196. See Daubert, 509 U.S. at 591.
198. The premise holds that there is a definite relationship between lying and certain emotional states, as well as between those emotional states and changes in the body. See Ronald J. Simon, Adopting a Military Approach to Polygraph Evidence Admissibility: Why Federal Evidentiary Protections Will Suffice, 25 Tex. Tech. L. Rev. 1055, 1058 (1994). If a person is threatened or concerned about a stimulus or question, especially querying about the matter under investigation, that concern will be expressed by measurable physiological reactions the subject is unable to control and which can be recorded on a polygraph instrument. See United States v. Galbreth, 908 F. Supp. 877, 884 (D. N.M. 1995). The testing format changed over the years, beginning with examiners using a "relevant/irrelevant" technique whereby they would ask relevant questions about the incident under investigation and irrelevant questions about non-threatening subject that would provoke true answers. This
continuous and simultaneous measurements and recording of various autonomic nervous system responses. However, a majority of commentators accept the underlying hypothesis causing the reliability debate to revolve around the polygraph's error percentage.

Since the interpretation of polygraph results corresponds to a consciousness of guilt or innocence about the alleged crime at the time of the examination, it is relevant to the issues presented in the case under Rule 401, and admissible under Rule 402.

2. Reliability. The Daubert reliability inquiry is much more complicated than its relevance counterpart. The conclusions arrived at by polygraph proponents and opponents are much more hotly contested. Studies often indicate a wide divergence on polygraph error rates, with proponents likely to ascertain high reliability and technique has been generally discredited. See McCall, supra note 40, at 381. In the 1960s, scientists developed the control question format. See Galbreth, 908 F. Supp. at 844. Here, the examiner asks the subject an anxiety-producing question (the control question) unconnected with, yet similar to, the issues under investigation. See id. That question is geared either to provoke a lie, or the subject is told to lie when answering. See id. The examiner follows the control question with questions concerning the incident. See id. A comparison of the person's responses to both types of questions is the critical criterion for determining whether deception is indicated. See id. The pretest interview between the examiner and subject is also a critical phase of the process. See id. For a critical view of polygraph assumptions and techniques, see generally David Gallai, Note, Polygraph Evidence in Federal Courts: Should It Be Admissible? 36 AM. CRIM. L. REV. 87 (1999); Timothy B. Henseler, Comment, A Critical Look at the Admissibility of Polygraph Evidence in the Wake of Daubert: The Lie Detector Fails the Test, 46 CATH. U. LAW REV. 1247, 1251 n.23 (1997).

199. A person generally cannot control autonomic responses such as blood pressure and sweating of the palms. See Galbreth, 908 F. Supp. at 883 n.9. The autonomic nervous system controls how the body adjusts to changes in conditions, and is relatively impervious to voluntary control. See id.


201. See supra note 182. Rule 401's relevance threshold is very low: the standard of probability under the rule is "more . . . probable than it would be without the evidence." FED. R. EVID. 401. "Any more stringent requirement is unworkable and unrealistic . . . . Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence." FED. R. EVID. 401 advisory committee's note.

202. See supra note 182.
opponents low reliability. No point is conceded. Each side questions the other's methodology if the result is unfavorable to that side's position. Analysis of the scientific argument and conflicting findings is beyond the scope of this Note. Suffice it to say that the debate continues to rage. This everpresent controversy forms the backdrop against which courts must attempt to evaluate this type of scientific evidence. Daubert's five factors provide a roadmap for those trial judges required to trudge through the thicket of conflicting reliability studies to make an assessment of polygraph admissibility.

a. Whether the theory/technique has been tested. The term "psychophysiological detection" of deception or PDD has been part of the scientific literature since 1921. However, the term 'polygraph' was generally accepted. The basic theory of PDD "and the various techniques used for the detection of deception have been put to numerous scientific tests over the past 25 years. Since its early use as a systolic blood pressure cuff on the arm of James Frye in 1923, the polygraph has undergone extensive refinement. Among the scientific advances in polygraph technology has been computerized polygraph instrumentation, scoring algorithms, formal quality assurance and continuing education programs for examiners. Numerous field and laboratory studies have been conducted focusing on the various polygraph techniques."

b. Whether the theory/technique has been subjected to

203. In a legal context, reliability refers to accuracy, while in a scientific context, reliability refers to consistency of results. In this section, the discussion focuses on the legal definition of reliability. See supra note 45.

