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# COMMENTS

## LIES, DAMN LIES, AND POLYGRAPHS: THE PROBLEMATIC ROLE OF POLYGRAPHS IN POSTCONVICTION SEX OFFENDER TREATMENT (PCSOT)\*

### I. INTRODUCTION

In the United States, sex offenders are distrusted and reviled above all other criminals.<sup>1</sup> The Supreme Court has “embraced a deeply held view in American society—that sex offenders are a different breed of offenders whose horrendous crimes render them less deserving of . . . constitutional guarantees.”<sup>2</sup> Congress has joined in the Supreme Court’s special distrust and disgust towards sex offenders by enacting Federal Rules of Evidence 413, 414, and 415, which make admissible prior act evidence against sex offenders that would be inadmissible against non-sex offender defendants.<sup>3</sup> This attitude towards sex offenders stems, in part, from the short prison

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1. Amanda C. Graeber, Note, *McKune v. Lile and the Constriction of Constitutional Protections for Sexual Offenders*, 23 REV. LITIG. 137, 139 (2004); see also Tanya Kessler, Comment, “Purgatory Cannot be Worse than Hell”: *The First Amendment Rights of Civilly Committed Sex Offenders*, 12 N.Y. CITY L. REV. 283, 290 (2009) (describing sex offenders as “the most despised” minority); Julia T. Rickert, Comment, *Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions*, 100 J. CRIM. L. & CRIMINOLOGY 213, 227 (2010) (“Multiple studies have shown that repugnance, anger, and fear are the most common reactions to sex offenders.”); John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 561–63 (2005) (describing state laws providing for chemical castration of certain convicted sex offenders); Michael L. Perlin, “*There’s No Success Like Failure/And Failure’s No Success at All*”: *Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. 1247, 1248 (1998) (claiming that insanity defendants are no longer the “most despised” group in society in part because sex offenders are the “new universe of ‘monsters’ replacing them in our demonology”). Perlin goes on to explain that sex offenders have “become the lightening rod for our fears, our hatreds, and our punitive urges.” *Id.*

2. Graeber, *supra* note 1, at 172 (discussing the plurality decision in *Lile*). See, e.g., *McKune v. Lile*, 536 U.S. 24, 32 (2002) (“Sex offenders are a serious threat in this Nation.”); *Kansas v. Hendricks*, 521 U.S. 346, 346–48 (1997) (upholding state civil commitment statute allowing for commitment of sexually violent offenders beyond the penal sentence imposed for conviction); see also Kessler, *supra* note 1, at 327 (describing federal courts’ rejections of civilly committed sex offenders’ double jeopardy and ex post facto claims based on the difference between imprisonment and civil commitment while analyzing, and generally rejecting, their First Amendment claims under a prisoner-like standard).

3. FED. R. EVID. 413–415; see also Bryan C. Hathorn, *Federal Rules of Evidence 413, 414, and 415: Fifteen Years of Hindsight and Where the Law Should Go from Here*, 7-1 TENN. J.L. & POL’Y 22, 22–23

sentences they often receive<sup>4</sup> and the well-known high recidivism rate of sex offenders.<sup>5</sup> As a result, the criminals most likely to again violate the law are released from prison after an average of three and a half years in prison. Because of this scenario, and the public and governmental sentiment towards sex offenders, there is a heightened interest in providing adequate treatment for sex offenders and strict monitoring of their behavior.<sup>6</sup> Unfortunately, the chosen method for achieving both of these goals is the Control Question Polygraph Test (“CQT”).<sup>7</sup> The purpose of this Comment is to highlight two problems created by the use of the CQT polygraph in the context of postconvicted sex offender treatment (“PCSOT”) and why these problems render CQT inappropriate for use in the criminal justice system.

The first problem is based on the Fifth Amendment of the United States Constitution—specifically, the Self-Incrimination Clause.<sup>8</sup> An integral part of PCSOT, and one in which the polygraph is heavily used, is getting the offender to completely disclose his sexual history, including any past, uncharged crimes.<sup>9</sup> This implicates the Fifth Amendment when the offender is under a court order to answer all questions asked of him and there is no guarantee that incriminatory responses will not be used against him in later prosecution.<sup>10</sup>

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(2011) (noting Congress acted “outside of the normal procedure for the creation of federal rules” when it created FRE 413–415 by ignoring objections of the judicial conference).

4. See PATRICK A. LANGAN ET AL., U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 9 tbl.3 (2003) (noting that the average sentence length for sex offenders released from prison in 1994 was 97.3 months, whereas the average time served was 42.3 months).

5. See *Lile*, 536 U.S. at 33 (noting that convicted sex offenders are more likely than any other type of offender to be rearrested for new rape or sexual assault). *But see* LANGAN ET AL., *supra* note 4, at 24 tbl.21 (noting that 5.3% of sex offenders released from prison in 1994 were rearrested for a new sex crime within three years, and 3.5% were reconvicted for a new sex crime within three years); *id.* 13 tbl.7 (noting that 43% of released sex offenders were rearrested within three years of release for *any* type of crime, and 24% were reconvicted).

6. See Ewout H. Meijer et al., *Sex Offender Management Using the Polygraph: A Critical Review*, 31 INT’L J.L. & PSYCHIATRY 423, 428 (2008) (noting high recidivism rates and the sensitivity of the public towards issues of sex offender treatment creates an incentive to strictly supervise and treat offenders); *see also* William G. Iacono, *Effective Policing: Understanding How Polygraph Tests Work and Are Used*, 35 CRIM. JUST. & BEHAV. 1295, 1304–05 (2008) (noting the vociferous public response to repeat offending by sex offenders led to more states requiring polygraphs as a condition of release for sex offenders); Ron Kokish et al., *Post-Conviction Sex Offender Polygraph Examination: Client-Reported Perceptions of Utility and Accuracy*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 211, 212 (2005) (explaining polygraphs are important to elicit information about sexual past to further treatment and prevent recidivism and also to ensure compliance with probation and treatment requirements); Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 700–01 (2011) (observing that “the management of sex offenders is a top priority for legislative action today”).

7. See KIM ENGLISH ET AL., THE VALUE OF POLYGRAPH TESTING IN SEX OFFENDER MANAGEMENT: RESEARCH REPORT SUBMITTED TO THE NATIONAL INSTITUTE OF JUSTICE 1, 11 (2003) (claiming use of polygraphs with sex offenders is similar to using drug tests for drug offenders); *see also* Commonwealth v. Shrawder, 940 A.2d 436, 443 (Pa. Super. Ct. 2007) (finding that “the therapeutic polygraph is an essential tool for a therapist whose job it is to reveal an offender’s deception”).

8. The Fifth Amendment provides, in relevant part, that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself.”

9. See ENGLISH ET AL., *supra* note 7, at 14–15 (describing use of sexual history polygraphs in PCSOT).

10. See *infra* notes 179–202 and accompanying text for a discussion of *United States v. Antelope* as an example of the manner in which PCSOT polygraphs can violate the Fifth Amendment.

The second major problem is based on the CQT polygraph itself. A large body of research, including a comprehensive study conducted by the National Research Council, has called into question not just the current reliability of CQT polygraphs but whether technological or methodological advancement could ever increase reliability of the examinations.<sup>11</sup> This raises questions as to whether it is appropriate for test results to play any role in determining whether an individual will be deprived of personal liberty.

This Comment analyzes both of these issues by examining how they have been addressed in federal and state courts throughout the country. In doing so, this Comment explains why the current systems and methodologies employed in many jurisdictions fail to adequately address the Fifth Amendment concerns and/or the reliability concerns raised by PCSOT polygraphs. A proposed solution, calling for the inadmissibility of polygraph results in any court proceedings while allowing for their continued use in the therapeutic context, is introduced. As of this writing, there is little literature that analyzes both the constitutional implications and reliability concerns raised by PCSOT polygraphs and the treatment these issues receive in a broad range of jurisdictions.<sup>12</sup>

Part II provides an overview of the legal scholarly discussions of PCSOT polygraphs. Specifically, Part II.A briefly explains the role of therapy and CQT polygraphs in PCSOT, how the CQT works, and current arguments for and against CQT polygraphs in the PCSOT context. Parts II.B, II.C, and II.D describe how the Supreme Court, the Circuit Courts of Appeals, and various state appellate courts, respectively, have dealt with the polygraph-related challenges raised by convicted sex offenders.

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11. See, e.g., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., THE POLYGRAPH AND LIE DETECTION 2 (2003) (noting the current measurement of ambiguous physiological responses indicates that any improvements in polygraph technique and interpretation will "bring only modest improvements in accuracy").

12. Most of the legal scholarly writing on this subject discusses the analysis of *McKune v. Lile* and, because polygraphs play a relatively minor role in that case, focuses more on the Fifth Amendment self-incrimination issues rather than how the polygraph affects them. See, e.g., Matthew Kilby, *Torturing the Fifth Amendment: McKune v. Lile*, 91 GEO. L.J. 1093 (2003) (focusing solely on Fifth Amendment implications of *McKune v. Lile*, with the word "polygraph" appearing one time in the article). Other legal articles take a much narrower jurisdictional approach to the issue. See, e.g., Terry Jane Feld, Note, *The Polygraph Paradox: Florida's Conflicting Approaches Toward the Admissibility and Use of Polygraph Results*, 20 NOVA. L. REV. 1369 (1996) (focusing only on polygraph admissibility in Florida and devoting little space to Fifth Amendment concerns). Other articles, although considering broader jurisdictional implications for polygraphs, do not focus on the PCSOT context. See, e.g., Vincent V. Viglucci, Note, *Calculating Credibility: State v. Sharma and the Future of Polygraph Admissibility in Ohio and Beyond*, 42 AKRON L. REV. 319 (2009) (focusing on the role polygraphs play in pretrial and trial contexts). Finally, the nonlegal studies conducted on polygraphs generally fail to address the Fifth Amendment implications of PCSOT polygraph examinations. See *infra* note 318 for a discussion of the failures of studies to acknowledge the Fifth Amendment implications of the polygraph.

One article, however, seems to come close to the scope of this Comment, in that it discusses both Supreme Court and circuit court responses to questions raised by polygraphs as well as a state-level approach to the use of polygraph testing in the PCSOT context. Furthermore, the article discusses both reliability and constitutional issues regarding the polygraph. Angela Kebric, Comment, *Polygraph Testing in Sex Offender Treatment: A Constitutional and Essential Tool for Effective Treatment*, 41 ARIZ. ST. L.J. 429 (2009). Yet, as the title demonstrates, Kebric's conclusions are in direct contrast with those reached in this Comment. Additionally, although Kebric discusses constitutional and scientific issues of the polygraph from state, circuit, and national perspectives, the analysis in this Comment is broader in scope and breadth.

Part III assesses courts' decisions regarding PCSOT polygraphs in light of the scientific and theoretical literature concerning CQT polygraphs. Part III.A.1 analyzes the problems with certain approaches towards the Fifth Amendment issue raised by PCSOT polygraphs, whereas Part III.A.2 addresses the problems of some of the courts' decisions in light of the unreliability of CQT polygraphs. Part III.A.3 explains why it is problematic for the courts to consider the two fundamental problems of self-incrimination and unreliability separately. Finally, Part III.B proposes a solution that would address the two major concerns of self-incrimination and reliability; namely, a rule that the practice of PCSOT should be allowed to assist in sex offender rehabilitation efforts, but that the results of any such test should be inadmissible at a later criminal proceeding against the offender.

## II. OVERVIEW

### A. *Postconviction Sex Offender Treatment and Polygraphs*

"Among forensic disciplines, none is as controversial as using the polygraph to detect deception."<sup>13</sup> The polygraph has been used for over seventy years, and it has continued to be the subject of rigorous debate for almost that entire span.<sup>14</sup> Despite this controversy, PCSOT polygraphs have grown in popularity.<sup>15</sup> Some consider the PCSOT polygraph to be the centerpiece of a "very important synergistic process that results from close, consistent collaboration among the polygraph examiner, the treatment provider and the supervising officer."<sup>16</sup> Though there are several different kinds of polygraph examinations,<sup>17</sup> the Comparison (or Control) Question Technique

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13. Donald J. Krapohl et al., *Does the Confession Criterion in Case Selection Inflate Polygraph Accuracy Estimates?*, FORENSIC SCI. COMM., July 2002, available at <http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2002/krapohl.htm>.

14. *Id.*; see also Theodore P. Cross & Leonard Saxe, *Polygraph Testing and Sexual Abuse: The Lure of the Magic Lasso*, 6 CHILD MALTREATMENT 195, 200 (2001) ("Regardless of one's position about the evidence, the clear conclusion is that there is no agreement among scientists [about polygraph accuracy and validity]."); Bryan Myers et al., *The Court of Public Opinion: Lay Perceptions of Polygraph Testing*, 30 LAW & HUM. BEHAV. 509, 509 (2006) (explaining the role of polygraph results in criminal proceedings is heavily debated and controversy shows no signs of abatement).

15. See ENGLISH ET AL., *supra* note 7, at 12, 17 (noting that of the 700 probation and parole supervisors contacted for the study, only seventeen percent had been using the polygraph for more than nine years, whereas twenty-eight percent of respondents reported using the polygraph for five to nine years); Gershon Ben-Shakhar, *The Case Against the Use of Polygraph Examinations to Monitor Post-Conviction Sex Offenders*, 13 LEG. & CRIMINOLOGICAL PSYCHOL. 191, 191 (2008) (noting an increase of use of polygraphs in convicted sex offender supervision with seventy percent of community sex offender programs making use of polygraphs); Kokish et al., *supra* note 6, at 211 (noting growing use of PCSOT polygraphs); Jill S. Levenson, *Sex Offender Polygraph Examination: An Evidence-Based Case Management Tool for Social Workers*, 6 J. EVIDENCE-BASED SOC. WORK 361, 361 (2009) (noting increasing popularity of PCSOT polygraph). This growth in polygraph use in the PCSOT context is not limited to the United States: the United Kingdom has considered implementing compulsory polygraph examinations for sex offenders. Ben-Shakhar, *supra*, at 191.

16. ENGLISH ET AL., *supra* note 7, at 16.

17. Types of polygraphs include: relevant-irrelevant examinations, control or comparison question examinations, and guilty knowledge polygraph testing. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 11, at 14–15.

(CQT) is the type used in the PCSOT context.<sup>18</sup> Before discussing the polygraph test, it is important to understand why therapy programs are used for convicted sex offenders and to examine some examples of what these programs involve.

### 1. Postconviction Sex Offender Treatment and Therapy

The effectiveness of sex offender therapy is nearly as controversial as the use of polygraphs.<sup>19</sup> Some question the wisdom of considering sex offenders as needing “treatment” in addition to punishment.<sup>20</sup> However, research generally indicates that rehabilitative programs can help sex offenders control their impulses and reduce their likelihood of reoffending.<sup>21</sup> Specifically, studies indicate that the recidivism rate for sex offenders receiving treatment was nineteen percent, compared to a twenty-seven percent rate for nontreated sex offenders.<sup>22</sup> Therefore, it is unsurprising that dozens of federal and state jurisdictions make use of PCSOT programs.<sup>23</sup>

One therapy method requires the offender to disclose the exact nature of his attractions so that the therapist can design a treatment program specifically for that individual and can use techniques intended to address the rehabilitative needs of the individual.<sup>24</sup> These techniques include asking the sex offender to relive aspects of his deviant fantasies and then spraying him with a noxious smell in an attempt to get him to associate an adverse experience with that fantasy.<sup>25</sup> As treatment progresses, offenders are asked to identify the sequence of events that led to the sex offense.<sup>26</sup> The

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18. Meijer et al., *supra* note 6, at 424; *see also* Iacono, *supra* note 7, at 1304 (noting expanding use of CQT polygraph in sex offender treatment).

19. *See* Linda S. Grossman et al., *Are Sex Offenders Treatable? A Research Overview*, 50 PSYCHIATRIC SERVICES 349, 349–50 (1999) (noting widespread skepticism regarding the efficacy of sex offender treatment, as well as the difficulty in assessing whether treatment actually works).

20. *See* Howard Zonana, *The Civil Commitment of Sex Offenders*, 278 SCIENCE 1248, 1248–49 (1997) (explaining that requiring civil commitment of certain sexually violent predators after finishing criminal sentence is an improper use of psychiatry and can undermine a previous determination by a trial court that offender was criminally responsible for his actions); *see also* Graeber, *supra* note 1, at 147 (noting some studies indicate certain treatment strategies actually undermine rehabilitation efforts).

21. *McKune v. Lile*, 536 U.S. 24, 33 (2002) (citing U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORR., A PRACTITIONER’S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER, at xiii (1988)); *see also* Merrill A. Maiano, Comment, *Sex Offender Probationers and the Fifth Amendment: Rethinking Compulsion and Exploring Preventative Measures in the Face of Required Treatment Programs*, 10 LEWIS & CLARK L. REV. 989, 997 (2006) (noting research generally indicates a lower rearrest rate for offenders who participated in treatment).

22. Grossman et al., *supra* note 19, at 357. Grossman provided an analysis of the then-existing research on sex offender treatment and found that although it was inconclusive whether institutional programs (such as those taking place in prisons) were effective, outpatient programs, such as those a parolee or probationer would attend, were generally much more effective. *Id.* at 355–56.

23. *See, e.g.*, *United States v. York*, 357 F.3d 14, 18 (1st Cir. 2004) (describing participation in PCSOT program as part of defendant’s condition of release); *see also* Graeber, *supra* note 1, at 144 (noting widespread use of sex-abuse treatment programs (“SATPs”)).

24. *See* Grossman et al., *supra* note 19, at 354–55 (describing various individualized techniques considered effective at helping sex offenders, which all require specific knowledge of the sex offender’s sexual fantasies and past transgressions).

25. *Id.* at 354.

26. *Id.*

therapist is then able to apply the “averse experience” (the noxious odor) to these types of behavior as well.<sup>27</sup> Regardless of the specific techniques used, almost all PCSOT programs require the “patient” to fully and honestly disclose his/her sexual history.<sup>28</sup> Complete disclosure is important to understand recidivism risks as well as behavior patterns.<sup>29</sup> Because honesty and completeness are necessary for the exercise to succeed, the CQT polygraph is often used to try to obtain the necessary information.<sup>30</sup>

## 2. The Control Question Technique (CQT) Polygraph

The CQT polygraph was initially implemented to correct deficiencies in earlier forms of polygraph examination.<sup>31</sup> In the CQT, the polygraphist uses “comparison” questions paired with “relevant” questions about the conduct at issue.<sup>32</sup> The comparison questions are accusatory in nature but do not deal with the misbehavior related to the specific offense at issue.<sup>33</sup> The procedure is based on the assumption that the most individually threatening questions will cause the greatest physiological response, so that the relevant questions will be most threatening to the guilty suspects, whereas the comparison questions are most threatening to innocent suspects.<sup>34</sup> Responses are measured according to physiological reactions based on skin conductance (monitored from the fingertips), respiration (monitored from belts around the chest and abdomen), and cardiovascular activity (monitored from a blood pressure cuff placed around one arm).<sup>35</sup> The National Research Council (NRC), in its comprehensive study of polygraphs,<sup>36</sup> described the assumptions on which CQT theory depends: (1) the examinee responds differently when trying to hide something than when not trying to hide something; (2) those who have nothing to hide will be less reactive to relevant questions than they are when lying on personally relevant (comparison) questions; (3) if examinees respond more strongly to relevant questions, it was not by chance alone; and (4)

[a]n examiner’s pursuit of an explanation of an anomalous response and the consequent activation of social norms and fear of having been detected will lead to explanations, admissions, or confessions one otherwise might not

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27. *Id.*

28. ENGLISH ET AL., *supra* note 7, at 14; Kokish et al., *supra* note 6, at 212.

29. Kokish et al., *supra* note 6, at 212.

30. See Levenson, *supra* note 15, at 363 (citing numerous studies claiming the polygraph is an essential aspect of sexual history interviews). See *infra* notes 59–69 and accompanying text for a discussion of the role polygraphs play in this aspect of therapy.

