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Warping the Rules: How Some Courts Misapply Generic Evidentiary Rules to Exclude Polygraph Evidence

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NOTES

Warping the Rules: How Some Courts Misapply Generic Evidentiary Rules to Exclude Polygraph Evidence

I. INTRODUCING POLYGRAPH EVIDENCE

Polygraph tests rely on the hypothesis that a subject's body yields physiologically different symptoms if he or she is lying.[1] When a polygraph test is administered, a mechanical apparatus records the subject's physiological changes, and the polygrapher conducting the examination interprets the data.[2] The techniques for measuring physiological changes vary in their foci, which may include respiration, blood pressure, cardiovascular function, and skin resistance.[3] The polygraph apparatus[4] records changes to one or more of these foci, and a technician, or polygrapher, then analyzes the results to conclude whether the subject has been truthful.

Polygraph results factor into choices ranging from indictment determinations to employment decisions. Between 1981 and 1997, the Pentagon conducted more than 400,000 polygraph examinations.[5] Similarly, state law enforcement officers have conducted thousands of polygraph examinations.[6] Even in the private sector, where federal law significantly limits private employers from requesting polygraph examinations, employee test results may lead to criminal liability.[7]

While other segments of society use polygraph results, courts remain reluctant to admit them. Although only two federal circuits employ common law bans against polygraph evidence,[8] district courts in every circuit consistently reject polygraph evidence.[9] Similarly, many state courts have excluded polygraph evidence for all purposes.[10] Unfortunately, many of these courts can only exclude polygraph

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1. COMM. TO REVIEW THE SCIENTIFIC EVIDENCE ON THE POLYGRAPH, NAT'L RESEARCH COUNCIL OF THE NATIONAL ACADS., THE POLYGRAPH AND LIE DETECTION 11 (2003).

2. *Id.* at 14.

3. 42 AM. JUR. *Trials* § 313, 331–40 (1991).

4. "Apparatus" will be omitted from future references to the equipment used for polygraph testing.

5. David G. Savage, *Let Trial Judges Decide: High Court Rejects a Per Se Rule on Polygraph Evidence*, 84 A.B.A. J., June 1998, at 52, 52; *see* 29 U.S.C. § 2006 (2006) (exempting government employees and certain government contractors from federal protections against polygraph examinations in the employment context).

6. *See, e.g.*, Height v. State, 604 S.E.2d 796, 797 (Ga. 2004) (discussing a retired Georgia Bureau of Investigation officer's statement that she had conducted nearly 3,000 polygraph examinations in her career). Georgia courts do not admit polygraph evidence at trial unless both parties stipulate otherwise. *Id.* at 797–98.

7. *See* 29 U.S.C. § 2006(d)–(f) (2006) (allowing polygraph tests for private employees in certain circumstances); *id.* § 2008(c) (providing for disclosure of criminal actions).

8. Lee v. Martinez, 96 P.3d 291, 311 (N.M. 2004).

9. *Id.* at 312 (quoting State v. Porter, 698 A.2d 739, 776–77 (Conn. 1997)).

10. *See Lee*, 96 P.3d at 310 (providing a list of state cases as of summer 2004 that identifies twenty-seven states and tbe District of Columbia as barring polygraph evidence for all purposes).

evidence by warping generic evidentiary rules to act as per se bans.[11] This Note focuses on their misapplication of evidentiary rules.

Many criticisms of polygraph evidence have merit, but these concerns should not lead courts to warp evidentiary rules in order to exclude polygraph evidence. For instance, competing studies find various polygraph methods accurate in anywhere from 12.5 to 90 percent of tests,[12] but courts should not transpose poor accuracy tests for one testing method to conclude that all other methods are unreliable.[13] Similarly, courts may have legitimate public policy concerns that polygraphy could usurp the jury's role as fact-finder,[14] but because statutory rules potentially allow polygraph evidence, only legislatively enacted per se bans should properly exclude all polygraph evidence.

Part II of this Note examines how judicial decisions have structured today's case law on the admissibility of polygraph evidence. In Part III, this Note will discuss how courts apply the five prevailing bars to polygraph admissibility: Rules 702, 403, 608, and 704, and per se bans.[15] Part IV argues that although each of these bars can properly exclude polygraph evidence in many circumstances, courts

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11. *See* discussion *infra* Part III.

12. *Compare* Paul C. Giannelli, *Polygraph Evidence: Post*-Daubert, 49 HASTINGS L.J. 895, 896 (1998) (citing United States v. Posado, 57 F.3d 428, 434 (5th Cir. 1995), which found an accuracy rate of 70 to 90 percent), *with* 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. L. REV. 1247, 1280 n.231 (1997) (referencing studies by the Office of Technology Assessment, one of which found such a low accuracy rate (12.5 percent) that, to this author, the result appears to be a statistical outlier); *see also infra* text accompanying note 155 (discussing studies that find polygraph testing to be reliable 50 percent of the time).

13. *See* discussion of Rule 702 *infra* Part III.C.

14. Perhaps the most colorful argument against polygraph evidence appears in a 1975 decision: "When polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi." United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975). The drafters of Military Rule of Evidence 707, which is discussed further in Part II, cited this language as a basis for excluding polygraph evidence. United States v. Scheffer, 41 M.J. 683, 686 (A.F. Ct. Crim. App. 1995) [hereinafter *Scheffer I*]. Under such an argument, courts should exclude polygraph evidence because a jury might give the results disproportionate weight. Justice Clarence Thomas articulated this sentiment further in parts II.B and II.C of his *Scheffer* opinion, which gained the support of three other Justices. United States v. Scheffer, 523 U.S. 303, 312–15 (1998) [hereinafter *Scheffer IV*]. Essentially, Justice Thomas argued that the jury's historical role as fact-finder would be supplanted by polygraph evidence and that considering such evidence would lead to regular litigation over issues other than determining the defendant's guilt. *Id.*

15. This Note will generally refer to evidentiary rules within the numbering system employed by the Federal Rules of Evidence. Hence, "Federal Rule of Evidence 401" will normally appear in the text as "Rule 401." Since the 1975 adoption of the Federal Rules of Evidence, forty-two states and Puerto Rico have adopted their principles in whole or great part. GEORGE FISHER, EVIDENCE 3 (2002). Accordingly, this Note cites both federal and state cases to interpret these rules.

should not treat the Federal Rules of Evidence as imposing per se bans on polygraph evidence.

II. EIGHTY YEARS OF (LARGELY) EXCLUDING POLYGRAPH EVIDENCE

A. Corroborative Scientific Evidence

A polygraph examination forces its subject to recall past events, and the polygrapher then evaluates the subject's physiological responses during this recollection.[16] In the adjudicatory setting, nothing prevents the subject from answering the same questions on a witness stand. Polygraph results merely offer those using these tests an evaluation of the subject's veracity in making a particular statement. Although parties in the late 1800s argued that any evidence beyond raw physical evidence and direct testimony was irrelevant,[17] such challenges generally fail today. In fact, juries may now hear extrapolations based on data that could not be offered as independent evidence.[18] Often, juries may not have the scientific acumen to process such data,[19] but they may rely on expert witnesses from each side to parse this information.[20] Polygraph results, however, have not received the same deference that courts have given to other types of scientific evidence.

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16. *See supra* text accompanying notes 1–3.

17. *See, e.g.*, State v. Smith, 81 N.W. 17 (Minn. 1899). In *Smith*, the Minnesota Supreme Court considered a challenge to scientific evidence that addressed an eyewitness's credibility. A prosecution expert conducted two experiments to determine what another witness could legitimately have seen and heard from her vantage point. Although the court opinion noted that such evidence offered no new information to the jury, it found admission of the evidence to be appropriate on two grounds: first, the jurors had access to the raw information behind the experiments' conclusions; second, each side could present a different interpretation of the raw data. *Id.* at 18; *see also* Estate of Toomes, 54 Cal. 509, 514 (1880) (analyzing the nature of expert testimony).

18. FED R. EVID. 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

19. *See* FED. R. EVID. 702 (asserting that the purpose of expert testimony is to "assist the trier of fact to understand the evidence"); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (describing the use of expert witnesses when "inexperienced persons are unlikely to prove capable of forming a correct judgment").

20. FED. R. EVID. 104(b), 702.

B. Into the "Twilight Zone:" Frye*'s General Acceptance*

The D.C. Circuit's decision to exclude polygraph evidence in the 1923 case *Frye v. United States*[21] was the first in a series of decisions to exclude polygraph evidence.[22] The *Frye* case involved the systolic blood pressure test which, like other polygraph techniques, relied on the hypothesis that deception required conscious effort.[23] In theory, this effort would produce an emotional response throughout the autonomic nervous system and raise systolic blood pressure by a mechanically detectable amount.[24]

The *Frye* court concluded that outside, expert witnesses may explain their scientific findings in court,[25] but only if their evidence met a series of rigorous requirements.[26] The court explained that scientific evidence must evolve beyond an "experimental" phase into a "demonstrable" one for courts to consider it.[27] The panel acknowledged the difficulty of applying its holding:

> Just when a scientific principle or discovery crosses the line between the 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.[28]

The court concluded that the technique of measuring systolic blood pressure to detect when a subject is lying "has not yet gained such standing," and accordingly, the court barred the test results from evidence.[29]

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21. 293 F. at 1014.

