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Admissibility of Polygraph Evidence and Repressed Memory Evidence When Offered by the Accused

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SECTION IV: EVIDENCE OF INNOCENCE OFFERED BY THE CRIMINAL DEFENDANT, NOT SO FAST

Admissibility of Polygraph Evidence and Repressed Memory Evidence When Offered by the Accused

I. INTRODUCTION

One of the primary purposes of the American court system is to work diligently to bring about some semblance of fairness and justice to those who have been legally wronged. In order to make our system fair, our laws dictate that everyone is entitled to adequate counsel, and more importantly, the right to present a defense. In spite of these guarantees, it appears that defendants that attempt to use polygraph or repressed memory evidence are in some circumstances often precluded from presenting their defenses because of the purported inadequacy of the evidence compromising their cases.

With regard to polygraph evidence, the overall consensus of courts, including the United States Supreme Court, is that polygraph evidence is too unreliable to be admitted into evidence. Courts have generally decided that admission of this evidence will not serve to assist the finder of fact to come to a decision regarding guilt or innocence. Moreover, courts have expressed a distrust of such evidence because there has yet to be a consensus in the scientific community concerning its validity. The fears often expressed by the courts regarding the evidence include concern that: questions of reliability may confuse the jury; the jury might focus more on the polygraph evidence instead of on the issues at stake; and the jury might give undue weight to the evidence. Although these fears are valid, the courts appear to adopt a less fearful attitude towards polygraph evidence depending on the party whom the evidence benefits.

Although the outcome of the cases that are analyzed below may be coincidental, there is a strong indication that the admissibility of polygraph evidence is heavily dependent upon which party benefits from its admittance. As will be shown in this Comment, when the polygraph

evidence will benefit the defendant, the court usually rules against admissibility. In cases where the evidence benefits the prosecution, however, the norm is to admit the evidence. Furthermore, even if the evidence is admitted and this is later found to be error on appeal, if the evidence is against the defendant's interest, it is generally found to be "harmless error." Interestingly, the analyses of the reliability issue appears to be very similar in each case, despite the fact the difference in outcome. Unfortunately, the defendant is normally precluded from submitting evidence from a polygraph exam when that evidence assists to bolster his credibility or to prove his case.

In contrast to the defendant's plight with regard to polygraph evidence, another issue involving the reliability of controversial evidence concerns repressed memory testimony. With repressed memory, the differences in the outcomes are not as obvious. The reason for this difference may be that the theory of repressed memory is fairly new and still under a significant amount of scrutiny. Another reason may be that normally, the defendant is not the individual presenting repressed memory evidence (it is often the plaintiff who has "remembered" an offense against him). As a result, the case law concerning repressed memory of the defendant is not as extensive as that of polygraph evidence.

Ironically, the leading Supreme Court decision concerning this issue involved a defendant's repressed memory. The Court held that a defendant, who has no other practical method of presenting a defense, may use repressed memory testimony in his case in chief. Even after this ruling, however, several courts have decided against allowing repressed memory testimony. With repressed memory, it appears that for the defendant, as well as for the plaintiff, the admissibility of repressed memory evidence appears to be left purely to chance. Although there does not appear to be a pattern of rulings, as with polygraph evidence, admission of this evidence for the prosecution would nevertheless place the defendant in a very difficult decision for reasons discussed in this Comment.

Although our court system professes to be fair to all, in reality, "fairness" tends to be what is more favorable to the prosecution than to the defendant. In spite of the fact that the judgments in these cases appear to work against a defendant's ability to present his defense, this issue has yet to be raised in the courts. The following analysis of these cases presents the idea that if we are to truly have a system of "fairness." Perhaps this issue should be raised.

II. POLYGRAPH EVIDENCE

As discussed above, there are many issues concerning the topic of

polygraph evidence ranging from the reliability of the science of polygraphy to the constitutional right[1] of an accused individual to use whatever means acceptable to present a defense.[2] In spite of recent decisions, there are still several courts that continue to exercise a per se ban on the admissibility of polygraph evidence because of the controversies regarding the science and the lack of agreement among those in the field on the reliability of the results.[3]

This issue has caused a split among the various state and federal courts, while the military currently lives under a different and more absolute rule. The Supreme Court held in *United States v. Scheffer*[4] that the per se rule against admission of polygraph evidence in court martial proceedings did not violate the Fifth or Sixth Amendment rights of the accused to present a defense.[5] While this holding is not binding on state and federal courts, as the Court was careful not to do, it nevertheless may signal the direction of the Supreme Court should another case come forward on a similar issue. The Court, however, left several issues open and unanswered that this Comment will address.

This first major part of this Comment will discuss the science of polygraphy and how it works (or how it does not work, depending on the perspective), and the history of the issue of polygraph admissibility, beginning with *Frye v. United States*.[6] Following will be the supposed death of *Frye* in light of the more recent *Daubert v. Merrell Dow Pharmaceuticals*[7] holding and how the new *Daubert* standard has been applied to subsequent cases. The Comment then discusses *Scheffer*,[8] where the Supreme Court upheld the per se rule of inadmissibility of polygraph evidence in court-martial proceedings, and its implications and complications for future cases. The post-*Scheffer* case law discussed

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1. U.S. CONST. amend. VI. The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. *See* United States v. Posado, 57 F.3d 428 (5th Cir. 1995) (discussed *infra* Part II.G.); *see also* United States v. Piccinonna, 885 F.2d 1529, 1532 (11th Cir. 1989) (holding that polygraph evidence is no longer per se inadmissible); Wolfel v. Holbrook, 823 F.2d 970, 972 (6th Cir. 1987) (changing from the per se rule of inadmissibility to allow polygraph related evidence in circumstances where "it is relevant to the proof developed by the probative evidence").

3. *See* United States v. Messina, 131 F.3d 36 (2d Cir. 1997); *see also* State v. Porter, 698 A.2d 739 (Conn. 1997); Perkins v. State, 902 S.W.2d 88, 94-95 (Tex. Ct. App. 1995).

4. 523 U.S. 303 (1998).

5. *Id.* at 309.

6. 293 F. 1013 (D.C. Cir. 1923) (discussed, *infra,* in section II.C.).

7. 509 U.S. 579 (1993).

8. 523 U.S. 303 (1998).

will be analyzed from the perspective of the defendant to determine if the evidence is treated differently when proffered by the accused. This part of the Comment concludes with a discussion of the future of polygraph evidence and its potential influence on American jurisprudence.

A. *The Science of Polygraphy*

In the early development of the procedures that were designed to detect the truthfulness of the person being examined, tests consisted of measuring changes in the subject's systolic blood pressure.[9] Since then, advances in modern technology have led to the ability to detect and record, by the way of graphs (hence the term "polygraph"), changes in various bodily functions such as blood pressure and respiration.[10] In fact, there has been research indicating that, "when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety percent of the time."[11]

The polygraph test consists of several tools that are used to measure the examinee's physiological responses to questions. A polygraph instrument will collect physiological data from at least three of the systems in the human body.[12] Rubber tubes are often placed over the examinee's chest and abdominal area to record respiration.[13] Two metal plates, attached to the fingers, will record sweat gland activity.[14] The tools are used to record the responses on a chart that is later interpreted by the examiner. Other instruments that are used to detect the responses of the examinee include cardiographs, pneumographs, and cardio-cuffs to measure the heart rate, pulse of the examinee, and blood pressure.[15] While there is no doubt that the instruments used can accurately measure changes in the targeted responses, the doubt emerges when the possible reasons for the changes are interpreted.

The entire foundation of the science of polygraphy is grounded in the assumption that everyone reacts in a manner that causes them to

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9. *See Frye*, 293 F. at 1913.

10. "Modern instrumentation detects changes in the subject's blood pressure, pulse, thoracic and abdominal respiration, and galvanic skin response." United States v. Posado, 57 F.3d 428, 434 (5th Cir. 1995) (citing 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5169 n.7 (1978)).

11. *Id.* at 434 (citing Bennett v. City of Grand Prairie, 883 F.2d 400 (5th Cir. 1989)). "Even the most ardent polygraph detractors cite accuracy rates of 70 percent." *Id.* 434 n.7.

12. *See* American Polygraph Association, *The Validity and Reliability of Polygraph Testing*, (Nov. 17, 2000), *available at* http://www.polygraph.org/apa5.htm.

13. *Id.*

14. *Id.*

15. *See* Timothy B. Henseler, *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, 1251-52 (1997).

exhibit some physiological signs of distress or anxiety when they are saying something untrue.[16] This assumption alone is problematic, as it is not possible to ascertain whether every person reacts the same to lying. Furthermore, this foundation assumes that the examiner will be able to accurately distinguish between a lie and other possible reasons for the physiological changes.

The proponents of polygraph examinations admit that the responses the tests are designed to measure are triggered when an examinee knowingly makes a false statement.[17] There are several other factors, however, that have been presented as being possible causes for a change in the measured responses. For example, nervousness and frustration could just as easily cause a measurable change in the monitored body functions as lying would.[18] Because of these possibilities and uncertainties, some authorities argue that the main key to valid examination results will be the skill, experience, education, and integrity of the examiner in interpreting the results of the test, not just the test itself.[19] The reality behind the validity of the results seems best described by one author who states, "A properly tuned piano is an instrument upon which it is theoretically possible to play the 'Moonlight Sonanta,' but whether we get that or 'Chopsticks' depends upon who is seated at the keyboard."[20]

Another issue regarding the validity of polygraph examination is the idea that there have been proven countermeasures that could "fool" the test and, consequently, the examiner.[21] Examples of countermeasures that are used by individuals taking a polygraph include ingesting muscle relaxers or cutting themselves right before an exam in an inconspicuous place.[22] The muscle relaxers help individuals to calm themselves and can consequently prevent them from getting too excited when asked certain questions. The cut will be a distracting pain that will allow the examinee to focus on something else and prevent certain physiological responses. These countermeasures are not 100% effective, but there

16. Meyers v. Arcudi, 947 F. Supp. 581, 585-86 (D. Conn. 1996) (detailing the proffered traditional theory behind the polygraph examination).

17. Farmer v. City of Ft. Lauderdale, 427 So. 2d 187 (Fla. 1983).

18. *See id.* at 91. The *Farmer* court cited examples of frustration, surprise, pain, shame, and embarrassment, in addition to other responses that could explain the changes in an examinee's physical functions.

19. *Id.*; *see also* WRIGHT & GRAHAM, *supra* note 10, § 5169.

20. WRIGHT & GRAHAM, *supra* note 10, § 5169.

21. *See* W. Thomas Halbleib, Note, *United States v. Piccinonna: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System*, 80 KY. L. J. 225, 229 (1992). As stated by Halbleib, "Any poker player knows that if his mouth goes dry, his voice trembles, his fact blushes, and he begins to sweat every time he tries to bluff his way into a big pot, he probably will lose. Good players learn to control and manipulate these physiological signs to their benefit." *Id.*

22. United States v. Piccinonna, 885 F.2d 1529, 1538 n.3 (11th Cir. 1989).

are verified accounts where these, as well as others, have helped an examinee to "beat" the exam.[23]

Despite these possible countermeasures, the examiner is faced with having to judge whether the examinee is telling the truth by comparing the responses given to the questions against the reactions recorded in order to decide whether the respondent is being truthful. So as it appears, even the best designed test is still capable of being employed for an invalid result because of the significant role the examiner plays with the administration and interpretation of the exam.[24] The question is: does the judiciary want to entrust what could be a significant piece of the evidentiary puzzle to an arguably infallible machine, but a fallible interpreter of the machine's information? While this question continues to surface, courts have begun to steer away from the traditional per se rule of inadmissibility and have begun opening the door for possible inclusion based on the tests that are becoming more standardized and widely used in government and employment arenas.

The recent admissibility of the tests seems to beg several questions. Just because the tests are being used, does that necessarily mean that the results are more often than not accurate? And, if the results are accurate, to what extent should they be allowed as evidence? Also, are the courts willing to risk the idea that a machine will effectively become a major factor in determining the existence of liberty for accused individuals? In accordance with the varied opinions of many scholars, the opinions of the admissibility of polygraph evidence have also varied in the decisions of the courts.

B. *Polygraphy According to the Examiners*

According to the American Polygraph Association ("APA"), the word "polygraph" literally means "many writings." This refers to the manner in which selected physiological activities are simultaneously recorded.[25] The APA reports that there is significant polygraph evidence that supports the high validity of the examination.[26] In fact, the APA reports that the accuracy of polygraph testing (when conducted according to APA guildelines) ranges from eighty to ninety-eight percent.[27] The APA acknowledges that this range is attributable to the different training and requirements of polygraphers, in addition to other

23. *Id.*

24. *See id.* at 1540 (Johnson, J., concurring in part and dissenting in part) (citing research that indicates that the experience of the examiner as well as the procedure used affects the accuracy of the test results).

25. *See* American Polygraph Association, *supra* note 12.