31. Iacono, *supra* note 6, at 1296. The predecessor to the CQT was the relevant-irrelevant polygraph examination, which involved comparing physiological responses to crime-relevant questions, such as “Did you force Suzy Q. to have sex with you?”, with irrelevant, and inconsequential, questions, such as “Is today Friday?” *Id.*

32. *Id.*

33. *Id.* An example might be: “Have you ever lied on your taxes?”

34. Meijer et al., *supra* note 6, at 424.

35. *Id.*

36. See Iacono, *supra* note 6, at 1300 (“The most thorough analysis of polygraph testing undertaken to date was published as a book by the National Research Council . . .”).

obtain but will not produce false confessions or a specific fear or anxiety in response to relevant questions on a follow-up test.<sup>37</sup>

*a. CQT Format*

The CQT polygraph examination has three phases: the pretest phase, the physiological phase, and the postphysiological interrogation.<sup>38</sup>

The pretest interview is pivotal to the polygraph examination and is conducted completely by the examiner, and so is subject to a great degree of variance.<sup>39</sup> The examiner interviews the subject to formulate the questions for the actual polygraph examination.<sup>40</sup> The examiner attempts to formulate the relevant questions to make them as unambiguous as possible, answerable with a simple “yes” or “no.”<sup>41</sup> During this phase, the examiner tries to make the subject believe that the polygraph machine is infallible.<sup>42</sup>

In the next phase, the subject is attached to the machine and the examiner begins the test. A typical CQT exam lasts ten minutes, going through the questions three times.<sup>43</sup> If the examinee finds any questions confusing, the examiner may reword the questions between “runs.”<sup>44</sup>

The third and final phase is only implemented if the examinee has been found “deceptive.”<sup>45</sup> During this phase, the examiner confronts the subject to try to get an admission, explanation, or a full confession.<sup>46</sup>

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37. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 11, at 80–81.

38. Iacono, *supra* note 6, at 1297–98.

39. *See id.* at 1298 (noting that even though scoring algorithms exist to standardize data interpretation, these computer programs are still dependent on questions developed by the examiner during the pretest interview); *see also* ENGLISH ET AL., *supra* note 7, at 23 n.24 (citing N.J. BLACKWELL, AN EVALUATION OF THE EFFECTIVENESS OF THE POLYGRAPH AUTOMATIC SCORING SYSTEM (PASS) IN DETECTING DECEPTION IN A MOCK CRIME STUDY (Dep't of Def. Polygraph Inst., Ft. McClellan, Ala., 1994)) (noting that test accuracy may decrease by up to eight to ten percent depending on the examiner); Ben-Shakhar, *supra* note 15, at 193 (explaining that because the examiner's determinations are based on comparing the examinee's responses to different questions, choice of control questions and relevant questions are pivotal); Ewout H. Meijer & Bruno Verschuere, *The Polygraph and the Detection of Deception*, 10 J. FORENSIC PSYCHOL. PRAC. 325, 327 (2010) (“[T]he accuracy of the [polygraph] test depends largely on the skills of the polygrapher rather than on the test itself.”).

40. Specific examples include asking questions about the evidence of the crime, the subject's version of what happened, and more general questions, such as the examinee's perspective about his own honesty. Iacono, *supra* note 6, at 1297.

41. *Id.* The examiner may ask a question such as “Have you ever lied to a person in a position of authority?” *Id.* The subject typically responds with seemingly innocent answers such as a “teacher” or “a parent,” because they are told the examination will only function if they are absolutely truthful at this point. *Id.* The control question might then be something like, “Other than what you have told me, have you ever lied to a person of authority?” *Id.*

42. Cross & Saxe, *supra* note 14, at 197; Meijer et al., *supra* note 6, at 424. The examiner also pressures the subject into answering “no” to the comparison questions by inferring that confessions of illegal activities will negatively influence the examiner's opinion of the subject. Iacono, *supra* note 6, at 1297.

43. Iacono, *supra* note 6, at 1298. This is because, in part, the blood pressure cuff becomes increasingly uncomfortable the longer it is on. *Id.*

44. *Id.*

45. *Id.*; Cross & Saxe, *supra* note 14, at 197.

b. *Countermeasures*

Countermeasures are a major concern for polygraphists and researchers. The National Research Council observed that, “[c]ountermeasures pose a potentially serious threat to the performance of polygraph testing because all the physiological indicators measured by the polygraph can be altered by conscious efforts through cognitive or physical means.”<sup>47</sup> Because the polygraph does not detect deception itself, but rather physiological responses associated with deception, the ability to control those responses severely undermines the practical and theoretical basis for the test.<sup>48</sup> It is relatively easy to increase the physiological response to control questions, which renders any physiological responses to the relevant questions less significant.<sup>49</sup> For example, an examinee can distort responses by “engaging in mental arithmetic” or biting his tongue when the comparison questions are asked.<sup>50</sup> Specific information about polygraph countermeasures is readily available: a Google search of the term “polygraph” revealed four “hits” on the first page of results that dealt with “beating” or “cheating” the polygraph.<sup>51</sup> A Google search of “polygraph countermeasures” came back with approximately 18,100 results.<sup>52</sup> As the National Research Council noted, these countermeasures are “learnable.”<sup>53</sup>

3. The Support for CQT Polygraph Examinations in the PCSOT Context

Articles about PCSOT polygraphs often begin with a description of the dishonesty and high recidivism rates of sex offenders, as well as the danger they pose to society in

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46. Iacono, *supra* note 6, at 1298.

47. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 11, at 4; *see also* Cross & Saxe, *supra* note 14, at 200 (citing William G. Iacono & David T. Lykken, *The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests*, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 582–618 (D. L. Faigman et al. eds., 1997)) (stating that “countermeasures are a real threat”).

48. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 11, at 13 (explaining that the polygraph instrument only measures physiological responses, not deception itself).

49. Iacono, *supra* note 6, at 1301–02; *see also* Meijer et al., *supra* note 6, at 426 (noting that several studies express concern over the use of mental countermeasures because they are not easily detected).

50. Iacono, *supra* note 6, at 1302; *see also* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 11, at 101 (“All of the physiological indicators measured by the polygraph can be altered by conscious efforts through cognitive or physical means, and all the physiological responses believed to be associated with deception can also have other causes.”). Other possible countermeasures include: drugs and alcohol, production of emotional imagery, mental disassociation, counting backwards, breath control, pain-inducing action before and during questioning (including muscle contraction or pressing toe on the ground). NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 11, at 139.

51. Search of “Polygraph,” GOOGLE, <http://www.google.com> (search “polygraph”) (last accessed Sept. 6, 2012).

52. Search of “Polygraph Countermeasures,” GOOGLE, <http://www.google.com> (search “polygraph countermeasures”) (last accessed Sept. 6, 2012). These results are not meant to imply that there are 18,100 websites describing how to defeat a polygraph. However, the number of results are merely illustrative of how easy it is for an individual to access a guide to passing or “beating” a polygraph examination.

53. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 11, at 216 (“[T]here is enough empirical research to justify concern that successful countermeasures may be learnable.”).

general.<sup>54</sup> Accordingly, proponents view the polygraph as an essential tool to monitor offender compliance with the terms and conditions of release, to reduce recidivism,<sup>55</sup> and to aid in treatment of the offender.<sup>56</sup> Some researchers have concluded that using the polygraph to monitor sex offenders is the same as “using urinalysis testing with drug offenders. It is a method of monitoring very specific behaviors.”<sup>57</sup> To meet these goals, the polygraph is used in three specific contexts: sexual history disclosure polygraph exams, denial and specific-issue exams, and maintenance or monitoring exams.<sup>58</sup>

The sexual history polygraph is used to force the sex offender to disclose, among other information, the “gender, age, and method of assault” for every one of his past victims.<sup>59</sup> The polygraphist reviews the offender’s responses and asks the offender specific questions about the history while the offender is connected to the polygraph machine.<sup>60</sup> Supporters of the polygraph believe it is an essential component of sexual history interviews because sex offenders have “extensive undetected offense histories.”<sup>61</sup> In order to make accurate risk assessments and to develop treatment plans, honest and complete sexual histories are essential, and proponents view polygraphs as the best way of assuring this.<sup>62</sup>

Denial polygraph examinations are used when the offender’s story of the crime is different than the victim’s or when the offender denies committing the crime.<sup>63</sup> The specific-issue examination is also used when the release-officer is concerned that the offender has violated a condition of his release.<sup>64</sup>

The maintenance or monitoring examination is used to ensure the offender’s compliance with the conditions of his release and the requirements of the particular

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54. See, e.g., ENGLISH ET AL., *supra* note 7, at 11 (noting sex offenders have “made secrecy and dishonesty a part of their lifestyle”); Meijer et al., *supra* note 6, at 428 (noting “[t]reatment of sex offenders is a serious issue,” and recidivism is high among sex offenders). Appellate courts often begin the analysis sections of their opinions with similar observations. See, e.g., *McKune v. Lile*, 536 U.S. 24, 32 (2002) (describing “serious threat” sex offenders pose to nation in general).

55. See Kebric, *supra* note 12, at 451 (asserting that polygraph is one of the most effective tools for preventing sex offender recidivism).

56. See ENGLISH ET AL., *supra* note 7, at 10–11 (explaining that postconviction polygraph examinations should be used to obtain “complete and accurate information to (a) determine risk to the public and (b) develop a treatment plan” for the offender); Don Grubin, *The Case for Polygraph Testing of Sex Offenders*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 177, 177 (2008) (noting PCSOT polygraph serves two goals: enhancing treatment and monitoring compliance); Kebric, *supra* note 12, at 434–35 (explaining need for PCSOT polygraphs to identify specific treatment because “sex offenders are not created equal”).

57. ENGLISH ET AL., *supra* note 7, at 11; see also Kebric, *supra* note 12, at 429 (noting “sex offenders tend to be more deceptive than other criminal groups”); Levenson, *supra* note 15, at 362 (noting “[s]exual abuse occurs and thrives in secrecy”).

58. ENGLISH ET AL., *supra* note 7, at 14–15.

59. *Id.* at 14.

60. *Id.*; see also Kebric, *supra* note 12, at 451 (noting polygraph helps ensure accurate information about sentence of conviction (denial and specific issue), sexual history (disclosure), and compliance with terms of release (maintenance or monitoring)).

61. Levenson, *supra* note 15, at 370 (claiming consensus among studies for this proposition).

62. *Id.*; Kokish et al., *supra* note 6, at 212.

63. ENGLISH ET AL., *supra* note 7, at 15.

64. *Id.*

PCSOT program.<sup>65</sup> Just like proponents argue that the secretive nature of sex offenders makes the sexual history polygraph essential,<sup>66</sup> they also assert that the high recidivism rate of sex offenders makes monitoring and compliance polygraphs more important than they might be for other types of offenders.<sup>67</sup>

The information from these examinations is then used to develop or modify treatment for the offender.<sup>68</sup> Although polygraphs are not the sole determinant in developing the treatment of the offenders, they play an important role in a process that involves the polygraphist, the therapist, and the supervising officer, who work together to decide the appropriate course of treatment.<sup>69</sup>

Proponents of the CQT have responded to the critics of polygraph examinations by conducting, and then citing, a large number of field studies purporting to demonstrate high accuracy rates for polygraphs.<sup>70</sup> Some studies indicate that polygraph accuracy rates are as high as ninety-six to ninety-eight percent.<sup>71</sup> Many of these studies rely on the controversial “confession criterion,” a heavily criticized measurement of accuracy.<sup>72</sup> Proponents have attempted to demonstrate this criticism as ungrounded.<sup>73</sup>

One study that attempted to disprove concern over the confession criterion was conducted in extremely specific circumstances and a heavily controlled environment.<sup>74</sup> Though it appeared to debunk concerns about the confession criterion, the researchers noted, “the confession criterion remains a potential source of contamination in undercontrolled studies.”<sup>75</sup>

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65. *Id.*; Cross & Saxe, *supra* note 14, at 198–99.

66. See ENGLISH ET AL., *supra* note 7, at 11 (asserting that “most sex offenders have made secrecy and dishonesty a part of their lifestyle”).

67. See Cross & Saxe, *supra* note 14, at 200 (citing Theodore P. Cross & Leonard Saxe, *A Critique of the Validity of Polygraph Testing in Child Sexual Abuse Cases*, 1 J. CHILD SEXUAL ABUSE 19 (1992)) (describing article that asserted unique nature of sex offenders makes lying about sex offenses harder to detect); Levenson, *supra* note 15, at 370–71 (noting recidivists are less cooperative with treatment and probationary supervision, and treatment failure in turn increases recidivism risks).

68. ENGLISH ET AL., *supra* note 7, at 16.

69. *Id.*; Levenson, *supra* note 15, at 371.

70. See, e.g., Kebric, *supra* note 12, at 439 (citing Raymond Nelson & H. Lawson Hagler, *Post-Conviction Sex Offender Testing: Summary of Presentation to New Mexico Sex Offender Management Board—May 27, 2004*, in RESEARCH OVERVIEW: POST CONVICTION SEX OFFENDER POLYGRAPH TESTING 56, 56 (Claudia Armijo ed., 2004)) (stating that “[s]tudies show polygraph accuracy rates of 95% to 98%”).

71. ENGLISH ET AL., *supra* note 7, at 22 (citing Forensic Research, Inc., *The Validity and Reliability of Polygraph Testing*, 26 POLYGRAPH 215 (1997)); see also Don Grubin & Lars Madsen, *Accuracy and Utility of Post-Conviction Polygraph Testing of Sex Offenders*, 188 BRIT. J. PSYCHIATRY 479, 479 (2006) (reporting study yielding accuracy rate of eighty-five percent).

72. See *infra* notes 109–18 and accompanying text for a discussion of the criticism of the confession criterion.

73. See generally Krapohl et al., *supra* note 13 (reporting results of study undertaken to determine validity of criticisms of confession criterion).

74. *Id.* This study involved using data collected from the U.S. Army Criminal Investigation Detachment Polygraph Division, which has a highly regulated and structured testing procedure. *Id.* Furthermore, in this system, only suspects who are the focus of specific investigations are asked to take polygraphs, so all the cases were single-issue examinations. *Id.* As discussed *infra* notes 104–09 and accompanying text, this is a different context from the typical PCSOT use.

75. Krapohl et al., *supra* note 13.

Supporters of polygraphs also must respond to allegations that polygraph results are largely influenced by human examiners and are therefore subject to human error.<sup>76</sup> The most common response is that sufficiently skilled examiners are able to properly formulate control questions and create an environment conducive to accurate test results.<sup>77</sup> Supporters and practitioners frequently blame any errors on incompetent examiners rather than on the instrument or theory itself.<sup>78</sup>

Without admitting deficiencies in polygraph reliability, many proponents argue that, regardless of accuracy, polygraphs still have deterrent value.<sup>79</sup> Faced with the inevitability of a polygraph, examinees will often disclose information that might otherwise have gone undiscovered, so polygraphs still increase disclosure and elicit useful information from the examinees.<sup>80</sup> Therefore, even if accuracy rates are low, the polygraph has significant value,<sup>81</sup> especially when it is used to improve treatment and ensure compliance of a class of criminals that poses a “serious threat in this [n]ation,”<sup>82</sup> and one that typically operates in secrecy.<sup>83</sup>

#### 4. Critics of the CQT

##### a. *Criticisms of the Polygraph Instrument*

For every empirical study yielding high polygraph accuracy rates, there is an article explaining why such studies, and the polygraph itself, are flawed.<sup>84</sup> One problem with polygraphs is that the physiological data that is recorded as indicative of falsehood is ambiguous; as one researcher noted, “there is no known physiological response that

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76. See *infra* notes 94–96 and accompanying text for a discussion of such criticism.

77. Meijer & Verschuere, *supra* note 39, at 327 (citing David C. Raskin & Charles R. Honts, *The Comparison Question Test*, in HANDBOOK OF POLYGRAPH TESTING I (Murray Kleiner ed., 2002)).

78. Iacono, *supra* note 6, at 1300.

79. See Ben-Shakhar, *supra* note 15, at 192 (acknowledging polygraphs have deterrent value, regardless of accuracy, to the extent they are believed to be accurate by examinees); see also Cross & Saxe, *supra* note 14, at 197 (noting threat of future polygraph can induce confessions before exam itself).

80. Meijer et al., *supra* note 6, at 427; see also Levenson, *supra* note 15, at 363 (explaining that regardless of accuracy problems, polygraphs encourage disclosure). One branch of this phenomenon is described as the “bogus pipeline.” Meijer et al., *supra* note 6, at 427. The idea behind the “bogus pipeline” is that the examiner attaches individuals to a machine he or she believes can detect deception, or threatens to do so, and the individual’s fear of being detected will force him or her to disclose information, either during the examination or before it, when the use of the machine is imminent. *Id.* Levenson specifically cites the “bogus pipeline” as an effective strategy to discover information that would otherwise remain undisclosed. Levenson, *supra* note 15, at 370 (citing Neal J. Roese & David W. Jamieson, *Twenty Years of Bogus Pipeline Research: A Critical Review and Meta-Analysis*, 114 PSYCHOL. BULL. 363 (1993)).

81. Levenson, *supra* note 15, at 367–69.

82. *McKune v. Lile*, 536 U.S. 24, 32 (2002).

83. See, e.g., ENGLISH ET AL., *supra* note 7, at 11 (asserting that “sex offenders have made secrecy and dishonesty a part of their lifestyle”); Levenson, *supra* note 15, at 362 (noting sexual abuse “thrives in secrecy”).

84. See generally Ben-Shakhar, *supra* note 15; Cross & Saxe, *supra* note 14; Iacono, *supra* note 6; Meijer & Verschuere, *supra* note 39; Meijer et al., *supra* note 6; see also NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 11, at 2, 4, & 115 (noting various factors that lower the quality and accuracy of polygraph validity).

is unique to lying.”<sup>85</sup> Heightened physical responses could be caused by a guilty examinee’s fear of being detected, but just as easily could result from an honest examinee’s fear of being determined deceptive.<sup>86</sup> Because there are multiple explanations for the physiological reactions measured by polygraphs, a theoretical connection needs to be established that links these reactions to the behavior the examination is trying to predict—deception.<sup>87</sup> The theory must be tested by research and studies that examine the relationship between the theory, the physiological responses, and actual deceptive activity.<sup>88</sup> This theoretical framework and research do not exist for polygraphs.<sup>89</sup> Proponents of the polygraph dismiss this deficiency by arguing that as long as the test “works,” an underlying theory is unimportant.<sup>90</sup>

Another concern is that repeated use of polygraphs, which is required in most PCSOT programs, will lead to decreasingly conclusive results.<sup>91</sup> This stems from the premise that “physiological responsivity decreases upon repeated presentation of the same stimulus.”<sup>92</sup> Therefore, guilty sex offenders subject to multiple polygraphs might show decreased responsiveness to the relevant questions, which raises the chances of a false negative report (undetected deception).<sup>93</sup>

In addition, critics are quick to demonstrate that even if the physiological reactions measured by the polygraph instrument did in fact measure only deception, as opposed to fear, embarrassment, or outrage, the instrument’s validity is still limited by human fallibility. The structure and content of the questions of the examination are the most important parts of the examination, and because these questions must be

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85. Cross & Saxe, *supra* note 14, at 196 (citing LEONARD SAXE ET AL., U.S. CONG., OFFICE OF TECH. ASSESSMENT, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION (1983)); *see also* NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 11, at 2 (describing “inherent ambiguity” of physiological responses measured by polygraphs).