22. *See infra* note 30 and accompanying text.

23. *Id.*

24. *Id.*

25.

> The rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to whicb the question relates are admissible in evidence.

Id. (quoting the defendant's brief); *see also* National Gas Light & Fuel Co. v. Miethke, 35 Ill. App. 629, 629 (1890) (containing a similar passage and citing ROGERS ON EXPERT TESTIMONY § 10).

26. *Frye*, 293 F. at 1014.

27. Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1205 (1980).

28. *Frye*, 293 F. at 1014.

29. *Id.*

In the ensuing decades, courts used *Frye* to exclude most proffered polygraph evidence.[30] The *Frye* standard offered three notable advantages. First, it kept the pool of scientific experts to a minimum.[31] Second, it promoted decision uniformity.[32] Third, and most critically, the standard established a method for ensuring the reliability of scientific evidence.[33]

The *Frye* decision did not, however, require a complete bar of all polygraph evidence. In fact, some courts admitted evidence that an examination had occurred to corroborate a withdrawn confession, while still barring the results.[34] The polygraph examinations in such cases were not seen as prejudicial because courts concluded that a jury is more likely to focus on the defendant's words than on the polygrapher's scientific conclusions.[35] In other exceptions at trial, courts required both sides to stipulate to the admission of the polygraph evidence, but even then, a judge could still bar the proffered results.[36] Meanwhile, courts were generally, though only slightly, more willing to admit polygraph results into evidence if the subject was not a defense witness.[37]

Frye's pervasive impact to exclude polygraph evidence dampened in the early 1970s as three separate state courts held that polygraph evidence now satisfied the "general acceptance" standard,

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30. *See, e.g.*, State v. Bohner, 246 N.W. 314, 317 (Wis. 1933) (following *Frye*'s reasoning and noting that it was the only such decision that the *Bohner* court could find); *see also* United States v. Piccinonna, 885 F.2d 1529, 1532 n.4 (11th Cir. 1989) (providing a brief history of federal cases regarding polygraph evidence after *Frye*).

31. Giannelli, *supra* note 27, at 1207. Rule 403 concerns would later encapsulate this thinking. *See* discussion *infra* Part III.B.

32. Giannelli, *supra* note 27, at 1207.

33. *Id.*

34. *See, e.g.*, State v. Melvin, 319 A.2d 450, 457–60 (N.J. 1974) (admitting polygraph results where police officers had read the defendant his *Miranda* rights prior to the polygraph exam, after which the defendant confessed, even though the rights-reading erroneously included language about using what he said in his favor in court); Johnson v. State, 166 So. 2d 798, 801 (Fla. Dist. Ct. App. 1964) (admitting evidence related to a polygraph examination because the polygraph evidence was not fruit of the poisonous tree); *see also* People v. McHenry, 22 Cal. Rptr. 621, 623–24 (Dist. Ct. App. 1962) (admitting statements made before polygraph examination).

35. *See* State v. DeHart, 8 N.W.2d 360, 362 (Wis. 1943) ("The thing that was prejudicial to defendant was the confession which is many times more conclusive than any implication that could be drawn from the fact of the lie detector test.").

36. *See, e.g.*, State v. McDavitt, 297 A.2d 849, 854–55 (N.J. 1972) (holding that polygraph evidence has achieved sufficient reliability to be admissible upon the stipulation of both parties); State v. Valdez, 371 P.2d 894, 900 (Ariz. 1962) (allowing stipulated polygraph results to be admitted and citing reliability studies in the process); *see also* State v. Chavez, 461 P.2d 919, 921 (N.M. 1969) (admitting stipulated polygraph results that went against the defendant).

37. *See, e.g.*, United States v. Hart, 344 F. Supp. 522, 523–24 (E.D.N.Y. 1971) (allowing defendant to present evidence of a government witness's failed polygraph examination, but barring defendant from presenting evidence of his own polygraph examination).

and parties no longer needed to stipulate to its admission.[38] Although courts seemed poised to admit polygraph evidence under the *Frye* standard, legislatures retained significant control over admissibility, and the state legislature in one of those states enacted a statutory ban to exclude polygraph evidence.[39] Still, the pro-polygraph momentum in the courts continued when the Seventh Circuit admitted expert polygraph testimony to avoid a "swearing contest" over whether police officers coerced a defendant's confession.[40]

In the 1980s, today's present circuit split emerged. While the Fourth, Fifth, and D.C. Circuits maintained per se bans against polygraphy,[41] other circuits became more accepting of it. In 1989, the Eleventh Circuit declared in *United States v. Piccinonna* that, at least in some instances, polygraphy satisfied *Frye*'s required general acceptance standard.[42] The divided *en banc* panel identified two situations where polygraph testimony could be admissible: (1) admission by stipulation; and (2) impeachment or corroboration of witness testimony.[43] The first category was consistent with previous post-*Frye* developments.[44] The second category required polygraph evidence to conform to the requirements of Rule 608.[45] Thus, polygraph evidence was permissible only in order to damage a witness's credibility or after one side had already damaged a witness's credibility.[46] Meanwhile, the Eleventh Circuit maintained that other evidentiary rules, including Rule 403, could continue to bar polygraph evidence.[47]

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38. *See* James R. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility after* Rock *and* Daubert, 1996 U. ILL. L. REV. 363, 381–89 (dissecting the following decisions: Commonwealth v. A Juvenile (No. 1), 313 N.E.2d 120 (Mass. 1974); State v. Dorsey, 539 P.2d 204 (N.M. 1975), *aff'd* for slightly different reasons, 532 P.2d 912 (N.M. Ct. App. 1975); Witherspoon v. Superior Court, 183 Cal. Rptr. 615 (Ct. App. 1982)).

39. CAL. EVID. CODE § 351.1 (2006). *See* People v. Lee, 115 Cal.Rptr.2d 828, 842 (Cal. Ct. App. 2002) (stating that California law "simply and unambiguously prohibits the admission of evidence that a person took a polygraph test").

40. United States v. Kampiles, 609 F.2d 1233, 1245 (7th Cir. 1979). The Third Circuit would later follow this reasoning in *United States v. Johnson*, 816 F.2d 918, 923 (3d Cir. 1987).

41. *See, e.g.*, United States v. Brevard, 739 F.2d 180, 182 (4th Cir. 1984); United States v. Clark, 598 F.2d 994, 995 (5th Cir. 1979); United States v. Skeens, 494 F.2d 1050, 1053 (D.C. Cir. 1974).

42. *See* United States v. Piccinonna, 885 F.2d 1529, 1532 (11th Cir. 1989), *superseded by* FED. R. EVID. 702, *as recognized in* In re Polypropylene Carpet Antitrust Litigation, 93 F. Supp. 1348, 1352 (N.D. Ga. 2000).

43. *Piccinonna*, 885 F.2d at 1536.

44. *Id.* at 1534.

45. *Id.* at 1536.

46. *Id.*

47. *Id. See* discussion *infra* Part III.B.

Although the Eleventh Circuit in *Piccinonna* had found that polygraph evidence was admissible in some instances, on remand, the district court barred the proffered polygraph evidence.[48] The court's analysis focused on Rule 608(a) and (b) in evaluating the admissibility of a polygraph test.[49] Rule 608(a) admits general character evidence; Rule 608(b) bars direct-examination testimony regarding specific instances of character.[50] The court held that a single polygraph test could not provide general character evidence admissible under Rule 608(a).[51] The court also held that polygraph results only proved "one specific instance of truthfulness" and therefore failed under Rule 608(b).[52]

The 1980s rulings on polygraphy coincided with broader decisions to liberalize the admission of testimony from scientific practices into evidence. In particular, the U.S. Supreme Court rejected, on constitutional grounds,[53] evidentiary rules that barred testimony obtained after hypnosis in *Rock v. Arkansas*.[54] Although the Supreme Court did not endorse questionable scientific techniques,[55] the Court noted that the defendant's right to present relevant testimony may "bow to accommodate other legitimate interests in the criminal trial process."[56]

C. Daubert *Consumes* Frye

In the 1993 decision *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court held that the liberal attitude under the Federal Rules of Evidence in favor of admitting relevant evidence superseded *Frye*'s requiring general acceptance to admit expert

48. United States v. Piccinonna, 729 F. Supp. 1336, 1338–39 (S.D. Fla. 1990), *aff'd*, 925 F.2d 1474 (11th Cir. 1991) (unpublished table decision).

49. *Piccinonna*, 729 F. Supp. at 1338.

50. FED. R. EVID. 608.

51. *Piccinonna*, 729 F. Supp. at 1338.

52. *Id.*

53. Because this Note focuses on the evidentiary rules, it discusses constitutionally based arguments regarding polygraph evidence on only a basic level. Other scholarly writings have saturated this field with varying criticism. They include: Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063 (1999) (focusing generally on the *Scheffer IV* decision discussed *infra* Part II.F.2); Peter Westen, Egelhoff *Again*, 36 AM. CRIM. L. REV. 1203, 1273 (1999) (briefly discussing polygraph evidence); and Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 590–93 (1978) (discussing the defendant's right to direct examination of witnesses at trial).