26. *Id.*

27. *Id.*

varying elements that will be discussed in this Comment.[28]

The actual testing guidelines of the APA, in abbreviated form, include the following. During a pre-test phase of the examination, the examiner completes the necessary paperwork and explains how the test will be administered to the examinee.[29] A chart collection phase where the examiner administers and collects a number of polygraph charts then follows.[30] There are certain specific questions that that examiners are not to ask during an examination. For example, during an employment examination, the examiner should not ask about religious beliefs or political beliefs.[31] After the chart collection phase, the examiner then analyzes the charts and renders an opinion as to the truthfulness of the examinee. When appropriate, the examiner will ask the examinee to present an explanation as to why he reacted in a certain manner.[32]

The APA claims that the reason its accuracy figures vary from the figures quoted by critics of polygraph testing is because critics often include inconclusive tests in their error determinations, while the APA does not.[33] With the issue of errors in polygraph examinations, the APA admits that the errors may be caused by the examiner's failure to properly prepare the examinee.[34] In an effort to combat potential errors, the APA encourages and teaches the use of various protective procedures. These procedures include, but are not limited to, an assessment of the examinee's emotional state, specialized tests to "identify the overly responsive examinee and to calm the overly nervous," and quality control review.[35]

The APA admits to the existing problems with polygraph examination and reports to employ continuous methods to reduce the amount of problems and the extent of uncertainty regarding the polygraph. The APA, however, stands completely behind polygraph testing and its validity, as long as the examiner is certified according to the APA criteria and prerequisites. The information gathered also reported that the admissibility of the polygraph evidence varies from state to state,[36] but has been allowed in numerous cases in recent history.[37]

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* The APA does not provide a detailed explanation of "specialized tests" or the elements of a quality control review in the information available to the public.
36. Although the information from the APA was gathered in November of 2000, there is no mention of *Scheffer* on the website.
37. American Polygraph Association, *supra* note 12. "Polygraph results (or

C. *Admissibility of Polygraph Evidence Beginning with Frye*

The first substantial case that was determinative of the issue of polygraph admissibility was *Frye v. United States*.[38] In *Frye*, the trial court refused to admit the results of a systolic blood pressure test.[39] The *Frye* court was given the task of determining whether to allow the use of the evidence from the test to be admitted by the criminal defendant in order to demonstrate his innocence in a murder trial.[40] The court used the "general acceptance" standard in order to determine the admissibility of scientific or technical evidence in the context of the science of polygraphy.[41] The test required the proponent of the evidence to show that the science was generally accepted in the relevant scientific community from which it emerged.[42] Using this theory, the *Frye* court decided that the systolic blood pressure test did not embody a scientific principle that was sufficiently reliable to allow the evidence to be admitted.

After *Frye*, many courts used the holding to determine the admissibility of most evidence that fell under the scientific or technical umbrella, but that was not widely known or accepted.[43] There were decisions, however, that moved away from the *Frye* and considered the facts of each case on the individual merits as opposed to the per se rule of inadmissibility of polygraph evidence enunciated in *Frye*.[44] In *Piccinonna*, the Eleventh Circuit rejected the *Frye* rule and rendered its own test for determining the admissibility of polygraph evidence. The *Piccinonna* court reviewed the reasons other courts gave for not wanting to admit polygraph evidence and concluded that because of the advances in the science of polygraphy, the examination had become accepted "as a useful and reliable scientific tool."[45]

D. *The Beginning of the Erosion of Frye—The Piccinonna Decision*

In *Piccinonna*, the Eleventh Circuit rejected the *Frye* rule and rendered its own test for determining the admissibility of polygraph evidence. The *Piccinonna* court reviewed the reasons other courts gave for

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psychophysiological detection of deception examinations) are admissible in some federal circuits and some states. More often, such evidence is admissible where the parties have agreed to their admissibility before the examination given, under terms of a stipulation." *Id.* (citing Schmerber v. California, 384 U.S. 757 (1966)).

38. 29 F. 1013 (D.C. Cir. 1923).

39. *Id.* at 1014. This blood pressure test was considered a crude predecessor to the polygraph examination of today.

40. *Id.* at 1013.

41. *Id.* at 1014.

42. *Id.*

43. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 303 (1998).

44. *See, e.g.*, United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989).

45. *Id.* at 1535.

not wanting to admit polygraph evidence and concluded, that because of the advances in the science of polygraphy, the examination had become accepted "as a useful and reliable scientific tool."[46] Instead of a per se rule, the *Piccinonna* court decided that courts would determine ad hoc the need of the relevant evidence in comparison to the possibility of the unfair prejudice that may result from its use at trial.[47] The court went on to further dismantle *Frye* by giving examples of the permissible instances of polygraph evidence.[48] These involved the advance stipulation between the parties before polygraph evidence would be admitted and the use of the evidence to impeach or corroborate a witness's testimony.[49] Regarding the first instance, the court stated that if the parties agreed in advance to the testing and what will be admissible from the test, the court might allow the evidence.[50]

The Eleventh Circuit did not just stop at allowing polygraph evidence in the event of a stipulation. A second permissible use would be for the impeachment or corroboration of testimony if three requisite conditions are satisfied.[51] First, the party offering the evidence must provide notice to the opposing party that it intends to offer expert testimony regarding polygraph examination.[52] Second, the opposing party must have the opportunity to conduct its own examination.[53] Third, Federal Rule of Evidence 608[54] would govern all determinations as to whether the evidence will actually impeach or corroborate the testimony of the witness.[55] Even if these three prerequisites are satisfied, the decision whether to admit polygraph evidence still remains within the discretion of the trial judge.[56]

E. *The Death of Frye at the Hand of Daubert?*

After the Eleventh Circuit in *Piccinonna* began the erosion of *Frye* by introducing its own test for the possible admissibility of polygraph evidence, the Supreme Court decided *Daubert* and held that Federal

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 1536.
50. *Id.* "[C]ircumstances must indicate that the parties agree on material matters such as the manner in which the test is the conducted, nature of the questions asked, and the identity of the examiner administering the test."
51. *Id.*
52. *Id.*
53. *Id.*
54. "[E]vidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." FED. R. EVID. 608(a)(2).
55. *Piccinonna*, 885 F.2d at 1536.
56. *Id.*

Rule of Evidence 702[57] overruled *Frye* with regard to the admissibility of expert testimony, and, consequently, the admissibility of polygraph evidence.[58] The Court stated that when there is a proffer of expert testimony, it is the role of the trial judge to determine if, under Federal Rule of Evidence 104(a),[59] the expert is testifying to what is: (1) scientific knowledge; and (2) what will be useful to help the fact finder in understanding or determining a fact that is in issue.[60]

The Court continued by presenting four factors that might be helpful for the trial judge in determining whether the evidence being proffered is scientifically valid.[61] The factors suggested include: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review; (3) the known or potential rate of error of the particular scientific technique; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique has gained general acceptance within the relevant scientific community.[62] The emphasis behind these suggested guidelines was that the trial judge had a "gatekeeping" job that was to ensure the reliability and relevancy of the information being offered.[63] This gatekeeping role was designed to give sufficient discretion to the trial judge in order to avoid problems for the fact finder in subsequent proceedings.[64]

F. *Admissibility of Polygraphy Under Daubert*

After *Daubert*, the issue of the admissibility of polygraphy can now be analyzed using the suggested factors enunciated by the Supreme Court. The first factor, whether the theory has been tested, problematically begins the analysis. There are three main types of techniques used for polygraph examinations,[65] and the scientific community has been

57. FED. R. EVID. 702 provides: "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."

58. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 303, 587-89 (1993).

59. "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).

60. *Daubert*, 509 U.S. at 592.

61. *Id.* at 593.

62. *Id.* at 593-94.

63. *Id.* at 597.

64. *Id.*

65. *See* United States v. Gilliard, 133 F.3d 809, 813 (11th Cir. 1998). The three main types of polygraph examinations are the "Relevant/Irrelevant Technique," the "Concealed or Guilty Knowledge Technique," and the "Control Question Technique." *Id.* The Relevant/Irrelevant Technique is a test where the examiner asks questions that are both relevant and irrelevant to the

unable to determine which, if any, is the most reliable to use.[66] In addition, the physiological responses being measured, as well as the countermeasures that may be employed, have led to problems with determining the consistent reliability of the tests.[67]

The second prong of the analysis under *Daubert*, (i.e. whether the technique has been subjected to peer review), seeks to uncover whether well-known members of the scientific community have commented on the reliability of the technique of polygraphy. Because of the substantial controversy surrounding the issue, this is one prong of the *Daubert* test that has no problem being met because there have been several articles and publications on the subject of polygraphy.[68] There is one problem with this prong — the mere fact that something has been written about a technique theory does not necessarily mean that the technique or theory is reliable. How long did the "scholars" of yesterday write and comment about the world being flat?

The third and fourth prongs of *Daubert* are directly related: the known error rate of the technique and the standard operating procedure. These factors are also difficult issues to address. There have been various studies conducted that have reported error rates with varying results.[69] To further complicate matters, error rates for polygraphy involve false positives and false negatives.[70] A false positive is an error that indicates that a subject is lying when he is actually being truthful. A

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issue at hand. *Id.* The theory is that the examinee will have a different response that will be associated with lying. *Id.* The scientific community has largely rejected this technique. *Id.* The Concealed or Guilty Knowledge Technique is a test where the examiner tests the examinee's response to information that only the perpetrator of the crime would know. *Id.* The theory behind this technique is that a guilty examinee will recognize the question that could incriminate him and will therefore have a psychophysiological response to that item. *Id.* The Control Question Technique is where the examiner asks both questions relevant to the purpose of the examination and control questions. *Id.* The control questions involve issues unrelated to the examination and depending on the technique used, the examinee will either be tricked or directed to give a false answer to each of the control questions. *Id.* The theory is that the innocent examinee will have a stronger physiological response to his false responses to the control questions as compared to his truthful answers where he denies the wrongdoing. *Id.*

66. *See* United States v. Pitner, 969 F. Supp. 1246, 1251 (W.D. Wash. 1997) (stating that the American Medical Association has questioned the reliability of polygraph examinations).

67. *See* David Gallai, Note, *Polygraph Evidence in Federal Courts: Should It Be Admissible*, 36 AM. CRIM. L. REV. 87, 94 n.45 (1999) (citing to Lisa Davis's attribution to Leonard Saxe, a lead analyst of a study of polygraphs done at Congress's request, the opinion that "the polygraph simply shows whether a question makes someone anxious, and there are a thousand and one reasons that explain why a person hooked up to a polygraph might become anxious.").

68. *See generally Pitner*, 969 F. Supp. at 1250-51 (explaining that polygraphy had been the subject of extensive peer review and publications).

69. *See* Allison Kornet, *The Truth About Lying: Has Lying Gotten a Bad Rap?*, PSYCHOLOGY TODAY, May 15, 1997, at 52, 56. "The best-controlled research suggests that lie detectors err at a rate anywhere from 25 to 75 percent." *Id.*

70. *See* United States v. Galbreth, 908 F. Supp 877, 885 (D. N.M. 1995).

false negative indicates a subject is being truthful when he is lying. Studies have shown that there are more false positives than there are false negatives.[71] The existence of the error rate can be a result of a combination of factors, such as the ambiguity of the questions asked, the experience of the examiner, the accuracy of the testing mechanism itself, etc.[72]

In terms of standard polygraph operating procedures, quite simply, there are none.[73] In addition, there are varied methods for training examiners and for administering examinations. In fact, some states do not even require licenses in order to become a polygraph examiner.[74] There are also varied schools of thought with regard to the type of pre-interview and post-interview questions that should be used to ensure accurate results.[75] In light of the significant role that the examiner has in interpreting the validity of the results, this lack of uniformity seems to be more than a little problematic.

The last prong of *Daubert* concerns the general acceptance of the technique in the scientific community. The first question with regard to this prong is, who would be considered a part of the relevant community? Further, if two substantial organizations within that community are at odds with the notion of acceptance,[76] which organization's opinion carries the most weight? Does the mere fact that there is a difference of opinion indicate there is no "general acceptance" in the scientific community? Because there are different techniques for polygraphy, there has been no unified acceptance of the science of polygraphy at all. There are some experts who assert that the evidence of polygraphy is reliable, while others in the field feel equally strong about the fact that the reliability does not exist.[77] Based on this conflict, it is unreasonable to propose that the science of polygraphy actually has achieved "general acceptance" within the scientific community. As a result, this prong of the *Daubert* test, lends to the movement toward inadmissibility.

G. *Applying Daubert—Just Say No*

After the Supreme Court enunciated the standards of *Daubert*, sev-

71. *Id.*

72. Gallai, *supra* note 67, at 98.

73. *Id.* at 99.

74. *Id.*

75. *Id.*

76. *See* Charles Robert Honts & Bruce D. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D. L. REV. 987, 992 (1995) (stating the Society of Psychophysiological Research reports that two thirds of their members felt that polygraph results were reliable). The American Medical Association has openly questioned the reliability of the examinations. *See supra* note 66.