86. Meijer et al., *supra* note 6, at 424; *see also* Ben-Shakhar, *supra* note 15, at 192 (explaining responses measured by polygraphs “are by no means measures of deception” but rather could be caused by surprise, loud noise, or “fear of being classified as ‘deceptive’”); Cross & Saxe, *supra* note 14, at 196 (explaining innocent persons may react more strongly to relevant questions because of perceived threat regardless of actual guilt or innocence); Iacono, *supra* note 6, at 1299 (noting outraged denial of false accusation could have same physiological response as deception). The National Research Council, in their comprehensive study of polygraph examinations, observed that, “[t]his inherent ambiguity of the physiological measures used in the polygraph suggests that further investments in improving polygraph technique and interpretation will bring only modest improvements in accuracy.” NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 11, at 2.

87. Ben-Shakhar, *supra* note 15, at 192.

88. *Id.*

89. *Id.* at 192, 196; *see also* Cross & Saxe, *supra* note 14, at 196 (“As several psychological experts have noted, the theory underlying the CQT is implausible.”); Grubin, *supra* note 56, at 179 (supporter of PCSOT polygraphs stating that any theories supporting investigative polygraphs are “unproven”).

90. *See* Grubin, *supra* note 56, at 179 (“[T]he existence of a theoretical explanation is not a necessary requirement for a technique to be used, providing it works . . .”).

91. *See* Cross & Saxe, *supra* note 14, at 198–99 (explaining periodic subsequent polygraphs typical in PCSOT context); Meijer et al., *supra* note 6, at 425 (citing STANLEY ABRAMS & JARED B. ABRAMS, POLYGRAPH TESTING OF THE PEDOPHILE (1993)) (noting PCSOT polygraphs generally administered every six months).

92. Meijer et al., *supra* note 6, at 426.

93. *Id.*; *see also* Cross & Saxe, *supra* note 14, at 196 (explaining that guilty examinees may “habituat[e]” to relevant questions due to repeated questioning).

formulated by the human polygraphist, his individual skill is a pivotal factor in assessing accuracy.<sup>94</sup> Because CQT is based on the notion that innocent examinees will be more concerned about control questions, and guilty ones more concerned about relevant questions,<sup>95</sup> the success of the test is also dependent on the examiner's ability to impart these sentiments to the examinee during the pretest interview.<sup>96</sup>

These problems are exacerbated by the nature of the CQT polygraph—in the PCSOT context, polygraph examinations often involve vague or unknown incidents, which makes formulation of questions more difficult.<sup>97</sup> Frequently, the comparison questions and the relevant questions become similar in form and content.<sup>98</sup> Because CQT is based on differentiated physiological responses to the control and relevant questions, if there is not a clear distinction between the two types of questions, the test results could be compromised.<sup>99</sup> Therefore, polygraph accuracy is limited by the individual skill of the examiner, which undermines the idea of the polygraph as an infallible deception-detection instrument.

Finally, the polygraph instrument itself is subject to criticism based on its susceptibility to countermeasures.<sup>100</sup> Critics frequently note the vulnerability of the CQT to countermeasures.<sup>101</sup> Detractors of polygraph accuracy assert that the threat of countermeasures is exacerbated by the ease with which they are learned<sup>102</sup> and the difficulty of detecting their use.<sup>103</sup>

*b. Criticisms of the Research Supporting CQT Polygraphs*

Critics of the CQT polygraph also question the research that proponents rely on for support. Many of the studies touting polygraph accuracy are based on specific-incident polygraphs—tests where the examiner is asking questions about a specific event.<sup>104</sup> The National Research Council indicated that specific-incident examinations, which only “discriminate lying from truth telling at rates well above chance, though

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94. See Ben-Shakhar, *supra* note 15, at 193 (noting in CQT polygraphs, formation of relevant and control questions are “crucial factors” and polygraphists’ choice of questions is pivotal); see also ENGLISH ET AL., *supra* note 7, at 23 n.24 (citing BLACKWELL, *supra* note 39) (noting that test accuracy may decrease by up to eight to ten percent depending on examiner’s preparedness).

95. Iacono, *supra* note 6, at 1296.

96. Meijer & Verschuere, *supra* note 39, at 327.

97. Meijer et al., *supra* note 6, at 425–26; see also Kokish et al., *supra* note 6, at 212 (noting PCSOT polygraphs are less specific).

98. Meijer et al., *supra* note 6, at 425; Meijer & Verschuere, *supra* note 39, at 331. An example of a comparison question would be: “Have you done anything over the last 3 months that would concern your probation officer?” Meijer et al., *supra* note 6, at 425. An example of a relevant question would be: “Have you had unsupervised contact with children over the last 3 months?” *Id.*

99. Meijer et al., *supra* note 6, at 425.

100. See *supra* Part II.A.2.b for a discussion of countermeasures.

101. E.g., Ben-Shakhar, *supra* note 15, at 202; Meijer et al., *supra* note 6, at 426.

102. Ben-Shakhar, *supra* note 15, at 202. See *supra* notes 51–52 and accompanying text for a discussion of the accessibility of instructions regarding polygraph countermeasures.

103. Meijer et al., *supra* note 6, at 426.

104. Kokish et al., *supra* note 6, at 212 (noting most polygraph research is based on specific-issue investigative examinations).

well below perfection,” are significantly more accurate than screening examinations.<sup>105</sup> Screening examinations ask about unknown events as opposed to specific incidents.<sup>106</sup> Because PCSOT polygraph tests typically ask about unknown events, critics note they are considerably less accurate than specific-incident polygraphs, and therefore many of the studies supporting polygraph accuracy are inapplicable to the CQT-PCSOT context.<sup>107</sup> Even some proponents have acknowledged this.<sup>108</sup>

Critics also attack studies that purport to confirm the accuracy of CQT polygraphs—one of the most heavily criticized aspects of polygraph studies is the “confession criterion.”<sup>109</sup> The confession criterion is used in almost every polygraph study, which means the accuracy of the polygraph is determined by the confession of the subject after he is determined “deceptive.”<sup>110</sup> Several features of the confession criterion undermine the results of studies that employ it. If a guilty person passes the polygraph (i.e., lies and deception is not indicated), there would be no post-polygraph questioning, and thus no confession, and the error would go unnoticed.<sup>111</sup> If an innocent examinee fails the polygraph (i.e., tells the truth and deception is indicated), the examinee almost never confesses,<sup>112</sup> and the case remains unconfirmed and would not be included in accuracy statistics.<sup>113</sup> If the innocent person is pressured into falsely confessing, the error goes unnoticed and artificially strengthens both the examiner’s belief in the accuracy of the polygraph and the accuracy statistics.<sup>114</sup>

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105. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 11, at 4.

106. *Id.* at 2.

107. *E.g.*, Ben-Shakhar, *supra* note 15, at 201–02; Meijer et al., *supra* note 6, at 425; *see also* Meijer & Verschuere, *supra* note 39, at 331 (noting that polygraph testing of unknown events is less accurate).

108. *See, e.g.*, Kokish et al., *supra* note 6, at 212 (noting most studies supporting accuracy rely on specific-incident examinations and that PCSOT polygraphs focus on less-specific conduct and may be less accurate).

109. *See* Cross & Saxe, *supra* note 14, at 199 (“The most damning criticism [of polygraph accuracy studies] is that the use of confession to measure ground truth introduces a selective bias.”); Krapohl et al., *supra* note 13 (reporting many critics of polygraphs consider confession criterion “[t]he biggest culprit” in inflating results of accuracy studies).

110. Iacono, *supra* note 6, at 1301; *see also* Ben-Shakhar, *supra* note 15, at 200–01 (discussing studies that only sample cases in which suspects confessed after interrogations). “Polygraph study” in this sentence refers to studies in which researchers test polygraph validity on real criminals or offenders. This is different from other types of studies in which researchers have a portion of a group of volunteers “commit” a crime and then take a polygraph test administered by a professional. Ben-Shakhar, *supra* note 15, at 200. After the test, the participants are thanked for their time and frequently given a monetary reward. *Id.* These tests are criticized because they do not invoke the same psychological concerns that exist when an individual is the subject of a real criminal investigation. *Id.* Therefore, when the studies involve real investigations, they rely on the confession criterion as a basis for determining accuracy, rather than on the researchers’ omniscience regarding the underlying facts of the “crime.” *See* Krapohl et al., *supra* note 13 (noting that confessions are often the sole source that examiners have to verify the truth).

111. Iacono, *supra* note 6, at 1301; *see also* Ben-Shakhar, *supra* note 15, at 200–01 (noting examiner will try harder to extract confession if examinee was determined to be deceptive).

112. Krapohl et al., *supra* note 13; Meijer & Verschuere, *supra* note 39, at 330. Furthermore, in this situation, the polygraphist is more likely to attribute the result to the fact that the innocent examinee is really guilty, not to any possible failings of the test itself. Meijer & Verschuere, *supra* note 39, at 330.

113. Krapohl et al., *supra* note 13.

114. Iacono, *supra* note 6, at 1304–05.

Another problem is that participation in the empirical studies on polygraphs is voluntary, so the group studied only consists of those who wish to participate.<sup>115</sup> Those who volunteer can elect to drop out at any time. In one study, only twenty-one out of the 116 sex offenders who were originally approached actually completed the study, which required two polygraph examinations for completion.<sup>116</sup> This could indicate that offenders confronted with an incorrect result may have quit the program, and those who knew they would fail the polygraph elected not to participate in the first place.<sup>117</sup>

Critics are troubled by the existence of these flaws and the refusal of proponents to acknowledge them.<sup>118</sup> Instead, proponents continue to conduct and rely on the same unsound studies as indicia of polygraph accuracy.<sup>119</sup> As the National Research Council noted, it was “unable to find any field experiments . . . or prospective research-oriented data collection specifically designed to address polygraph validity and satisfying minimal standards of research quality,”<sup>120</sup> and “[a]lmost a century of research in scientific psychology and physiology provides little basis for the expectation that a polygraph test could have extremely high accuracy.”<sup>121</sup>

### B. *The Supreme Court and PCSOT Polygraphs*

#### 1. *Minnesota v. Murphy*

Of the three Supreme Court cases pertinent to the concerns surrounding PCSOT polygraphs, *Minnesota v. Murphy*<sup>122</sup> most directly relates to those issues and is the case most frequently cited by lower courts resolving these issues.<sup>123</sup> Although *Murphy* is a seminal case in probation/parole law,<sup>124</sup> it does *not* deal with polygraphs.

115. Meijer et al., *supra* note 6, at 425; *see also* Grubin & Madsen, *supra* note 71, at 479 (noting 321 sex offenders in treatment programs were approached, and 176 agreed to participate, indicating forty-five percent of those approached elected not to take part in study).

116. Don Grubin et al., *A Prospective Study of the Impact of Polygraphy on High-Risk Behaviors in Adult Sex Offenders*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 209, 209, 212 (2004).

117. *See* Meijer et al., *supra* note 6, at 425 (noting that offenders may drop out due to incorrect test results).

118. *See supra* notes 89–90 and accompanying text, which note the response offered by supporters of polygraphs to the charge that there is no underlying theory to CQT polygraphs. *See also* Iacono, *supra* note 6, at 1300 (noting that when practitioners are confronted with examples of polygraph error they blame individual examiners and not test itself).

119. *See* Iacono, *supra* note 6, at 1301 (noting supporters of polygraphs continue to conduct and publish flawed studies).

120. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 11, at 115.

121. *Id.* at 2. The National Research Council also noted that, of the dozens of studies they examined, all of which involved specific-incident polygraphs (the most accurate and easily measurable test), the quality of the studies “[fell] far short of what is desirable,” and most of the studies failed to “fully address key potential threats to validity.” *Id.* at 2–3.

122. 465 U.S. 420 (1984).

123. This statistic is misleading, however, because *Murphy* is also the oldest of the three cases. *McKune v. Lile* was decided in 2002, and *United States v. Scheffer* in 1998, while *Murphy* has been the law since 1984. Therefore it is to be expected that it would be cited more frequently.

124. *See, e.g.,* *United States v. Antelope*, 395 F.3d 1128, 1133 (9th Cir. 2005) (citing *Murphy* when stating that the Fifth Amendment applies to probationers); *United States v. York*, 357 F.3d 14, 24 (1st Cir.

Murphy had pled guilty to a charge of false imprisonment that arose out of prosecution for sexual misconduct, and was placed on probation.<sup>125</sup> The conditions of his release required participation in a sex offender treatment program, reporting to his probation officer as directed, and honesty “in all matters” when reporting.<sup>126</sup> A few months into the treatment, one of the counselors informed Murphy’s probation officer that Murphy had admitted to a 1974 rape and murder.<sup>127</sup> The probation officer met with Murphy and informed him of what she had learned.<sup>128</sup> Murphy became upset, denied the false imprisonment charge, and confessed to the rape and murder.<sup>129</sup> He was arrested and indicted for first-degree murder.<sup>130</sup>

Murphy attempted to suppress the testimony of the probation officer concerning his confession on Fifth and Fourteenth Amendment grounds.<sup>131</sup> The trial court denied Murphy’s motion, reasoning “that the confession was neither compelled nor involuntary.”<sup>132</sup> The Minnesota Supreme Court reversed, finding that even though Murphy failed to invoke his Fifth Amendment privilege when he was questioned, the compulsory nature of the meeting and the fact that he was under a court order to respond truthfully to the officer’s questions, indicated that his confession was the result of compulsion and should be excluded from trial.<sup>133</sup>

The Supreme Court, in a six-to-three ruling, reversed the Minnesota Supreme Court.<sup>134</sup> The Court concluded that a probationer does not lose his Fifth Amendment right concerning uncharged crimes and that compelled statements that incriminate the probationer in such crimes cannot be used in a subsequent criminal trial.<sup>135</sup> However, the majority held that the Fifth Amendment does not prohibit an individual from voluntarily offering incriminating information.<sup>136</sup> An individual must normally assert the privilege and refuse to answer if he wishes to avoid self-incrimination; otherwise, he is not considered “compelled” for purposes of the Fifth Amendment.<sup>137</sup>

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2004) (same); United States v. Lee, 315 F.3d 206, 211 (3d Cir. 2003) (noting that in *Murphy* the Supreme Court defined the Fifth Amendment right for probationers).

125. *Murphy*, 465 U.S. at 422.

126. *Id.*

127. *Id.* at 423. In 1974, Murphy had been questioned about this incident prior to being charged with false imprisonment in the matter that led to his probation. *Id.* at 422. However, the police had not charged Murphy after they questioned him. *Id.*

128. *Id.* at 423.

129. *Id.* at 423–24.

130. *Id.* at 425.

131. *Id.*

132. *Id.*

133. *Id.* (citing *Minnesota v. Murphy*, 324 N.W.2d 340, 344 (Minn. 1982)).

134. *Id.* The majority opinion was delivered by Justice White, and Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and O’Connor joined in the opinion. Justices Marshall, Stevens, and Brennan dissented. *Id.* at 421.

135. *Id.* at 426.

136. *Id.* at 427.

137. *Id.* at 428–29.

The Court observed that there are exceptions to the “affirmative assertion” rule, and the most relevant for Murphy was the “classic penalty situation.”<sup>138</sup> When the individual’s assertion of the privilege is penalized so as to “[foreclose] a free choice to remain silent, and . . . [to compel] . . . incriminating testimony,”<sup>139</sup> the witness need not affirmatively invoke the Fifth Amendment.<sup>140</sup> The Court concluded that, in the context of probation,

[i]f the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer’s answers would be deemed compelled and inadmissible in a criminal prosecution.<sup>141</sup>

The Court held that Murphy was not placed in the “penalty” situation because, although truthful answers were required, his probation condition did *not* mention whether he had the freedom to refuse to answer, and did not suggest that his probation was dependent on his waiver of Fifth Amendment privilege.<sup>142</sup> Because Murphy had not asserted his Fifth Amendment right and he had not been placed in the classic penalty situation, his statements were not compelled.<sup>143</sup>

## 2. *United States v. Scheffer*

*United States v. Scheffer*<sup>144</sup> is less related to the issue of therapeutic polygraphs than *Murphy*, except in one key area: the polygraphs themselves. In *Scheffer*, the Supreme Court observed that the scientific community was in disagreement regarding polygraph examination dependability, specifically noting that polygraph accuracy ranged from being correct as much as eighty-seven percent of the time,<sup>145</sup> to being little better than “the toss of a coin,” or being correct fifty percent of the time.<sup>146</sup> As a result of the disagreement in the scientific community, the Court held that Military Rule of Evidence 707, which prohibited the use of the results of polygraph examinations, the

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138. *Id.* at 429, 435. See also *United States v. Locke*, 482 F.3d 764, 767 (5th Cir. 2007) (recognizing existence of the *Murphy* “classic penalty situation” and discussing it in context of polygraph Fifth Amendment claim). Note that the “classic penalty” situation described in *Murphy* has only two facets—being punished for remaining silent or being punished upon self-incrimination—and does not include the third facet of the “trilemma,” the risk of being punished for lying (such as perjury). See *infra* Part III.A.1.a for a discussion of why this is inappropriate in the context of PCSOT polygraphs.

139. *Murphy*, 465 U.S. at 434 (alterations and omissions in original) (quoting *Garner v. United States*, 424 U.S. 648, 661 (1976)).

140. *Id.*

141. *Id.* at 435.

142. *Id.* at 437–38.

143. *Id.* at 440.

144. 523 U.S. 303 (1998).

145. *Scheffer*, 523 U.S. at 310 (citing STANLEY ABRAMS, *THE COMPLETE POLYGRAPH HANDBOOK* 190–91 (1989)).

146. *Id.* (citing William Iacono & David Lykken, *The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests*, in 1 *MODERN SCIENTIFIC EVIDENCE* 582, 629 (David L. Faigman et al. eds., 1997)).

opinion of a polygraph examiner, or any reference to either taking or failing to take a polygraph,<sup>147</sup> did not violate the accused's right to present a defense.<sup>148</sup>

### 3. *McKune v. Lile*

In *McKune v. Lile*,<sup>149</sup> Robert Lile, a convicted sex offender, was ordered, while incarcerated, to participate in a Sexual Abuse Treatment Program (SATP) a few years before his scheduled release date.<sup>150</sup> The SATP required participants to disclose a full sexual history that described in detail all prior sexual activities, including uncharged criminal offenses.<sup>151</sup> Kansas, the state in which this took place, explicitly retained the option to use any information gained from SATP in future criminal proceedings.<sup>152</sup> If an inmate refused to participate in the SATP, his privilege status was reduced.<sup>153</sup> This resulted in automatic reduction of his visitation rights, earnings, work opportunities, access to personal television, and other privileges. The inmate would also be transferred to a maximum-security unit, which, as the Court admitted, was a "potentially more dangerous environment."<sup>154</sup> Lile refused to participate in the SATP, claiming the program violated his Fifth Amendment right against self-incrimination.<sup>155</sup> He brought action against the warden and secretary of the Kansas Department of Corrections, under 42 U.S.C. § 1983, to enjoin them from withdrawing his privileges and transferring him to a maximum-security unit.<sup>156</sup> The District Court for the District of Kansas entered summary judgment in Lile's favor, which the Court of Appeals for the Tenth Circuit affirmed.<sup>157</sup>

The Supreme Court disagreed in a plurality opinion<sup>158</sup> and reversed the judgment of the Court of Appeals.<sup>159</sup> In the four-justice plurality opinion, the Court noted the dangerous problem that sex offenders pose to the nation.<sup>160</sup> The plurality explained that any self-incrimination concerns were unfounded because Kansas had not yet used any information gained from SATP in subsequent criminal proceedings.<sup>161</sup> However, the

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147. *Id.* at 306–07.