54. 483 U.S. 44, 62 (1987).

55. *Id.*

56. *Id.* at 55 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

scientific evidence.[57] Thus, *Daubert* clarified the threshold for admitting evidence produced through a scientific technique.[58] The underlying goal was to ensure "that an expert's testimony rests on a reliable foundation and is relevant to the task at hand."[59] Under the Court's new approach, general acceptance became just one consideration in a broader, non-exclusive list of factors, including:[60] (1) a theory's submission to testing to determine its validity—in essence, the scientific method;[61] (2) whether the theory has been subjected to peer review and publication;[62] (3) the known potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation;[63] and (4) general acceptance in the relevant scientific community.[64] The Court subsequently held that *Daubert* applies to all scientific evidence.[65] Courts following *Daubert* apply these factors to evaluate the methodology and principles behind a particular expert witness's technique, rather than solely evaluating the specific results of his technique.[66]

The first *Daubert* factor, presence of the scientific method, is largely preliminary.[67] Without the scientific process to create scientific knowledge, the entire *Daubert* analysis would never be triggered.[68] Nonetheless, determining whether there is "scientific knowledge" can be problematic because the determination does not require absolute certainty as to a scientific assertion's truth.[69] Instead, the Supreme Court required only validation based on "good grounds" that the assertion be true.[70]

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57. Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579, 587 (1993).

58. *Id.* at 587–88.

59. *Id.* at 597.

60. The *Daubert* Court noted that these factors were only observations. The Justices did not create a "definitive checklist or test." *Id.* at 593; August McCarthy, *The Lost Futures of Lead-Poisoned Children: Race-Based Damage Awards and the Limits of Constitutionality*, 14 GEO. MASON U. CIV. RTS. L.J. 75, 88 n.61 (2004). Relevance could be articulated as another factor in light of Rule 702's requirement that evidence assist the fact-finder. *Daubert*, 509 U.S. at 591. However, the Court treats it, along with scientific knowledge, as a preliminary issue to resolve before continuing with tbe analysis. *Id.* at 592–93.

61. *Id.* at 589–90, 592–93.

62. *Id.* at 593.

63. *Id.* at 594.

64. *Id.*

65. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

66. *See Daubert*, 509 U.S. at 594–95.

67. *See id.* at 592–93.

68. *See id.* at 592.

69. *Id.* at 590.

70. *Id.*

Peer review and publication are somewhat easier to define.[71] Publication is a form of peer review.[72] It subjects research to the evaluation of others in the scientific community.[73] Peer responses to published material then contribute to determining a technique's validity.[74]

The Court provided little explanation of what is an acceptable known potential rate of error.[75] It does, however, coincide with the existence and maintenance of standards to provide predictable results.[76] One procedure should produce the same result with anticipated frequency.[77]

The last factor—general acceptance—incorporated *Frye*'s standard.[78] Widespread adoption of a technique likely constitutes general acceptance; conversely, courts may view techniques that have attracted minimal support with skepticism.

D. Daubert*'s Wake: The Door Briefly, and Slightly, Opens*

The *Daubert* analysis prompted federal district courts to admit polygraph evidence under Rule 702 in *United States v. Crumby*[79] and in *United States v. Galbreth*.[80] Still, the most significant opinion to follow *Daubert*—*United States v. Posado*[81]—emerged from a pretrial suppression hearing. In *Posado*, the Fifth Circuit held that, in light of *Daubert*, courts could no longer bar polygraph evidence as per se inadmissible under common law.[82] However, much like the Supreme Court's reluctance to endorse questionable scientific techniques in

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71. *Id.* at 593.

72. *Id.*

73. *Id.*

74. *Id.* at 594.

75. *See id.* (observing only the importance of this consideration and providing case parentheticals).

76. *See id.*

77. *Id.* at 593–94.

78. *See id.*

79. 895 F. Supp. 1354, 1363–64 (D. Ariz. 1995).

> Thus, if the Defendant takes the stand and testifies that he did not commit the crime, and the government impeaches his credibility, then the Defendant may support his credibility with the use of the polygraph evidence. The credibility of the witness can only be supported with evidence that Defendant took a polygraph examination in connection with this case, and passed the examination.

Id. (relying on Rule 608(a) and to a lesser extent Rule 608(b)). Incidentally, the *Crumby* court specifically disagreed with the *Piccinonna* district court's application of Rule 608 to polygraph evidence. *Id.*

80. 908 F. Supp. 877, 896 (D.N.M. 1995) (noting that the inquiry was fact-specific).

81. 57 F.3d 428, 429 (5th Cir. 1995).

82. *Id.* at 434.

Rock, the Fifth Circuit's decision did not specifically endorse the use of polygraphy.[83] In fact, the court openly avoided a determination of the reliability of polygraph results.[84] Instead, the panel simply concluded that *Daubert* expanded the admissibility of scientific evidence.[85] On remand, the trial court still barred the evidence as inadmissible under Rules 702 and 403.[86] Nevertheless, the *Posado* decision set a precedent in rejecting per se common law exclusions, and the Ninth Circuit would later adopt this reasoning.[87]

E. The Supreme Court Enters the Fray: Polygraphy in Light of Scheffer *and* Lile

1. Military Cases Force the Issue

A unique military evidentiary rule eventually forced the U.S. Supreme Court to determine whether courts could exclude polygraph evidence. Military cases are particularly unique in this area because Congress has given the military express authorization to conduct polygraph tests on its personnel.[88] Not surprisingly, military courts have been less inclined to reject the evidence as unreliable. In the pre-*Daubert* case, *United States v. Gipson*, the U.S. Court of Military Appeals concluded that polygraph results could be admissible to show a defendant's truthfulness during the polygraph examination.[89] The court conditioned such admissibility on "the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise."[90] The court also limited admissibility to those situations in which the examiner testified as to the subject's truthfulness in an assertion at the time of the examination,[91] essentially avoiding problems under Rule 608. The jury could then evaluate the subject's credibility at the

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83. *Id.*

84. *See id.* at 429.

85. *See id.* at 433. The panel did note tbat its decision might open a "Pandora's box." *Id.* at 436.

86. United States v. Ramirez, No. CRIM. H-93-252, 1995 WL 918083, at **2–5 (S.D. Tex. Nov. 17, 1995).

87. United States v. Cordoba, 104 F.3d 225, 227–28 (9th Cir. 1997) [hereinafter *Cordoba I*].

88. *See* 29 U.S.C. § 2006 (2006); *supra* text accompanying notes 5–7.

89. United States v. Gipson, 24 M.J. 246, 253 (C.M.A. 1987), *superseded by* MIL. R. EVID. 707, *as recognized in* United States v. Scheffer, 44 M.J. 442, 44 (C.A.A.F. 1996) [hereinafter *Scheffer II*], *rev'd*, 523 U.S. 303 (1998).

90. *See Gipson*, 24 M.J. at 253.

91. *Id.* at 252–53.

trial proceedings.[92] Accordingly, even the prosecution could offer polygraph evidence at trial.[93] However, the ramifications of the Military Court of Appeals' decision in *Gipson* were short-lived. Four years after this decision, then-President George H. W. Bush promulgated by executive order Military Rule of Evidence 707,[94] which excluded all polygraph evidence from military courts.[95]

Per se rules against polygraph evidence, such as Military Rule 707, were seen as constitutionally suspect because they limited the evidence that a defendant could present.[96] The stage was set for the Supreme Court to clarify—or at least attempt to clarify—the disjointed appellate opinions on the admissibility of polygraph evidence.

2. The Supreme Court Shifts the Discussion

The U.S. Supreme Court's first polygraph decision was a relatively minor *per curiam* opinion. Nonetheless, this opinion was the first in a series that deferred to the jurisdiction's treatment of polygraph evidence. In *Wood v. Bartholomew*, the Supreme Court held that a prosecutor did not violate the defendant's discovery rights[97] by withholding evidence that two state witnesses had taken polygraph exams.[98] Justifying its decision, the Court concluded that

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92. *Id.* at 253.

93. *Id.* at 252.

94. MIL. R. EVID. 707 (hereinafter referred to as "Military Rule 707") states:

> (a) 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.
>
> (h) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

95. *Scheffer IV*, 523 U.S. at 306–07.

96. United States v. Williams, 39 M.J. 555, 558 (A.C.M.R. 1994), *vacated on other grounds*, 43 M.J. 348 (C.A.A.F. 1995). McCall, *supra* note 38, at 422. *But see* United States v. Lech, 895 F. Supp. 582, 586 (S.D.N.Y. 1995) (holding that per se inadmissibility did not run afoul of a defendant's Fifth and Sixth Amendment rights). *See generally* John J. Canham, Jr., *Military Rule of Evidence 707: A Bright-Line Rule That Needs to Be Dimmed*, 140 MIL. L. REV. 65 (1993) (arguing that Rule 707 as a bright-line rule is flawed on policy and constitutional grounds).