77. *See generally* Honts & Quick, *supra* note 76.

eral circuits have used the case to continue to refuse the admissibility of polygraph evidence. In *United States v. Wright*,[78] a defendant requested a polygraph examination and then stipulated to its admissibility, but the court decided to exclude the results of the polygraph. *Wright* involved a fire that destroyed a Wal-Mart department store.[79] The defendant hired legal counsel who encouraged him to take a polygraph examination in an effort to prove his innocence.[80] The defendant failed the test and the prosecution sought to use the results as an attack on the defendant's credibility.[81]

The court noted that it had concerns about the reliability of the polygraph examination and the potential prejudicial effect that the results might have on the jury.[82] The court used the *Daubert* prong relating to the lack of consensus on the reliability of polygraphy in the scientific community to reject the evidence, in spite of the stipulation and advances in the field.[83] The court also noted, "The Eleventh Circuit continues to consider polygraphy as 'a developing and inexact science' and has noted that polygraph evidence should not be used in all situations where 'more proven types of expert testimony are allowed.'"[84] Interestingly, the court observed that another reason for its decision was the fact that the attorney representing the defendant was limited in his criminal experience.[85] This statement seems to indicate that had the attorney been more experienced, he would have either: (1) not stipulated to the admission of such evidence; or (2) not attempted to rely upon such questionable evidence at all.

In *United States v. Gilliard*, the Eleventh Circuit followed suit by deciding to uphold a district court's decision that the evidence offered from the polygraph evidence was inadmissible.[86] *Gilliard* concerned allegations of false Medicare claims made by the defendant, a chief executive officer of a medical diagnostic center.[87] Gilliard agreed to submit to a polygraph examination. The results of the examination indicated that Gilliard was being truthful when he indicated he denied any

78. 22 F. Supp. 2d 751 (W.D. Tenn. 1998).

79. *Id.* at 753.

80. *Id.*

81. *Id.*

82. *Id.* at 755.

83. *Id.* at 754.

84. *Id.* at 755 (citing United States v. Piccinonna, 885 F.2d 1529, 1535 (11th Cir. 1989)).

85. *Id.*

86. United States v. Gilliard, 133 F.3d 809, 812 (11th Cir. 1998) (citing *Piccinonna*, 885 F.2d at 1535) ("polygraphy [is] a developing and inexact science" and has noted that polygraph evidence should not be used in all situations where "more proven types of expert testimony are allowed").

87. *Id.* at 811.

wrongdoing.[88] After his initial conviction, Gilliard appealed, citing that the lower court should have admitted the polygraph results into evidence. The lower court decided that the evidence was inadmissible and cited the danger of unfair prejudice, confusion of the issues, and misleading the jury to support its finding.[89] The *Gilliard* court, citing *Daubert*, stated that it was obligated to review "a district court's decision to admit or exclude expert testimony under Rule 702 . . . for abuse of discretion."[90] Under this standard or review, the only grounds to reverse a district court's decision would be if the court stepped outside of its boundaries when making its decision. Because of the specifics outlined in *Daubert* regarding the "gatekeeping" role of judges, it is highly unlikely that reversal of such decisions involving polygraph evidence would be commonplace with this standard of appellate review.

In *Messina*, a Second Circuit case, the district court refused to allow polygraph evidence presented by the defendant.[91] The facts of the case involved a disbarred lawyer, Messina, who presented the results of a "passed" polygraph test at his sentencing hearing.[92] The polygrapher was questioned extensively at the sentencing hearing, detailing the methods used during the examination and possible error rate with regard to the results.[93] In spite of this, the district court stated, "It was interesting to meet [the polygrapher] and hear his views. I still don't believe—let me put it this way, I believe that the rule of law which excludes polygraphs is the right one."[94]

Despite the *Daubert* holding, other courts have used *Daubert* to move in a direction of admissibility for polygraphy. In *United States v. Posado*, the Fifth Circuit stated that the per se rule against the admissibility of polygraph evidence is no longer viable.[95] The *Posado* court did not hold that the polygraph examinations were valid or that they will always assist the trier of fact. The holding was only that the per se rule of inadmissibility was removed.[96] The Ninth Circuit has also lifted the per se rule as well by holding that district courts must use a balancing test instead of the absolute rule of inadmissibility.[97] Interestingly, the court held that not only did *Daubert* overrule the per se rule against

88. *Id.*
89. *See id.*
90. *Id.* at 812.
91. *See* United States v. Messina, 131 F.3d 36 (2d Cir. 1997).
92. *Id.* at 41-42.
93. *Id.*
94. *Id.* at 42.
95. 57 F.3d 428, 434 (5th Cir. 1995).
96. *Id.*
97. United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997). The court stated: "District courts must strike the appropriate balance between admitting reliable, helpful expert testimony and

admission of stipulated evidence, it also removed the per se rule against non-stipulated evidence.[98]

H. *Enter Scheffer Exit Daubert Stage Left*

In 1998, the United States Supreme Court decided *Scheffer*.[99] In *Scheffer*, the Court held that the per se rule against the admission of polygraph evidence in the context of court martial proceedings was still good law and did not violate the Constitution.[100] While the holding in *Scheffer* is not binding on state and federal courts due to the Supreme Court's intentional limiting of the holding to court martial proceedings,[101] it is fairly safe to predict how the Court would rule on a similar case arising from a state or federal jurisdiction.

The opinion in *Scheffer* was restricted to the per se application of Military Rule of Evidence 707, which makes polygraph evidence inadmissible.[102] The issue in the case involved the admissibility of evidence from a polygraph examination that indicated that the defendant was telling the truth about the allegations. Edward Scheffer volunteered as an informant on drug investigation for the Air Force Office of Special Investigations.[103] He was advised that there would be periodic drug testing and polygraph examinations.[104] On one occasion, Scheffer provided a urine sample and then agreed to take a polygraph test.[105] The test indicated no deception when the respondent denied using drugs since joining the Air Force, but the urinalysis results revealed the presence of methamphetamine.[106] Scheffer wanted to submit the polygraph evidence in order to support his testimony.[107] The judge denied the motion on the basis of Military Rule of Evidence 707.[108] Scheffer was con-

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excluding misleading or confusing testimony to achieve the flexible approach outlined in *Daubert*." *Id.* at 228 (citing United States v. Rincon, 28 F.3d 921, 922 (9th Cir. 1994)).

98. *Id.* at 228.

99. 523 U.S. 303 (1998).

100. *Id.* at 304.

101. The formation of the issue, according to the Court, evidenced the narrowness of the decision the Court was making. "This case presents the question whether Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings, unconstitutionally abridges the right of accused members of the military to present a defense." *Id.* at 305.

102. Military Rule of Evidence 707 states, 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."

103. *Scheffer*, 523 U.S. at 305.

104. *Id.*

105. *Id.* at 306.

106. *Id.*

107. *Id.*

108. *Id.*

victed and sentenced.[109]

The Air Force Court of Criminal Appeals affirmed explaining that Rule 707 "[did] not arbitrarily limit the ability of [the accused] to present reliable evidence."[110] The United States Court of Appeals for the Armed Forces reversed, holding that a per se exclusion violates an accused Sixth Amendment right.[111] The Supreme Court granted certiorari and reversed the appellate court. The Court cited three main legitimate interests that must be met in order to ensure that the trier of fact is presented with reliable evidence.[112] The interests developed by the Court included the reliability interest, the role of the jury, and the possibility of collateral issues that may distract the jury from its central function of determining guilt or innocence.[113]

With the reliability interest, the Court looked specifically to the lack of scientific consensus on the issue of polygraph admissibility. The Court cited the varied holdings from state and federal cases as proof of the lack of reliability.[114] It was noted that after *Daubert*, expert testimony (including that of polygraph evidence) could be admitted if the district court deemed it both relevant and reliable.[115] The Court reasoned that Rule 707 was rational and proportional as a means of barring unreliable evidence.[116] Therefore, according to the Court, the inadmissibility of the evidence in terms of the reliability interest does not offend the notion of due process.[117]

The second interest that the Court mentioned involved the presentation of the jury's core function of making credibility determinations in criminal trials.[118] The Court opined that the use of polygraph evidence would take away the jury's role in determining whether the accused is actually being truthful. When presented with evidence from the polygraph machine, jurors may give too much credit to the reliability or

109. *Id.*

110. *Id.* at 307.

111. *Id.* ("[A] per se exclusion of polygraph evidence offered by an accused to rebut a attack on his credibility . . . violates his Sixth Amendment right to present a defense.").

112. *Id.* at 309.

113. *Id.*

114. *Id.* at 311.

115. *Id.* at 311 n.7.

116. *Id.* at 312. "Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams."

117. *Id.* at 309.

118. *Id.* (citing United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)). "A fundamental premise of our criminal trial system is that the jury is the lie detector."

infallibility of the device.[119] Furthermore, the judge is often unable to determine whether the expert is likely to unduly influence the jury.[120] Based on these factors, the Court determined that the question of usurping the jury's role was sufficient to survive the issue of admissibility.

Finally, the Court observed that Rule 707 avoided collateral litigation that could serve to distract the jury.[121] The Court noted that each case would involve issues such as the credibility and expertise of the examiner, the accuracy of the testing instruments, the specific type of test used and its reliability within the community, and the possibility of countermeasures used.[122] Because the Court reasoned that this would have to be done for each and every case, this procedure would be time-consuming and would take the jury's minds off of the actual matter at hand—the guilt or innocence of the accused.

The Court noted that prior cases addressing this issue were distinguishable because in each case the exclusion of evidence that was declared unconstitutional significantly undermined fundamental elements of the accused's defense.[123] It was explained that the reason the cases do not invalidate Rule 707 was because the trial court in this case was allowed to hear all of the relevant details of the case and Rule 707 did not prevent the defendant from including any factual evidence.[124] Based on the combination of these reasons, the Court found that Rule 707 did not violate any rights of the accused and therefore should remain intact.

The problem with the *Scheffer* ruling is that the Court says that the accused was allowed to introduce the factual evidence regarding the case. In actuality, the fact that the accused was not allowed to present evidence that he did not "intentionally ingest" the methamphetamine was a significant portion of the case that the trial court refused to allow

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119. *Id.* at 314. "The aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt."

120. *Id.*

121. *Id.* "Rule 707 [avoids] litigation over issues other than the guilt or innocence of the accused. Such collateral litigation prolongs criminal trials and threatens to distract the jury form its central function of determining guilt or innocence."

122. *Id.*

123. *Id.* at 315. The precedents that were used by the Court were *Rock v. Arkansas*, 483 U.S. 44 (1987), *Washington v. Texas*, 388 U.S. 14 (1967), and *Chambers v. Mississippi*, 410 U.S. 284 (1973). In each of these cases, the Court found that because the accused was denied a fundamental element of his defense, the exclusion of the evidence was unconstitutional. In *Rock*, the Court said that the rule of per se inadmissibility deprived the jury of the testimony of the only witness who was at the scene with firsthand knowledge of the facts. *Rock*, 483 U.S. at 57. In *Washington*, the Court said that the state arbitrarily denied the accused the right to put a witness on the stand that was physically and mentally capable of testifying to events that he had permanently observed. *Washington*, 388 U.S. at 23. In *Chambers*, the court found that the voucher rule was a due process violation. *Chambers*, 410 U.S. at 302.

124. *Scheffer*, 523 U.S. at 315.

the jury to hear. Therefore, there *was* an impediment for the accused to defend himself.

The dissent by Justice Stevens agreed and noted that the per se rule excluding unstipulated polygraph evidence is inconsistent with the flexible inquiry assigned to the trial judge by *Daubert*.[125] Justice Stevens argued there is no need for the per se exclusion rule anymore because of the advances that have been achieved in the field and the lack of evidence that juries are unduly swayed by polygraph evidence.[126] As an interesting point for the admissibility of polygraph evidence, Justice Stevens points to the fact that the lie detector plays a special role in military practices, even more so than in the civilian world.[127] The reason given for the reliability of military lie detector tests can be attributed to the stringent standards and extensive training given to the examiners.[128]

With regard to the interests articulated by the majority, Justice Stevens notes that even in light of such interests, the Court never acknowledged that a person accused of a crime has a constitutional right to present a defense.[129] In terms of the reliability interests, the dissent points to reports that place the accuracy of polygraph examinations at eighty-five to ninety percent.[130] In terms of the usurpation of the role of the jury, Justice Stevens says that the function of the jury is to make credibility determinations and assistance from polygraph examination evidence could be helpful in making such determinations.[131]

Justice Stevens acknowledged that the jury may give undue weight to the evidence from polygraphy, but reasoned that detailed jury instructions would serve to minimize the amount of undue weight placed on the evidence.[132] With regard to the collateral litigation argument, Justice Stevens dismissed this claim by stating, "The potential burden of collat-

125. *Id.* at 322 n.3.

126. *Id.* at 322.

127. *Id.* at 324. "The Military has administered hundreds of thousands of such tests and routinely uses their results for a wide variety of official decisions."

128. *Id.* Justice Stevens reports that the Department of Defense has a Polygraph Institute that bases its curriculum on forensic psychophysiology and applied knowledge that meet the requirements of master's degree-level of study. The candidates selected must meet certain criteria, go through rigorous training, and conduct a series of tests under the supervision of a certified polygraph examiner.

129. *Id.* at 325-26.