148. *Id.* at 317.

149. 536 U.S. 24 (2002).

150. *Lile*, 536 U.S. at 29–30 (plurality opinion).

151. *Id.* at 30.

152. *Id.*

153. *Id.*

154. *Id.* at 30–31.

155. *Id.*

156. *Id.* In relevant part, the Fifth Amendment reads, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." See also 42 U.S.C. § 1983 (2006) (permitting civil actions against government for violation of an individual's constitutional rights).

157. *Lile*, 536 U.S. at 31 (plurality opinion).

158. Justice Kennedy wrote the opinion in which Justice Scalia, Justice Thomas, and Chief Justice Rehnquist joined, while Justice O'Connor filed a concurring opinion, and Justices Stevens, Souter, Ginsburg, and Breyer dissented.

159. *Id.* at 48.

160. *Id.* at 32 ("Sex offenders are a serious threat in this Nation.").

161. *Id.* at 34.

Court then described the necessity of “keeping open the option to prosecute a particularly dangerous sex offender.”<sup>162</sup>

The plurality explained that all other issues aside, “[t]he SATP does not compel prisoners to incriminate themselves in violation of the Constitution,”<sup>163</sup> because the consequences of Lile’s choice to “remain silent”<sup>164</sup> did not constitute compulsion by the state.<sup>165</sup> In reaching this conclusion, the plurality observed that “the fact of a valid conviction and the ensuing restrictions on liberty are essential to the Fifth Amendment analysis,”<sup>166</sup> and therefore determined the petitioner’s Fifth Amendment rights based on his status as an inmate.<sup>167</sup> As such, prisoners must demonstrate that they are subject to “atypical and significant hardship” in exercising their Fifth Amendment right for the state conduct to be considered “compulsion.”<sup>168</sup> The Court observed, in a phrase oft-repeated in the lower courts, that “[i]t is well settled that the government need not make the exercise of the Fifth Amendment privilege cost free.”<sup>169</sup>

In her concurring opinion, Justice O’Connor, the fifth justice in the Court’s majority, agreed that Lile’s Fifth Amendment privilege had not been violated.<sup>170</sup> However, she disagreed with the plurality’s determination that compulsion in the prison context must result in an “atypical and significant hardship” on the inmate in order for the Fifth Amendment to be implicated,<sup>171</sup> and thus did not ascribe to the plurality’s status-based approach.<sup>172</sup> In her analysis, Justice O’Connor adopted a more traditional approach and applied the same standard that had always been used for determining whether state conduct constituted “compulsion.”<sup>173</sup> Justice O’Connor concluded that the state conduct at issue did not constitute compulsion in light of that

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162. *Id.* at 35.

163. *Id.*

164. Consequences include loss of privileges and transfer to a much more dangerous living area of the prison. *Id.* at 31, 36.

165. *Id.* at 36 (quoting *United States v. Washington*, 431 U.S. 181, 188 (1977)) (explaining that the “constitutional guarantee is only that the witness not be *compelled* to give self-incriminating testimony”).

166. *Id.*

167. *See Maiano*, *supra* note 21, at 1010 (noting that the *Lile* plurality believed the “threshold for impermissible compulsion is predicated on the status of the testifying party”).

168. *Id.* There is precedent for this type of “status-based” ruling. In *United States v. Knights*, 534 U.S. 112 (2001), the Court held that the government needs a “reasonable suspicion” to search a probationer’s home, as opposed to the probable cause and warrant generally needed under the Fourth Amendment. *Maiano*, *supra* note 21, at 1011. *Maiano* notes that although a status-based approach might be feasible in Fourth Amendment contexts, it is not as easy to apply with regards to the Fifth Amendment. *Id.* Although there is precedent that clearly (relatively speaking) differentiates between the probable cause and reasonable suspicion standards, there is no similar precedent for determining what is an “atypical and significant hardship” for invocation of the Fifth Amendment. *Id.* at 1011–12. Therefore, it is difficult to identify clear boundaries as to what is permissible pressure and what is impermissible compulsion in the Fifth Amendment context, which makes the status-based approach problematic. *Id.* at 1012.

169. *Lile*, 536 U.S. at 41 (plurality opinion).

170. *Id.* at 48–49 (O’Connor, J., concurring).

171. *Id.*

172. *Id.* at 49.

173. *Id.* at 48–49. *See also Maiano*, *supra* note 21, at 1012 (believing Justice O’Connor’s test was “functionally equivalent” to plain language of Fifth Amendment).

traditional precedent.<sup>174</sup> The dissent argued for an in-depth Fifth Amendment analysis, which would entail a more thorough evaluation of all relevant facts and circumstances of each case.<sup>175</sup>

The Supreme Court has failed to provide definitive guidance regarding the issues surrounding PCSOT polygraphs. Lower courts have been left to interpret and synthesize rules from three tangentially-related decisions spanning a twenty-two year period. The most recent case, *Lile*, was a plurality opinion and discussed the Fifth Amendment rights of convicted sex offenders while incarcerated.<sup>176</sup> *Scheffer* offered a Supreme Court opinion on polygraph reliability in the limited context of whether a Military Rule of Evidence had a sufficient basis to rule polygraphs inadmissible.<sup>177</sup> *Murphy*, though delineating a probationer's Fifth Amendment rights, was decided nearly thirty years ago and did not involve polygraphs.<sup>178</sup> Unsurprisingly, different jurisdictions have synthesized different law from these decisions.

### C. *The Circuits and PCSOT Polygraphs*

The Circuits can be divided into three groups: those that are more protective of the Fifth Amendment rights of postconviction sex offenders, those that demonstrate a level of indifference towards the Fifth Amendment concerns harbored by the offenders, and those that hesitate to directly address the issue.

#### 1. The Protective

In 2005, the Ninth Circuit Court of Appeals ruled on a case that demonstrated the benefits of constitutional caution when determining the extent of a convicted sex offender's Fifth Amendment rights in the PCSOT polygraph context. In *United States v. Antelope*,<sup>179</sup> the appellant was a "convicted sex offender who show[ed] promise of rehabilitation."<sup>180</sup> After pleading guilty to possession of child pornography, Antelope was sentenced to five years of probation, which included participation in the Sexual Abuse Behavior Evaluation and Recovery program (SABER), which, in turn, required polygraph examinations.<sup>181</sup> At sentencing, Antelope raised a Fifth Amendment objection to the polygraph condition and appealed the denial of that objection.<sup>182</sup> While that appeal was pending, Antelope had his probation revoked for, among other things, refusing to submit to a polygraph; the district judge reimposed the probation and

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174. *Lile*, 536 U.S. at 48–49 (O'Connor, J., concurring).

175. *See id.* at 62–68 (Stevens, J., dissenting) (discussing specific facts and circumstances of *Lile*'s position and consequences that penalties imposed on him for invoking his Fifth Amendment right would have). *See also* Maiano, *supra* note 21, at 1013 (discussing dissent's focus on factual circumstances and its desire to apply case-by-case analysis).

176. *Lile*, 536 U.S. at 29 (plurality opinion).

177. *United States v. Scheffer*, 523 U.S. 303, 305 (1998).

178. *See generally* *Minnesota v. Murphy*, 465 U.S. 420 (1984).

179. 395 F.3d 1128 (9th Cir. 2005).

180. *Antelope*, 395 F.3d at 1130.

181. *Id.* at 1131.

182. *Id.*

warned Antelope that continued failure to take the test would result in jail time.<sup>183</sup> Antelope appealed, and at this point had two appeals pending.<sup>184</sup> Before these appeals were resolved, the district court found Antelope in violation of probation after Antelope refused to complete a sexual history assignment and polygraph.<sup>185</sup> Antelope explained that he wanted to progress in his treatment but that the polygraph violated his Fifth Amendment rights.<sup>186</sup> The district court revoked Antelope's probation and sentenced him to thirty months in prison.<sup>187</sup> A third appeal was then filed.<sup>188</sup>

At this point, the Court of Appeals heard Antelope's consolidated appeals, but did not review Antelope's Fifth Amendment claim and instead reversed in part and remanded for resentencing.<sup>189</sup> After being resentenced to twenty months' incarceration and three years of supervised release with the same conditions that led to the original appeals, Antelope again objected, was again denied, and again appealed.<sup>190</sup> Not long after resentencing, Antelope finished his prison term and was out on supervised release.<sup>191</sup> Unsurprisingly, he invoked his Fifth Amendment right, was held in violation of his release, and was incarcerated.<sup>192</sup> This time, he was sentenced to an additional ten months in prison and twenty-six months of supervised release, with the same conditions as before.<sup>193</sup> The Court of Appeals then heard these fourth and fifth consolidated appeals.<sup>194</sup>

After concluding that Antelope's claim was ripe for review, the court quickly moved to the constitutional analysis of the Fifth Amendment issue. Citing *Murphy*, the court held that a convicted sex offender on probation, such as Antelope, still retained his Fifth Amendment rights.<sup>195</sup> The court applied a two-fold Fifth Amendment analysis: the petitioner must first establish that the testimony he was being asked to provide carried the risk of incrimination and then must demonstrate that the consequences he suffered from remaining silent constituted compulsion.<sup>196</sup> In assessing whether Antelope's preemptive invocation of the Fifth Amendment sufficiently satisfied the "risk of incrimination" prong, the court stated: "This is not to say . . . that the prosecutorial sword must actually strike or be poised to strike. To the contrary, an individual 'need not incriminate himself in order to invoke the privilege.'"<sup>197</sup> The court continued, stating that "countervailing government interests, such as criminal

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183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1131–32.

188. *Id.* at 1132.

189. *Id.* (citing *United States v. Antelope*, 65 F. App'x 112, 113–14 (9th Cir. 2003)).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 1133.

196. *Id.* at 1134.

197. *Id.* (quoting *McCoy v. Comm'r*, 696 F.2d 1234, 1236 (9th Cir. 1983)).

rehabilitation, do not trump this right.”<sup>198</sup> Based on the nature of the sexual history polygraph and the apparent likelihood that it would reveal uncharged crimes, the court concluded that Antelope’s participation in the SABER program involved a “real danger of self-incrimination.”<sup>199</sup> This conclusion was buttressed by the SABER counselor’s statements that “he would turn over evidence of past sex crimes to the authorities” because, under Montana state law, the counselor would be required to report any past criminal conduct involving minors.<sup>200</sup>

In its “compulsion” analysis, the court looked to *Lile*, but it applied Justice O’Connor’s opinion rather than the plurality’s opinion, stating that

[T]he controlling issue [in a Fifth Amendment compulsion analysis] is the state’s purpose in imposing the penalty: Although it may be acceptable for the state to impose harsh penalties on defendants when it has legitimate reasons for doing so consistent with their conviction for their crimes of incarceration, it is a different thing to impose “penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony.”<sup>201</sup>

The court concluded that the state had inappropriately sanctioned Antelope for validly invoking his Fifth Amendment rights by incarcerating Antelope for an additional ten months.<sup>202</sup>

In reaching its conclusion, the court also referenced the decisions of two of its “sister circuits”: the First and Third Circuit Courts of Appeals.<sup>203</sup>

In *United States v. Lee*,<sup>204</sup> the Third Circuit Court of Appeals had to address the Fifth Amendment implications of polygraphs for convicted sex offenders. Lee, similar to Antelope, had had a special condition imposed on his supervised release, requiring Lee to submit to random polygraph examinations.<sup>205</sup> Lee objected to this condition on Fifth Amendment grounds.<sup>206</sup> He attempted to argue that the added condition of the polygraph substantially altered the *Murphy* analysis.<sup>207</sup> The court held that the

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198. *Id.*

199. *Id.* at 1135. The court determined that Antelope’s refusal to submit to the polygraph indicated a likelihood that truthful completion of the sexual history would reveal uncharged crimes. *Id.*

200. *Id.* (citing MONT. CODE ANN. §§ 41-3-201 to -202 (2003) (requiring that certain professionals and officials, including mental health professionals, report any suspected child abuse to department of public health and human services)).

201. *Id.* at 1137 (quoting *McKune v. Lile*, 536 U.S. 24, 53 (2002) (O’Connor, J., concurring)). See also Maiano, *supra* note 21, at 994 (noting *Antelope* court relied heavily on Justice O’Connor’s concurrence). For an argument that would justify the Ninth Circuit’s reliance on Justice O’Connor’s *Lile*’s concurrence rather than the plurality opinion, see generally Ryan M. Moore, Comment, *I Concur! Do I Matter?: Developing a Framework for Determining the Precedential Influence of Concurring Opinions*, 84 TEMP. L. REV. 743 (2012).

202. *Id.* at 1137–38.

203. *Id.* at 1138–39 (citing *United States v. York*, 357 F.3d 14 (1st Cir. 2004); *United States v. Lee*, 315 F.3d 206 (3d Cir. 2003)).

204. 315 F.3d 206 (3d Cir. 2003).

205. *Lee*, 315 F.3d at 210.

206. *Id.* at 210–11.

207. *Id.* at 211–12. Specifically, Lee argued that the physical restraint caused by his being attached to the polygraph, as well as the fact that the examination was administered by a former police officer, made his situation factually distinct from *Murphy*. *Id.* at 212.

conditions as described by Lee did not rise to a level of compulsion so as to implicate the Fifth Amendment.<sup>208</sup>

The court also held that the incrimination aspect of the Fifth Amendment was not implicated because the prosecutor had stipulated that if Lee failed a polygraph, that failure “in and of itself, likely would not result in a finding of a supervised release violation.”<sup>209</sup> The government stated that the failure to answer questions in a polygraph that were within the scope of the privilege against self-incrimination would not result in revocation.<sup>210</sup> Therefore, the Third Circuit Court of Appeals held that, given the precautions taken by the government, Lee’s Fifth Amendment right was not per se violated based on the polygraph condition of his supervised release.<sup>211</sup>

The First Circuit, like the Third Circuit, did not have to directly address the issue of whether a condition of supervised release requiring sexual history polygraphs was constitutional.<sup>212</sup> However, in its analysis of the issue before it, the First Circuit made an affirmative decision to err on the side of constitutional protection. In *United States v. York*,<sup>213</sup> the court had to address a sex offender’s complaint about the following condition of his probation:

The defendant shall be required to submit to periodic polygraph testing as a means to insure that he is in compliance with the requirements of his therapeutic program. No violation proceedings will arise based solely on a defendant’s failure to “pass” the polygraph. Such an event could, however, generate a separate investigation. When submitting to a polygraph exam, the defendant does not give up his Fifth Amendment rights.<sup>214</sup>

York raised several objections to the polygraph condition of his release, including an objection that the polygraph was inherently unreliable and thus was an unreasonable and invalid condition of his sentence.<sup>215</sup> The court refused to rule on the reliability of polygraph testing because both York and the government failed to include any factual foundation for their respective positions on polygraph accuracy.<sup>216</sup> Instead, the court based its decision on the language of the sentencing court’s order, which stated that “[n]o violation proceedings will arise based solely on [the] defendant’s failure to ‘pass’ the polygraph.”<sup>217</sup> The court interpreted this language as providing protection to York

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 213.

212. See *United States v. Antelope*, 395 F.3d 1128, 1139 (9th Cir. 2005) (noting that based on fact patterns before them, the First and Third Circuits were able to pursue policy of “constitutional avoidance” regarding Fifth Amendment issue).

213. 357 F.3d 14 (1st Cir. 2004).

214. *York*, 357 F.3d at 18.

215. *Id.* at 23. In making this argument, York relied on the language from *Scheffer* that “there is simply no consensus that polygraph evidence is reliable.” *Id.* (quoting *United States v. Scheffer*, 523 U.S. 303, 309 (1998)).

216. *Id.* The court noted that *Scheffer* had been decided six years before the instant appeal, and the court did not know whether the accuracy of polygraphs had improved or whether they had been debunked as a valid lie-detecting device. *Id.* Therefore, given the lack of knowledge, the court decided to withhold ruling on the issue. *Id.*

217. *Id.*

in the event of a false report on the polygraph, thereby guarding against any reliability concerns.<sup>218</sup>

The court took a similar approach to York's Fifth Amendment claim. The court noted that under *Murphy*, York could not invoke his Fifth Amendment privilege solely on the basis that his replies could lead to revocation of his supervised release, and that probation officers, in requiring York to answer such questions, would not be compelling him to incriminate himself.<sup>219</sup> However, "[t]he question, then, [was] whether the requirement that York submit to polygraph tests during these interviews alter[ed] the constitutional analysis."<sup>220</sup>

The court observed that whether the polygraph condition implicated York's Fifth Amendment rights depended on how the sentencing court's order was read.<sup>221</sup> The court found the constitutionality of the order hinged on its final sentence: "When submitting to a polygraph exam, the defendant does not give up his Fifth Amendment rights."<sup>222</sup> The court deduced three ways to interpret this: (1) York's probation would not be revoked due to his refusal to answer questions based on a *valid* assertion of the Fifth Amendment; (2) York had to answer every question or risk revocation, but he would be immunized from future prosecution based on the answers; or (3) York would be entitled, in the event of future prosecution, to attempt to exclude any self-incriminatory answers he had been required to provide during the polygraph.<sup>223</sup> The court held that the second interpretation was likely invalid because the district judge did not have the power to grant immunity from future prosecution. The court declared "the third interpretation offers [York] no assurances at all."<sup>224</sup> The court adopted the first interpretation, holding that York was free to validly assert his Fifth Amendment privilege concerning any incriminating questions, and that if York and the probation officers did not agree that the assertion was valid, York would receive a judicial hearing before any sanctions were imposed.<sup>225</sup> Even though the First Circuit Court of Appeals did not directly confront the issue, it did express a valid and real concern about the Fifth Amendment implications of PCSOT polygraph testing. By applying a more constitutionally protective interpretation of the sentencing court's order, the court took an affirmative step to safeguard the rights of the petitioner. The court also left open the possibility of holding polygraph testing insufficiently reliable to be a condition of release.

## 2. The Indifferent

Though the First, Third, and Ninth Circuit Courts of Appeals have taken steps to protect the Fifth Amendment rights of convicted sex offenders in the PCSOT-

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218. *Id.*

219. *Id.* at 24 (citing *Minnesota v. Murphy*, 465 U.S. 420, 427-35 (1984)).

220. *Id.*

221. *Id.*

222. *Id.* at 25.

223. *Id.*

224. *Id.* The Second Circuit has adopted this third interpretation. See *infra* notes 226-35 and accompanying text for a discussion of the approach chosen by the Second Circuit Court of Appeal.

225. *Id.*

polygraph context, other circuit courts have moved in the opposite direction. For example, in *United States v. Johnson*,<sup>226</sup> the Second Circuit Court of Appeals provided the same Fifth Amendment protection that the First Circuit had stated was “no assurance[] at all.”<sup>227</sup> In *Johnson*, the petitioner argued that the polygraph condition of his release was not “reasonably related” to the purposes of sentencing and violated his Fifth Amendment right.<sup>228</sup> When Johnson made his objections in the district court, he was told he “must answer the questions posed to him, but, by answering, he will not be waiving his Fifth Amendment rights with respect to any criminal prosecution unrelated to the conviction for which he is now on supervised release.”<sup>229</sup>

In dealing with Johnson’s first claim regarding the polygraphs, the circuit court noted that “[f]ederal sentencing policy requires that conditions of supervised release impose no greater restraint than reasonably necessary to promote sentencing goals.”<sup>230</sup> Johnson, much like the appellant in *York*, cited *Scheffer* as supporting the proposition that polygraph evidence is not reliable and therefore is not reasonably related to the relevant sentencing factors.<sup>231</sup> The court reviewed the large number of other circuits that approved the use of supervised release polygraphs.<sup>232</sup> The court noted that the Supreme Court in *Scheffer* had observed that polygraph reliability ranged between “greater-than-50% and 87%.”<sup>233</sup> The court reasoned that because “even the bottom of the range is still more-likely-than-not, the technology produces an incentive to tell the truth, and thereby advances the sentencing goals.”<sup>234</sup>

After a lengthy discussion of whether Johnson’s claim was ripe, the court determined that “[o]n the merits . . . Johnson fails.”<sup>235</sup> Relying on Second Circuit

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226. 446 F.3d 272 (2d Cir. 2006).