97. These rights are more commonly referred to as *Brady* discovery. The prosecution must disclose potential exculpatory evidence. *See generally* Brady v. Maryland, 373 U.S. 83 (1963) (discussing the disclosure requirement). *Wood v. Bartholomew* posed the question of whether disclosure was necessary when the local evidentiary rules would otherwise have excluded the evidence under most circumstances. 516 U.S. 1, 6 (1995). *But see generally* Conley v. United States, 323 F.3d 7 (1st Cir. 2003) (remanding the case for review when the prosecution withheld unfavorable *Brady* evidence); Conley v. United States, 332 F. Supp. 2d 302 (D. Mass. 2004) (ordering a new trial because the prosecution withheld the unfavorable polygraph results).

98. *Wood*, 516 U.S. at 5–6.

shielding the favorable results from the defendant did not affect the outcome at trial because the state's highest court generally rejected polygraph evidence anyway.[99]

Three years later, in *United States v. Scheffer*, the Court addressed Military Rule of Evidence 707 and held that per se bans on polygraph testimony do not necessarily violate a defendant's constitutional rights.[100] This decision was the Court's first—and only—decision directly addressing the admissibility of polygraph evidence.[101] In *Scheffer*, eight Justices agreed on two points: (1) the disputed reliability of polygraph results created a valid government interest in restricting their use;[102] and (2) the rule barring such evidence did not violate the defendant's constitutional due process rights.[103] Interestingly, only a four-Justice plurality-minority[104] rejected polygraph evidence as infringing on the jury's role in determining credibility.[105] Similarly, a majority could not conclude that litigating polygraph evidence would distract a jury from the guilt-innocence determination.

While *Scheffer* held rules barring polygraph evidence to be constitutional, the Court upheld a law that potentially permitted polygraph evidence to be admitted against defendants in *McKune v. Lile*.[106] The *Lile* case involved a state law that required submission to polygraph testing as a sentencing condition.[107] However, under this law, the polygraph session could be admissible against the inmate at subsequent criminal proceedings.[108] The *Lile* inmate had testified at trial and was thus vulnerable to prosecution for perjury for any conflicting statements made during the polygraph examinations that were part of his treatment.[109] Through this decision, the Supreme

99. *Id.* at 6 (citing Bartholomew v. Wood, 34 F.3d 870, 875 (9th Cir. 1994), which concluded that Washington state courts rejected polygraph evidence). Interestingly, this common-law treatment precedes the promulgation of the Federal Rules of Evidence. *See generally* State v. Woo, 527 P.2d 271 (Wash. 1974) (barring polygraph evidence).

100. *Scheffer IV*, 523 U.S. at 315.

101. *Wood v. Bartholomew* focused on the prosecution's failure to disclose the unfavorable polygraph results, not their ultimate admissibility. *Wood*, 516 U.S. at 8.

102. *Scheffer IV*, 523 U.S. at 309–12.

103. *Id.* at 315–17.

104. Four Justices supported Justice Kennedy's concurrence instead of these sections. *Id.* at 318. The ninth, Justice Stevens, dissented from the prevailing exclusion. He would have admitted the polygraph evidence. *Id.* at 320. Combining dissenting and concurring positions suggests that Justice Thomas wrote for a minority position, rather than a plurality.

105. *Id.* at 312–14.

106. McKune v. Lile, 536 U.S. 24, 47–48 (2002).

107. *Id.* at 30.

108. *Id.* at 32, 34–35.

109. *Id.*

Court again deferred to the local jurisdiction in how it chose to use polygraph evidence. In essence, the Supreme Court has upheld a rule that barred polygraph evidence and a law that would admit it.

F. Scheffer's *Wake*

The momentum in favor of polygraph evidence subsided after *Scheffer*. Multiple federal circuit courts cited the decision as approving of per se rules against polygraph admissibility as well as for the general proposition that polygraph evidence is unreliable.[110] The Seventh Circuit even misconstrued *Scheffer* to stand for the proposition that courts should exclude polygraph evidence because it infringes on the jury's responsibilities.[111]

Some circuit courts have interpreted *Scheffer* more narrowly in a manner favorable to admitting polygraph evidence.[112] For example, the Eighth Circuit cited *Scheffer* for the proposition that "categorical exclusions of evidence that 'significantly undermined fundamental elements of the defendant's case'" remained unconstitutional.[113] Against this background, in the summer of 2004, the New Mexico Supreme Court went further than any other U.S. jurisdiction had gone and admitted polygraph evidence at trial.[114]

G. New Mexico Opens its Floodgates

In *Lee v. Martinez*, the New Mexico Supreme Court applied a comprehensive *Daubert* analysis to admit polygraph evidence under New Mexico Rule of Evidence 702.[115] The state supreme court interpreted *Daubert* to contain three factors: testability; peer review and publication; and rate of error.[116] In this case, the court requested that a special judge conduct a thorough review of polygraph reliability and its admissibility in other jurisdictions.[117] Interestingly, the

110. *E.g.*, Castillo v. Johnson, 141 F.3d 218, 222 (5th Cir. 1998) (citing *Scheffer IV* for its assertion that polygraphs are unreliable).

111. United States v. Lea, 249 F.3d 632, 639 (7th Cir. 2001).

112. The First Circuit has largely avoided the issue of admissibility. *See, e.g.*, Conley v. United States, 332 F. Supp. 2d 302, 319 n.16 (D. Mass. 2004).

113. Newman v. Hopkins, 247 F.3d 848, 852–53 (8th Cir. 2001) (citing *Scheffer IV*). The Eighth Circuit has not declared per se exclusions unconstitutional. *Id.*

114. *See* discussion *infra* Part II.H.

115. Lee v. Martinez, 96 P.3d 291, 306 (N.M. 2004). Although New Mexico's Rule 707 provides special conditions for admitting polygraph evidence that are not present in other jurisdictions, it did not affect the *Lee* court's *Daubert* analysis. *Id.*

116. *See* discussion *supra* note 60.

117. *Lee*, 96 P.3d at 293–94.

special judge concluded that polygraph evidence was too unproven to present at trial.[118] Nevertheless, the New Mexico high court held that *Daubert*'s tenets mandated admission of a particular polygraph technique—the question control technique.[119]

For the testability factor, the court relied heavily on a 2003 report from the National Academy of Sciences ("NAS").[120] This report found polygraph evidence to be reliable in many circumstances.[121] More relevant for *Daubert* purposes, the court cited this reliability as creating the ability to test polygraph results.[122] As a result, the court held that polygraph evidence met the first *Daubert* prong, testability.[123]

The New Mexico Supreme Court next concluded that the particular polygraph technique met the second prong of *Daubert*, peer review and publication.[124] Again citing the NAS Report, the court noted the committee's identification of 102 separate studies that were "deemed of sufficient quality" for inclusion in the report.[125] The court reached this conclusion despite the committee's determination that many of these studies "do not generally reach the high levels of research quality desired in science."[126] Instead, the New Mexico justices focused on the publication of many of these studies in "good-quality, peer-reviewed journals."[127] Both the state and the defendant had submitted analyses about the accuracy of polygraph results, and the court focused on the publication of these differing analyses in scientific journals rather than on their conflicting scientific conclusions.[128]

Lastly, the New Mexico court concluded that the polygraph test in question satisfied the third prong of *Daubert* because it exhibited an acceptable rate of error.[129] The court cited the NAS Report for a

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118. *Id.* at 322 app.

119. *Id.* at 306.

120. The court described the body as "a private, non-profit society of distinguished scientists and engineers that advises the federal government on scientific and technical matters." *Id.* at 295.

121. *Id.* at 294 (citing NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, THE POLYGRAPH AND LIE DETECTION 13 (2003), *available at* http://www.nap.edu/openbook/0309084369/html [hereinafter NAS Report]).

122. *Lee*, 96 P.3d at 298, 306.

123. *Id.*

124. *Id.* at 300.

125. *Id.* (citing NAS Report, *supra* note 121, at 107).

126. *Lee*, 96 P.3d at 300 (citing NAS Report, *supra* note 121, at 108).

127. *Lee*, 96 P.3d at 300.

128. *Id.*

129. *Id.* at 301–02.

median 89 percent success rate in field studies.[130] Notably, the report had expressed concern over the extent to which real-world polygraph application would lead to false positives that would incriminate the innocent.[131]

In the months since *Lee v. Martinez*, only the Georgia Supreme Court and three state appellate courts have had the opportunity to cite the decision.[132] Accordingly, its impact on other jurisdictions will remain unclear for the next several years. Nonetheless, by relying on *Daubert*, the New Mexico Supreme Court analyzed a specific process grounded in studies rather than categorically dismissing the process's results. Accordingly, its thorough Rule 702 analysis provided a means for admitting polygraph results into evidence that other states and the federal courts may adopt.

III. ONE COMMON EVIDENTIARY ROADMAP WITH MULTIPLE ANALYTICAL DETOURS

Virtually all jurisdictions use the same basic evidentiary rules in assessing polygraphy's admissibility. Relevance, however, is not among the grounds for rejecting polygraph evidence. Reliable polygraph results comply with Rule 401's requirement that proffered evidence make a fact's existence more or less probable.[133] In addition, polygraph evidence avoids hearsay objections as long as a polygraph examiner's testimony is not offered to prove the truth of the matter asserted.[134]

Five significant evidentiary mechanisms have been used by courts to bar polygraph testimony. The Federal Rules of Evidence and their state equivalents pose the first four roadblocks, as courts have inappropriately warped most of these rules beyond their general application into serving as per se bans. Statutory per se bans against polygraph admissibility provide the fifth roadblock and offer what should be the most enduring basis for the exclusion of polygraph

130. *Id.* at 301 (citing NAS Report, *supra* note 121, at 125, wherein the interquartile range for all field studies was 71.1 to 99.9 percent).