130. *Id.* at 333.

131. *Id.* at 336. "In my judgment evidence that tends to establish either a consciousness of guilt or a consciousness of innocence may be of assistance to the jury in making such determinations."

132. *Id.* at 336-37 (citing Ann Cavoukian & Ronald J. Heslegrave, *The Admissibility of Polygraph Evidence in Court: Some Empirical Findings*, 4 LAW & HUM. BEHAV. 117, 123, 127-128, 130 (1980) ("Indeed, research indicates that jurors do not 'blindly' accept polygraph evidence, but that they instead weigh polygraph evidence with other evidence.").

eral proceedings to determine the examiner's qualifications is a manifestly insufficient justification for a categorical exclusion of expert testimony."[133] Put simply, Justice Stevens is of the opinion that although the concerns regarding the validity of polygraphs are valid, they are insufficient to support a categorical rule that prohibits the admission of polygraph evidence in all cases, regardless of the reliability or probative value of the evidence.

The dissent makes a valid point in stating that there are some instances when polygraph evidence should not be admitted based on factors that may limit the reliability of the results, or the undue influence that my be placed on the jury by the admission. The proper way, however, to look at these issues should be on a case-by-case basis to the extent necessary. By applying a per se rule of inadmissibility, the Supreme Court has basically mandated that regardless of how reliable the testing is, or how necessary the evidence is to the defense of the accused, it will not allow polygraph evidence to be admitted. Further, the Court has chosen to base this broad categorical rule on the premise that if the facts of the case can be introduced, this will be sufficient to make the per se rule applicable. The inference then is that it is of no consequence how effective the alternative presentation of the polygraph evidence might be. The mere fact that the alternatives exist lends credence to the idea that the admission of the polygraph evidence is not necessary.

As far as the jury's role is concerned, this writer would suggest that the Court rely on its own advice and allow judges to do the job given to them in *Daubert—viz.* exercise their gatekeeping roles. What was the purpose of the Court's decision to give guidelines in *Daubert* in order to assist judges in determining the admissibility of evidence with regard to its probative value, reliability, etc., if, in spite of that guidance, it would overrule the gatekeeping function of the judges by deciding that polygraph evidence is simply inadmissible in all matters? Although *Scheffer* concerned a military issue and is only binding on such military courts, the reasoning the Court espouses for its holding can easily be applied to civilian cases. This writer predicts that should a case come before the Court with similar circumstances, where the Court can explain that all of the facts of the case were introduced, the decision will be the same as in *Scheffer* and the polygraph evidence in civilian cases will categorically be disallowed as well.

The Court of Appeals for the Armed Forces in *Scheffer*, through an implied admission of lack of reliability of polygraph evidence, presented

133. *Id.* at 337.

guidelines for creating a foundation for polygraph evidence.[134] The court noted that: (1) the examiner must be qualified; (2) the equipment must work properly and must have been properly used; and (3) the examiner must have used valid questioning techniques.[135] These guidelines were procedural safeguards that were presented as a method of reducing the inaccuracies of the process of polygraphy. By employing safeguards, the appellate court attempted to allay the fears regarding the reliability of the evidence while simultaneously providing a mechanism for the admissibility of the evidence. These safeguards did not apparently increase the comfort level of the Supreme Court, which ultimately decided to adhere to the per se inadmissibility rule.

I. *Where Do We Go from Here? Post-Scheffer Opinions*

A question arises in light of the Supreme Court's holding in *Scheffer* and the presented safeguards of the Court of Appeals of the Armed Forces, as to what impact *Scheffer* will have on the attitudes of state and federal courts. Since *Scheffer*, there have been a limited number of decisions incorporating *Scheffer* into their legal analyses.[136] Because of this limited incorporation, a reasonable answer to that question cannot be deciphered. There have been several cases published after *Scheffer*, however, that have gone in different directions based on the deciding court's own decision-making factors.

J. *Polygraph Evidence Allowed*

In *Paxton v. Ward*,[137] the Tenth Circuit found that polygraph evidence was admissible during the sentencing phase of a criminal trial.[138] There, the defendant was convicted of murder and petitioned for habeas corpus. At trial, he was prevented from presenting evidence that he had passed a polygraph test indicating that he did not kill his wife.[139] The Tenth Circuit held that the inability of the defendant to present this evidence, specifically in the context of a death penalty case, violated of his Eighth and Fourteenth Amendment rights to present mitigating evidence.[140]

The *Ward* court decided to allow the polygraph evidence despite *Scheffer*. The court stated, "*Scheffer* is distinguishable in at least one dispositve respect: it did not involve a capital defendant's constitutional

134. *Id.* at 323 n.5.
135. *Id.*
136. *See generally* Gallai, *supra* note 67.
137. 99 F.3d 1197 (10th Cir. 1999).
138. *Id.* at 1216.
139. *Id.*
140. *Id.*

right to present mitigating evidence."[141] The court continued its reasoning for allowing the polygraph evidence noting, ". . . application of the per se rule barring polygraph results prevented [the defendant] from telling the jury the reason why the prior criminal proceedings had been dismissed, thus significantly impairing his ability to defend against the death penalty."[142] The *Ward* court distinguished *Scheffer* by stating, "Because *Scheffer* specifically limited its holding to cases in which exclusion did not undermine the accused's defense or implicate other significant interests, it is inapposite here."[143]

In *Davies v. State*,[144] an Indiana case involving the alleged murder of a child, the court held that polygraph evidence was admissible, but failed to include *Scheffer* in its analysis.[145] There, the defendant took a polygraph examination and later challenged the results of the test.[146] The results of the polygraph examination in Davies showed that the defendant had been deceptive when he asserted he was not involved in the crime. The prosecution sought to introduce the evidence in order to impeach the defendant's credibility.[147]

The Indiana appellate court used the *Sanchez* test[148] to determine whether the polygraph examination was admissible based on the stipulation of the parties.[149] In *Sanchez*, the Indiana Supreme Court put forth four prerequisites[150] that must be met before polygraph results can be admitted.[151] The *Davies* court found that because these requirements

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141. *Id.* at 1215.

142. *Id.* at 1215 n.9.

143. *Id.* at 1216.

144. 730 N.E.2d 726 (Ind. Ct. App. 2000).

145. *See id.*

146. *Id.* at 732.

147. *Id.*

148. *See* Sanchez v. State, 675 N.E.2d 306, 308 (Ind. 1996). It is possible that there was no need to cite to *Scheffer* because Indiana did not have a per se inadmissibility rule, especially after *Sanchez*.

149. *Davies*, 730 N.E.2d at 737.

150. The four prerequisites of the *Sanchez* test are:

> 1) that the prosecutor, defendant, and defense counsel all sign a written stipulation providing for the defendant's submission to the examination and for the subsequent admission at trial of the results; 2) that notwithstanding the stipulation, the admissibility of the test results is at the trial court's discretion regarding the examiner's qualifications and the test conditions; 3) that the opposing party shall have the right to cross-examine the polygraph examiner if his graphs and opinion are offered in evidence; and 4) that the jury be instructed that, at most, the examiner's testimony tends only to show whether the defendant was being truthful at the time of the examination, and that it is for the jury to determine the weight and effect to be given such testimony.

Sanchez, 675 N.E.2d at 308.

151. *Id.*

had all been met, the polygraph evidence was admissible.[152] The court also noted in its decision the defendant's insistence on taking the polygraph examination.[153] The court concluded that the reasons offered by the defendant as to why the polygraph evidence was inadmissible were not sufficient to reverse the verdict, in accordance with the *Sanchez* test.[154] Therefore the polygraph results were admissible and the verdict was sustained.

K. *Polygraph Evidence Inadmissible*

In *State v. Wakefield*,[155] the Kansas Supreme Court used the *Scheffer* analysis to support its holding of inadmissibility of polygraph evidence. The facts of *Wakefield* concerned an appeal of a forty year conviction for various felonious criminal acts, including murder. The defendant submitted to five different polygraph examinations, all of which indicated the defendant was being truthful when he asserted that he had not committed the murders in question.[156] The *Wakefield* court observed, "[In *Scheffer*] the Supreme Court noted that although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams."[157]

The Kansas Supreme Court decided against the admissibility of the polygraph evidence, even though the evidence showed that was being truthful when he asserted that he was not the murderer.[158] The court noted in its ruling, "Kansas is among those jurisdictions where doubt still exists as to the reliability of polygraph examinations . . . polygraph tests are too unreliable to be admissible and they tend to invade the province of the jury in determining the ultimate question of fact: whether a witness is speaking the truth."[159]

In *Willey v. State*,[160] the facts concerned a conviction of felony murder where the Indiana Supreme Court found that the polygraph statements were erroneously admitted. The defendant agreed to the poly-

152. *Davies*, 730 N.E.2d at 737.
153. *Id.* at 738.
154. *Id.* at 737.
155. 977 P.2d 941 (Kan. 1999).
156. *Id.* at 945.
157. *Id.* at 955 (citing United States v. Scheffer, 523 U.S. 303 (1998)).
158. *Id.*
159. *Id.*
160. 712 N.E.2d 434 (Ind. 1999).

graph after being told that he had been implicated in the crime.[161] The defendant failed the polygraph and the results of the examination were introduced in evidence by the examiner.[162] The court found that the introduction of this evidence was in error because it failed the *Sanchez* test.[163] In spite of this error, the court decided not to reverse the decision of the lower court.[164] The court reasoned that because of other statements made by the defendant relating to his admitted involvement in the agreement to harm the deceased, the testimony of the polygrapher, "at most, had a slight impact on the jury's verdict."[165] Therefore, "its erroneous admission was harmless."[166]

In an interesting case deciding against the admissibility of polygraph evidence, the California Supreme Court stated that polygraph evidence is still not reliable enough to warrant admissibility in court unless the parties stipulate to its admissibility or the defendant offers proof that the techniques used in the polygraph are generally accepted by the scientific community.[167] The defendant was convicted of murder following a jury trial. In an unusual circumstance, the defendant asked the court to compel one of the prosecution's key witnesses to submit to a polygraph examination.[168] The defendant believed that because of the witness's purported lack of credibility, the polygraph would serve as an additional consideration for the prosecution in deciding whether to proceed with the special circumstances against the defendant.[169] In response to the request, the California Supreme Court stated, "The trial court ruled . . . that 'there is not either authority [,] nor acceptance in the scientific community, with reference to the polygraph, [and] for those reasons, the motion will be denied.' We agree that defendant was not entitled to have the court compel a polygraph examination of [the witness]."[170]

The court denied the request to have the witness take a polygraph examination in spite of the inconsistencies in the reports given to the police and the testimony of the witness. The court reasoned that the defense could attempt to attack the witness's credibility using the already available means of attack under the California Evidence Code.[171] The court, however, noted, "It is implicit in Evidence Code

161. *Id.* at 438.
162. *Id.* at 438-39.
163. *Id.* at 440-41.
164. *Id.*
165. *Id.*
166. *Id.* at 442.
167. *See* People v. Ayala, 96 Cal. Rptr. 2d 682, 706 (Cal. 2000).
168. *Id.* at 705-06.
169. *Id.* at 706.
170. *Id.*
171. *Id.*

section 351.1 that at trial court may not compel a polygraph examination. It would be an idle act, which 'the law neither does nor requires.'"[172]

Other courts have also used the *Scheffer* holding to support the denial of polygraph evidence. In *People v. Jefferson*,[173] the Illinois Supreme Court decided that the admission of polygraph evidence was not ordinarily allowed, its admittance in this case was harmless error because of the jury instructions and the court's belief in the jurors.[174] In *Jefferson*, the defendant agreed to take a polygraph test, but gave an inculpatory statement to the police before test was administered. The defendant sought to have the fact that she had agreed to take a polygraph examination excluded based on the precedents regarding the inadmissibility of polygraph evidence. The court explained the reason for its decision:

> We do not depart from our longstanding rule that evidence about polygraph testing is generally inadmissible in courts in Illinois. Such evidence became relevant and admissible here, however, when the defendant offered an alternative explanation for the reasons that led her to confess to the charged offenses. We believe that the State was entitled to rebut the defendant's explanation with other evidence about her reasons for speaking to authorities.[175]

The court "cured" this problem by giving instructions to the jury to use the reference to the polygraph only to determine whether the defendant's statement was unreliable.

A Virginia appellate court ruled in the same manner, stating that although polygraph evidence is improper, its admission was not grounds for a mistrial because the court believed that there was no prejudice as a result of the evidence.[176] The defense contended that the mere mention of the polygraph unfairly prejudiced the jury. The judge gave instruc-

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172. California Evidence Code § 351.1 provides in pertinent part:

> (a) Notwithstanding any other provision of law, the results of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination shall not be admissible in any criminal proceeding . . . unless all parties stipulate to the admission of such results.
>
> (b) Nothing in this section is intended to preclude from evidence statements made during a polygraph examination which are otherwise admissible.

CAL. EVID. CODE § 351.1.

173. 705 N.E.2d 56 (Ill. 1998).