204. See supra notes 96, 120 and infra pp. 1694-95.

205. For example, see FAIGMAN, supra note 8, at 565-633 and STRONG, supra note 10, at 908-12.

206. Respondent's Brief at 17 n.6, Scheffer (No. 96-1133) (citation omitted).

207. Brief of the Committee of Concerned Social Scientists as Amicus Curiae in Support of Respondent at 7, Scheffer (No. 96-1133).


209. See Respondent's Brief at 17 n.6, Scheffer (No. 96-1133).

peer review. This factor goes hand-in-hand with whether the technique has been tested: in the scientific community, once a theory is tested, the researcher will publish the results in scientific journals.\footnote{211} Publication as a method of quality control allows other scientists in the field to closely scrutinize and replicate—or be unable to replicate—the researcher’s findings. Replicability tends to insure reliability. The Committee of Concerned Social Scientists, in their Amicus Brief on behalf of Scheffer, cited fifty-four articles containing studies, surveys and evaluations of the polygraph in their table of authorities.\footnote{212} They claimed that the “large number of original scientific studies published in peer-reviewed scientific journals” indicated acceptance of the polygraph technique.\footnote{213} They cited polygraph studies in mainstream journals, including The Journal of Applied Psychology, Psychophysiology, and The Journal of General Psychology.\footnote{214} The Brief described the stringent peer review process, noting that “[a]rticles which are not acceptable within the scientific discipline covered by the journal are simply not published in that journal,” and that the extensive publication “gives a clear indication that the psychophysiological detection of deception is generally accepted as valid science by the community of scientific psychologists.”\footnote{215}

Polygraph reliability testing has been conducted for decades. Often, published studies have generated pointed criticism by scientists on the opposite side of the polygraph divide, who claim the tests suffer from substantive methodological flaws. The Committee of Concerned Social Scientists engaged in such peer review criticism in their Amicus brief, pointing out that the negative results of a certain study on polygraph acceptability conducted by polygraph detractors had been distorted by flawed methodology.\footnote{216}

\footnote{211. See Brief of the Committee of Concerned Social Scientists as Amicus Curiae in Support of Respondent at 19-20, \textit{Scheffer} (No. 96-1133).}
\footnote{212. See Brief of the Committee of Concerned Social Scientists as Amicus Curiae in Support of Respondent at iv-x, \textit{Scheffer} (No. 96-1133).}
\footnote{213. \textit{Id.} at 19.}
\footnote{214. See \textit{id}.}
\footnote{215. \textit{Id.} at 19, 20.}
\footnote{216. See \textit{id.} at 17 n.21. The Brief roundly criticized a survey of members of the Society for Psychophysiological Research on polygraph acceptability by Dr.}
c. Known or potential rates of error of a scientific technique. This factor sometimes tends to blend into the widespread acceptance factor: if error rates in certain scientific tests are significant, then the relevant scientific community will not find the test results reliable and the technique will not be accepted within the community. The rate-of-error factor continues to generate heated debate on polygraph reliability. Proponents generally claim that polygraph accuracy rates hover around 90% or better. Detractors claim either that it is little more accurate than a toss of a coin, or around 70%.

Both proponents and opponents, as battle-hardened soldiers of the polygraph admissibility wars, arm

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William Iacono and David Lykken, outspoken critics of polygraph testing, as so flawed and controversial that it could not be used for any substantive purpose. See id. at 17-18. The Brief denounced the Iacono and Lykken methodology as biased, by asking those who responded to make political and legal judgments rather than scientific ones; how the sample of respondents was as a whole, highly uninformed about the topic of polygraph examinations; how their statistical choices made it impossible to compare surveys; how the survey, represented as random, was not; and how Iacono and Lykken refused to make their data available for reanalysis. See infra notes 246-47.

217. See STRONG, supra note 10, at 909-12.

218. See Brief of the Committee of Concerned Social Scientists as Amicus Curiae in Support of Respondent at 14, Scheffer (No. 96-1133); Respondent's Brief at 22, Scheffer (No. 96-1133); see also Canham, supra note 167, at 84; Charles Robert Honts & Bruce D. Quick, The Polygraph in 1995 Progress in Science and the Law, 71 N.D. L. REV. 987, 998 (1995); Honts & Perry, supra note 23, at 360-62, 365; Imwinkelried & McCall, supra note 41, at 1055; James A. Matte's compendium, supra note 10 (offering an extensive and exhaustive review of polygraph studies conducted since the 1980's); David C. Raskin, The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence, 1986 UTAH L. REV. 29, 43 (1986); Simon, supra note 198, at 1062-63; MOENSSENS, ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES, § 20.11 & n.1 (4th ed. 1995) (referencing the accuracy of polygraph tests, the section on "The Detection of Deception" cites a 1990 study by Ansley, "The Validity and Reliability of Polygraph Decisions in Real Cases," Polygraph 19(3), 169-81, in which the author reviewed eleven field studies conducted between 1980 and 1990, involving 920 suspects, and reported that polygraph examiners were correct in 90% of their diagnoses, based on a limited analysis of chart responses);