131. *Lee*, 96 P.3d at 314 app.

132. Height v. State, 604 S.E.2d 796, 798 (Ga. 2004); State v. Shaneyfelt, 695 N.W.2d 506, 506 (Iowa Ct. App. 2005) (declining to admit unstipulated polygraph results); State v. Kerby, 118 P.3d 740, 749 (N.M. Ct. App. 2005); *In re* D.S., 828 N.E.2d 143, 150 (Ohio Ct. App. 2005).

133. FED. R. EVID. 401. This statement assumes, of course, that the evidence presented will correspond to an issue at trial.

134. 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 353.1 (2d ed. 1994); *see also* United States v. Ridling, 350 F. Supp. 90, 99 (E.D. Mich. 1972) (suggesting that then-proposed Rule 703 would permit a polygraph examiner testifying as an expert witness to use hearsay evidence in the opinion that he presented to the jury).

evidence. This Part will first examine Rule 702, which some courts use to bar polygraph evidence categorically rather than adopting a case-specific application. Second, it will explore Rule 403, which some courts misapply to turn a case-specific, catch-all provision into a per se ban. Third, this Part will examine Rule 608, which some courts misuse as a relevance bar. Fourth, this Part will address Rule 704(b), which bars all *mens rea* expert testimony, and which courts essentially construe as a statutory per se exclusion. Finally, this Part will conclude by briefly examining statutory per se rules barring *actus reus* and *mens rea* polygraph evidence and concluding that these statutory rules are the most appropriate means of excluding polygraph evidence.

A. Rule 702: Relying too Heavily on Scheffer

> 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[135]

Because it controls all scientific evidence, Rule 702 is the primary barrier to the admissibility of polygraph evidence. At least two commentators have argued that polygraph admissibility should turn solely on a court's application of Rule 702.[136] Unfortunately, many trial courts have inconsistently applied *Daubert*'s interpretation of Rule 702 while others overemphasize certain *Daubert* factors.[137] Furthermore, the appellate process does little to rectify the problem because the abuse of discretion standard makes overturning exclusionary rulings difficult, if not impossible.[138]

Today, courts addressing the admissibility of polygraph evidence generally focus on "reliability."[139] However, some treat "reliability" in a way that merely rearticulates *Frye*'s general acceptance standard. These courts effectively treat Rule 702 as a per se ban without any *Daubert* analysis.

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135. FED. R. EVID. 702.

136. 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, 1051, 1080–81 (1997) (focusing on the impropriety of using Rule 608 to exclude polygraph evidence); *see also* Henseler, *supra* note 12, at 1279 (arguing that *Daubert* does not compel the admission of polygraph evidence under Rule 702).

137. United States v. Henderson, 409 F.3d 1293, 1303 (11th Cir. 2005) (noting that reasonable judges can disagree over polygraph admissibility).

138. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142 (1999) (citing General Electric Co. v. Joiner, 522 U.S. 136, 143 (1997)).

139. *See, e.g.*, United States v. Lea, 249 F.3d 632, 639 (7th Cir. 2001).

Recent decisions cite *Scheffer*'s finding of disagreement within the scientific community as to polygraphy's reliability. The Court in *Scheffer* explained, "there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques."[140] The Eighth Circuit in *United States v. Rouse* emphasized this language in upholding a trial court's decision to exclude polygraph evidence.[141] The Eighth Circuit only mentioned *Daubert*; it neither quoted the text of Rule 702 nor articulated any *Daubert* factors.[142] In fact, only 326 words of the opinion's 2,757 words, or 11.8 percent, addressed the issue.[143] Conversely, 23.4 percent of the 7,400 words in the district court's opinion discussed this issue.[144] By contrast, the key appellant brief[145] devoted 3,053 of its 5,118 words, or 59.7 percent, to the polygraph issue; the shorter government reply devoted 867 of its 1391 words, or 62.3 percent, to this issue. The Eight Circuit panel, however, attempted to make the simple *Scheffer* citation dispositive of a more complicated issue. Other opinions similarly cite *Scheffer* as dispositive in their Rule 702 analysis.[146] *Scheffer*, however, only addressed a per se inadmissibility rule and thus never needed to conduct a *Daubert* analysis.[147] Accordingly, the lack of scientific consensus cited in *Scheffer* should not end the *Daubert* analysis.

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140. *See Scheffer IV*, 523 U.S. 303, 309 (1998). This polarization of opinion is reflected in both state and federal opinions. *See, e.g.*, United States v. Rouse, 410 F.3d 1005, 1011 n.3 (8th Cir. 2005) (noting the lack of consensus regarding reliability); State v. McHoney, 544 S.E.2d 30, 35 (S.C. 2001).

141. *Rouse*, 410 F.3d at 1011.

142. *Id.*

143. *Id.* The word count of the opinion body, including footnotes, was performed using a copy of the opinion obtained through Westlaw. Unfortunately, party briefs were not available to determine how much space the parties devoted to these arguments.

144. United States v. Rouse, 329 F. Supp. 2d 1077 (D.S.D. 2004).

145. Appellant's Brief, United States v. Rouse, 410 F. 3d 1005 (8th Cir. 2005) (No. 04-1470), *available at* http://www.ca8.uscourts.gov/briefs/04/06/appellant/041470_1br.pdf (last visited Mar. 31, 2006). Because the case had four appellants, four appellant briefs were filed. This brief refers to appellant Russell Hubbeling.

146. *See, e.g.*, State v. McHoney, 544 S.E.2d 30, 35 (S.C. 2001). The South Carolina Supreme Court, which has adopted *Daubert*, devoted minimal attention in its opinion to polygraph arguments under the state's equivalent of Rule 702. Alice B. Lustre, *Post-*Daubert *Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R.5th 453 (2005). Only 582 of the *McHoney* opinion's 4,199 words, or 13.9 percent, discussed polygraphy. 544 S.E.2d 30. The opinion did not delve into legal analysis but, unlike *Rouse*, restated South Carolina's Rule 702. *Id.* at 35 n.4. The party briefs were unavailable. *See also* United States v. Canter, 338 F. Supp. 2d 460, 463–64 (S.D.N.Y 2004) (citing *Scheffer IV* in support of the court's decision not to perform a *Daubert* analysis because the evidence was too unreliable).

147. *Scheffer IV*, 523 U.S. 303, 312 (1998). For further discussion of a prematurely halted *Daubert* analysis, see the discussion of *United States v. Lea* in Part III.B's Rule 403 analysis, *infra*.

Courts occasionally misapply *Daubert*'s key tenets in analyzing polygraph evidence. For example, the Ninth Circuit conducted a thorough *Daubert* analysis in *United States v. Cordoba*.[148] Its conclusion, however, focused on the uncertainty as to whether a polygraph instrument functioned correctly in a particular application. The court wrote, "The accuracy obtained in one situation or research study may not generalize to different situations or to different types of persons being tested."[149] Nonetheless, the Supreme Court has not focused solely on scientific results themselves. Instead, it has focused on the polygrapher's "principles and methodology"[150]—in essence, his technique—and analytical separation between the data and the opinion proffered[151]—in essence, the basis that provided for his conclusion. The *Kumho Tire* opinion further explains *Daubert*'s reliability requirement for any scientific methodology: "[T]he specific issue before the court was not the reasonableness *in general* of a tire expert's use of a visual and tactile inspection. . . . The relevant issue was whether the expert could reliably determine the cause of *this* tire's separation."[152] In *Cordoba*, however, the court held polygraphy to be unreliable in general, and it did not focus its analysis on the particular technique employed.[153] In light of post-*Daubert* case law, the *Cordoba* panel should have narrowed its *Daubert* analysis to the specific technique proffered[154] rather than rejecting polygraphy in general.

Even if the *Cordoba* court had addressed the specific technique rather than polygraphy in general, the decision reveals a fundamental limitation of *Daubert* and its progeny: how reliable must a specific technique be to pass muster? The *Cordoba* panel cited various studies that estimated polygraphy's general success rate to be between 50 and 87 percent as further evidence that the proffered polygraph results failed the *Daubert* test.[155] A court giving greater weight to the studies that found polygraphy to be 87 percent reliable could have decided the

148. United States v. Cordoba, 194 F.3d 1053, 1056–62 (9th Cir. 1999) [hereafter *Cordoba II*] (citing the same language from *Scheffer IV* but using that language only in support of the court's ultimate conclusion, rather than short-circuiting its *Daubert* analysis).

149. *Id.* at 1059 (quoting OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING 102 (1983), *available at* http://www.wws.princeton.edu /ota/disk3/1983/8320_n.html (last visited Mar. 31, 2006)).

150. Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579, 594–95 (1993).

151. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

152. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 15354 (1999).

153. *Sec Cordoba II*, 194 F.3d at 1058–62 (frequently referring to polygraph evidence as a whole rather than to the particular exam).