174. The *Jefferson* court stated: "[T]he general rule in Illinois is to preclude introduction of evidence regarding polygraph examinations and the results of those tests. . . . [P]olygraphy is not sufficiently reliable to establish guilt or innocence. . . . the quasi-scientific nature of the test may lead a trier of fact to give the evidence undue weight, notwithstanding its lack of reliability. . . ." *Id.* at 59-60 (citations and quotations omitted).

175. *Id.* at 62.

176. *See generally* Bennett v. Commonwealth, 511 S.E.2d 439, 443 (Va. Ct. App. 1999)

tions to the jury to disregard the testimony regarding the polygraph. The defense, however, continued to argue that this measure did not sufficiently mitigate the harm. The appellate court ruled that a mistrial was not warranted because although the exam was mentioned, there was no information given as to any specifics regarding the outcome of the examination, or the willingness of the defendant to take the examination.

In a recent Pennsylvania case, a court held that there was a reversible error because a polygraph test was referred to directly without cautionary instructions.[177] In *Commonwealth v. Watkins*, the defendant was convicted and appealed based on the premise that the reference of the failed polygraph test was prejudicial.[178] The *Watkins* court distinguished its case from the cited cases by noting that there were no cautionary instructions given to the jury to prevent a prejudicial effect.[179] In its opinion, the court cited cases that involved a reference to polygraphs where cautionary jury instructions were given with regard to the examinations.[180]

The *Watkins* court held that although the prosecution never mentioned the results of the polygraph examination, the references to the polygraph allowed for jury inference.[181] This inference was sufficient to warrant a new trial because the implication of the polygraph bolstered the validity of other evidence for the jury.[182] From the court's statement regarding cautionary instructions, it can be inferred that if there had been cautionary instructions to the jury explaining to what extent the information regarding the polygraph evidence should have been used, the reference to the polygraph might have been admissible.

As noted, the courts are varied with regard to whether to admit polygraph evidence and what circumstances, if any, dictate the admissibility of such questionable evidence. It does appear that defendants are not allowed to submit their evidence when the evidence is in their favor. Similarly, it appears that when the evidence is against the defendant, the evidence is allowed to come in, or allowed to remain in evidence because of a "harmless error" label. In spite of the varied opinions regarding the admissibility, this writer believes that polygraphy will slowly begin to be admitted into evidence in more and more courtrooms

("Although we find Mrs. Bennett's reference to her polygraph was improper, we disagree appellant's defense was prejudiced as a result.").

177. *See* Commonwealth v. Watkins, 750 A.2d 308 (Pa. Super. Ct. 2000).

178. *Id.*

179. *See id.*

180. *Id.* at 317-18. (citing Commonwealth v. Sneeringer, 668 A.2d 1167, 1174 (Pa. Super. Ct. 1995); Commonwealth v. Rhone, 619 A.2d 1080 (Pa. Super. Ct. 1993); Commonwealth v. Upchurch, 513 A.2d 995 (Pa. Super. Ct. 1986)).

181. *Id.* at 319.

182. *Id.*

throughout the country where the evidence is against the interest of the criminal defendant.

The reasons for this belief have been hinted at in previous decisions. First, the technology involved and the advancements of the science of polygraphy are continuously being improved. It is the opinion of some that these improvements will soon remove the reliability aspect of polygraphy.[183] Secondly, the reports that indicate juries are being affected more by the instructions of the court, rather than the results of a polygraph test, will probably begin to be cited to more by the prosecution or courts seeking to uphold the admission of favorable polygraph evidence for the prosecution in an effort to avoid the undue weight argument. Lastly, in light of the safeguards that can be employed to minimize the level of inaccuracy, more polygraph evidence will be allowed into evidence and the jury will be allowed to do its job—decide on the guilt or innocence of the accused.

In spite of all of the advances in the field of polygraphy, judging from the cases reviewed, the significance of these advances will only be viewed in a positive light when the prosecution seeks to introduce the evidence, or when the defendant is harmed by the evidence. This may all be circumstantial, but it appears that often when the defendant attempts to prove his innocence through a "passed" polygraph test, those very same instruments which appear to be improving their reliability (when introduced by the prosecution) are not worthy of admissibility and are too unreliable to be considered as an assistance to the finders of fact.

III. REPRESSED MEMORIES—MEMORY OR MAKE BELIEVE?

As stated earlier, the issue of repressed memory evidence is a related issue to polygraph evidence. This is evidence that has been "put away" or repressed and then remembered at a later period of time.[184]

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183. *See* James R. McCall, *The Personhood Argument Against Polygraph Evidence, or "Even If the Polygraph Really Works, Will Courts Admit the Results?,"* 49 HASTINGS L.J. 925 (April 1998). McCall states:

> All that is necessary for the past irrational judicial attitude toward polygraph evidence to change is for courts to seriously confront the claim by its proponents that polygraph testing procedures scientific knowledge. . . . If courts approach the issue of polygraph evidence by requiring proof of the scientific methodology. . . . the history of the achievements of American science gives reason to believe that the seemingly significant problems concerning polygraph theory and practice will either be solved or proven to have been non-existent.

Id. at 943-44.

184. *See* Cynthia V. McAlister, Comment, *The Repressed Memory Phenomenon: Are Recovered Memories Significantly Valid Evidence Under Daubert?,* 22 N.C. CENT. L. J. 56, 59 (1996).

Usually, repressed memories concern incidents of sexual abuse or misconduct.[185] This factor adds to the sensitivity of the issue, but there are still concerns about the admissibility of the repressed memory testimony. The issues concerning the admissibility of this evidence mirror the issues of polygraphy. These include whether the evidence reliable, whether the evidence generally accepted, and whether expert testimony on the issue actually assist the fact finder. One of the major developments on repressed memory theory is that some courts have generally allowed the evidence if: (1) the evidence was remembered without the aid of psychotherapy; and (2) if the testimony can be corroborated by other evidence.[186] Consequently, if an alleged victim remembered the incidents through psychotherapy and there is no evidence to corroborate the testimony, some courts have ruled that the evidence is inadmissible[187] unless it meets the requirements of the *Frye* test.[188] This has been the source of debate in jurisdictions throughout the country.

The distinctions in judgments regarding repressed memory testimony are not as detectable as those involving polygraph testimony. In other words, it does not appear that the party introducing the evidence, or the party to whom the evidence is adverse, is a determinative factor in the decisions by the courts. Instead, the decisions have no real pattern and are seemingly subject solely to what the court wants the outcome to be. This may be because of the idea that a repressed memory is new and the existence of such memories is extremely difficult to laymen, let alone judges. In spite of this, courts have used the guideline given to them by the Supreme Court in an effort to work through this muddled situation.

In 1987, the Supreme Court decided in *Rock v. Arkansas* that the per se inadmissibility rule regarding hypnotically refreshed memory (memory recovered through psychotherapy) when offered by a defendant was no longer good law.[189] The Court made this decision since the testimony could be corroborated by other evidence and that the only witness available was the accused, who had undergone psychother-

185. *Id.*

186. *See generally* Meiers-Post v. Schafer, 427 N.W.2d 606 (Mich. Ct. App. 1988); New York v. Murphy, 235 A.2d 933 (N.Y. App. Div. 1997).

187. *See, e.g.*, People v. Shirley, 31 Cal. 3d 18 (Cal. 1982); *In re* Marriage of Broderick, 209 Cal. App. 3d 489 (Cal. Ct. App. 1989).

188. The *Kelly-Frye* test has been adopted from *People v. Kelly*, 549 P.2d 1240 (Cal. 1976) and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In *Kelly*, the California Supreme Court held that testimony based on "a new scientific technique" requires proof that it is reliable. To satisfy this requirement, the proponent of the testimony must show that the technique has gained general acceptance, that the witness is testifying as a qualified expert on the subject and that the correct scientific procedures were used in the case.

189. *See* Rock v. Arkansas, 483 U.S. 44 (1987).

apy.[190] Consequently, the per se rule would in actuality prevent the witness from testifying on her own behalf, which the Court reasoned was a violation of the Sixth Amendment.[191]

After the *Rock* decision, there were many questions left open that have aided in the lack of uniformity in decisions in the varied jurisdictions. This portion of the Comment discusses repressed memory theory and how it is believed to work. The Comment will then discuss what the issues are concerning the reliability of repressed memory theory and how courts have dealt with the issues, including the question of the statute of limitations. Finally, the Comment will conclude with the writer's hypothesis as to the trend and final outcome of this controversial evidence.

A. *The Theory of Repressed Memory*

"[S]tudies have shown that individuals who have suffered a painful or traumatic experience sometimes repress their memories of the event."[192] The term repression refers to the mind's "putting away" or concealing of the traumatic event from itself within the "unconscious". The repressed material does not cease to exist; it is merely stored in a place in the mind that is not easily or readily accessible.[193] Sometimes the repressed memory can be "triggered" by an event and recalled from the "unconscious."[194] Other times, the individual undergoing some sort of psychotherapy recalls the event.[195]

Currently, the ability of one to recover the memories without aid lends to more acceptance than memories that are recovered with the use of therapy.[196] This is because therapists often recommend asking patients if they recall any sexual abuse or if they believe they have been sexually abused.[197] Some therapists also go through a sort of "roll call" where they call out various symptoms that are often exhibited by people who have been sexually abused.[198] The problem raised by these techniques is that the thought of sexual abuse can be planted in the minds of the patient by the mere suggestion of its occurrence, or the identification of one of the "symptoms."[199]

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190. *Id.*
191. *Id.* at 62.
192. Wilson v. Phillips, 73 Cal. App. 4th 250 (Cal. Ct. App. 1999).
193. Victor Barall, *Book Review: Thanks for the Memories: Criminal Law and the Psychology of Memory*, 59 BROOK. L. REV. 1473, 1476 (1994).
194. *Id.* at 1477.
195. *Id.*
196. *See id.*
197. *Id.*
198. *Id.*
199. *Id.*

There are two distinct schools of thought with regard to whether the advent of psychotherapy actually results in accurate memory recollection.[200] Those who believe that memories are easily implanted or suggested also submit that because such possibilities exist, the method of recovery is flawed because one cannot distinguish between events that have been suggested and events that actually happened.[201] In fact, one psychiatrist has described the repressed memory syndrome as "a way of absolving yourself for screwing up by shifting the blame to your infancy when you can't be blamed for anything. From these gymnastics, by which 'therapists' make their money, the adult emerges guilt-free."[202] There are also some who have reported that there is no evidence that supports the repressed memory theory at all.[203] The other school of thought looks to the various studies that show that repressed memory through psychotherapy does result in accurate memory recovery.[204] Because there is some question as to whether traditional memory process is affected by events, memory that is assisted in recovery surely will raise the same concerns.

B. *Traditional and Hypnotically Refreshed Memory: Problems and Possibilities*

There are three stages of the traditional memory process: perception, retention, and retrieval.[205] Research has shown that events in one's life can affect all three stages to the point where memories are altered.[206] Because memories may be altered by other events and then recalled inaccurately this raises some significant questions as to whether recalled memory testimony should be admitted into evidence, whether hypnotically assisted or not. This road of thought is extremely dangerous because if we begin to question the process of traditional memory and its

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200. *See* Sheila Taub, *The Legal Treatment of Recovered Memories of Child Sexual Abuse*, 17 J. LEGAL MED. 183 (1996).

201. *Id.* at 190.

202. *See* Lynn Holdsworth, *Is it Repressed Memory with Delayed Recall or is it False Memory Syndrome? The Controversy and its Potential Legal Implications*, 22 LAW & PSYCHOL. REV. 103, 107 (1998) (citing Ralph Slovenko, *The "Revival of Memory" of Childhood Sexual Abuse: Is the Tolling of the Statute of Limitations Justified?*, 21 J. PSYCHIATRY & LAW 7, 20 (1993)).

203. *See* DAVID S. HOLMES, THE EVIDENCE FOR REPRESSION: AN EXAMINATION OF SIXTY YEARS OF RESEARCH, in REPRESSION & DISSOCIATION: IMPLICATIONS FOR PERSONALITY, THEORY, PSYCHOPATHOLOGY AND HEALTH 85 (Jerome Singer ed. 1990).

204. *See* Judith L. Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1, 1-14 (1987).