219. See The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests, in FAIGMAN, supra note 8, at 629; see also OTA REPORT, supra note 55, at 5, 97; Henseler, supra note 198, at 1297 n.233.

220. Henseler, supra note 198, at 1280 (citing David T. Lykken, The Validity of Tests: Caveat Emptor, 27 JURIMETRICS J. 263, 265 (1987)).
themselves with polygraph test results that fortify their conclusions, and continue to fire salvos into the enemy camp in the hopes of winning the end-game. Proponents cite studies by Honts & Quick, Raskin, or Matte to prove their point, while opponents cite studies by the Office of Technology Assessment and Professor Lykken.

Clearly, the issue of polygraph reliability remains at the forefront of scientific inquiry and debate. It is the area to which courts more often than not look when attempting to decide upon admissibility.

d. Existence and maintenance of standards controlling the technique's operation. Opponents have long pointed to the lack of standardization of polygraph examiners as a

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221. MATTE, supra note 10, at 121-29; Honts & Quick, supra note 218, at 997-98; Raskin, supra note 218, at 43. For a survey of the pro-polygraph position, see The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests, in FAIGMAN, supra note 8, at 565-82, 619-27, 629-31.

222. See generally OTA REPORT, supra note 55.


224. See, e.g., United States v. Black, 831 F. Supp. 120, 123 (E.D.N.Y. 1993) (citing United States v. Rea, 958 F.2d 1206, 1224 (2d Cir. 1989) (holding that polygraph tests were not sufficiently reliable to warrant the admission of the results in evidence); People v. Baynes, 430 N.E.2d 1070, 1076 (Ill. 1981) (stating that "the primary obstacle in admission of polygraph evidence, stipulated to or not, has continually and consistently been the instrument's disputed scientific reliability.") (citations omitted); State v. Beard, 461 S.E.2d 486, 493 (W.Va. 1995) (stating that "we remain convinced that the reliability of such examinations is still suspect and not generally accepted within the relevant scientific community. Therefore, any speculation that our position in Frazier regarding polygraph admissibility is in question due to the Daubert/Wilt rulings is put to rest today.") (emphasis in original). But see United States v. Posado, 57 F.3d 428, 434 (5th Cir. 1995) (stating that the "[c]urrent research indicates that, when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety percent of the time.") (footnote omitted) (citation omitted); United States v. Crumby, 895 F.Supp. 1354, 1358 (D.C. Ariz. 1995) (stating that "based on the evidence presented by the parties, the Court finds that there has been a significant increase in the reliability of polygraph evidence over recent years.").
fatal flaw in the system.\footnote{225}{See Brief of the United States at 23-24, Scheffer (No. 96-1133).} They recite that some states have no licensing or training requirements for examiners.\footnote{225}{See Brief of the United States at 23-24, Scheffer (No. 96-1133).} Justice Stevens noted that these concerns could be addressed in pre-trial adversary proceedings on admissibility of polygraph results.\footnote{227}{See United States v. Scheffer, 523 U.S. 303, 333-34 (1998).} However, this concern does not arise in the military, which maintains the highest standards for polygraph examiners and operations in the country.\footnote{228}{See id. at 323-24 n.5.} The Department of Defense Polygraph Institute (DoDPI), which trained the polygraph examiner in the Scheffer case, requires that "every polygraph in a criminal case is reviewed by two levels of quality control, one at operational field level by the field supervisor, and then at the program's headquarters."\footnote{229}{Brief of the Committee of Concerned Social Scientists as Amicus Curiae in Support of Respondent at 28, Scheffer (No. 96-1133).} DoDPI examiners are required to undertake a rigorous study of "forensic psychophysiology, and conceptual, abstract, and applied knowledge that meet the requirements of a master's degree-level of study."\footnote{230}{See id. at 323-24 n.5.}