154. *Id.* at 1057–58 (elaborating on the controlled question technique).

155. *Cordoba II*, 194 F.3d at 1060 (citing *Schcffer IV*, 523 U.S. 303, 309 (1998)).

reliability question differently.[156] Without isolating a particular technique in the reliability discussion, however, different success rates create meaningless comparisons.

Although this Part focuses on how courts misapply Rule 702 and *Daubert* to exclude polygraph evidence, a *Daubert* analysis does not necessitate admission of polygraph evidence.[157] In *United States v. Gilliard*, for instance, the Eleventh Circuit properly excluded polygraph evidence after concluding that an examiner's particular technique lacked sufficient peer review.[158] Conceivably, additional peer review would allow the prosecution to present evidence to refute a particular test's validity. Any time a court cites to certain factors, or lack thereof, it leaves open the possibility of changing its decision in the future if those factors change. Accordingly, as researchers develop more evidence of a polygraph technique's reliability—which is certainly possible, if not likely—Rule 702 will be less of an obstacle to the admissibility of polygraph results.

B. Rule 403: An Alternative Balancing Test

> Although 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.[159]

Some courts misinterpret Rule 403 as presenting a per se bar to the admission of polygraph evidence. The advisory committee's note on Rule 403 recognizes that "certain circumstances call for the exclusion of evidence which is of unquestioned relevance."[160] By excluding such evidence, Rule 403 prevents the jury from making "its decision based on unfair considerations which do not relate to the issues in the case."[161] The rule imposes a fact-specific inquiry that requires these concerns to outweigh substantially the probative value

156. *See* discussion *supra* Part II.H regarding *Lee v. Martinez*, 96 P.3d 291 (N.M. 2004). *But see* Brown v. Darcy, 783 F.2d 1389, 1396–97 (9th Cir. 1986) ("Providing the jury with an all or nothing evaluation of credibility and then telling the jury that this evaluation has an eighty percent to ninety percent chance of being accurate if the polygraph was properly administered interferes with, rather than enhances, the deliberative process."). *Brown*'s bright-line test was subsequently overruled by *Daubert*. *Cordoba I*, 104 F.3d 225, 228 (1997).

157. *See, e.g.*, United States v. Gilliard, 133 F.3d 809, 814–15 (11th Cir. 1998) (providing a test-specific analysis).

158. *Id.* at 814.

159. FED. R. EVID. 403.

160. FED. R. EVID. 403 advisory committee's note.

161. ANTHONY BOCCHINO & DAVID A. SONENSHEIN, A PRACTICAL GUIDE TO FEDERAL EVIDENCE: OBJECTIONS, RESPONSES, RULES, AND PRACTICE COMMENTARY 34 (rev. 4th ed. 1999).

of proffered evidence.[162] Courts have held that this rule should be applied "only sparingly since the evidence excluded is concededly probative."[163] Thus, the rule does not govern entire classes of evidence. Instead, other rules govern class exclusions, subject to a case-specific Rule 403 analysis as a concluding step.[164] Although other rules may affect a Rule 403 analysis,[165] some courts start and end their polygraph admissibility analysis with Rule 403.

Sometimes, courts use Rule 403 to usurp *Daubert*. In *United States v. Lea*, for example, the defendant argued that the court should only consider Rule 403's listed considerations when assessing the admissibility of polygraph evidence.[166] The Seventh Circuit disagreed, however, holding that it could perform its analysis of polygraph evidence admissibility under *either* Rule 403 or under Rule 702. The panel cited Justice Thomas's lead opinion in *Scheffer*[167] for the notion that "the jury is the lie detector."[168] The court then properly noted that although reliability falls within a *Daubert* analysis, such concerns "may also become an integral part of a 403 inquiry."[169] The panel went even further and declared a Rule 403 analysis to be an alternative to the *Daubert* framework. The court noted that "a district court need not conduct a full *Daubert* analysis in order to determine the admissibility of standard polygraph evidence, and instead may examine the evidence under a Rule 403 framework."[170] Because the polygraph evidence in this case was excluded under Rule 403, the appellate panel did not even consider the defendant's argument that the trial court erred by not conducting a full *Daubert* analysis.[171] This omitted reasoning is particularly unusual given the tendency of

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162. FED. R. EVID. 403.

163. Spain v. Gallegos, 26 F.3d 439, 453 (3d Cir. 1994) (citing Blancha v. Raymark Indus., 972 F.2d 507, 516 (3d Cir. 1992) (internal citations omitted)).

164. For instance, Rule 702 would provide grounds for excluding an evidentiary category, such as polygraph evidence, if the science were insufficient. Polygraph evidence, however, would seem to have met this standard. *See* discussion *supra* Part III.A.

165. For instance, in *United States v. Castillo*, the district court used Rule 403 in further support of its excluding polygraph evidence under Rule 608(a). No. 96-CR-430, 1997 WL 83746, at *2 (E.D. Penn. Feb. 19, 1997) (order denying defendant's motion to admit polygraph evidence).

166. United States v. Lea, 249 F.3d 632, 639 (7th Cir. 2001).

167. The panel, however, declared it to be the court's majority opinion. *Id.* Only two circuit courts have specifically acknowledged that this aspect of *Scheffer IV* is, at most, a plurality opinion. *See* Morris v. Burnett, 319 F.3d 1254, 1275 (10th Cir. 2003); Miskel v. Karnes, 397 F.3d 446, 455 (6th Cir. 2005).

168. *Lea*, 249 F.3d at 639 (quoting *Scheffer IV*, 523 U.S. 303, 313 (1998)). The citation appears in Part II.B of the *Scheffer IV* opinion, to which only four Justices agreed.

169. *Lea*, 249 F.3d at 639. This notion is consistent with using Rule 403 in conjunction with a less generic, more category-specific rule.

170. *Id.* at 640 n.6.

171. *Id.*

intermediate appellate courts to address issues fully in order to avoid a higher court's later ordering them to do so.[172]

Interestingly, the *Lea* panel did not discuss the high threshold necessary to exclude evidence under Rule 403; instead it referenced Rule 403 as imposing a mere "balancing test."[173] In omitting this discussion, the court seems to have misinterpreted Rule 403 to have the same effect as Rule 702 and *Daubert*. *Daubert* is itself a consideration of many factors,[174] but its test is separate from that of Rule 403.[175] Unlike Rule 403, *Daubert* considerations do not presume the admission of evidence.[176] Rule 403 only excludes evidence when probative value of this evidence is "substantially outweighed" by other concerns.[177]

Even the pre-*Daubert* Eleventh Circuit overemphasized Rule 403's importance in *Piccinonna*.[178] Both the Eleventh Circuit and, later, the Ninth Circuit held that Rule 403 could exclude polygraph evidence by a simple balancing test of probative value against Rule 403's concerns.[179] The *Piccinonna* decision suggests that the judges remained reluctant to admit polygraph results into evidence despite finding that polygraphy had achieved general acceptance.[180]

The *Piccinonna* court's half-hearted grounds for refusing admission of polygraph evidence may reflect concerns about maintaining the traditional role of juries in assessing credibility. For non-stipulated admission, the court only permitted polygraph evidence to assist the fact-finder in assessing credibility; the defendant could not wield polygraphy as the final word on the charges against him.[181]

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172. The principle is logical and practical. If a higher court rejects that single notion, it will likely remand the case for the lower court to decide the appeal based on the remaining issues. If the lower court addresses each issue, however, then the higher court is less likely to remand the case for further review.

173. *Lea*, 249 F.3d. at 640.

174. Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579, 593–94 (1993).

175. United States v. Ramirez-Robles, 386 F.3d 1234, 1246 (9th Cir. 2004).

176. *See id.* at 1245–46 ("[A]ny kind of evidence may be excluded [under Rule 403] if its probative value will be substantially outweighed by its prejudicial impact. . . . *Daubert*, on the other hand, establishes a standard by which the court must evaluate expert testimony for its reliability *before* admitting it into court.") (emphasis added).

177. *Id.* at 1245.

178. *See* United States v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989) (applying Rule 403 as a catch-all).

179. *See id.*; United States v. Miller, 874 F.2d 1255, 1261–62 (9th Cir. 1989).

180. *See Piccinonna*, 885 F.2d at 1536 (emphasizing the narrow holding and the trial court's discretion for excluding polygraph evidence on other grounds).

181. *Id.* at 1536–37. No court has held that polygraph tests would be admissible as conclusive proof of innocence or guilt.

Thus, this reformulation of Rule 403 seems to incorporate a public policy desire to preserve the fact-finder's role at trial.

Some courts apply Rule 403 with such regularity as to nullify its effectiveness. For instance, the Sixth Circuit relied on Rule 403 in at least three criminal opinions to reject polygraph evidence without examining the possible effect that *Daubert* could have on this evidence.[182] Nonetheless, the Sixth Circuit still holds that polygraph evidence is not per se inadmissible.[183] Arguably, however, the Sixth Circuit applies Rule 403 with such frequency that it has transformed this rule from an option of last resort into the equivalent of a per se bar.