205. Garry M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 133 (1993).

206. *See* Emily E. Smith-Lee, *Recovered Memories of Childhood Abuse: Should Longe-Buried Memories Be Admissible Testimony?*, 37 B.C. L. REV. 591, 604 (1996).

reliability, the reliability of any witness in court proceedings will always be under scrutiny regarding the accuracy of what he or she remembers. According to scientists in the field, there is no identifiable timeframe that explains when memory begins to become susceptible to outside events. Because of this dangerous idea, most courts have rarely commented on the accuracy of traditional memory and have continued to concentrate on memory that was aided by some sort of psychotherapy.[207]

One substantial question that arises is how accurately one can distinguish between normal (non-repressed memories) and recovered memories. The opponents of refreshed memory testimony base many of their arguments on the fact that "[t]here is no empirical evidence to support the assertion that experts can identify accurate recall."[208] Therefore, even the most skilled psychotherapist may not be able to detect a memory that is accurate from one that is not.[209] Further, in terms of the admissibility of such memory recall, it is important that the purpose of the therapy is kept in mind.[210] The therapist does not depend on the accuracy of the memories, but uses the memories as a therapeutic tool in order to "ease the patient's symptoms, regardless of the accuracy of the memories."[211] Therefore, it is argued that allowing this testimony to be admitted undermines the jury's role as fact-finder because admitting this evidence will be seen as bolstering of the credibility of the witness.[212]

The concerns involving repressed memory understandably become even more significant vis-a-vis the reliability of memories that have been recalled through some sort of psychotherapy technique. The argument against the reliability of this type of therapy concerns the idea that when someone goes to therapy, he is generally seeking an answer.[213] This makes the person vulnerable and susceptible to the suggestions of his therapist.[214] In commenting on the suggestive nature of a repressed memory therapy session, one author states:

> There is no reason to believe that repressed memories are any less susceptible to the processes of decay and falsification than "normal" memories. Indeed, it is arguable that persons who have no present recollection of alleged events in the remote past may be particularly

207. *See* Ernsdorff & Loftus, *supra*, note 205.

208. Joseph A. Spadaro, Note, *An Elusive Search for the Truth: The Admissibility of Repressed and Recovered Memories in Light of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 30 CONN. L. REV. 1147, 1192 (1998).

209. *Id.*

210. *Id.* at 1193.

211. *Id.*

212. *Id.*

213. *See* McAlister, *supra* note 184.

214. *Id.* at 62.

> vulnerable to suggestion by others, such as psychotherapists, or trusted friends, that such events actually occurred, and my come to "remember them" accordingly.[215]

The American Psychological Association disagrees with the skeptics of repressed memory. While the Association admits that suggestions can be implanted into the mind of a patient and most patients come to therapy after an event has been triggered, rather than going to therapy to trigger the event.[216] Further, it argues there is no significant evidence that supports the unreliability of hypnotically refreshed memories in comparison to "traditional" memory reliability. Therefore, the science is helpful in assisting victims in working through their problems and, accordingly, the results of such therapy can be used in a court of law in the same manner as other recalled testimony.[217] The Association strongly argues in support of the actual existence of repressed memories and their accessibility, even years, after an incident. First, the theory of repressed memory has been in the field since the days of Freud.[218] The general theory of Freud on this issue was that people repress memories as a form of a defense mechanism.[219] Secondly, there is a similar example of repressed memory seen through Vietnam veterans.[220] These individuals often suffer from Post Traumatic Stress disorder where the mental trauma does not surface until fifteen or twenty years after the event actually occurred.[221] Another point that scientists rely on with regard to the validity of repressed memory theory is the fact that people remember events on their own by "triggers" or things that occur in their lives. Proponents argue that because these events are remembered without any aid this attests to the fact that repressed memories do exist and can be recovered.

The opposition's argument is equally as compelling. They argue that if repressed memories do exist and can be recovered, there is no verifiable method of determining the accuracy of such memories.[222] It is also argued that repressed memories will be more susceptible to alteration because they are often repressed for several years and, thus, are

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215. Susan Chira, *Sexual Abuse: The Coil of Truth and Memory*, N.Y. TIMES, Dec. 5, 1993, at D3 (explaining how it would be easy for a therapist to suggest things to a patient that never existed and have the patient remember the events as though they did; implication is that the more problems a therapist would be able to uncover, the more sessions will be needed, the more money earned).

216. *See* Taub, *supra* note 200.

217. *Id.*

218. *See* Ernsdorff & Loftus, *supra* note 205.

219. *Id.* at 134.

220. *See id.* at 133.

221. *Id.*

222. *Id.* at 157.

exposed to more of the experiences and outside influences on the individual.[223] Critics also argue against the techniques used by the therapists in memory recovery, stating that the techniques alone may unduly influence the minds of the person seeking assistance.[224]

It is clear that the scientific community is at odds regarding the reliability of repressed memory evidence. Therefore, it is easy to understand why the legal community relying on the opinions of the scientific community has not come to a consensus regarding the admissibility of repressed memory evidence. Courts have attempted to deal with the problem by employing the requirements of safeguards and corroboration, but questions of reliability of the scientific theory behind repressed memory evidence still remain.

C. *Repressed Memory Court Decisions*

Because of the controversy surrounding repressed testimony, in 1987, the Supreme Court was forced to deal with the issue in *Rock v. Arkansas*.[225] The case involved the admissibility of the source of the controversy in this issue—hypnotically refreshed testimony. The case did not concern the common repressed memory sexual abuse claim, but involved a question of intent in a homicide case. The Court, through a narrow holding, in a five to four decision, allowed the testimony in spite of the use of psychotherapy.

The facts of the case involved a woman who was charged with manslaughter for the killing of her husband.[226] Her accounts to the police, according to their reports, as to what happened during the incident were not exactly the same.[227] Because she was having a difficult time remembering specific facts regarding the incident, she was advised by her attorney to undergo psychotherapy in order to refresh her memory. When the prosecutor learned of the psychotherapy, he filed a motion to exclude the testimony of the defendant.[228] The trial judge agreed. The court ordered that the defendant's testimony would be limited only to what was remembered before the therapy sessions. The defendant was convicted, and on appeal, the Supreme Court of Arkansas rejected her claim that the limit on her testimony violated the Sixth Amendment.[229] The defendant petitioned the Supreme Court for writ of certiorari. The Supreme Court invalidated the per se exclusionary rule

223. *Id.*
224. *Id.*
225. 483 U.S. 44 (1987).
226. *Id.* at 45.
227. *Id.* at 46.
228. *Id.* at 47.
229. *Id.*

of Arkansas.[230]

In its holding, which appeared limited only to certain circumstances,[231] the Court noted that the rule of per se inadmissibility of all hypnotically refreshed testimony infringed impermissibly on the criminal defendant's right to testify on her own behalf.[232] The Court made it clear that because the defendant was precluded from giving complete testimony, coupled with the fact that there was corroboration for the events, including expert testimony, the application of the per se rule in this case was impermissible. In addition, the court noted that in order to ensure the effectiveness of our adversary system, the testimony of those of competent understanding about the facts must be allowed to testify.[233]

It was the opinion of the Supreme Court that Arkansas applied an arbitrary rule of exclusion on the grounds that hypnotically refreshed memory testimony is always unreliable.[234] The problem with this, as the Court described, was that the rule left no discretion to the trial judge to admit the testimony even if the judge is persuaded that the testimony is reliable.[235] Another problem the Court had with the application of the rule was the fact that it prohibited the testimony of anyone who had undergone hypnosis, regardless of what other evidence may have been available to corroborate the information or the reason for the hypnosis.[236]

The Court emphasized, however, that there are legitimate limitations to the right to present relevant testimony. "The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the

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230. *Id.* at 62.

231. *Id.* at 57. The Court noted:

> In this case, the application of that rule had a significant adverse effect on petitioner's ability to testify. It virtually prevented her from describing any of the events that occurred on the day of the shooting, despite the corroboration of many of those events by other witnesses. Even more importantly, under the court's rule petitioner was not permitted to describe the actual shooting except in the words contained in Doctor Back's notes. The expert's description of the gun's tendency to misfire would have taken on greater significance if the jury had heard the petitioner testify that she did not have her finger on the trigger and that the gun went off when her husband hit her arm.

Id.

232. *Id.*

233. *Id.* at 54. "[T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court." *Id.* (quoting Washington v. Texas, 388 U.S. 14, 22 (1967)).

234. *Id.* at 61.

235. *Id.* at 56 n.12.

236. *Id.* at 56. "This rule operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced."

criminal trial process.'"[237] The Court noted that states must use a sort of balancing test between the defendant's constitutional right to testify and an analysis of whether the interests served by such an exclusionary rule justify the limitation.[238] The Court ruled that in light of the gravity of the rights at stake, the Arkansas Supreme Court failed to perform the necessary constitutional analysis before rendering a decision.[239] From dictum, the Court appears to open the door for states to exclude evidence if they conduct this constitutional balancing test and determine if governmental interests outweigh the defendant's constitutional rights. This may present some difficulty for the state (although the Court gave no examples of the pattern such a conclusion would follow), but it does provide states with another avenue for exclusion.

The Arkansas Supreme Court decided to exclude the testimony in part because the testimony had not been proven to be reliable. The United States Supreme Court agreed with the fact that the opinions regarding the technique vary, but noted the use of safeguards can minimize the inaccuracies in the process, making the evidence more reliable.[240] By explaining the types of safeguards that could be used in the decision to admit repressed memory evidence, the Court appears to provide another permissible avenue of exclusion. Although the list is not to be considered as all-inclusive, it could be argued that if several of the listed safeguards are not met, a state court could conclude that the reliability of the evidence was not enough to warrant its admittance. This could serves as evidence of performing the constitutional balancing test that the Court indicated was necessary to determine whether the evidence is admissible.

Aside from safeguards related to the actual science, the Court emphasized the traditional safeguards, such as corroboration of the testimony, effective cross-examination, and jury education and instructions

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

238. *Id.* at 56.

239. *Id.* at 57-58.

240. The Court noted:

> One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist. Suggestion will be less likely also if the hypnosis is conducted in a neutral setting with no one present by the hypnotist and the subject. Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked. Such guidelines do not guarantee the accuracy of the testimony, because they cannot control the subject's own motivations or any tendency to confabulate, but they do provide a means of controlling overt suggestions.

Id. at 60-61 (citations omitted).

that can be useful in determining the accuracy of the testimony.[241] Again, the Court appears to open another method that may be used for exclusion—corroboration. Throughout the opinion, the Court addresses the fact that there is corroboration for the evidence from the hypnotically refreshed testimony. Arguably, without corroboration, in spite of other safeguards that may have been employed, safeguards alone could be insufficient to avoid the inadmissibility of the evidence.

The conclusion of the Supreme Court effectively was that because of the corroboration of the evidence and the tape recordings of the hypnosis (a mentioned safeguard), the trial court should have considered admissibility of the evidence. Because the per se rule prohibited this consideration, the rule impermissibly infringes on the right of a defendant to testify on his own behalf.[242] Again, at the conclusion of the opinion, the Court gave another subtle hint that exclusion of hypnotically refreshed evidence will not always be impermissible by stating, "[the] circumstances present an argument for admissibility of petitioner's testimony *in this particular case,* an argument that must be *considered* by the trial court."[243] It can be argued that *Rock* should be considered with regard to the facts of the circumstances in this case and the trial court must only consider the circumstances in their decision to admit the evidence.

The Court never addressed the admissibility of repressed memory evidence without the use of hypnosis or the level of corroboration needed in order to constitute verification of the refreshed testimony. Also, because the Court was not presented with the questions of whether testimony of another witness with repressed memory evidence would be admissible, whether a sexual abuse case would have received the same analysis, or the statute of limitation issue with regard to repressed memories these questions were also left open. Therefore, it has been left to individual courts to determine whether they will allow the evidence to be entered in circumstances that do not fall in the narrow circumstances of *Rock.*

There was a stinging dissent in *Rock* that emphasizes the shortcomings of the majority's opinion. Chief Justice Rehnquist argued that the majority ignores the fact that the "[t]he Constitution does not in any way relieve the defendant from compliance with 'rules of procedure and evidence designed to assure both fairness and reliability in the ascertain-

241. *Id.* at 61. "Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and other cautionary instruction."

242. *Id.*

243. *Id.* at 62 (emphasis added).

ment of guilt and innocence.'"[244] Chief Justice Rehnquist continues, "Surely a rule designed to exclude testimony whose trustworthiness is inherently suspect cannot be said to fall outside this description."[245] In other words, the dissent seems to argue that although the defendant has a constitutional right to testify on her own behalf, that testimony must still be governed by the rules designed to created uniformity within the justice system. Because the testimony of the defendant is untrustworthy and reliable, the rules mandate that the testimony be excluded. The dissent does not argue that the evidence from hypnotically refreshed testimony will forever be disallowed, but the lack of consensus regarding the use of hypnosis lends to the idea that such evidence at this point should not be admissible.[246] In addition, the dissent expresses an administrative concern[247] over the mandate that each trial judge be made to consider the matter of admissibility of evidence in each case.[248]

The five-to-four decision in *Rock* tends to support the idea that the decision could have easily gone in the other direction. The Court was greatly divided on this issue and so are other courts that have tackled the question of admissibility. As with most controversial issues, the decisions of the courts are as greatly varied as are the reasons given for the decisions. Without any uniform rules, it is no wonder why courts continue to struggle to make sense out of an issue that the psychological community and the Supreme Court cannot agree upon.

D. *To Be or Not To Be*

After *Rock*, the question becomes: what are the courts supposed to do? The *Rock* decision made the per se inadmissibility rule unconstitutional, but so what? The Court provided little guidelines for federal and state courts to follow. Consequently, there are a substantial amount of cases being litigated with a variety of different results. In an effort to fairly decide cases of repressed memory evidence, courts have devel-

244. *Id.* at 64 (Rehnquist, C.J., dissenting) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* This writer agrees that refreshed memory testimony should not be allowed, but the reason of administrative concern does not appear to support the idea. The trial judge's job, according to the Supreme Court in *Daubert*, is to do the very thing the dissent expresses will cause a problem. The role of the trial judge is to serve a "gatekeeping" function and to evaluate the evidence and its admissibility based on the factors presented to the court. Thus, it is rather ridiculous for the Court to question that the very job of the trial judge (which in the majority's opinion was simply made clearer) should not be something other than "gatekeeping" because of the potential "administrative difficulties."

oped their own procedures for admissibility, while attempting to follow the *Rock* holding.