For over fifteen years, New Mexico has been the only state to formulate a rule of evidence allowing polygraph results.\footnote{231}{See N.M. R. EVID. § 11-707.} That Rule of Evidence establishes high standards for admission of polygraph evidence.\footnote{232}{The rule provides that polygraph evidence is admissible only when the following conditions are met: the examiner must have had at least five years experience in conducting polygraph tests and twenty hours of continuing education within the past year; the examination must be tape recorded in its entirety; the polygraph charts must be scored quantitatively in a manner generally accepted as reliable by polygraph experts; all polygraph materials must be provided to the opposing party at least ten days before trial; and all polygraph examinations conducted on the subject must be disclosed. See id.} Proponents often point to New Mexico's successful experience with the polygraph, now incorporated in statute, as maximizing reliability of the technique and minimizing potential scientific or legal snafus concerning admissibility.\footnote{233}{See McCall, supra note 40, at 385-99; Exculpatory Polygraphs, supra note 127, at 100-01. In his dissent, Justice Stevens also referred to the New}
New Mexico's criminal justice system has not collapsed by admitting polygraph evidence certainly suggests that the fears surrounding polygraph admissibility are quite exaggerated.

5. Widespread Acceptance Standard. Polygraph opponents and proponents clash on the familiar battleground of polygraph acceptance within the relevant scientific communities. When focusing on widespread acceptance of the polygraph, it would have behooved the Scheffer Court to apprehend the simple truth that "the existence of disagreement in the scientific community [is] not a ground for exclusion under Daubert." Polygraph opponents have assiduously endeavored to skew the Court's assessment of polygraph acceptance into polygraph disapproval based on the very existence of the disagreement. But disagreement per se does not indicate that a technique does not enjoy widespread acceptance.

The widespread acceptance debate revolves around which scientific community is relevant: would it be polygraph examiners, psychophysicologists, or psychologists? In an attempt to answer this Daubert inquiry, polygraph opponents and proponents cite two well-known surveys of psychophysicologists undertaken in 1982 and 1992: the proponents uphold the survey results, and the
Proponents view the survey as proof that a majority of scientists in the relevant community believed the control question polygraph

Psychophysiological Research (SPR), was conducted by the Gallup Organization. The purpose of the survey was to assess general acceptance of the polygraph in the relevant scientific community for the Wall Street Journal, which sought to introduce polygraph evidence in a civil libel suit.

SPR is a scientific organization composed of psychologists, medical researchers and engineers who study the relationships between physiological reactions and psychological states, and whose members and journal have published the majority of scientific articles concerning polygraph techniques. Therefore, the membership of SPR best represents the 'relevant scientific community' for determining the validity of polygraph testing. Approximately two-thirds of the scientists reported favorable opinions concerning the usefulness of polygraph tests.

The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests, in FAIGMAN, supra note 8, at 580-81. The 1992 survey, conducted by Susan Amato and Charles Honts, by mail, mirrored the results of a decade earlier. They also subdivided their respondents into a group that considered themselves “highly informed” about the polygraph, and 83% of this group endorsed polygraph testing. Id. at 581.

239. In response to Raskin, William Iacono and David Lykken challenge the survey results on a number of fronts. See The Scientific Status of Research on Polygraph Technique: The Case Against Polygraph Testing, in FAIGMAN, supra note 8, at 612-18. They view SPR membership as constituting only part of the relevant scientific community, with psychologists as the best qualified to assess polygraph validity and reliability. See id. at 616. They then attack the surveys' methodology, charging that the 1982 survey was unpublished, and provided few details concerning how it was conducted. See id. at 612. They dismissed the second survey by noting that only 30% of those surveyed responded, and that its query as to whether the scientist viewed the polygraph as a “useful diagnostic tool” did not necessarily mean that it was useful for legal proceedings. Id. at 612-13. They noted the surveys were fraught with ambiguities and did not distinguish between what questioning technique was employed. See id. at 591, 612-14. They discussed results of a mail survey they had conducted in 1994 of certain SPR members, of which 90% returned their questionnaires. See id. at 614. The results were startlingly divergent, with 64% denying that the Control Question Technique was scientifically sound, and only about one-quarter of those surveyed willing to use either passed or failed tests in court. See id. at 614-15. They also conducted a survey of “an elite group of psychologists” where the results were similar, leading to their conclusion that “the scientific community regards the CQT [Control Question Technique] to be an unstandardized, nonobjective technique, based on implausible assumptions ... and which is unlikely to achieve good accuracy in detecting either truthfulness or deception.” Id. at 616-17. Raskin, et al. in turn responded to this criticism. Id. at 626-27.
technique was "a useful tool when considered with other evidence for assessing truth or deception."\textsuperscript{240}