227. See *York*, 357 F.3d at 25 (explaining that interpretation requiring petitioner to answer every question asked and merely entitling him to seek exclusion of responses in event of later prosecution offers “no assurances at all”).

228. *Johnson*, 446 F.3d at 274.

229. *Id.* at 275.

230. *Id.* at 277.

231. *Id.* at 277–78.

232. *Id.* at 277 (citing *York*, 357 F.3d at 22 (holding that *York*’s sentence, which included use of polygraphs as condition of supervised release, was valid as construed by court); *United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003) (holding that, because “the use of a polygraph test here is not aimed at gathering evidence to inculcate or exculpate,” it was appropriate condition of release); *United States v. Zinn*, 321 F.3d 1084, 1089–90 (11th Cir. 2003) (“Under the circumstances, we conclude polygraph testing to ensure compliance with probationary terms is both reasonably related to Appellant’s offense and personal history, and when reasonably applied will not unduly burden his rights.”); *United States v. Lee*, 315 F.3d 206, 213 (3d Cir. 2003) (“We find that the polygraph condition is neither unnecessary nor overly burdensome.”)).

233. *Id.* at 278. This is something of a mischaracterization: the exact wording in *Scheffer* was that the accuracy of the control question polygraph “is ‘little better than could be obtained by the toss of a coin,’ that is, [fifty] percent.” *United States v. Scheffer*, 523 U.S. 303, 310 (1998). Because polygraphs frequently involve “Yes” or “No” answers only, it stands to reason that the lowest possible accuracy percentage will be around fifty percent, or that of any person who would guess whether the individual was lying or not.

234. *Johnson*, 446 F.3d at 278. In further support of its conclusion, the court also noted that the polygraph might deter lying despite its unreliability “because of the subject’s fear that it might work” or that someone will credit it with being accurate no matter whether it works or not. *Id.* at 277. Therefore, according to the court, its value did not solely rest on its reliability. *Id.*

235. *Id.* at 279.

precedent from 1992, the court held that the revocation of supervised release is permissible if the individual “fails to answer questions even if they are self-incriminating.”<sup>236</sup> The court arrived at this holding despite the fact that “a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.”<sup>237</sup> The Second Circuit concluded that when a probationer takes a polygraph examination, he must answer any and all incriminating questions. The opportunity to challenge any incriminating responses in later proceedings is a sufficient protection of his Fifth Amendment rights.<sup>238</sup>

The Fourth Circuit took a similar stance regarding Fifth Amendment claims. In *United States v. Henson*,<sup>239</sup> a nonprecedential opinion, the petitioner challenged the requirement that he join a program that would likely require him to submit to polygraph tests and self-report any illegal activity.<sup>240</sup> Rather than engaging in an in-depth Fifth Amendment analysis, the court held that according to the United States Sentencing Guidelines, the district court can impose a probation condition that requires the defendant to “participate in a mental health program approved by the United States Probation Office.”<sup>241</sup> The court then concluded that because the programs were meant for rehabilitation and assessing whatever threat the defendant might pose to society rather than searching for incriminating evidence, there was no risk to the defendant.<sup>242</sup> The court did not discuss what would happen if, during the course of that rehabilitative therapy, an incriminating question was asked of the defendant.<sup>243</sup> The Fourth Circuit

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236. *Id.* (citing *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992)). The court acknowledged that *Asherman* did not involve a polygraph but asserted that the polygraph has no impact on the Fifth Amendment analysis. *Id.* at 280.

237. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).

238. *Johnson*, 446 F.3d at 280. *Johnson*'s logic has been extended to issues involving civil commitment as well. In *United States v. Ayers*, an unpublished opinion, the Second Circuit rejected the petitioner's claim that the polygraph condition of his release violated his Fifth Amendment privilege because he would be forced to supply incriminatory answers that could be used against him in future civil commitment proceedings. 371 F. App'x 162, 164 (2d Cir. 2010). In *Ayers*, the Second Circuit applied *Johnson*'s rationale and held that the Fifth Amendment was satisfied by allowing the petitioner to challenge any use of such statements at a later date, and therefore he did not have the right to refuse to answer any such incriminatory questions at the time they were asked. *Id.* at 164–65. Just like the petitioner in *Johnson*, *Ayers* had to answer the incriminatory questions or risk having his release revoked. *Id.* 163–64.

Second Circuit district courts have regularly relied on *Johnson* in dismissing Fifth Amendment polygraph claims. *See, e.g.*, *Carney v. Hogan*, 9:08-CV-1251 (DNH/ATB), 2010 U.S. Dist. LEXIS 59439, at \*11–13 (N.D.N.Y. Mar. 30, 2010) (citing *Johnson*, 446 F.3d at 275, 280); *McChesney v. Hogan*, No. 9:08-CV-1186 (NAM/DEP), 2010 U.S. Dist. LEXIS 25705, at \*28–30 (N.D.N.Y. Feb. 26, 2010) (citing *Johnson* to dismiss petitioner's Fifth Amendment polygraph claim).

239. 22 F. App'x 107 (4th Cir. 2001).

240. *Henson*, 22 F. App'x at 111.

241. *Id.* at 112 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(d)(5) (2000)).

242. *Id.*

243. Several states in the Fourth Circuit have mandatory reporting requirements that would require disclosure of information relating to past, uncharged criminal conduct involving a child victim, similar to that which existed in Montana (in the Ninth Circuit) in the *Antelope* case. *E.g.*, MD. CODE ANN., FAM. LAW §§ 5-701 to -707 (LexisNexis 2010); VA. CODE ANN. §63.2-1509 (2010).

continued to use this logic in other cases where conditions of supervised release involving polygraphs were challenged.<sup>244</sup>

### 3. The Hesitant

Several circuits have, either by design or from lack of opportunity, managed to avoid directly confronting the issues of PCSOT polygraphs. The Sixth Circuit, for example, applied the same reasoning that would later be used by the Fourth Circuit: in *United States v. Wilson*,<sup>245</sup> the Sixth Circuit held that the appellant's concerns about the reasonableness of the polygraph conditions of supervised release were unfounded because the tests were "not geared toward the collection of evidence for prosecution of possible future parole violations."<sup>246</sup> The court left open whether polygraph examinations were sufficiently reliable to be used as a basis for revoking the supervised release of the defendant.<sup>247</sup> The Sixth Circuit failed to make a definitive holding on the issue in later cases: in *United States v. Lee*<sup>248</sup> and *United States v. Massey*,<sup>249</sup> the court did not make a substantive ruling, and instead held that the petitioners' claims were not ripe.<sup>250</sup>

The Eleventh Circuit followed a similar path of avoidance when confronted with this issue. In *United States v. Zinn*,<sup>251</sup> the court initially held that the petitioner's general challenges to the conditions of his supervised release were ripe.<sup>252</sup> The court then held that Zinn's challenges to the "implementation" of the polygraph examinations—in reality, the substantive bulk of his claims<sup>253</sup>—were not ripe.<sup>254</sup>

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244. In *United States v. Music*, 49 F. App'x 393 (4th Cir. 2002), the court dismissed the appellant's concerns that polygraphs were unreliable and the results of the polygraphs could be used to revoke his supervised release. The court stated that

[t]he sentence . . . makes the testing available as part of treatment, not as a program of monitoring to ensure compliance with other conditions. If at some point in the future Music is subjected to these tests and their results are relied upon to revoke his supervised release, he will be free to object at that time. For now, Music's alternative objection is not well taken.

*Id.* at 395. Similarly, in *United States v. Dotson*, 324 F.3d 256 (4th Cir. 2003), the court recognized that the polygraph is "inadmissible in nearly every circumstance at trial." *Id.* at 261. However, the court concluded that because the polygraph in this instance was not aimed at finding evidence to inculcate the appellant but rather as a treatment tool, there was no real concern. *Id.*

245. No. 98-5373, 1998 U.S. App. LEXIS 32005 (6th Cir. Dec. 22, 1998).

246. *Wilson*, 1998 U.S. App. LEXIS 32005, at \*7.

247. *See id.* at \*8 ("It is conceivable that results of the [polygraph and plethysmograph] tests may be deemed sufficiently reliable to serve as evidence that defendant has violated the conditions of his supervised release.").

248. 502 F.3d 447 (6th Cir. 2007).

249. 349 F. App'x 64 (6th Cir. 2009).

250. *See Massey*, 349 F. App'x at 70 (observing that any issues with conditions of appellant's supervised release were not ripe because he had been sentenced to 360 months in prison); *Lee*, 502 F.3d at 450 (concluding that because Lee would not be released from prison for fourteen years, any issues with conditions of his supervised release were not ripe).

251. 321 F.3d 1084 (11th Cir. 2003).

252. *Zinn*, 321 F.3d at 1089.

253. The court considered the petitioner's Fifth Amendment challenge as a challenge to the implementation of the polygraph. *Id.* at 1090–91.

254. *Id.*

Because there had not yet been any incriminating questions or an invocation of the Fifth Amendment privilege that was overridden by the government, the court asserted it could not address Zinn's Fifth Amendment challenge: "hypothetical possibilities do not present a cognizable Fifth Amendment claim."<sup>255</sup>

In *United States v. Hodnett*,<sup>256</sup> a nonprecedential opinion, the Eleventh Circuit Court of Appeals continued to avoid the issue. Hodnett challenged the polygraph condition of his supervised release on Fifth Amendment grounds.<sup>257</sup> Rather than seeking to have the condition completely removed, Hodnett merely requested that the circuit court "construe this condition of supervised release to provide that his supervised release cannot be revoked if he refuses to submit to the polygraph testing based on a *valid* assertion of his Fifth Amendment rights."<sup>258</sup> The Eleventh Circuit refused to do even that, again holding that Hodnett's claim was not ripe for review because it was only based on speculative Fifth Amendment violations.<sup>259</sup>

The circuits are divided into three groups: those which err on the side of constitutional protection and understand that the polygraph could alter the Fifth Amendment analysis; those that ignore or underplay the effect that polygraphs have on the Fifth Amendment rights of offenders; and those which go out of their way, despite the example of the appellant in *Antelope*, to avoid directly resolving the issue. A few brief examples of the holdings of some different state court cases illustrates that the confusion evident in federal courts is not contained therein.

#### D. State Courts and PCSOT Polygraphs

A discussion and analysis of a few state court decisions provides a representative sample of the widespread confusion regarding therapeutic polygraph use for convicted sex offenders.

For example, the Commonwealth of Pennsylvania gave strong protection to the Fifth Amendment rights of sex offenders taking polygraphs, but also ruled in favor of admissibility of polygraph results in revocation proceedings. In *Commonwealth v. Shrawder*,<sup>260</sup> the Superior Court of Pennsylvania held that the Fifth Amendment barred the government from forcing the probationer to answer questions that could provide information that could be used against the probationer in a future criminal trial.<sup>261</sup> In

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255. *Id.* at 1091 (emphasis omitted). *But see* *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005) ("This is not to say . . . that the prosecutorial sword must actually strike or be poised to strike. To the contrary, an individual 'need not incriminate himself in order to invoke the privilege.'" (quoting *McCoy v. Comm'r*, 696 F.2d 1234, 1236 (9th Cir. 1993))).

256. 210 F. App'x 949 (11th Cir. 2006).

257. *Hodnett*, 210 F. App'x at 953–54.

258. *Id.* at 954 (emphasis added).

259. *Id.*

260. 940 A.2d 436 (Pa. Super. Ct. 2007).

261. *Shrawder*, 940 A.2d at 443. Before deciding the substantive issue, the court first concluded that the issue was ripe for review, even though the appellant had not yet had to undergo any polygraph testing. *Id.* at 440. However, the court did not address what effect, if any, the fact that the appellant had pled *nolo contendere* would have on his Fifth Amendment right, specifically, whether the defendant could refuse to answer questions regarding the commission of the underlying offense. *Id.* at 443. The court decided it need not discuss

reaching this conclusion, the court stated that “[t]he *test results* [of polygraphs] further the primary goal of counseling.”<sup>262</sup> This wording, emphasizing the role of test results rather than the tests themselves, suggested an underlying belief concerning polygraph accuracy. Three years later, the court directly ruled on this issue.

In *Commonwealth v. A.R.*,<sup>263</sup> the petitioner had been convicted of several offenses for videotaping his thirteen-year-old stepdaughter in the bathroom.<sup>264</sup> In the videotape, she was “in various stages of undress, including complete nudity.”<sup>265</sup> The petitioner admitted at trial that he had done so, but contested the charge that his motivation was sexual gratification: according to A.R., he had made the video to embarrass his stepdaughter because she had twice entered his bedroom while he was naked, one time bringing a friend with her.<sup>266</sup> The petitioner said that he had tried discussing the matter with his wife (the girl’s mother), but his supplications were in vain.<sup>267</sup> Therefore, he had made the video and purposefully left the video where his wife would find it, and she promptly called the police.<sup>268</sup>

The court sentenced the petitioner to three and a half years of probation, with the special condition that the appellant follow all sex offender treatment recommendations.<sup>269</sup> A.R. had entered a sex offender treatment program, but during the entire twelve-week orientation period, he continued to deny that he had had a sexual motivation for videotaping his stepdaughter.<sup>270</sup> Eventually, the treatment professionals gave the petitioner a therapeutic polygraph “to identify the [petitioner’s] risk behaviors and to promote his honesty in treatment.”<sup>271</sup> The polygraphist found the petitioner deceptive in all relevant answers.<sup>272</sup> After the test, the treatment professionals continued questioning A.R. about his motivation for making the video, and he continued to provide the same answer.<sup>273</sup> The program’s supervisor then discharged the appellant from the program because of a lack of progress, and his probation officer filed a probation violation petition.<sup>274</sup> The trial court received as evidence the results of the polygraph examinations, and subsequently revoked the appellant’s probation.<sup>275</sup>

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that issue in this proceeding, but that the appellant could raise the issue should the situation arise. *Id.* at 443 n.6.

262. *Id.* at 443 (emphasis added).

263. 990 A.2d 1 (Pa. Super. Ct. 2010).

264. *A.R.*, 990 A.2d at 3.

265. *Id.* The convictions were for two counts of Sexual Abuse of Children, two counts of Invasion of Privacy, and one count of Criminal Use of a Communications Facility. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 4.

273. *Id.*

274. *Id.*

275. *Id.*

The Superior Court affirmed the revocation of appellant's probation.<sup>276</sup> The court noted that the appellant was discharged from the program because he had failed to comply with "all treatment recommendations," which was a condition of his probation.<sup>277</sup> His probation was then revoked because he had failed to attend the required treatment program.<sup>278</sup> The trial court had relied on the polygraph results in reaching its decision; in affirming the revocation, the Superior Court ruled that polygraph evidence may be admitted "as supportive proof of a violation of a condition of a sexual offender's therapy-related probation requirements."<sup>279</sup>

This ruling was made despite clear Pennsylvania precedent: as the dissent noted,<sup>280</sup> the Pennsylvania Supreme Court had held that "the results of a polygraph examination are inadmissible for any purpose in Pennsylvania because the scientific reliability of such tests has not been sufficiently established."<sup>281</sup> Furthermore, the dissent noted that even if *Gee* were limited to trial proceedings, the Pennsylvania Supreme Court had also held that, at a violation of probation hearing, the facts must still be "probative and reliable."<sup>282</sup> In light of Pennsylvania's consideration of polygraph examinations as "notoriously unreliable," the dissent believed that the results of such examinations had no place in any phase of the criminal justice system.<sup>283</sup>

Therefore, in Pennsylvania, courts have taken two somewhat ideologically opposed stances regarding polygraphs: First, as demonstrated in *Shrawder*, the Fifth Amendment right of self-incrimination cannot be infringed even though the examinee is a convicted sex offender;<sup>284</sup> second, and somewhat conversely, polygraph

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276. *Id.* at 8.

277. *Id.* at 5.

278. *Id.*

279. *Id.* at 6.

280. *Id.* at 8 (Colville, J., dissenting) (quoting *Commonwealth v. Gee*, 354 A.2d 875, 883–84 (Pa. 1976)).

281. *Gee*, 354 A.2d at 883–84.

282. *A.R.*, 990 A.2d at 8 (Colville, J., dissenting) (emphasis omitted) (quoting *Commonwealth v. Mullins*, 918 A.2d 82, 85 (Pa. 2007)).

283. *Id.*

284. Almost exactly one month after *Commonwealth v. A.R.* was decided, the Superior Court of Pennsylvania ruled on *Commonwealth v. Fink*, 990 A.2d 751 (Pa. Super. Ct. 2010). In *Fink*, the appellant's parole had been revoked, resulting in an incarceration of four to eight years, because he had refused to complete a polygraph disclosure questionnaire as part of his sex offender treatment. *Id.* at 753. One of the questions in this questionnaire was: "[H]ow many children did you have some form of sexual contact with prior to the date of conviction for your last offense?" *Id.* at 754–55 (emphasis omitted). The questionnaire then asked that the appellant provide the victim's age, gender, appellant's age at the time, the month/year of first and last sexual contact, the frequency of the contact, the relationship the appellant had toward the victim, the type of sex acts, as well as type of force used. *Id.* Another question in the questionnaire was: "[H]ave you ever killed someone during or after sex?" *Id.* at 756. The appellate court held that these questions were incriminatory and that, under both *Shrawder* and *Murphy*, the appellant had a right to refuse to answer them, and the government could not revoke his parole because of his valid assertion of that right. *Id.* at 760–61. Therefore, a few weeks after holding that the lone exception to Pennsylvania's ban on polygraph evidence admissibility for any purpose was when it was offered as "supportive proof of a violation of a condition of a sexual offender's therapy-related probation requirements," *A.R.*, 990 A.2d at 6, the Superior Court of Pennsylvania reaffirmed the sex offender's Fifth Amendment right against self-incrimination.

examination results are considered reliable enough to be admitted as evidence against examinees during probation revocation proceedings.<sup>285</sup>

Indiana took a similar approach to the issue. In *Carswell v. State*,<sup>286</sup> the Indiana Court of Appeals held that any results of the appellant's polygraph examinations were inadmissible in subsequent court proceedings.<sup>287</sup> In so finding, the court noted the inadmissibility of polygraph results stemmed from its scientific unreliability.<sup>288</sup> In the next sentence, the court held that the same polygraph results *were* admissible during a probation revocation proceeding because "a probation revocation hearing is not an adversarial criminal proceeding, but a civil matter which requires more flexible procedures."<sup>289</sup>

Minnesota has repeatedly admitted polygraph evidence at probation revocation hearings and has used that evidence as a basis for revoking the probation of convicted sex offenders. In *State v. Arndt*,<sup>290</sup> the Court of Appeals of Minnesota did not consider the issue of polygraph evidence admissibility; instead, the court debated whether the appellant's failure of a polygraph examination was reliable enough to be considered a violation of probation.<sup>291</sup> The court held that, under the circumstances, it was.<sup>292</sup> In reaching this decision, the appellate court noted "the record indicates that appellant previously admitted the sexual misconduct in a psychosexual evaluation, yet denied such conduct during a polygraph examination. Thus, there is evidence that the failed polygraph is attributable to appellant's intentional deception rather than some flaw in the examination itself."<sup>293</sup>

In a similar case, the petitioner had been expelled from his treatment program after failing a polygraph. In *State v. Hamers*,<sup>294</sup> the petitioner had gone through five years of probation without any alleged violations.<sup>295</sup> However, in 2008 the petitioner's former girlfriend told the Sheriff's Office that Hamers had forced her to perform oral sex on him.<sup>296</sup> Hamers was asked about this during one of his PCSOT polygraph examinations.<sup>297</sup> He claimed the sexual activity had been consensual, but the examiner told Hamers that his answer contained "significant indicia of deception."<sup>298</sup> By way of explanation, Hamers said that his ex-girlfriend may have felt pressured to perform oral

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285. *A.R.*, 990 A.2d at 7.