Although courts have overemphasized Rule 403 in barring polygraph evidence outright, they have paid little attention to Rule 403 in analyzing the defendant's evidentiary alternatives to presenting polygraph evidence. Nonetheless, these alternatives may be the most appropriate application of the rule. Most notably, the U.S. Supreme Court held in *Old Chief v. United States* that the prosecution must accept the defendant's stipulation to past criminal convictions under Rule 403.[184] Although this holding does not contribute directly to the determination of polygraph admissibility, the dicta of its supporting reasoning is useful here:

> [W]hen a court considers "whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may . . . be an appropriate factor." The point gets a reprise in the Notes to Rule 404(b), dealing with admissibility when a given evidentiary item has the dual nature of legitimate evidence of an element and illegitimate evidence of character: "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under 403." *Thus the notes leave no question that when Rule 403 confers discretion by providing that evidence "may" be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives.*[185]

Accordingly, the best application of Rule 403 to polygraph evidence may be through a recalculation of its probative value in light of other evidence. Courts can follow *Old Chief* in their Rule 403 analyses and determine the benefits a party may obtain if allowed to use polygraph

182. United States v. Thomas, 167 F.3d 299, 308 (6th Cir. 1999) (noting that the Sixtb Circuit "generally disfavor[s] admitting the results of polygraph examinations"). The Sixth Circuit has not considered *Daubert*'s impact on polygraph admissibility. *Id.* at 309 n.8 (citing United States v. Sherlin, 67 F.3d 1208, 1216 (6th Cir. 1995), and Conti v. Commissioner, 39 F.3d 658, 662–63 (6th Cir. 1994)).

183. United States v. Odom, 13 F.3d 949, 957 (6th Cir. 1994).

184. Old Cbief v. United States, 519 U.S. 172, 191–92 (1997).

185. *Id.* at 184–85 (emphasis added) (internal citations omitted).

results in light of the benefits possible through using alternative evidence. For instance, a court could exclude polygraph evidence in light of eyewitness testimony.

Rule 403 offers little to the evidentiary analysis when courts treat it as duplicative of Rule 702. Instead, courts should only use Rule 403 to exclude polygraph evidence under case-specific circumstances, such as redundancy of evidence or the risk of unfair prejudice in light of the evidence's proffered purpose.[186]

C. Rule 608: Credibility as a Relevance Link

> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.[187]

Although courts primarily focus on Rules 702 and 403 in considering whether to admit polygraph evidence, the few courts that have conducted a Rule 608 analysis have often concluded that the proffered polygraph results relate to the subject's character for truthfulness. As a result, these courts have effectively treated Rule 608 as a per se bar to admitting polygraph evidence.

Whether Rule 608 should even apply to polygraph results is open to debate. Under Rule 608(a), evidence supportive of a character for truthfulness is only permissible when the opposing side has already attacked a witness's character for truthfulness.[188] Under Rule 608(b), specific examples of an untruthful character are admissible

186. For instance, profferred polygraph evidence could skirt Rule 608 so closely as to make Rule 403's exclusion of it appropriate.

187. FED. R. EVID. 608.

188. FED. R. EVID. 608(a).

only on cross-examination.[189] Character-based testimony, however, is only one way of attacking credibility,[190] and a harsh cross-examination does not necessarily amount to a character-based attack.[191] Furthermore, a party offering polygraph evidence normally offers the results through the examiner's testimony for their asserted truth, particularly toward reinforcing a witness's credibility. Proponents rarely offer polygraph evidence to show good character, and therefore, Rule 608 should almost never apply.

Several sources suggest that Rule 608 should never apply when assessing the admissibility of polygraph evidence. In *Gipson*, the U.S. Court of Military Appeals held that although "polygraph evidence relates to the credibility of a certain statement, it does not relate to the declarant's character."[192] Similarly, Professors Edward Imwinkelried and James McCall have argued that polygraph testimony would not require the jury to make any of the character inferences that the drafters or Rule 608 feared.[193] They contend that polygraph evidence only reveals a particular act of truthfulness.[194] Accordingly, such evidence does not go toward proving a truthful character, and the worst significant inference that a juror might draw is that the accused is conscious of his innocence.[195]

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189. FED. R. EVID. 608(b).

190. *See, e.g.*, Lanham v. Commonwealth, 171 S.W.3d 14, 23 (Ky. 2005) (discussing application of Kentucky's analogue to Rule 608(a)); United States v. Bedonie, 913 F.2d 782, 802 (10th Cir. 1990) (discussing character for truthfulness as an example of an attack on witness credibility)

191. United States v. Thomas, 768 F.2d 611, 618 (5th Cir. 1985).

192. United States v. Gipson, 24 M.J. 246, 252 (C.M.A. 1987), *superseded by* MIL. R. EVID. 707. The court elaborated further in a footnote:

> For this reason, we reject the Government's alternate contention that Mil.R.Evid. 608(a)(2) and (b) bar use of polygraph evidence. Mil.R.Evid. 608(a)(2) allows admission of "evidence of truthful character . . . only after the character of the witness for truthfulness has been attacked." As the Government points out, appellant's character was not attacked. However, since the rule addresses character evidence, and polygraph evidence is not character evidence, the rule is inapposite. A like result disposes of the Government's Mil.R.Evid. 608(b) argument. That rule generally prohibits use of "extrinsic evidence," "other than conviction of crime," to prove "[s]pecific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness." Evidence of such conduct (usually misconduct) is adduced for the inferences that might be drawn about the witness' character for credibility. Again, since polygraph results do not reveal character, they are not barred by the rule.

Id. at 252 n.8. Of course, the *Scheffer* decision had the effect of overruling *Gipson*, but that decision only related to the constitutionality of a per se rule against polygraph evidence.

193. Imwinkelried & McCall, *supra* note 136, at 1074–79 (including diagram).

194. *Id.* at 1078.

195. *Id.* (suggesting that polygraph evidence has probative value under a "consciousness of innocence" theory).

Most courts that allow polygraph evidence to survive Rules 702 and 403 seemingly treat Rule 608 as a compromise position that practically limits the effect of those prior determinations to admit polygraph results. The Eleventh Circuit acting *en banc* in *Piccinonna* held that under Rule 608, polygraph evidence would only be admissible if a witness's character for truthfulness had already been called into question.[196] On remand, the trial court held that a single polygraph examination was insufficient to constitute general opinion evidence of character under Rule 608(a).[197] Similarly, the court in *Lee*—to date, the most accepting of polygraph evidence—considered whether Rule 608(b) applied.[198] The *Lee* court suggested that a special New Mexico evidentiary rule might have created an exception to Rule 608(b) for polygraph evidence.[199]

Whether polygraph evidence is admissible under Rule 608(a) turns on a court's definition of "opinion" evidence. In *United States v. Thomas*, the Fifth Circuit questioned the admissibility of a polygrapher's opinion testimony regarding his subject's truthfulness.[200] The trial court rejected the polygraph results, and the Fifth Circuit concluded that exclusion was appropriate because the prosecution had not challenged the subject's credibility.[201] The *Thomas* court cited a separate district court decision that effectively excluded all opinion testimony as to credibility under Rule 608(a) if this testimony did not address a defendant's character for truthfulness.[202] The Fifth Circuit held that the district court's

196. United States v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989). The court did not specify whether the evidence would be admissible under Rule 608(a) or (b). Presumably, Rule 608(a) would apply, because it permits opinion testimony in response to evidence showing a truthful character. Meanwhile, the four-person dissent took exception to admitting the evidence under Rule 608. *Id.* at 1537 (Johnson, J., dissenting).

197. United States v. Piccinonna, 729 F. Supp. 1336, 1338 (S.D. Fla. 1990). The Eleventh Circuit affirmed the decision without a published opinion. United States v. Piccinonna, 925 F.2d 1474 (11th Cir. 1991).

198. Lee v. Martinez, 96 P.3d 291, 294–95 (N.M. 2004).

199. *Id.*

200. 768 F.2d 611, 618–19 (5th Cir. 1985).

201. *Id.* at 618.

202. *Id.* (citing United States v. Earley, 505 F. Supp. 117, 120 (S.D. Iowa 1981)). *Earley* stated:

> A polygraphist expresses his opinion, but he expresses it as to whether the subject of the polygraph examination spoke truthfully or untruthfully on the specific occasion of the polygraph examination. The polygraphist does not express his opinion of the subject's "character for truthfulness or untruthfulness." Thus the opinion testimony of the polygraphist is not within the express limitation Rule 608(a) places on opinion testimony relative to the credibility of a witness.

505 F. Supp. at 120 (quoting FED R. EVID. 608(a)). Ironically, the district court stated that polygraph evidence does not address the truthfulness of the subject's character. Accordingly, its Rule 608(a) analysis should be unnecessary if not for a flawed opinion evidence requirement.

standard had been overly restrictive. Expert testimony has long been recognized as admissible to reinforce another witness's credibility;[203] using data to reconstruct an event offers another form of scientific evidence.[204] Conversely, the *Crumby* court, which admitted polygraph results, adopted a more permissive view of opinion testimony and held that a polygraph examiner could offer his expert opinion under Rule 608(a).[205]

The current case law is uncertain and even contradictory in its application of Rule 608 to polygraph results. This development is somewhat understandable because polygraph testimony is one area of expert opinion evidence that closely parallels evidence of a subject's truthful character under Rule 608(a). Likewise, polygraph results closely skirt the Rule 608(b) prohibition against specific acts of a truthful character. Accordingly, the true purpose of offering the expert polygraph testimony should be the focus of the court's decision. In the atypical event that a defendant presents a polygrapher's testimony to show character for truthfulness, then the court must analyze it within the parameters of Rule 608. Otherwise, the polygraph evidence—both the results and the polygrapher's opinion—should be admissible without any other prerequisites.