A recent federal district court opinion concerning polygraph admissibility analyzed each of the \textit{Daubert} reliability factors with such competence, both scientific and legal, that a noted polygraph expert termed \textit{United States v. Galbreth} "[t]he most thorough published exposition of the application of the \textit{Daubert} factors to polygraph evidence."\textsuperscript{241} The \textit{Galbreth} Court held a pretrial \textit{Daubert} hearing on the defendant's motion to admit expert opinion evidence regarding exculpatory polygraph results.\textsuperscript{242} After carefully evaluating the polygraph examiner's credentials,\textsuperscript{243} the technique used in the examination,\textsuperscript{244} published laboratory and field studies,\textsuperscript{245} scoring techniques\textsuperscript{246} and challenges to

\begin{itemize}
\item \textsuperscript{240} United States v. Galbreth, 908 F. Supp. 877, 892 (D.N.M. 1995). The most widely used and accepted polygraph technique involves two types of questions: control questions and relevant questions that concern the particular investigation. See \textit{id.} at 884. Through comparative reactivity rather than absolute reactivity to the questions, the examiner can opine as to truth or deception. See \textit{supra} note 198.
\item \textsuperscript{241} Daniels, \textit{supra} note 128, at 18.
\item \textsuperscript{242} Galbreth, 908 F. Supp. at 878.
\item \textsuperscript{243} The examiner was Dr. David Raskin, Professor of Psychology at the University at Utah, a specialist in psychophysiology and one of the nation's leading experts on and proponents of polygraphy. See \textit{Galbreth}, 908 F. Supp. at 882-83.
\item \textsuperscript{244} Dr. Raskin administered a Directed Lie Control Question Technique polygraph test to the defendant (an advanced form of the Control Question technique). See \textit{id.} The Drug Enforcement Agency, various military and intelligence agencies, the Internal Revenue Service and Department of Energy currently use this test. See \textit{id.} at 885; see also Canham, \textit{supra} note 167, at 84-85.
\item \textsuperscript{245} The \textit{Galbreth} court extensively reviewed the scientific data underlying the Probable Lie Control Question Technique (a generic version of the directed lie control question technique undergone by the defendant). See 908 F. Supp. at 884. According to Dr. Raskin's testimony, the high quality studies conducted on this technique "number in the many dozens" and support the hypothesis underlying the technique. \textit{Id.} at 885. Dr. Raskin testified about his involvement with 12-15 laboratory studies that "produced accuracy rates in excess of 90%" and a major field study that "yielded an accuracy rate of approximately 94-95%." \textit{Id.} at 885-87. For further discussion on laboratory and field studies, see \textit{Abrams, supra} note 54, at 188-201; \textit{Norman Ansley & Marcia Garwood, The Accuracy and Utility of Polygraph Testing, Dep't. of Def. 1984, reprinted in 13 Polygraph 5 (1984); Faigman, supra note 8, at 570-76, 603-12; Gianelli & Imwinkelried, \textit{supra} note 11, at 225-29; Strong, \textit{supra} note 10, at 909-11;
the polygraph technique, the judge ruled that the polygraph results were admissible. Galbreth added a sixth factor to the Daubert non-exclusive reliability list: a court must scrutinize the specific application of the scientific technique in the case at bar as imperative to a faithful application of Daubert. The Memorandum and Order


246. Dr. Raskin testified that he employed a computer scoring method in this case to evaluate test results. See Galbreth, 908 F. Supp. at 888. "The examiner simply runs the program and the computer makes tens of thousands of calculations within five to ten seconds." Id. This totally objective scoring method removes one of the issues that critics charge make the polygraph test unreliable: incorporating some of the examiner's clinical impressions of the subject during the pretest interview and examination. This subjective assessment, which accompanied early polygraph examinations, provoked criticism that the examiner's interpretation of the subject's behavior was being tested, not the subject's deception. For further information on the use of computer algorithms to analyze physiological data collected during Psychological Detection of Deception tests, see Yankee, supra note 11.