286. 721 N.E.2d 1255 (Ind. Ct. App. 1999).

287. *Carswell*, 721 N.E.2d at 1266.

288. *Id.* at 1265–66.

289. *Id.* at 1266 (citing *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)).

290. No. A05-1388, 2006 Minn. App. LEXIS 610 (Minn. Ct. App. June 13, 2006).

291. See *Arndt*, 2006 Minn. App. LEXIS 610, at \*6 (noting that appellant's failure did not seem to be a result of unreliability of polygraph technique, but of his dishonesty).

292. *Id.* at \*6–7.

293. *Id.* See *infra* Part III.A.2.a for a discussion as to why this reasoning is based on misunderstanding of the polygraph examination.

294. No. A09-1308, 2010 Minn. App. LEXIS 493 (Minn. Ct. App. June 1, 2010).

295. *Hamers*, 2010 Minn. App. LEXIS 493, at \*1–2.

296. *Id.* at 2.

297. *Id.*

298. *Id.*

sex or risk Hamers ending the relationship.<sup>299</sup> The treatment program discharged Hamers, and stated it would only consider permitting his re-entrance after a “correctional consequence.”<sup>300</sup> At the probation revocation hearing, the court found that Hamer had violated his probation by being discharged from his treatment program.<sup>301</sup> The court of appeals affirmed the revocation, finding that Hamers’s expulsion from the treatment program was a violation of his probation.<sup>302</sup> The court credited Hamers’s therapist’s explanation that the discharge was the result of Hamers’s “general lack of progress” and his failure of the polygraph examination.<sup>303</sup>

This is in stark contrast to states that hold that polygraph results are per se inadmissible in all proceedings, including probation revocation hearings.<sup>304</sup> In *Cassamassima v. State*,<sup>305</sup> the court observed that “courts of other jurisdictions are virtually unanimous in approving the requirement of a polygraph as a condition of probation” despite the inadmissibility of polygraphs in criminal trials in those same jurisdictions.<sup>306</sup> The Florida court explained this phenomenon by noting the perceived psychological deterrence value of polygraph examinations.<sup>307</sup> The *Cassamassima* court determined, therefore, that although polygraphs are a valid condition of supervised release, the results of the polygraph are not admissible to prove a probation violation.<sup>308</sup> Furthermore, the court interpreted *Murphy* as forbidding any questions about criminal conduct during a polygraph test, and affirmed the probationer’s right to refuse to answer such questions.<sup>309</sup> In a footnote at the end of the opinion, the court explained that its decision did not eviscerate the value of polygraphs as conditions of

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299. *Id.* at \*2–3.

300. *Id.* at \*3.

301. *Id.* Another issue in the case was Hamers’s conduct after the discharge: Hamers’s probation officer, following his discharge, sought revocation because (1) Hamers failed to complete the treatment and (2) was not truthful with the probation officer because he did not discuss his relationship with the ex-girlfriend. *Id.* The probation officer told Hamers that he was *not* to enter a new treatment program until the violation proceedings were concluded. *Id.* However, Hamers decided to enroll in a new treatment program. *Id.* Later, when the probation officer visited Hamers’s home, she found posters of “scantily-clad” women in the home. *Id.* at \*3.

302. *Id.* at \*6.

303. *Id.* at \*9–10 (internal quotation mark omitted). It is unclear, however, why an individual who for five years had not had even an *alleged* probation violation was suddenly determined to have a general lack of progress. With respect to the issue of Hamers’s entrance into a new treatment program despite his probation officer’s order to the contrary, the court noted that, because Hamers had disobeyed a directive from his probation officer, this was a clear violation of his probation. *Id.* at \*10–11. The court specifically said that it did not matter that his disobedience was actually an affirmative action to seek help. *Id.* This calls into question how concerned courts, or at least this court, are with an offender’s success at rehabilitation or treatment.

304. See, e.g., *Cassamassima v. State*, 657 So. 2d 906, 907 (Fla. Dist. Ct. App. 1995) (noting polygraph tests inadmissible as evidence in any subsequent judicial proceeding to prove guilt); *State ex rel. Koszewski v. Schwarz*, 659 N.W.2d 506, 506 (Wis. Ct. App. 2003) (citing *State v. Ramey*, 359 N.W.2d 402 (Wis. Ct. App. 1984)) (stating that results of polygraph tests are not admissible in any criminal proceeding, including probation revocation proceedings).

305. 657 So. 2d 906 (Fla. Dist. Ct. App. 1995).

306. *Cassamassima*, 657 So. 2d at 910.

307. *Id.*

308. *Id.* at 911.

309. *Id.* The court also noted that the state may still require the probationer to answer potentially incriminating questions, but only if the state offers use immunity for the response. *Id.*

release: the court, quoting another Florida case, noted that polygraphs still had value to assist probation officers in supervising their charges.<sup>310</sup> The polygraph results may inform the probation officer as to areas where more supervisory attention is needed, or allow him to launch an investigation that might lead to independently admissible evidence that the probationer had committed sex crimes.<sup>311</sup> As such, the polygraph still had significant value to help monitor offenders and ensure compliance, despite the inadmissibility of the test results.<sup>312</sup>

The state courts are similarly, if not even more drastically, muddled and confused than the circuit courts when it comes to delineating and establishing the rights of sex offenders in regards to therapeutic polygraph examinations. This is unsurprising given the lack of Supreme Court action in this area.

### III. DISCUSSION

#### A. *The Issues*

In the American criminal justice system, sex offenders are generally treated differently, and for the worse, than other criminals. Despite the fact that the Constitution does not mandate a restricted set of rights for sex offenders, in modern-day America, this class of criminals is guaranteed reduced constitutional protection.

There are two separate yet related concerns with PCSOT polygraphs: (1) Fifth Amendment self-incrimination and (2) polygraph reliability and its role in revocation of supervised release.<sup>313</sup> Though some courts have recognized these concerns and provided some measure of protection,<sup>314</sup> many have not.<sup>315</sup> Other jurisdictions have not made affirmative rulings on the Fifth Amendment rights of the convicted sex offender in the polygraph context or on the admissibility of polygraph results in revocation proceedings.<sup>316</sup> Federal courts have held that polygraph examinations are either reliable enough or have enough of a deterrent effect that they can be made a condition of

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310. *Id.* at 911 n.9 (quoting *Hart v. State*, 633 So. 2d 1189, 1190 (Fla. Dist. Ct. App. 1994)).

311. *Id.*

312. *Id.*

313. See *supra* Parts II.B–D for a discussion of the way various courts have ruled on these issues.

314. See *supra* notes 179–202 and accompanying text for a discussion of the Ninth Circuit Court of Appeals' approach towards the Fifth Amendment issue. See, e.g., *State ex rel. Koszewski v. Schwarz*, 659 N.W.2d 506 (Wis. Ct. App. 2003) (holding polygraph results per se inadmissible at all criminal proceedings, including probation revocation hearings).

315. See, e.g., *United States v. Johnson*, 446 F.3d 272, 279–80 (2d Cir. 2006) (holding sex offenders did not have right to remain silent when asked any PCSOT polygraph questions, but rather retained only the right to challenge responses when/if subsequent judicial proceedings based on those responses were initiated against them); *State v. Arndt*, No. A05-1388, 2006 Minn. App. LEXIS 610, at \*6 (Minn. Ct. App. June 13, 2006) (holding that polygraphs were reliable enough that appellant's failure of polygraph was enough to constitute violation of probation).

316. See *supra* Part II.C.3 for a discussion of the circuit courts of appeals that have not made a determination regarding the Fifth Amendment rights of convicted sex offenders. See, e.g., *United States v. York*, 357 F.3d 14, 23 (1st Cir. 2004) (refusing to rule on the admissibility of polygraphs based on their reliability).

supervised release, the refusal of which can result in revocation of release.<sup>317</sup> Just as many courts ignore or dismiss these concerns, researchers often omit in-depth discussion of Fifth Amendment implications of polygraphs from their publications.<sup>318</sup>

Courts that address both self-incrimination and reliability issues typically analyze these issues separately.<sup>319</sup> In keeping with this format, this Section first discusses the problems that exist with various courts' approaches to the Fifth Amendment claims. The next subsection addresses the deficient reliability/admissibility analyses employed by several courts. The third subsection shows that it is counterintuitive to approach these two issues separately because, at least in connection with one popular use of the PCSOT, they are inherently related.

### 1. The Fifth Amendment Issue

#### *a. The Second Circuit and the Fifth Amendment: Creating a "Trilemma"*

The Second Circuit's approach to the Fifth Amendment PCSOT polygraph issue in *United States v. Johnson*<sup>320</sup> is the most constitutionally troubling. The *Johnson* court held that no matter how incriminating the potential response to a question, the probationer/parolee must answer that question or he can be held in violation of his release.<sup>321</sup> In so ruling, the Second Circuit has put the examinee in the classic "trilemma" against which the Fifth Amendment was meant to protect. The trilemma forces the individual to choose between (1) answering the question honestly and incriminating himself; (2) remaining silent and being held in contempt of court for

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317. *E.g.*, *Johnson*, 446 F.3d at 277–78; *York*, 357 F.3d at 23; *United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003). This is *not* the same as deciding whether a polygraph is admissible in revocation proceedings. This is merely holding that the sentencing court could make the taking of polygraphs a condition of release, and failure to do so or to cooperate fully could result in a release violation and revocation of release. It does *not* necessarily mean that a failure of a polygraph could result in revocation.

318. For example, several authors wrote a forty-six page article about polygraph use in the PCSOT context and devoted only three pages to a discussion of the Fifth Amendment issues. ENGLISH ET AL., *supra* note 7, at 18–21. After devoting three paragraphs (eleven sentences) to the constitutional jurisprudence surrounding the Fifth Amendment, the authors reminded the readers how important it is to obtain information about past victims from defendants. *Id.* at 18. The remaining three pages were devoted to possible ways to satisfy the Fifth Amendment, such as limited immunity, or not requesting specific names or dates regarding past victims. *Id.* at 18–21. The authors recorded several criticisms of these methods, emphasizing how important the information is to the treatment of the offenders and protection of the community, while generally failing to emphasize the importance of Fifth Amendment rights of the offenders. *Id.* They conclude by saying, "[w]hatever the policy regarding prosecution of new crimes, nothing eliminates the legal responsibility of treatment providers and others in most states to report child abuse when they learn of it." *Id.* at 20. Again, they fail to report how this conflicts with the offender's Fifth Amendment rights. Other studies do not mention the Fifth Amendment at all. *E.g.*, Grubin, *supra* note 56; Grubin & Madsen, *supra* note 71; Iacono, *supra* note 6; Krapohl et al., *supra* note 13; Meijer et al., *supra* note 6; Meijer & Verschuere, *supra* note 39. *But see* Levenson, *supra* note 15, at 371 (noting that self-incrimination concerns should be addressed by immunity or not asking examinee to disclose identity of victims).

319. *See, e.g.*, *York*, 357 F.3d at 23–24.

320. 446 F.3d 272 (2d Cir. 2006).

321. *See supra* notes 235–38 and accompanying text for a discussion of the Second Circuit's analysis and approach of the issue.

failing to answer; and (3) lying and running the risk of perjury.<sup>322</sup> Even though the PCSOT polygraph is not taken under oath nor subject to perjury, the situation created by the Second Circuit is still directly analogous to the trilemma. According to the holding in *Johnson*, the individual has three options: (1) answer the question and incriminate himself; (2) refuse to answer the question and risk having his release revoked;<sup>323</sup> or (3) lie on the polygraph, which could potentially lead to expulsion from the PCSOT program, amounting to a violation of the examinee's release.<sup>324</sup>

The trilemma created by the *Johnson* court is further complicated by mandatory reporting laws, which exist in many jurisdictions. Under these laws, treatment providers are required to report any misconduct involving a child victim, regardless of whether that conduct was ever prosecuted and regardless of the Fifth Amendment rights of the alleged perpetrator.<sup>325</sup> At least one state within the Second Circuit has a mandatory reporting requirement that includes any "psychologist[s] . . . mental health professional[s] . . . [and] licensed professional counselor[s]."<sup>326</sup> In this state, if any of the mandated reporters in the course of their employment have "reasonable cause to suspect or believe" that any child has been abused, they are required to report the suspected abuse to the Commissioner of Children and Families or a law enforcement agency.<sup>327</sup> These mandatory reporting laws increase the risk of punishment resulting from compelled self-incrimination, as any incriminatory responses, required by the Second Circuit's interpretation of the Fifth Amendment, would be quickly disclosed to law enforcement authorities.<sup>328</sup>

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322. See, e.g., *Andresen v. Maryland*, 427 U.S. 463, 476 n.8 (1976) (explaining the trilemma of self-incrimination).

323. This is analogous to being held in contempt of court. In both instances, the individual fails to comply with a court order, and in both instances jail time, or a deprivation of liberty, is generally a possible consequence.

324. Though *Johnson* did not directly address this issue, the court did observe that, "[the examinee] can be injured because he might end up in jail if he truthfully confesses a new offense during testing, *falsely denies it*, or invokes the Fifth Amendment to avoid answering." *Johnson*, 446 F.3d at 278 (emphasis added). This disposition of the issue would not be that unusual. In several cases an examinee's failure of an examination has led to his expulsion from a PCSOT program. See *supra* notes 226–38 and 263–75 for examples of instances where an examinee was discharged from a PCSOT program for failing a polygraph and then held in violation of his release for it.

Though *Johnson* seemed to notice that lying on the polygraph could result in revocation of release punishable by incarceration, later in the opinion the court also asserted that "the use of the lie detector has no impact on Fifth Amendment considerations." *Johnson*, 446 F.3d at 280. It appears that *Johnson* conceded this issue at oral argument, which may have influenced the court's opinion. *Id.* However, it also seems somewhat suspect to base a constitutional determination on what someone's attorney may have said in response to a judge's question at oral argument, particularly where the attorney apparently did not concede the point in his or her brief. If failure of a polygraph could result in revocation of release, then the Fifth Amendment is implicated. To find otherwise, as the court did here, seems illogical and disingenuous.

325. See, e.g., *United States v. Antelope*, 395 F.3d 1128, 1135 (9th Cir. 2005) (citing MONT. CODE ANN. §§ 41-3-201 to -202 (2011) (requiring that certain professionals and officials, including mental health professionals, report any suspected child abuse to the department of public health and human services)).

326. CONN. GEN. STAT. § 17a-101 (2011).

327. *Id.* § 17a-101a.

328. Connecticut requires that the report be made no later than twelve hours after the reporter has "reasonable cause to suspect or believe" that child abuse has occurred. *Id.* § 17a-101b(a).

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i. Inadequacy of the Remedy

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The right to remain silent was meant to protect the individual from the trilemma of self-incrimination.<sup>329</sup> The Second Circuit Court of Appeals determined that right does not exist for convicted sex offenders taking polygraphs. The only privilege that the court left the individual was the “right to challenge in a court of law the use of [incriminating] statements as violations of his Fifth Amendment rights” in the event that subsequent criminal proceedings are initiated against him based on the compelled incriminating statements.<sup>330</sup>

This “remedy” does not guarantee protection; it merely promises the ability to request protection at a future time. The extreme prejudice against sex offenders in the American legal system undermines the notion that this remedy is a meaningful safeguard. As one commentator observed, the Supreme Court has been “‘notably unreceptive to constitutional challenges’ against state sex-offender target programs,” and has given great “deference to the police power of states to target sex offenders with invasive . . . interventions.”<sup>331</sup> Congress has exhibited a similar prejudice against sex offenders, as demonstrated by its enactment of Federal Rules of Evidence 413–15, which allow certain evidence to be admissible against accused sex offenders that would be inadmissible had the defendant been accused of robbery or assault.<sup>332</sup> This systemic prejudice is problematic in the context of the Second Circuit Court of Appeals’ ruling in *Johnson* because of the lack of certainty of the “protection” afforded the sex offender after that ruling. The “protection” is not an absolute bar of any illegally obtained statements, nor is it the certainty that no statements will be made because of the right to remain silent; but, rather, it is based on the ability of another judge to overcome a prejudice so ingrained in the American legal system that it has caused the Supreme Court, Congress, and state governments to devise special constrictions on the rights of sex offenders.<sup>333</sup>

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329. *Andresen v. Maryland*, 427 U.S. 463, 476 n.8 (1976).

330. *United States v. Johnson*, 446 F.3d 272, 280 (2d Cir. 2006).

331. Graeber, *supra* note 1, at 161 (quoting Kevin J. Breer, *Beyond Hendricks: The United States Supreme Court Decision in Kansas v. Crane and Other Issues Concerning Kansas’ Sexually Violent Predator Act*, 71 J. KAN. B. ASS’N 13, 13 (2002)); *see also* Kessler, *supra* note 1, at 326–27 (noting the Supreme Court’s sex offender civil commitment jurisprudence has led to restriction of First Amendment rights of sex offenders).

332. FED. R. EVID. 413–15 (permitting admissibility of prior acts of sexual assault or molestation by defendant in civil or criminal cases involving accusations of sexual assault or molestation); *see also* Hathorn, *supra* note 3, at 22–23 (noting that Congress passed FRE 413–15 over objections from the judicial conference).

333. *See* FED. R. EVID. 413–15; *Kansas v. Hendricks*, 521 U.S. 346, 368–71 (1997) (upholding constitutionality of state civil commitment law for sexually violent criminals); Kessler, *supra* note 1, at 303–20 (discussing how federal courts apply prison inmate standard when reviewing constitutional claims by civilly committed sex offenders, resulting in derogation of First Amendment rights of civilly committed sex offenders).

States have taken other, more drastic measures based on the systemic fear of and prejudice against sex offenders. For example, California has enacted a “chemical castration” law, which requires certain sex offenders to be given massive doses of a man-made female hormone that eliminates almost all testosterone from the sex offender’s system. Stinneford, *supra* note 1, at 561. This has a similar effect to actual castration.

The fear of a judge's inability to overcome such deep-rooted, societal prejudice is not groundless. For example, in one state court case the sex-offender defendant had entered a plea agreement under which he had to complete a four-year sex-offender treatment program, after which he would return for sentencing.<sup>334</sup> The sentencing range, after completion of the program, was to be zero to twenty years, and the judge had to elect a sentence with an open mind, taking into consideration all circumstances, including the defendant's completion of the program.<sup>335</sup> When the defendant finished the program and returned for sentencing, a new judge was sitting.<sup>336</sup> The new judge declared she would treat the plea agreement as one "negotiated for a 20-year sentence," even though she was aware that the twenty-year sentence was only a cap.<sup>337</sup> She then declared it irrelevant that the defendant had completed the sex offender program and "that it was the defendant's 'hard luck' to draw her as a trial judge," because of her "strong views on sex offenses involving minor children."<sup>338</sup>

Another area in which judicial bias against sex offenders may manifest itself is in evidentiary rulings. Despite the fact that judges are cognizant of the prejudicial nature of evidence of prior sex crimes, they will readily admit prior sex offense felonies for impeachment purposes under Federal Rule of Evidence 609, or a state equivalent.<sup>339</sup> One scholar suggests that a reason for some judges' willingness to introduce such highly prejudicial evidence, even when its relevance is suspect, is that they are "influenced by their own feelings towards sex offenders."<sup>340</sup>

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*Id.* However, aside from removing sexual desire and capacity, "chemical castration" has significant negative side effects, including irreversible loss of bone mass, pulmonary embolism, and diabetes mellitus. *Id.* The only way for a "patient" to avoid chemical castration under this law is to undergo the surgical alternative—permanent, physical castration. *Id.* at 578. Within the last decade, three states (Virginia, Alabama, and Kentucky) have considered laws requiring convicted sex offenders to undergo permanent, surgical castration. *Id.* at 585.