D. Rule 704(b): The Mens Rea *Exclusion*

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[206]

Rule 704(b) is arguably the most appropriate of the Federal Rules of Evidence to apply in barring polygraph results because it excludes all types of expert testimony on *mens rea* as a statutory per se ban. Nonetheless, Rule 704(b) infrequently bars an expert witness's polygraph testimony because polygraph evidence typically addresses *actus reus*. Polygraph examinations essentially pose the question: "Is the subject truthful in stating what his actions were?" At least one court has articulated the divide between *actus reus* and *mens rea* evidence through reference to the question's nature: mental state versus factual questions.[207]

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203. *See* discussion *supra* Part II.A.

204. *See supra* note 17.

205. United States v. Crumby, 895 F.Supp. 1354, 1364 (D. Ariz. 1995).

206. FED. R. EVID. 704(b).

207. United States v. Ramirez-Robles, 386 F.3d 1234, 1245 (9th Cir. 2004).

In two post-*Daubert* cases, the Ninth Circuit rejected polygraph evidence used to disprove the subject's intent to commit a crime.[208] In one of these cases, *United States v. Campos*, the appellate court upheld the district court's decision not to hold a *Daubert* hearing before excluding polygraph results.[209] As another appellate court noted, polygraph evidence is inherently at odds with Rule 704(b) for proving intent because the expert witness must conclude whether the subject-defendant possessed the requisite intent.[210]

Although the U.S. Supreme Court has not differentiated *actus reus* from *mens rea* polygraph evidence, Rule 704(b) is much like the per se bars that the Court has upheld. *Scheffer* addressed the constitutionality of a rule that barred an entire category of evidence.[211] The Court had already held that eliminating certain *mens rea* defenses was constitutionally permissible.[212] Accordingly, Rule 704(b) will likely remain the most appropriate of the general evidentiary roadblocks to polygraph evidence in coming years.

E. Per Se Inadmissibility: State-Specific Laws and Actus Reus

Per se inadmissibility of polygraph evidence comes in two forms: common law and statutory. Common law holdings can be overturned by a jurisdiction's statutory rules of evidence. Accordingly, Rules 702, 403, and 608 could compel the admission of polygraph

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208. United States v. Booth, 309 F.3d 566 (9th Cir. 2002); United States v. Campos, 217 F.3d 707 (9th Cir. 2000). *But see* United States v. Ridling, 350 F. Supp. 90, 93, 98 (E.D. Mich. 1972) (noting that intent requirements for a perjury offense were a good use of polygraph evidence (a pre-*Daubert* decision)).

209. *Campos*, 217 F.3d at 710.

210. United States v. Finley, 301 F.3d 1000, 1014–16 (9th Cir. 2002).

211. *Scheffer IV*, 523 U.S. 303, 305 (1998). The *Scheffer* decision is also interesting here because the Court upheld the evidentiary rule as applied to *mens rea* evidence. *Id.* at 306, 317. The *Scheffer* defendant sought admission of polygraph evidence to prove that he used narcotics without knowledge. He claimed that he awoke one morning in his car without any knowledge of ingesting drugs. *Scheffer II*, 44 M.J. at 443–44. His brief arguing against certiorari used his polygraph results as proof that he lacked the requisite intent. Brief In Opposition to Petition for a Writ of Certiorari at 2, United States v. Scheffer, 520 U.S. 1227 (1997) (No. 96-1133), *available at* 1997 WL 33484621 [hereafter *Scheffer III*] ("The only evidence admitted against respondent at his court-martial to prove his *wrongful and knowing* use of methamphetamine was the result of a random urinalysis test.") (emphasis added). *See* United States v. Pabon, 42 M.J. 404, 406 (C.A.A.F. 1995) (imposing a "knowingly" *mens rea* requirement on the statute). Thus, the defendant essentially contested *mens rea*. *See* Cheek v. United States, 498 U.S. 192, 203 (1991) (court could not instruct jury not to consider evidence of defendant's belief that he had no duty to file a tax return because he did not believe that wages were taxable income). Furthermore, the proffered testimony of the polygraph examiner would certainly appear to be conclusive as to the intent element. *See Finley*, 301 F.3d at 1014–16 (noting the inherent problem of such testimony under Rule 704(b)).

212. Montana v. Egelhoff, 518 U.S. 37, 51 (1996).

evidence despite any common law rules against polygraph admissibility, provided that the test methodology and evidentiary purpose fit within those rules.

When properly applied, the Federal Rules of Evidence do not provide a universal, absolute bar to polygraph admissibility. Therefore, jurisdictions that want polygraph evidence to be inadmissible at all times can only turn to statutory bars. Such per se exclusionary rules, like the Military Rule 707 highlighted in *Scheffer*, can only be overcome by constitutional protections.[213] Furthermore, the U.S. Supreme Court has yet to identify a situation where preventing the defendant from presenting polygraph testimony would violate his or her constitutional rights. In *Scheffer*, the Justices split on whether a defendant could ever trigger a constitutional right to admit polygraph evidence; they only agreed that *Scheffer*'s situation had not triggered one.[214] Therefore, implicating constitutional rights poses a high threshold to overcome evidentiary rules that bar polygraph evidence.

IV. HINGING ADMISSIBILITY ON CASE-SPECIFIC RELEVANCE

One solution to the repeated misapplications of the Federal Rules of Evidence cited in Part III is to limit the general evidentiary rules to their standard, case-specific applications and, if desired by the jurisdiction, to enact per se bans by statute. Each evidentiary rule could still bar polygraph evidence but only after a case-specific determination. Reliability concerns, as embodied in Rule 702, will always be the most critical bar to any scientific evidence. As time passes, however, researchers might refine a particular polygraph technique, leading to greater acceptance of it as reliable. In those instances, only a statutory rule will be able to bar the evidence.

Rule 702 should be the primary bar to polygraph evidence because polygraph evidence is ultimately scientific evidence. As always, courts must examine the specific technique and its particular application,[215] and courts should not interpret *Scheffer* to bar all polygraph evidence. The *Scheffer* opinion outlined legitimate policy reasons to exclude polygraph evidence but did so in upholding a promulgated rule rather than common law.[216]

The other evidentiary rules can be used to bar polygraph evidence, but few circumstances require their application. Rule 403

213. *See supra* notes 97–109 and accompanying text.

214. *See supra* notes 103–06 and accompanying text.

215. *See supra* text accompanying notes 140-156.

216. *See supra* notes 100–105 and accompanying text.

can bar polygraph evidence but only in relation to its proffered purpose. If, for instance, the evidence comes close to violating Rule 608(b), then Rule 403 provides appropriate grounds for barring the evidence. Furthermore, Rule 403 could be beneficial when the polygraph evidence would have an unfairly duplicative effect because of the availability of other witnesses who can reinforce the subject's credibility.[217] Similarly, Rule 608 can bar polygraph evidence in the infrequent event that its proponent offers it to show the subject's general character for truthfulness.[218] Meanwhile, Rule 704(b) can continue barring polygraph evidence in the instances where it pertains to *mens rea* because excluding a specific defense is constitutional.[219]

Although statutory per se bans offer the most enduring means to bar polygraph evidence, such statutes remain subject to constitutional limitations. The constitutional analysis to overcome a statutory bar far exceeds the scope of this Note, and numerous articles already address when a law so limits the defense's case as to violate the defendant's constitutional rights.[220] More importantly, the Federal Rules of Evidence do not include such a provision, so any analysis here would rely on predicting hypothetical statutory language.

V. SPECIFIC RULES TO CONTROL WHERE GENERAL ONES CANNOT

Opponents of polygraph evidence should safeguard their jurisdictions by imposing statutory per se bans rather than permitting courts to warp general evidentiary rules to the same end. Scientific re-creations, documents, and even eyewitness recollections carry risks of presenting inaccurate information to the fact-finder. Polygraph evidence is no different. However, under current evidentiary rules, juries can have the opportunity to consider such evidence. Furthermore, legislatures that fail to enact bans risk the possibility that new scientific research will strengthen arguments in favor of admitting polygraph evidence under *Daubert*. As a result of such scientific findings, Rule 702 would be less likely to act as a bar to the admission of polygraph evidence.

Although per se bans may still succumb to constitutional protections, the U.S. Supreme Court has set a high threshold to strike down such rules. For now, legislatures opposed to polygraph evidence

217. *See supra* text accompanying notes 184-185.

218. *See* discussion *supra* Part III.C.

219. *See* discussion *supra* Part III.D.

220. *See supra* note 53 (providing a short list of articles).

must decide whether to acquiesce to the uncertain—and ultimately, limited—protections of generic evidentiary rules or enact more concrete statutory bars. Regardless of the ultimate choice, courts must cease overextending evidentiary rules drafted for case-specific applications to serve as per se bars to polygraph evidence.

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