247. Issues involved here are the competence of the examiner, whether the examiner may manipulate the subject and examination to produce a desired result, whether certain personality types (such as psychopaths) can defeat the test, and whether countermeasures (such as drugs or other physical countermeasures) could defeat the test. See Galbreth, 908 F. Supp. at 889. Dr. Raskin testified that studies have indicated psychopaths could not beat a properly conducted test, and that no studies have demonstrated as of yet that drugs were effective countermeasures against the control question technique. See id. Concerning physical countermeasures, Dr. Raskin testified that research has indicated that if a subject is given specific training on how to use undetectable maneuvers (such as biting the tongue or tensing the leg muscles during control questions), as many as 50% of subjects can produce erroneous results. See id. at 890. However, Dr. Raskin added, and the Court found, that because a subject "must receive highly specialized hands-on training in order to successfully engage in countermeasures, the possibility that a subject will succeed in such measures is very slight." Id. For further discussions on the issue of countermeasures, see ABRAMS, supra note 54, at 185-86; FAIGMAN, supra note 8, at 576-79, 595-96; GHANNELLI & IMWINKELRIED, supra note 11, at 229-30; LYKKEN, supra note 96, at 230-32, 273-77, 292-93; MATTE, supra note 10, at 531; Stan Abrams & Lt. Michael Davidson, Counter-Countermeasures in Polygraph Testing, 17 POLYGRAPH 16 (1988); Charles R. Honts, et. al., Effects of Spontaneous Countermeasures on the Physiological Detection of Deception, 16 J. POLICE SCI. & ADMIN. 91, 91-93 (1988); Honts & Perry, supra note 23, at 373-75.


249. See id. at 881. The Court viewed the validity of polygraph results as not only dependent on the general validation provided by field and laboratory
issued by the judge provided an exhaustive account of how the *Daubert* reliability factors and the relevance inquiry, applied to the polygraph, dictated admissibility.

The *Galbreth* Court joined a growing number of Federal jurisdictions which have re-evaluated previous holdings against admission of polygraph evidence. The trend has gained momentum following *Daubert*. Two Circuit Courts have reconsidered their per se rules against admissibility and dispensed with them.

Federal Rule of Evidence 403 figures prominently in post-*Daubert* Circuit Court decisions. The Tenth Circuit held that *Daubert* must be applied to polygraph evidence, though it was later excluded on a Rule 403 basis, while studies for the hypothesis underlying the polygraph technique, but also specifically dependent on certain conditions such as a properly conducted examination by a competent examiner and utilization of standard polygraph techniques in the particular case. See id. at 882.

250. See, e.g., John E. Theuman, *Admissibility in Federal Criminal Case of Results of Polygraph (Lie Detector) Test—Post-Daubert Cases* 140 A.L.R. FED. 525 (1997) (giving an overview of relatively recent circuit and federal district court cases concerning the polygraph).

251. See United States v. Cordoba, 104 F.3d 225, 228 (9th Cir. 1997) (concluding its former per se rule of exclusion of polygraph evidence was inconsistent with *Daubert*, the court noted that the trial court had to weigh the probative value of the evidence against the danger of misleading the jury under Rule 403); United States v. Posado, 57 F.3d 428, 429 (5th Cir. 1995) (holding that "the rationale underlying this circuit's per se rule against admitting polygraph evidence did not survive *Daubert*," and finding that Rule 403 would also govern admissibility). Both the Ninth and Fifth Circuits updated these decisions, providing more guidance concerning polygraph admissibility in a post-per se rule era. See United States v. Elkwachi, 111 F.3d 139 (9th Cir. 1997). While noting that polygraph results were not per se inadmissible, the Ninth Circuit upheld exclusion of the evidence as within the trial court's discretion. See id. The Fifth Circuit updated Posado in United States v. Pettigrew 77 F.3d 1500 (5th Cir. 1996). The court observed that the inquiry pursuant to Federal Rule of Evidence 702 is a flexible one, where admissibility is left to the sound discretion of the trial court. See Pettigrew, 77 F.3d at 1515. In this case, while the court opined that it did not "sanction efforts to 'short circuit' the *Daubert* analysis," it found the polygraph examiner's questions irrelevant and thus inadmissible. Id.

252. Federal Rule of Evidence 403 reads, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

253. See United States v. Call, 129 F.3d 1402 (10th Cir. 1997) (rejecting its
the Second Circuit, though declining to hold that the polygraph was admissible under Rule 702, ruled it inadmissible under Rule 403. The Eighth Circuit held that a proper foundation under Daubert must be laid for expert testimony on the polygraph, but excluded the testimony pursuant to Rule 403. Another Circuit acknowledged that Daubert required them to review their holdings disallowing polygraph results, but the test was excluded since the defendant had sought the relief without proper notice to the opposing party.

categorical rule of exclusion, the court went on to uphold the trial courts exclusion of polygraph evidence under Rule 403). The Scheffer Court's disregard of Daubert prompted one of the amici to write:

Unfortunately, Daubert has not served to change the ultimate reality of per se exclusionary practices. The major change in many post-Daubert cases has not been a change toward acceptance of the consequences of the opinion, but rather has been a shift in the stated rationales for what are, in effect, continued per se refusals to admit the polygraph evidence.

Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 8, Scheffer (No. 96-1133). Courts inhospitable to the polygraph have used Rule 403 discretion and other exclusionary theories. See generally IMWINKELRIED & MCCALL, supra note 41 (explaining that courts have rejected the admissibility of polygraph evidence because of its tendency to prejudice or mislead the jury).

254. See United States v. Kwong, 69 F.3d 663 (2d Cir. 1995). The court faulted the polygrapher for asking questions that were "inherently ambiguous no matter how they were answered," which led to their conclusion that admission of the defendant's answers would mislead and confuse the jury, "outweighing any probative value they may have [had]." Id. at 668. In United States v. Messina 131 F.3d 36, 42 (2d Cir. 1997), cert. denied ___ U.S. __, 118 S.Ct. 1546 (1998), the panel noted that the Second Circuit had not "decided whether polygraphy has reached a sufficient state of reliability to be admissible under Rule 702 of the Federal Rules of Evidence," perhaps representing an ever-so-slight loosening of the Circuit's traditional anti-polygraph position. Id.

255. See United States v. Williams, 95 F.3d 723 (8th Cir. 1996) (finding that the polygrapher's questions concerned peripheral details about the crime and that because of that infirmity, the judge did not abuse his discretion in disallowing the evidence under Rule 403). The Eighth Circuit permits polygraph evidence if stipulated to by both parties prior to the test. See Anderson v. United States, 788 F.2d 517, 520 n.1 (8th Cir. 1986).

256. The Sixth Circuit relaxed its per se rule against admissibility of polygraph related evidence in limited circumstances where "it is relevant to the proof developed by the probative evidence." United States v. Wright, 22 F. Supp. 2d 751, 753 (W.D. Tenn. 1998) (citing Wolfel v. Holbrook, 823 F.2d 970, 972 (6th Cir. 1987)). However, the circuit later circumscribed that opening. See United
Only the D.C. and Fourth Circuits do not allow polygraph evidence under any circumstances, holding fast to the seventy-six year old Frye standard.257

The Eleventh Circuit was the first to counter the polygraph inadmissibility rule, even before Daubert, and has allowed polygraph evidence for ten years.258 The remaining circuits allow polygraph results to be admitted if a proper foundation is laid,259 or appear to allow it only under particular circumstances.260

The majority of state courts, not required to follow the Daubert standard for admissibility of scientific evidence pursuant to the Federal Rules of Evidence, continue to follow the Frye “general acceptance” standard for expert

States v. Sherlin, 67 F.3d 1208, 1216-17 (6th Cir. 1995) (holding that unilateral polygraph examination was inadmissible, particularly since it would have dubious probative value); Conti v. Commissioner, 39 F.3d 658, 663 (6th Cir. 1994) (stating that “unilaterally obtained polygraph evidence is almost never admissible under Evidence Rule 403.”), cert. denied 514 U.S. 1082 (1995). The Sixth Circuit adroitly and consistently declined to address the effect of Daubert on its holdings concerning the polygraph. See United States v. Thomas, 167 F.3d 299, 309 n.8 (6th Cir. 1999).

257. See, e.g., United States v. Sanchez, 118 F.3d 192, 197 (4th Cir. 1997) (adhering to the circuit’s per se rule prohibiting introduction of polygraph evidence). The Sanchez court observed that in a previous decision, United States v. Toth, 91 F.3d 136 (4th Cir. 1991), the Fourth Circuit suggested it may be possible to change the prohibition against polygraph evidence without approval of the en banc court in light of Daubert, but declined to reach the issue. Id. at 197 n.3.

258. See United States v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989) (allowing polygraph expert testimony when stipulated to in advance; allowing such testimony when used to impeach or corroborate witness upon proper notice). After carefully reviewing scientific evidence on the polygraph, the court concluded, “It is unwise to hold fast to a familiar rule [against polygraph admissibility] when the basis for that rule ceases to be persuasive.” Id. at 1537.