In addition, there is a legitimate concern that admissibility of prior act evidence as provided for in FRE 413–15 will effectively undermine the Seventh Amendment right to trial by jury. Due to the highly inflammatory nature of sex offense convictions, prosecutors have greater leverage over defendants with sex offenses on their records. *Cf.* Rickert, *supra* note 1, at 214–16 (describing a case in which a defendant who had an "eminently triable" case was forced to forego a trial and accept a plea deal for seven years' incarceration because of his prior sex offense conviction). Though Rickert wrote about the effect of using sex crimes for impeachment purposes under FRE 609 and state equivalents, the concern is even greater for FRE 413–15 cases, where a convicted sex offender is on trial for a sex offense and there is no limiting instruction that the prior act evidence is only admissible for credibility purposes.

334. Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy. Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 361 (2010) (citing *Heath v. State* 450 So. 2d 588 (Fla. Dist. Ct. App. 1984)).

335. *Id.*

336. *Id.*

337. *Id.* at 362 (quoting *Heath*, 450 So. 2d at 590).

338. *Id.* (quoting *Heath*, 450 So. 2d at 590). Though the appellate court reversed the sentence, *id.*, this anecdote demonstrates that judges are not immune from the systemic bias against sex offenders, and that it can affect their judgment.

339. Rickert, *supra* note 1, at 216–16. For such prior offense evidence to be admissible, the impeachment value of the prior sex offense must generally outweigh the prejudicial effect of the admission of the evidence. *Id.*

340. *Id.*

The specter of judicial prejudice is particularly relevant in states in which judges are elected, rather than appointed. Judicial candidates regularly use “pro-sex offender” decisions by an incumbent judge as ammunition during a campaign. For example, in one state the incumbent supreme court justice had struck down a sex-predator law as unconstitutional.<sup>341</sup> The challenging candidate ran advertisements highlighting the decision, and stating that if the incumbent were reelected, sexual predators would have free reign to attack children.<sup>342</sup> In Mississippi, one incumbent state supreme court justice lost his reelection bid after the challenger used advertisements highlighting an opinion in which the incumbent declared the Federal Constitution prohibited the death penalty for nonlethal rape.<sup>343</sup> In another election, a challenging candidate used the following advertisement against the incumbent: “Justice ‘Butler found a loophole. [The criminal defendant] went on to molest another child.’”<sup>344</sup>

Therefore, though judges are expected to be above societal bias and to have the ability to make passionless decisions founded purely on the law, the reality is that their decisions are often colored by that bias.<sup>345</sup> This is particularly true in states in which judges are elected, where the voting public can force the incumbent judge to comply with its bias, or elect a judicial candidate who will. Thus, as one Circuit Court of Appeals put it, the protection offered by the *Johnson* court “offers [the examinee] no assurances at all.”<sup>346</sup>

ii. Inconsistency with *Murphy*

This approach also contravenes the Supreme Court’s reasoning in *Murphy*. In *Murphy*, the Court found it pivotal that the conditions of Murphy’s release did not require him to answer all questions; they required that when he did answer, he did so truthfully, meaning he still had the right to refuse to answer incriminating questions.<sup>347</sup> The Court specifically noted that “Murphy was not expressly informed during the crucial meeting with his probation officer that an assertion of the privilege would result

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341. Swisher, *supra* note 334, at 330, n.37 (citing Jeannine Bell, *The Politics of Crime and the Threat to Judicial Independence*, in JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, 1 app. F at 7 (2003)).

342. *Id.*

343. *Id.* at 331, n. 42.

344. *Id.* at 331.

345. Some may argue that even if individual trial judges are biased, the appellate courts will ensure that the correct decision is reached, regardless of the morally offensive nature of the defendant’s alleged conduct. However, this reliance is misplaced for two reasons. First, as shown above, in states where appellate judges and justices are elected, they are equally susceptible to societal pressures. Second, given the slow pace of the appellate process, a sex offender who had his probation unlawfully revoked will end up serving several months, or over a year, in prison. For example, as discussed earlier, in *Commonwealth v. Fink*, the state appellate court held that the trial court had erroneously revoked the petitioner’s release in violation of his Fifth Amendment rights. See *supra* note 284 for a discussion of *Fink*. However, the petitioner’s release was revoked on September 23, 2008 and the appellate opinion was not filed until February 16, 2012, indicating Fink had spent close to a year and a half in jail for a valid invocation of his Fifth Amendment rights. *Commonwealth v. Fink*, 990 A.2d 751, 753 (Pa. Super. Ct. 2010).

346. *United States v. York*, 357 F.3d 14, 25 (1st Cir. 2004).

347. *Minnesota v. Murphy*, 465 U.S. 420, 437 (1984).

in the imposition of a penalty.”<sup>348</sup> Therefore, the permissibility of the questioning hinged on whether Murphy’s right to remain silent was preserved and unrestrained. Conversely, in *Johnson*, the petitioner was told if he exercised his right to remain silent, his release, and therefore liberty, could be revoked.<sup>349</sup> The *Johnson* court was allowing the exact conduct that the *Murphy* Court cautioned against—punishing valid invocation of the right to remain silent. Interestingly, the *Johnson* court did not cite *Murphy* a single time, even though *Murphy* is a seminal case concerning the Fifth Amendment rights of probationers/parolees.

*b. The Fourth Circuit and the Fifth Amendment*

Even though the Fourth Circuit Court of Appeals’ approach seems different, the result is similar to that reached by the Second Circuit. The Fourth Circuit decided that as long as the terms of release state that the polygraph is to be used for treatment purposes, there is no Fifth Amendment concern.<sup>350</sup> The court did not address what would happen if an examinee’s incriminating response was used against him in subsequent proceedings. By ruling that there are no self-incrimination concerns for “treatment” polygraphs, the court essentially held that the examinee had to answer all questions—meaning that his only option was to challenge the incriminating responses at a later date, after proceedings had already been initiated. Therefore, this holding would have the same practical effect as that of the Second Circuit Court of Appeals. The court’s assertion that there are no self-incrimination concerns because the polygraphs are therapeutic and not investigatory is disingenuous in light of the existence of mandatory reporting laws in many states within the Fourth Circuit.<sup>351</sup> Even if the original purpose of the polygraph was therapeutic, compliance with those reporting laws could quickly trigger a chain of events ending in a subsequent criminal investigation.<sup>352</sup>

*c. The “Hesitant Circuits” and the Fifth Amendment*

The refusal of several circuit courts to directly rule on this issue is also problematic. Prudence might seem appropriate in an area as divisive as polygraphs, especially when there has been no clear guidance from the Supreme Court. However, the facts from *Antelope* highlight the potential consequences of such delay to individual petitioners.<sup>353</sup> The case cited in this Comment was the second time that *Antelope* had

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348. *Id.* at 438.

349. See *supra* notes 226–38 and accompanying text for a discussion of *Johnson* and its holding.

350. See *United States v. Henson*, 22 F. App’x 107, 112 (4th Cir. 2001).

351. *E.g.*, MD. CODE ANN., FAM. LAW § 5-705 (West 2010); VA. CODE ANN. § 63.2-1509 (2010).

352. See, *e.g.*, MD. CODE ANN., FAM. LAW § 5-705 (stating that residents of Maryland must, except in limited circumstances, inform a local law enforcement agency if they have reason to believe a child has been subjected to abuse); VA. CODE ANN. § 63.2-1509 (requiring mental health professionals and others to report anytime a reason to believe that a child has been abused exists). *Accord* *United States v. Antelope*, 395 F.3d 1128, 1138 (9th Cir. 2005) (noting PCSOT counselor admitted in past he had provided to police incriminating information learned about “patients” during therapy pursuant to state reporting law). See also *supra* notes 325–328 and accompanying text for a discussion of the operation of a typical mandatory reporting law.

353. See *Maiano*, *supra* note 21, at 993–94 (noting district court in *Antelope* had made several unsuccessful attempts to preserve *Antelope*’s Fifth Amendment rights before circuit court finally ruled on

appeared before the Ninth Circuit Court of Appeals, and was the second time that he had raised his Fifth Amendment concerns. In the first appeal, the court did not address his Fifth Amendment claims but instead remanded on other grounds. Because of the court's hesitance to address these claims, Antelope was forced to serve up to two-and-a-half years in prison for valid invocations of his Fifth Amendment rights.<sup>354</sup> Additionally, evidence in Antelope's case revealed that his case was not unique: Antelope's SABER counselor "testified that he routinely transmits to authorities any admissions his clients make about past sex crimes, and that such reports have led to more prosecutions."<sup>355</sup> Despite these frequent violations, only one petitioner managed to get his case heard, and it took him two tries to do it.<sup>356</sup> This indicates that the opportunities to hear these claims are disproportionately fewer than the number of violations regularly occurring. Therefore, when a court has an opportunity to rule on such a claim it should do so, to protect both the appealing individual and similarly situated, but less vocal or less well-represented individuals from unconstitutional deprivations of liberty.

Unfortunately, of the circuits that have had an opportunity to address this issue, the majority have either failed to do so or have done so in a manner that is constitutionally suspect. The Ninth Circuit directly confronted the issue, and held that the examinee's Fifth Amendment privilege allowed him to refuse to answer any incriminating questions.<sup>357</sup> This approach seems to be the most closely aligned with the holding in *Murphy*<sup>358</sup> and the underlying theory of the Fifth Amendment itself, and therefore the most constitutionally satisfactory. The Second Circuit's approach is the least satisfactory because it literally compels the examinee to answer any and all incriminating questions upon pain of revocation, and thus prison.<sup>359</sup> The "remedy" provided is thus no remedy at all, and revokes the right to remain silent as defined in *Murphy*.

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issue). See *supra* notes 179–202 and accompanying text for a more in-depth discussion of *Antelope*, including the facts of the case and the courts' analysis. Pre-*Antelope*, these individuals were faced with the choice of self-incrimination, remaining silent (which would result in revocation of release), or trying to lie their way through the polygraph, which also bears significant consequences.

354. After the first appeal, Antelope was resentenced to twenty months in prison. After serving that time, Antelope was re-incarcerated for again invoking his Fifth Amendment rights regarding the PCSOT, and he was sentenced to ten months incarceration, which he served while waiting for the circuit court to hear his second round of appeals. *Antelope*, 395 F.3d at 1132–33. The court does not note how much of his ten-month sentence Antelope had actually served between the sentencing and the disposition of his appeal. Given how slowly the appellate process works, even in criminal cases, it is certainly possible that he served the entire ten-month sentence, which, when combined with the original twenty months served for the first revocation, would total thirty months, or two-and-a-half years, in prison.

355. *Antelope*, 395 F.3d at 1138.

356. See generally *id.*

357. *Id.* at 1137–38.

358. Specifically, *Murphy* held that the individual's status as a probationer did not affect his Fifth Amendment privilege against self-incrimination of uncharged crimes. See *supra* Part II.B.1 for a discussion of *Murphy*.

359. *Murphy* stated that threat of revocation is compulsion for the purposes of the Fifth Amendment. *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984). See *supra* note 284 for examples of questions that might be asked during a PCSOT polygraph examination—specifically the sexual history portions—which an examinee in the Second Circuit would be required to answer.

## 2. Reliability Issues

The other major issue raised in challenges to PCSOT polygraphs concerns the reliability of polygraph test results and their admissibility in court. Almost every circuit court of appeals has held that polygraphs are an appropriate condition of release, either because they are considered sufficiently reliable<sup>360</sup> or because their reliability does not matter because of their deterrent effect.<sup>361</sup> In making these decisions, the circuits used little or no empirical evidence of polygraph reliability. This is largely the fault of the appellants, who often fail to support their attacks on polygraph reliability with scientific studies. Appellants either rely on *Scheffer*,<sup>362</sup> holdings from prior circuit court decisions,<sup>363</sup> or unsupported, flat assertions of polygraphs' well-known unreliability.<sup>364</sup> Accordingly, circuit courts have frequently made decisions regarding the appropriateness of polygraphs as conditions of supervised release without any real knowledge of their limitations.<sup>365</sup>

Many state appellate courts have held polygraph evidence admissible in release revocation hearings to show the parolee/probationer violated his release.<sup>366</sup> Although the records in these cases do not include any mention of scientific studies for or against polygraph accuracy, many courts do take note of the (in)famous unreliability of the

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360. See, e.g., *United States v. Johnson*, 446 F.3d 272, 278 (2d Cir. 2006) (citing *United States v. Scheffer*, 523 U.S. 303, 309–10 (2006)) (stating at worst polygraph has accuracy rate better than fifty percent and therefore provides incentive for examinee to be honest); *United States v. Music*, 49 F. App'x 393, 395 (4th Cir. 2002) (explaining that “[t]he level of reliability required for a test to reasonably relate to the goals of supervised release is not as high as the level of reliability required for admissibility into evidence”).

361. See, e.g., *United States v. Taylor*, 338 F.3d 1280, 1283 n.2 (11th Cir. 2003) (explaining that examinee's fear of failing a polygraph will promote compliance with the sex offender treatment program).

362. See *Johnson*, 446 F.3d at 277–78 (relying on *Scheffer* as evidence of polygraphs unreliability); *United States v. York*, 357 F.3d 14, 23 (1st Cir. 2004) (noting that the appellant relied on *Scheffer* to support his argument against polygraph reliability). The court in *York* noted that “[t]he record in this case provides no factual foundation on which to evaluate these arguments.” *Id.* It further explained that the problem with relying solely on *Scheffer* was that the case had been decided five years earlier, and the court had no basis for making a decision as to whether polygraphs had since been debunked, proven reliable, or been developed sufficiently as to make *Scheffer* inapplicable as a determination of polygraph reliability. *Id.* However, studies indicate that because there are several possible justifications for the physiological responses that polygraph-theory associates with lying, as long as those physiological responses are the indicia of deception, then it is unlikely that technological improvements will have any effect on accuracy. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 11, at 2. This is logical, because a technology that more accurately records heart rate or perspiration likely will still not be able to determine the underlying cause for that physiological response, whether it is nerves, fear at being wrongfully accused of deception, or fear of actual deception being detected.

363. See *United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003) (explaining that Fourth Circuit has held polygraphs “inadmissible in nearly every circumstance at trial”). The *Dotson* court rejected the argument that the inadmissibility of polygraphs at trial applies to sex-offender treatment considerations, noting that “evidentiary cases do not govern our evaluation of the use of polygraphs in connection with the treatment of an offender.” *Id.*

364. See *Music*, 49 F. App'x at 395 (observing that appellant did not offer any evidence about reliability, or unreliability, of polygraph examinations).

365. See *supra* Part II.A.4 for a discussion of the criticisms and limitations of polygraphs.

366. See *supra* Part II.D for a discussion of state courts that have held polygraph results admissible in revocation hearings.

tests.<sup>367</sup> Despite making this observation, courts have held polygraphs admissible in revocation proceedings.<sup>368</sup> The courts reason that a revocation hearing is not a trial, so it is not subject to the same evidentiary and admissibility standards as a trial.<sup>369</sup> The courts' lack of understanding of the limitations of polygraphs has led them to make dangerous assumptions, which have drastic effects on the liberty of the examinees. This lack of understanding is exacerbated by the fact that polygraph examiners and sex therapists, who vigorously defend polygraphs,<sup>370</sup> are the ones who frequently testify about polygraphs during revocation hearings.<sup>371</sup>

*a. Misunderstanding the Examination Process*

In *Arndt*, the defendant had his probation revoked largely because he failed a polygraph.<sup>372</sup> In affirming the revocation, the appellate court observed "the record indicates that appellant previously admitted the sexual misconduct in a psychosexual evaluation, yet denied such conduct during a polygraph examination. Thus, there is evidence that the failed polygraph is attributable to appellant's intentional deception rather than some flaw in the examination itself."<sup>373</sup> The court saw the polygraph's recording of "deception" as validation of its reliability.<sup>374</sup> This analysis demonstrates a deficiency in understanding of the mechanics of the PCSOT polygraph, because it assumes that the polygraph instrument is the only relevant factor in determining reliability.<sup>375</sup> It ignores the pivotal, even principle, role that the examiner plays in the

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367. See *Carswell v. State*, 721 N.E.2d 1255, 1266 (Ind. Ct. App. 1999) (noting that although results of polygraph examinations are not reliable enough to be admissible at trial, they can be admitted in revocation hearings). Furthermore, twenty-eight states have held polygraph results per se inadmissible at trial because of their unreliability, while eighteen others only allow admission of polygraph results upon stipulation by the parties. *State v. A.O.*, 965 A.2d 152, 161–62 (N.J. 2009). New Mexico is the only state that has ruled on the issue that permits the admission of polygraph test results without stipulation. *Id.* at 162 (citing *Lee v. Martinez*, 96 P.3d 291, 306–07 (N.M. 2004)).

368. *Carswell*, 721 N.E.2d at 1266.

369. See *id.* (explaining that "a probation revocation hearing is not an adversarial criminal proceeding"); *Commonwealth v. A.R.*, 990 A.2d 1, 6 (Pa. Super. Ct. 2010) ("[A violation of parole/probation] hearing is not a trial and, as such, does not deal with questions of 'guilt' or 'innocence' . . . . [E]vidence not normally admissible at trial . . . may be presented by the Commonwealth . . .").

370. See *Iacono*, *supra* note 6, at 1300 (noting that polygraph practitioners frequently disavow errors in polygraph process and, if they do recognize them, attribute them to mistakes made by individual incompetent examiners).

371. See, e.g., *State v. Hamers*, No. A09-1308, 2010 Minn. App. LEXIS 493, at \*10 (Minn. Ct. App. June 1, 2010) (explaining testimony provided by Hamers's therapist at revocation hearing); *A.R.*, 990 A.2d at 4 (describing testimony provided by program director and polygraphist).

372. See *supra* notes 290–93 and accompanying text for a discussion of *Arndt*.

373. *State v. Arndt*, No. A05-1388, 2006 Minn. App. LEXIS 610, at \*6–\*7 (Minn. Ct. App. June 13, 2006).