E. *Repressed Memory Testimony Allowed*

In *State v. Murphy*,[249] a New York appellate court allowed repressed memory testimony due to the presence of other evidence to corroborate it. Murphy involved a defendant who was accused of murder, attempted murder, and petit larceny.[250] Neither of the victims could identify the defendant. After a year, one of the victims recalled the attack and was able to identify the defendant. The defendant appealed his convictions on the grounds that the testimony of the witness should have been inadmissible because it was based on repressed memory.[251]

The appellate court allowed the testimony of the witness based on its understanding of the triggering mechanism that can occur with repressed memories.[252] The court was also careful to note, however, that had the repressed memory been triggered by hypnosis, the analysis would have been different:

> On the critical question of whether such previously repressed memories are authentic, there are no empirical answers, although those recovered in therapeutic settings should be viewed with skepticism given the oftentimes suggestive therapeutic environment. That impediment is not present here; nevertheless, we believe that this type of testimony should not be admissible unless it is independently corroborated.[253]

In another case, *Wilson v. Phillips*,[254] the California Court of Appeal allowed the repressed memory testimony, stating that because it was not hypnotically refreshed, and that it was corroborated by expert testimony, that the psychological symptoms were consistent with persons who had been sexually abused.[255] The facts of the case concerned stepsisters who had allegedly been abused as children.[256] One of the sisters began remembering the incidents and eventually shared them with her stepsister. The latter then began to remember the incidents, and both decided to sue Phillips.[257] The court decided to admit the evidence

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249. 235 A.D.2d 933 (N.Y. App. 1997).

250. *Id.* at 933.

251. *Id.* at 934.

252. *Id.* "[A] repressed memory may spontaneously resurface as the result of a variety of triggering mechanisms that usually are related to the traumatic event." *Id.* (quoting Ernsdorff & Loftus, *supra* note 205, at 132).

253. *Id.* (citations omitted).

254. 73 Cal. App. 4th 250 (Cal. Ct. App. 1999).

255. *Id.*

256. *Id.* at 252.

257. *Id.*

based on the absence of hypnotic therapy and the corroboration.[258]

Phillips, the defendant, argued that there should be a *Kelly-Frye* hearing[259] to determine the general acceptance of repressed memory theory in the scientific community.[260] The court rejected the argument. "*Kelly-Frye* applies to cases involving novel devices or processes, not to expert medical testimony . . ."[261] The court accepted the testimony based upon the fact that it did not concern the validity of repressed memory theory, and accordingly, it did not require a *Kelly-Frye* hearing.[262]

The *Wilson* court distinguished between expert medical testimony, as the type rendered in the case, and evidence derived form a new scientific device or procedure, such as repressed memory theory:

> When a witness gives his [or her] personal opinion on the stand — even if he [or she] qualifies as an expert — the jurors may temper their acceptance of his [or her] testimony with a healthy skepticism born of their knowledge that all human beings are fallible. But the opposite may be true when the evidence is produced by a machine: like many laypersons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently 'scientific' mechanism, instrument, or procedure. Yet the aura of infallibility that often surrounds such evidence may well conceal the fact that it remains experimental and tentative.[263]

Wilson differs from *Murphy* because the *Murphy* court required that testimony be "independently corroborated." In *Wilson*, the testimony that corroborated the evidence stemmed from a therapy session that was related to the accusation. The court ruled that it would allow the testimony because the expert did not testify as to the validity of the claim of the sexual abuse.[264] The expert only testified that in her opinion, the profiles of the alleged victims were consistent with those of sexual abuse cases.[265]

F. *Inadmissibility of Repressed Memory Evidence*

In *State v. Hungerford*,[266] the New Hampshire Supreme Court followed the holding in *Rock* and denied the admission of repressed mem-

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258. *Id.*

259. *See supra* note 188 and accompanying text.

260. *Wilson*, 73 Cal. App. 4th at 253.

261. *Id.* at 254 (quoting People v. Ward, 83 Cal. Rptr. 2d 828 (Cal. Ct. App. 1999)).

262. *Id.* at 256.

263. *Id.* at 254-55 (quoting People v. McDonald, 690 P.2d 709 (Cal. Ct. App. 1984), *overruled in part by* People v. Mendoza, 4 P.3d 265 (Cal. 2000)).

264. *Id.* at 255.

265. *Id.* at 253.

266. 697 A.2d 916, 930 (N.H. 1997).

ory testimony.[267] Although the *Hungerford* court disallowed the repressed memory evidence, it did so after an examination of the science of repressed memory and not on the basis of a per se inadmissibility rule.[268] Thus, the *Hungerford* court followed the directions handed down by the United States Supreme Court. After an in-depth analysis of repressed memory evidence, the New Hampshire Supreme Court stated, "Our review of the memories without regard to the suggestiveness of the therapeutic process, however, convinces us that they do not pass our test of reliability."[269] The court continued, "There probably will be a day, as there has been regarding the forensic use of DNA, when courts can be given reliable, competent information on the issue of repressed memory. That day is not here."[270]

In *Schall v. Lockheed Missiles and Space Company*,[271] the California appellate court refused to allow repressed memory testimony. The *Schall* court also walked through the door of inadmissibility that the Supreme Court decision in *Rock* left wide open. The *Schall* court analyzed the admissibility of the repressed memory evidence and concluded, "The vice of hypnosis, in the legal sense, is the unreliability of the facts restored by the process, not of a specific goal to recover facts in aid of litigation."[272] The court also decided to deny the admittance of other testimony that the witness claimed was shared with her therapist before the hypnotic sessions.[273] The court stated that it was unable to discern what events were recalled and relayed to the therapist before the hypnosis, the entire testimony relating to the events discussed in hypnosis was inadmissible.[274]

In *Franklin v. Stevenson*,[275] the Utah Supreme Court reversed the judgment of a lower court and held that repressed memory evidence should not have been admitted.[276] The case involved a plaintiff that used therapy to discover that her cousin physically abused her.[277] The Utah Supreme Court decided that the plaintiff failed to prove that her memory or the methods used to reflect her memory were scientifically

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267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* (quoting Ault v. Jasko, 673 N.E.2d 870, 875-76 (Ohio 1994) (Moyer, C.J., dissenting)).

271. 37 Cal. App. 4th 1485 (Cal. Ct. App. 1995).

272. *Id.* at 1493.

273. *Id.*

274. *Id.* "[P]laintiff claims that some proposed testimony was about events recalled and related to her therapist prior to the hypnotic sessions. As we have noted, however, the evidence showing this fact is, at best, conflicting."

275. *See* Franklin v. Stevenson, 987 P.2d 22 (Utah 1999).

276. *Id.* at 30.

277. *Id.* at 23.

reliable.[278]

There are other courts that have distinguished their particular cases from the narrow *Rock* holding. This was not a difficult task, considering that the *Rock* holding specified that the inadmissibility as applied in the case was unconstitutional because the rule "had a significant adverse effect on the petitioner's ability to testify."[279] Based on this holding, several courts have refused to admit refreshed memory testimony on the grounds that the defendant was allowed to testify.[280] As a result, no difficulties with the *Rock* decision were implicated.

In *Burral v. State*, the court followed the implications of the *Rock* holding.[281] The Supreme Court in *Rock* made a point of noting that it did not decide whether the per se admissibility rule applied to anyone other than the defendant. In *Burral*, the court noted, "There is no doubt but that *Rock* itself was carefully confined to the testimony of the defendant."[282] The *Burral* court concluded that the defendant's right to compulsory process did not entitle him to present hypnotically-enhanced testimony of a defense witness.[283]

G. *Matter of Time*

There is another substantial issue regarding repressed memory evidence—the issue of time. In other words, at what point will the courts decide that even with repressed memory the ability to pursue legal action against an alleged perpetrator no longer exists? The question focuses on how much time the courts will allow to pass before a proponent faces a "you snooze, you lose" summary judgment or directed

278. *Id.* at 30.

279. Rock v. Arkansas, 483 U.S. 44, 57 (1987).

280. *See, e.g.*, Morgan v. Krenke, 232 F.3d 562, 569-70 (7th Cir. 2000) (finding that the "trial judge did not prevent [the defendant] from testifying"); United States. v. Hach, 162 F.3d 937, 944 (7th Cir. 1998) (this case is different from *Rock* because defendant was allowed to testify; far from being "virtually prevented form describing any of the events" relevant to his defense, defendant answered a "plethora of questions", in which he was able to refute all of the elements of this charge); Williams v. Borg, 139 F.3d 737, 742-43 (9th Cir. 1998) (stating that the defendant was allowed to testify and the fact that he chose not to do so in accordance with the regulations of testimony did not create a *Rock* problem.); Cox v. Wyrick, 873 F.2d 200, 202 (8th Cir. 1989) (holding that because the defendant was not prevented from presenting testimony, his reliance on *Rock* for a reversal was misplaced; defendant chose not to testify and he was not prevented from doing so); Rault v. Butler, 826 F.2d 299, 303-04 (5th Cir. 1987) (There are three distinguishing factors that separate *Rault* from *Rock*: (1) in *Rock*, the defendant was not going to testify under a state of hypnosis, as suggested here; (2) the defendant in *Rock* was unable to recall the events at issue without the hypnosis, where the defendant in this case has constantly claimed his ability to recall the events; and (3) there was no limitation placed on the defendant's right to testify at trial).

281. *See* Burral v. State, 724 A.2d 65 (Md. Ct. App. 1999).

282. *Id.* at 79.

283. *Id.* at 81-82.

verdict.[284]

The *Phillips* case[285] mentioned above also involved an issue of the statute of limitations with regard to bringing a claim under the repressed memory theory. The question stemming from cases like *Phillips* is whether a claim of repressed memory theory toll the statute of limitations. In *Phillips*, the court used the words of the statute to respond to the claim. "The statute in question is clear insofar as it allows an action for childhood sexual abuse to be filed 'within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse.' "[286] The court held that the looking at the plain meaning of the statute, the legislature expressed its desire for the tolling of the statute. Thus, the plaintiff's claims were timely and not time-barred.

Again, courts have not been given guidance from the Supreme Court "on high" for this answer, so the rules vary according to the jurisdiction. In *Meiers-Post v. Schafer*,[287] the court remanded the case for a determination of whether the claim of repressed memory can constitute insanity for the purposes of tolling the statute.[288] The court also examined if the delay discovery rule in child sexual abuse prosecutions also applied.[289]

In *Bertram v. Poole*,[290] the Minnesota Court of Appeals decided that repressed memory testimony was admissible in general because it was corroborated and also for the purpose of tolling the statute of limitations.[291] The facts of *Poole* concerned two plaintiffs who claimed that

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284. No pun intended.

285. Discussed *infra* p. 1637 and accompanying text.

286. *Wilson*, 73 Cal. App. 4th at 256-57 (citing CAL. CODE CIV. PROC. § 340.1(a)).

287. 427 N.W.2d 606 (Mich. Ct. App. 1988).

288. *Id.* at 609-10. The Michigan Court of Appeals stated:

> The limitation period for actions for injuries to a person is three years. . .. Normally, the period of limitation on the claim of a child victim does not begin to run until the child reaches the age of eighteen. . . There is a section of the statute that] provides that if a person is insane at the time her claim accrues, she has one year after the disability is removed to bring the action although the applicable period of limitation has run. . ..Whether a person is insane for the purposes of the above provision is a jury question unless it is incontrovertibly established either that the plaintiff did not suffer from insanity at the time the claim accrued or that she had recovered from any such disability more than one year before she commenced her action.

Id. at 608 (citations omitted). A clear problem with leaving the question of whether repressed memory constitutes insanity involves asking novices to determine the validity and definition of a scientific theory. This problem will be explored in detail further in this Comment.

289. *Id.* at 609-10. The delayed discovery rule tolls the statute of limitations where the victim of the child sexual abuse blocks incidents from their conscious memory during the entire time of the running of the period of limitation. *Id.*

290. 597 N.W.2d 309, 312 (Minn. Ct. App. 1999).

291. *Id.* at 312.

they were sexually abused by their uncle. Both plaintiffs claimed that they suffered from repressed memory syndrome.[292] The trial court granted summary judgment for the defendant based on an expired statute of limitations. The Minnesota Court of Appeals reversed the decision.

The court allowed for the admission of repressed memory as a tool for tolling the statute of limitations by using the data of Holocaust survivors and World War II veterans that document the existence of repressed memory syndrome.[293] The court noted that such events and occurrences are well documented, and, therefore, the existence of repressed memory syndrome met the standards of acceptability for the court.[294] The problem in this case involved whether the scientific definition of the expert witness coincided with the legal definition of repressed memory.[295] The court remanded the case to decide whether the repressed memory claim was sufficient under the legal guidelines to toll the statute of limitations. Again, the court appears to be remanding to the fact finder the issue of what legally constitutes the theory of repressed memory to the fact finder with no guidance from precedence and no actual knowledge of the subject matter.