259. See United States v. Lynn, 856 F.2d 1529, 1536 (11th Cir. 1989) (requiring judge’s discretion); see also United States v. Pulido, 69 F.3d 192 (7th Cir. 1995) (allowing polygraph pursuant to judge’s discretion). In Pulido, the Seventh Circuit cited its position of having “persistently refused to adopt [a per se rule against admissibility of polygraphs], choosing rather to leave the decision on admissibility to the sound discretion of the district court.” Id. at 205 (quoting United States v. Kampiles, 609 F.2d 1233, 1244 (7th Cir. 1979), cert. denied 446 U.S. 954 (1980)).

scientific testimony, thereby maintaining case law roadblocks against polygraph admissibility. One rule of thumb to follow for those seeking to find some sort of consistency in the polygraph admissibility quagmire was proposed by two noted experts in the field: "acceptance or rejection of the evidence by the courts hinges on each judge’s perspective on the accuracy of the technique."}

**CONCLUSION**

Despite Daubert's clear mandate to assess scientific expert testimony according to more liberal evidentiary rules, prejudice against the polygraph, evidenced in Scheffer, retains a stranglehold on the evidentiary process. Ignoring Daubert's guidelines for evaluating scientific


262. Honts & Perry, supra note 23, at 369.
expert testimony, and using instead a variant of the overruled 'general acceptance' standard, the Scheffer Court maintained the polygraph's status as imprisoned without parole in a Fryean dungeon. Seventy-five years of scholarly and technological progress in psychophysiology and its measurement count for naught. With this finding, the Court underscored the polygraph's unique status as an illegitimate offspring of the scientific revolution. A cursory comparison with other genres of scientific evidence quickly reveals that the Supreme Court does not require the same near-perfect accuracy rate for other types of scientific evidence as it demands for the polygraph. Even if the polygraph proved to be 100% reliable, opponents would still argue against its admissibility.

Not even constitutional protections can penetrate the wall of polygraph prejudice. The same government that administers hundreds of thousands of polygraph examinations, some of which determine the most critical issues of national security, hypocritically argues that, in a legal context, per se rules excluding polygraph results serve a legitimate interest of ensuring that only reliable evidence is introduced at trial. Despite Rock's unequivocal holding which condemned per se rules excluding a defendant's evidence as unconstitutional, the Scheffer Court latched on to Rock's peripheral language acknowledging limits on presentation of relevant evidence. Using that rationale, the

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263. "A great deal of lay testimony routinely admitted is at least as unreliable and inaccurate [as the polygraph], and other forms of scientific evidence involve risks of instrumental or judgmental error." STRONG, supra note 10, at 915 & n.57.

264. During the oral argument before Supreme Court, this exchange between counsel for the United States and Justice Stevens indicated that high polygraph reliability, the gravamen of the written briefs, would still not be enough to admit polygraph evidence. "The Court: Your position, as I understand it, is, even if it were totally reliable, you would still take the same position, it's inadmissible? Mr. Dreeben: I do, Justice Stevens." Transcript of Oral Argument Before the United States Supreme Court at 14, Scheffer (No. 96-1133).

265. See Winemiller, supra note 94, at 349 (stating that "[a]lthough the polygraph is not perfect, the Department of Defense considers it to be one of its 'most effective investigative tools' and uses it tens of thousands of times each year. To dismiss as irrelevant a kind of expert opinion on which crucial matters of confidence—even national security—rely borders on capriciousness, especially when one considers the other forms of opinion evidence that are routinely admitted.") (citation omitted).
Court circumscribed the rights of the accused, betrayed its precedent and broke faith with the liberal spirit of the Federal Rules of Evidence. Consequently, valid, reliable, helpful and arguably outcome determinative evidence did not reach Scheffer's jury. The trial judge, as gatekeeper, was stymied by a "blunderbuss" evidentiary rule that prevented even a foundation from being laid to explore admissibility issues. The Court effectively marooned a standard it promulgated a generation earlier: "By denying an accused the opportunity to present exculpatory testimony, an exclusionary evidentiary rule calls into question the ultimate 'integrity of the fact-finding process.'" That premise and promise of American constitutional law rings hollow in the wake of Scheffer.

Given the slow but sure inroads the polygraph has made at the circuit court level, what is now needed is time—time for those more accommodating circuit court opinions to trickle down to federal trial courts and perhaps even to state courts. While the erosion of the polygraph admissibility bar continues to take place, the case anticipated by the Scheffer concurring justices may soon prompt reconsideration of this issue by the Court.

266. Scheffer, 523 U.S. at 338 (illustrating Justice Stevens' term for the per se rule excluding polygraph evidence).


268. IMWINKELRIED & GARLAND, supra note 43, at 495 (citing Justice Powell's opinion in Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).