The same issue of whether a victim could be aware of some fact of abuse and still have repressed memory syndrome arose in *Clay v. Kuhl*.[296] In *Kuhl*, the Illinois Supreme Court determined that the statute of limitations barred the claim because the victim was always aware of the crime and could have brought the charges earlier.[297] The court did not allow the repressed memory claim, citing to the fact that all of the memories were not repressed. As a result, the ability to bring the charges existed since the actual act of abuse. The court noted that simply because the plaintiff did not remember all of the details of her abuse, she did remember some of them, and thus had a basis for a claim before the statute of limitations ran.[298]

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292. *Id.*

293. *Id.*

294. *Id.* at 313. "[The Minnesota] supreme court in *W.J.L.* stated that once a victim is abused the statute of limitations begins to run because of the causal connection between the abuse and the injury, unless there is a legal repressed memory disability. . ." *Id.* at 313 n.2.

295. *Id.* at 313. "Dr. Hewitt states here that repressed memory syndrome may include essential knowledge of events that took place. That raises the question of whether the victim may suffer from repressed memory under the legal definition. . . Because the Minnesota Supreme Court hasn't decided a repressed memory case, what legally constitutes repressed memory syndrome remains unclear. . .."

296. 727 N.E.2d 217 (Ill. 2000).

297. *Id.* at 219.

298. *Id.* at 222-24.

H. *Unsure? Give It to the Judge/Jury*

The method many courts have used in order to solve the issue of reliability is often to leave it to the jury. While the jury is the fact finder and should be given every opportunity to successfully do its job, there are duties that the jury should not be expected to perform, especially if the ultimate goal is for the jury to perform its duties well. Leaving the question of the reliability of repressed memory evidence to the jury is at best unfair. Through this action, juries are often burdened with a task upon which the scientific community cannot even agree.

The problems with allowing jurors to answer the question of reliability are numerous. First, the jury is not made up of scientists. Consequently, the testimony of the expert becomes crucially important, and equally persuasive.[299] A juror with no knowledge of a subject will tend to give the most credit to the expert who appears to be the most believable.[300] With this, the reliability of the evidence is no longer at issue, the expert with the most believable face is. Therefore, the jury has not performed its job and the purpose of the fact finder goes unserved.

Yet another issue involves making the judge into an amateur scientist. The average judge, as with the average juror, has no working knowledge of repressed memory. Thus, she will be forced to determine whether the information will assist the jury and whether the admittance of the information will lead to an unfair decision, based on what she learns from the attorneys. While this is a normal procedure for the judge, and mandated by *Daubert*, this procedure should not involve an issue upon which the scientific community cannot agree.[301] The very problem with repressed memories is that the scientists do not consider the theory reliable to any significant level of acceptance. As a result, the judges are actually being asked to do the seemingly impossible.

Through an exact application of *Daubert*'s requirements, it is difficult to understand why or how a trial judge as a "gatekeeper" would allow repressed memory evidence. The scientific community says there is a lack of falsifiability regarding the repressed memory evidence, which precludes it from being a valid scientific theory.[302] Falsifiability is believed to mean is that there is no way to prove that the results are incorrect or false. The definition is not easy to understand and has continued to lead to confusion.[303]

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

300. *See id.* at 1250.

301. *Id.*

302. *See* McAlister, *supra*, note 184.

303. Chief Justice Rehnquist wrote, "I am at a loss to know what is meant when it is said that

Judging from the varied scientific opinions, the lack of a uniform rule, and the recent court decisions on the matter, it is relatively easy to conclude that repressed memory evidence is unreliable and should not be admitted into evidence. Many of the courts that have decided to allow repressed memory evidence have done so based on expert testimony on the issue. This reasoning seems circular—the evidence alone is not reliable enough to be admitted, but an expert's testimony about the reliable evidence makes the evidence more reliable and thus admissible. This begs the question, how can evidence be unreliable, but someone who is an expert on the unreliable evidence will miraculously make the evidence more reliable than it was before? The reasoning is illogical and should not be employed by courts in matters concerning such serious considerations as the potential removal of an accused person's liberty. The fact that the chance of the repressed memory will be actual and accurate can be a roll of the dice, a fifty-fifty shot. This should be enough to warrant an absolute inadmissibility until the science is more clearly defined and better substantiated.

IV. CONCLUSION

While there is an existing theory that espouses that the courts will begin to open the door wider with respect to prosecution-beneficial polygraph evidence, it is the opinion of this writer that this is not the best route for American jurisprudence. The fact that the very people who have studied the science of polygraphy cannot agree to any significant extent on the reliability of the results of these tests or even on the best method to use for testing appears to be more than enough evidence to justify placing a hold on the admissibility of polygraph evidence. In addition, the substantial role that the examiner plays in the interpretation of the results coupled with the lack of uniformity regarding the qualifications of the examiners indicates that this science is not quite ready to be introduced as evidence that determines whether someone will lose his or her liberty.

Further, even with jury instructions, there is a significant probability that the jury will give more weight to the evidence from the polygraph, thereby leading to the creation of an unfair position for the accused. Juries will probably recognize that people might be inclined to do anything when the aspect of losing their freedom is before them. In addition, the fact that jurors will recognize the significant interest of the accused in the case indicates that they might be more inclined to believe the polygraph's results. After all, the results are often what the jury con-

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the scientific status of a theory depends on its 'falsibility.'" Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 600 (1993) (Rehnquist, C.J., concurring in part, dissenting in part).

centrates on. Specifically, the jury would focus on the results that were derived from a machine and the testimony of a third-party expert with no interest in the outcome of the case. Thus, the polygraph evidence will probably be given more weight than other evidence that will be presented, in spite of indication of the results.

Another reason to postpone adoption of the admissibility of polygraph evidence at this time concerns the right of an accused to present a defense. While this writer admits that polygraph evidence may be an extremely important part of the defense presentation, the fact remains that it is still considerably unreliable. In addition, the mere fact that the evidence would be important if admitted should not supercede the fact that the evidence is unreliable. It is this writer's belief that admitting evidence that is, in and of itself, relatively suspect will not assist the trier of fact to conclude guilt or innocence. In fact, evidence that is unreliable would serve exactly the opposite function of misleading the jury and in fact undermine the purpose of the jury's role.

It should be inconsequential as to whom the evidence will benefit if the evidence itself is unreliable. The precedents regarding polygraph evidence, while hopefully circumstantial, are nonetheless alarming. Courts should be on the same accord with their analysis and admittance of evidence regardless if the beneficiary is the state or the defendant. After all, justice is supposed to be blind.

As a society, we cannot afford to essentially allow a machine, capable of mistaking a nervous response for a lie or a lie for a truth, and a person who does not have to meet any mandatory regulations for his or her so-called expertise, to decide whether the accused loses the very thing that we as Americans hold dear—liberty. We cannot afford to take this risk on such a science that is still developing and is not close to being exact. Although there are strides being made in this area, this writer is not comfortable with chancing the liberties of the accused on a science that is inexact and underdeveloped. The debates regarding the admissibility of both polygraph evidence and repressed memory evidence do not seem to have an end in sight. The scientific community is completely divided over the reliability of both types of evidence and the question of admissibility that each possesses. There are certain things that we take for granted with regard to science, but those things usually have the majority of scientist and students of scientists in agreement with their existence or at least their reliability.

The experts continue to disagree on what is the best method of polygraph examination. They also are unable to agree on whether the interpretation of the evidence will lead to an increase in incorrect results. More importantly, experts cannot agree that the very changes that the

examinations record can actually be attributed to someone telling a falsehood. If the test itself cannot be said without a doubt to accurately test for false information, it would be negligent to use its results in any manner, especially in a court of law.

Some argue that polygraph examinations are commonplace in employment and even in the government. While this is true, this widespread usage does not automatically equate to reliability. Further, if the tests are questionable, it is logical to conclude that the results would be questionable regardless of how experienced the examiner is. When freedom is at stake, it would be criminal to allow an uncertain methodology to be used to reach a very certain result.

The bottom line with regard to the admissibility of polygraph evidence boils down to one question: do we want to turn our system of jurisprudence over to a machine instead of people with feelings, experiences, ideas, and understanding? In the alternative, do we want a significant portion of our ideas of justice to be based on the observations of a person, who relies on a machine to effectively determine the guilt or innocence of a human being? Even if polygraph evidence is supportive of the innocence of the defendant, it is still plagued with reliability problems, and should therefore not be allowed in as evidence. Even with all of the safeguards of licensing examiners and checking the machine's recording devices, the fact of the matter is that a polygraph is still a machine, and this writer is not comfortable with having a machine determine whether someone goes free or loses his or her freedom.

This is the reason why the *Scheffer* decision is not as meaningful as it appears at first glance. The *Scheffer* decision held that the per se rule of admissibility of polygraph evidence was inadmissible in the limited context of military rules. It is apparent, however, by the opinion's language that the *Scheffer* majority has a distrust of the evidence because of its lack of reliability and verifiability. Further, because the decision was not a close one, (Justice Stevens was the only dissenter) it is a safe bet that if a case were to appear before the Court outside of the realm of the military, the Court would decide it in a similar manner. The rule of per se inadmissibility may not be allowed after *Rock*, but the door for the inadmissibility of the evidence would be left open wide enough for a Mack truck. The Court definitely decided *Scheffer* correctly. Perhaps at some point science will be more conclusive with regard to the evidence and its testing and admissibility, but that time is not here.

There are some that argue that repressed memory testimony even if hypnotically enhanced is just as accurate as traditional memory testimony. Therefore, the argument continues if the courts allow traditional memory testimony, they should also allow testimony of repressed mem-

ory. While it may be true that both memories are accurate, it may also be true that both memories may be inaccurate. The difference between the memories is that most jurors can decide the reliability of a traditional memory for themselves because they too have traditional memories. Many jurors are unfamiliar with repressed memories and how they are triggered, even if they have experienced something similar.

The likelihood that the traditional memory is easier to understand and relate to makes the decision of reliability of the witness easier. The fact that repressed memory is presented as a scientific theory alone will cause apprehension in jurors based on their lack of knowledge. Consequently, they will give significant credibility to the expert witness who appears confident and knowledgeable about this unfamiliar theory. Therefore, the reliability of the witness's testimony will not be at issue. The ability of an expert to convince the jury through confusing and novel information will be the ultimate issue. Science has not determined how accurate repressed memories are, but it has been determined that repressed memories are vulnerable to change. It is unconscionable to place a person's fate in the hands of an ignorant jury hanging on every word of an expert who appears to know what he is talking about.

The *Rock* decision may have been a slight victory for the defendant in the case, but it offered a gaping hole for other courts to disallow repressed memory testimony. The *Rock* decision was intentionally narrow and specifically expressed that because there was no other way to hear the defendant's story without the testimony, the Court would allow the testimony to be admitted. In other words, if there is another way to get the information without the repressed evidence testimony, the testimony can be excluded. Further, if the defendant's right to testify is not at stake, the testimony can also be excluded. This can be easily interpreted as allowing for the exclusion of repressed memory testimony from witnesses other than the defendant. Lastly, the Court continuously referred to its elimination of the "per se" rule. This indicates that an analysis that avoids per se inadmissibility may very well be sufficient to avoid a *Rock* problem. Indeed, the door for inadmissibility was left open for any court that is capable of reading between the lines in *Rock*.

Because the scientists themselves cannot collectively say for certain whether repressed memories are accurate, we cannot afford to allow testimony based on memories that may have been planted or altered in some significant fashion to be admitted as evidence. Further, before this testimony should be admitted, there should be specific uniform guidelines that determine how long someone has before he can no longer bring a claim. This limitation is necessary because how fair would it be to allow a sixty-year-old woman to bring a claim of incest or molestation

that occurred when she was sixteen-years-old? While there is sympathy for the unfortunate events she believes she experienced, we must maintain a system of fairness—even for alleged molesters. Without a time limit, this would be comparable to an open invitation to every quack in the country to plant or suggest abusive history and constantly reap the benefits from their "therapy sessions."

No matter how many safeguards are used, neither polygraphy nor repressed memory evidence is certain and reliable enough to be admitted in a court of law. The very reason for our adversarial system is to allow those who are accused of a crime to receive a fair opportunity to prove, through reliable means, their innocence. If the means are not reliable, no matter how much they can assist the trier of fact, the rules regarding evidence will not allow them to be admitted.

While this writer sympathizes with those who are accused and have nothing other than the results of a polygraph test or their testimony of repressed memories for their defense, the reliability of such evidence is not up to a standard that the courts of America can embrace. This evidence may one day be reliable enough to be used in a court of law, but today, it should not be admitted simply because some within the scientific community argue for its acceptance. It would be unjust for Americans to leave the pursuit of justice in the hands of an unreliable, uncertain, and unsubstantiated methodology that is still being tested and developed.

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