374. *Id.*

375. The court's reasoning is comparable to that put forth by many supporters of polygraphs, who assert that because the polygraph "works," there is no need to question underlying theory. E.g., *Grubin*, *supra* note 56, at 179. Similarly, the court seems to be asserting that as long as the polygraph "works," there is no need to question its validity. Both lines of reasoning rely solely on the fact that the polygraph "works" as their justification. See *supra* Part II.A.4 for an explanation of why this is likely a faulty assumption.

examination. One researcher attempted to describe the human subjectivity of a polygraph by comparing it to an X-ray test:

When a trained X-ray technician administers the standard protocol, the results are independent of the procedure followed. For instance, were two different technicians to obtain X-rays on the same person, the resulting images would be highly similar. However, this type of standardization does not exist for the CQT, and it is important to understand how this can affect the outcome of the test.<sup>376</sup>

Aside from test interpretation, the examiner's role in creating the questions for the examination—the crucial component of the process—creates a risk of human error. This difficulty is exacerbated in the PCSOT context because examiners try to create definite questions when they are asking about vague or unknown events.<sup>377</sup> As a result, the relevant questions often resemble the comparison questions, which clouds results and could explain the discrepancy in *Arndt*.<sup>378</sup> Therefore, these results should be understood for what they are: interpretations of physiological responses with various possible explanations that are heavily influenced by the examiner's abilities.<sup>379</sup>

The court in *Arndt* did not appear to understand these limitations. It failed to understand that the polygraph is really a human-conducted, “polygraph-assisted interview” that is subject to human error.<sup>380</sup> The heavy deference the court gave to the polygraph's ability to “detect” *Arndt*'s inconsistencies was therefore inappropriate.

*b. Misunderstanding of the Physiological Responses*

A second Minnesota appellate case highlights another problem with dependence on and admissibility of polygraph results: the many possible causes for the physiological responses that polygraph-theory associates with deception. It is well documented that these physiological indicia can, and frequently are, caused by states of mind other than deception, such as fear or anxiety.<sup>381</sup> Furthermore, the National Research Council observed that

there is evidence suggesting that truthful members of socially stigmatized groups and truthful examinees who are believed to be guilty or believed to have a high likelihood of being guilty may show emotional and

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376. Iacono, *supra* note 6, at 1297. See also Ben-Shakhar, *supra* note 15, at 196 (noting pretest interview is “completely subjective” and formation and selection of control questions depend absolutely on interrogator).

377. Meijer et al., *supra* note 6, at 426.

378. *Id.* at 425. For example, imagine that *Arndt* had admitted to X during the pretest interview. If, during the physiological phase, *Arndt* does not realize that a question is about X, but instead believes the question is about Y, he might “deceptively” answer. Any physiological response could be based on nervousness about, for example, not fully understanding a question when his liberty depended on his answer. See *supra* notes 84–90 and accompanying text for a discussion of the possible explanations for “deceptive” physiological responses.

379. See Ben-Shakhar, *supra* note 15, at 193 (“The choice of these control questions and the inferences made on the basis of the comparison between responses to the two types of questions are the crucial factors determining the validity of polygraph tests.”).

380. Iacono, *supra* note 6, at 1297.

381. See *supra* notes 84–90 and accompanying text for a discussion of the ambiguity of physiological responses measured by the polygraph.

physiological responses in polygraph test situations that mimic the responses that are expected of deceptive individuals.<sup>382</sup>

It is not a stretch to classify convicted sex offenders as members of a “socially stigmatized group” or as individuals who are perceived to “have a high likelihood of being guilty.”<sup>383</sup> Therefore, regardless of whether the sex offender is being deceptive, his consciousness of his situation in society and/or his awareness of the examiner’s belief of his guilt can influence his physiological reactions to questions.

In light of this information, the court’s ruling in *Hamers* is problematic. In *Hamers*, the appellant had completed five years of his supervised release without any reported or alleged violations until his *ex-girlfriend* reported that he had forced her to perform oral sex on him.<sup>384</sup> After failing a polygraph about this issue, Hamers was expelled from the treatment program because he “appear[ed] to be in his sexual abuse cycle at the present time.”<sup>385</sup> Hamers’s probation revocation was affirmed by the appellate court.<sup>386</sup>

Because this was Hamers’s first “violation” and it was an emotionally charged issue, it is irresponsible to assume that a heightened physical response to a question about that issue indicates deception. When the nature of the allegation (accusation of nonconsensual sex by an ex-girlfriend) is coupled with Hamers’s membership in a group that is both stigmatized and frequently presumed guilty, research indicates that the results of a polygraph examination in this atmosphere must be taken with a large grain of salt. The court did not address any of these concerns but instead held that the petitioner, who had complied with the terms for several years without incident, had violated his release. Because of its lack of understanding of the limitations of polygraphs, and given the many result-influencing factors surrounding this examination, it is possible that Hamers’s release was revoked based on little more than the word of a spurned lover.

### 3. The Fifth Amendment–Reliability Paradox

As mentioned before, in many cases any Fifth Amendment claims raised are considered separately from reliability claims. This approach overlooks the connection between these issues. Some jurisdictions, like Pennsylvania, have held that the appellant retains his Fifth Amendment right to refrain from answering incriminating

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382. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 11, at 3. The National Research Council also observed that the atmosphere in which the test takes place and the general environment of the interrogation can influence the physiological responses of the individual, regardless of whether he is actually being deceptive or not. *Id.* at 16–17.

383. *Id.* at 3; *see also* *McKune v. Lile*, 536 U.S. 24, 32 (2002) (discussing the high rates of recidivism for sex offenders); Graeber, *supra* note 1, at 138 (noting physically and psychologically traumatizing nature of sex crimes places sex offenders in unique class of criminals).

384. *State v. Hamers*, No. A09-1308, 2010 Minn. App. LEXIS 493, at \*2–3 (Minn. Ct. App. June 1, 2010).

385. *Id.* at \*2. The program informed the court of this, despite the fact that this was Hamers’s first violation in five years of treatment. *Id.* Furthermore, even if Hamers had re-entered his abuse cycle, it raises some concerns that the treatment program would expel him for that. It would seem that it is at this point treatment becomes all the more important.

386. *Id.* at \*10–11.

questions,<sup>387</sup> but the results of polygraph examinations are admissible at hearings and can be used to revoke supervised release.<sup>388</sup> This ruling demonstrates a further lack of understanding of polygraph mechanics, and has a problematic result.

It is widely acknowledged by both opponents and proponents of the polygraph that specific-instance polygraphs are more accurate than polygraphs about vague or unknown events.<sup>389</sup> Because of the Fifth Amendment protections in place in many jurisdictions, the PCSOT examiner generally cannot ask about specific instances of past conduct, but rather can ask only about speculative or uncertain events.<sup>390</sup> The results are troubling: (1) polygraphs are more accurate when the questions are specific-instance questions; (2) the examinee does not have to answer any questions about incriminating *specific instances* of uncharged conduct; and (3) as a result, the polygraph results that are admissible at revocation proceedings are below the optimal level of accuracy for polygraphs, which itself is not high.<sup>391</sup> In many jurisdictions, if an individual is asked a question such as, “Did you molest Johnny last week?”, he is not required to answer that question. However, if he were asked, “Have you had any inappropriate contact with a minor over the last two weeks?”, he would likely be required to answer the question, and any physiological response could be used against him to revoke his release, regardless of whether he was actually lying or not.<sup>392</sup> Because the second question is much more ambiguous,<sup>393</sup> the results of the examination are much less reliable. Yet it is this less reliable and more ambiguous data, and the examiner’s interpretation of it, that can be used to revoke the examinee’s release. Therefore, some of the jurisdictions that protect the Fifth Amendment rights of sex offenders also create a greater threat to the liberty of those same offenders because of their ignorance regarding polygraphs.

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387. Commonwealth v. Shrawder, 940 A.2d 436, 442–43 (Pa. Super. Ct. 2007).

388. Commonwealth v. A.R., 990 A.2d 1, 7 (Pa. Super. Ct. 2010).

389. See, e.g., NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 11, at 1, 23.

390. Meijer et al., *supra* note 6, at 425. An example would be: “Have you had unsupervised contact with children over the last three months?” *Id.*

391. Even if a specific-instance polygraph examination is the most accurate type, it still does not solve the problems of other justifications for physiological responses. It also does not entirely solve the problem of misunderstandings between the examiner and examinee, the examiner’s personal skill, or influencing test results, although it does remove a lot of the ambiguity, and thus the opportunity, for unskilled examiners to taint the results.

392. See, e.g., A.R., 990 A.2d at 6 (holding polygraph results admissible at a hearing); *Shrawder*, 940 A.2d at 443 (holding that examinee can refuse to answer incriminating questions). Because the sample question used here merely refers to “inappropriate contact,” and does not specify criminal conduct, it is more likely that the examinee will be forced to answer it.

393. For example, what does “inappropriate contact” mean? If he held his young niece at a family reunion, is that inappropriate? What about if she sat on his lap? If the examinee is confident that he did not view the contact as inappropriate, but is nervous that—were the examiner to find out about it—the examiner might find it inappropriate, then this could influence physiological response. Conversely, if he had engaged in criminal conduct with a minor, but according to his own internalized standards, he did not consider it “inappropriate,” the instrument might not record his response as “deceptive.” See Meijer et al., *supra* note 6, at 425–26 (noting that sex offenders often justify sexual contact with children, and ambiguity of CQT questions creates greater risk for false negative test results).

B. *Proposed Solution: A Protective-Selective Method*

There are several problems with the role polygraphs currently play in the criminal justice system. The lack of reliability inherent in polygraphs makes their involvement in a process that threatens deprivation of liberty inappropriate. This concern is exacerbated by the polygraph's vulnerability to simple and nondetectable countermeasures.<sup>394</sup> The continual friction between PCSOT polygraphs and the Fifth Amendment further complicates polygraph use. Current "solutions" that have attempted to protect the Fifth Amendment rights of examinees while permitting polygraph results to be used in revocation proceedings have created a situation in which deprivation-of-liberty decisions could be based on the least reliable test results. In short, the role of polygraphs in the criminal justice system needs to be reexamined.

There are two possible solutions for these problems. One is to eliminate the Fifth Amendment protections that have created this paradox. If the role of polygraphs is inappropriate in the system as it is, then, do not change that role, but, rather, change the system. Allow polygraph examiners to delve into specific instances of past conduct so that any test results admitted would be the most reliable results possible, which would reduce the chances of an erroneous deprivation of liberty.

This is an unsatisfactory solution for various reasons. First, it would contravene the Supreme Court's interpretation of probationers'/parolees' constitutional rights.<sup>395</sup> Also, this solution does not address the reliability concerns inherent in all polygraphs, whether CQT or specific-instance. Because both types of polygraphs measure "deception" based on physiological response, they are both subject to the same limitations inherent in that methodology. This is why the National Research Council determined that the specific-instance polygraph, though more accurate than the CQT, is still far from perfect.<sup>396</sup> In addition, both specific-instance polygraphs and CQT polygraphs are vulnerable to countermeasures, which can be both effective and difficult to detect. Though a derogation of Fifth Amendment rights would allow for the admissibility of more reliable polygraph results, it would not address the underlying reliability concerns inherent in an instrument that purports to detect deception based on heart rate and perspiration.

The best solution seems to be the adoption of a Protective-Selective Method of polygraph use. It is protective because it allows the examinee to immediately make a valid invocation of his Fifth Amendment rights without fear of reprisal. It is selective because it limits polygraph use to a purely therapeutic context and restricts its entrance into the criminal justice system. This strategy is appropriate because even supporters of the polygraph observe that "polygraph results alone should not be used to make case management decisions."<sup>397</sup>

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394. See *supra* Part II.A.2.b for a discussion of polygraph countermeasures.

395. See *supra* Part II.B.1 for a discussion of *Murphy* and the Fifth Amendment rights of probationers/parolees.

396. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 11, at 4.

397. Levenson, *supra* note 15, at 371. Levenson specifically noted that "deceptive [polygraph] results appear to be less reliable than truthful findings." *Id.* Some states follow this approach and have held polygraph evidence inadmissible in all proceedings. See *supra* notes 304–12 and accompanying text for a discussion of these courts.

### 1. Maintaining the Right to Remain Silent

In keeping with the protective aspect of this method, the individual's Fifth Amendment right as interpreted in *Antelope* and *Murphy* should apply. If the therapist asks any questions that would require the individual to incriminate himself regarding an uncharged offense, then the individual should be allowed to refuse to answer without having his release revoked.<sup>398</sup> Anything less creates a high risk that the individual's Fifth Amendment right will be violated. This is especially true given the existence of mandatory reporting laws in many states, which require therapists to report any crimes involving a minor to law enforcement officials.<sup>399</sup> Furthermore, the systemic prejudice against sex offenders makes it dangerous for their constitutional rights to depend on the ability of a subsequent judge to overcome that prejudice, especially after investigations based on the compelled statements have produced evidence of a possible crime. Offenders should be able to freely invoke their Fifth Amendment rights without fear of reprisal, rather than rely on the opportunity to assert those rights after the incriminating evidence has been disclosed.

As an alternative to free invocation of Fifth Amendment rights, sex offenders should be immunized from further prosecution based on their sexual history disclosures.<sup>400</sup> This solution most clearly aligns with the goal of using the polygraphs as a treatment tool rather than an investigative technique: if treatment is the goal, then the "patient" should be free to disclose his past crimes to enhance his treatment and improve his chances for rehabilitation.<sup>401</sup> Immunity encourages full disclosure,<sup>402</sup> which is the purported goal of polygraph use for sexual history interviews.<sup>403</sup>

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398. See *United States v. Antelope*, 395 F.3d 1128, 1142 (9th Cir. 2005) (holding that convicted sex offender can invoke Fifth Amendment rights when questioned about uncharged conduct as part of PCSOT program). Unless revisions are made to mandatory reporting laws, this is the only way to guarantee protection of an examinee's Fifth Amendment right.

399. See, e.g., MONT. CODE ANN. §§ 41-3-201 to -202 (2003) (requiring certain professionals and officials, including mental health professionals, to report any suspected child abuse to department of public health and human services).

400. This also comports with *Murphy*, which notes that "a witness protected by the [Fifth Amendment] may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973)). However, as one court noted, the judge does not have the discretion to immunize the offender—that decision lies with the prosecution. *United States v. York*, 357 F.3d 14, 25 (1st Cir. 2004).

401. See ENGLISH ET AL., *supra* note 7, at 19 (noting that those who support immunity for prior crimes believe learning about prior victims is more important for rehabilitation and safety than prosecuting for past crimes).

402. *Id.*

403. *Id.* at 14–15; see also *United States v. Antelope*, 395 F.3d 1128, 1135 (9th Cir. 2005) (noting that autobiography questionnaire would be accompanied by polygraph to ensure full disclosure).

## 2. The Role of Results in Supervision and Treatment

If, as many courts have claimed,<sup>404</sup> the primary purpose of the PCSOT polygraph is treatment, then the results of the examination should only be relevant within the treatment program and should not be permitted to enter the realm of criminal justice.<sup>405</sup>

The logical counterargument is that this approach would cause examinees to fear less from failing a test: if they know nothing will happen, they will not worry about misbehaving, and having that misbehavior exposed by a polygraph.<sup>406</sup> This is a valid concern, but not an insurmountable one.

The therapist should be permitted to take polygraph examinations into consideration, without granting them undue deference,<sup>407</sup> when assessing the examinee's progress in the treatment. If the examinee is deemed to have made insufficient progress, the therapist should request that the court order the individual to continue his treatment until he makes sufficient progress rather than automatically expelling him from the program, which forces the examinee to violate his release.<sup>408</sup> The polygraph should be permitted to play an appropriate role in determining whether the examinee is making strides in his treatment, but polygraph results alone should not result in the termination of the treatment, as such termination may lead to revocation of probation.<sup>409</sup>

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404. See *supra* notes 236–44 and accompanying text for a discussion of cases holding that appellants' concerns about polygraph results being used to revoke release were unfounded because the primary purpose of the polygraph examinations were for treatment, not for investigation. However, the judicial label attached to PCSOT polygraph examinations often does not reflect reality: they are used for far more than mere treatment purposes. See ENGLISH ET AL., *supra* note 7, at 14–15 (describing one common purpose of PCSOT polygraph is to monitor individual to ensure compliance).

405. *Cf.* Commonwealth v. A.R., 990 A.2d 1, 8 (Pa. Super. Ct. 2010) (Colville, J., dissenting) (explaining the Pennsylvania Supreme Court precedent that holds polygraphs “inadmissible for any purpose” in court).

406. *Cf.* United States v. Johnson, 446 F.3d 272, 277–78 (2d Cir. 2006) (explaining that regardless of reliability, polygraphs produce incentives to tell truth, and deter noncompliance). A similar argument is that polygraphs lead to disclosure, regardless of their reliability. Levenson, *supra* note 15, at 363. *But see* Meijer et al., *supra* note 6, at 426 (asserting greater disclosure has uncertain value because it cannot be confirmed how much of disclosed information is accurate and how much remains undisclosed).

407. See *infra* Part III.B.3 for a discussion of another way the Protective-Selective Method would ensure that polygraphs were not given too much deference.

408. Note that this approach also seems to reinforce the notion that the primary purpose is “treatment.” If that truly is the goal, it seems counterintuitive to expel the probationer from the program when he may have had a setback. It seems that it is at this point that treatment is the most important. “Setback” does not mean the commission of a new sex crime, but rather could mean engaging in conduct that has been identified as prefacing commission of a crime, such as looking at pornography or, as was the case in *Hamers*, telling his girlfriend that he might terminate the relationship if she does not perform oral sex. State v. Hamers, No. A09-1308, 2010 Minn. App. LEXIS 493, at \*2–3 (Minn. Ct. App. June 1, 2010). If the Protective-Selective Method was applied, Hamers would not have been kicked out of the program after failure of the polygraph, but rather the therapist could either have extended the length of the treatment program, required Hamers to attend more sessions (for example, requiring him to attend two sessions per week rather than one), or asked the court to order either, or both.

409. See, e.g., *id.* at \*2–4 (holding revocation proper when examinee's treatment was terminated due to failure of polygraph).

This allows polygraphs to be used for therapeutic purposes such as getting the individual to confront the crime for which he was convicted as well as helping therapists understand the individual's perception of his behavior.<sup>410</sup> It also negates any concerns about the individual being incarcerated based on an inherently imperfect (i.e., human) interpretation of an unreliable, and easily deceived, instrument.

This method could also increase the reliability of therapeutic polygraphs. As noted above, there are several explanations for the physiological responses associated with deception, such as nervousness or fear. If one of the main causes for that nervousness or fear (i.e., being sent to prison based on the results of the examination) is removed, then results would presumably be more accurate. More accurate results would provide a greater benefit to the therapist—in addressing the issues and formulating treatment—and to the examinee—in receiving more appropriate and helpful treatment.<sup>411</sup> Also, by removing the threat of punishment, there is a reduced incentive to use countermeasures, which would similarly increase the reliability of results.

If there was still a concern that this solution undermines deterrent value too much, then the therapist<sup>412</sup> could be permitted to report any “fails” to the offender's probation or parole officer. As noted in *Cassamassima*, this has deterrent value in that it allows the officer to focus his supervision on areas indicated by polygraph results.<sup>413</sup> If the offender is made aware of this possibility, he will realize that failing a polygraph has real consequences. However, there is less of a chance that these consequences will be unjust. The officer would have to independently investigate the circumstances surrounding a failed polygraph and therefore act as a screening measure that separates a revocation of release from the failure of the polygraph. The revocation decision would not be solely based on test results but rather would be made only after independent investigation revealed a violation of release conditions. In this way, the inherent unreliability of polygraph results has a less direct influence on an individual's liberty interest.<sup>414</sup>

### 3. Educating the Actors

Because of the fervor with which many practitioners defend polygraphs,<sup>415</sup> even the Protective-Selective Method's limited use of polygraphs is subject to abuse. For this approach to have any success, the deference provided to polygraphs must be reduced. The best way to do this is to provide the relevant actors in the PCSOT

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410. For example, if the individual was convicted of indecent exposure, or inappropriate contact with a minor, the therapist might be able to use the polygraph to better understand what the individual considers to be “indecent” or “inappropriate,” which in turn could help guide the therapist in constructing a treatment program for the individual.

411. See Levenson, *supra* note 15, at 362–63 (explaining that polygraphs help supply accurate information regarding offender which is necessary for development of successful treatment program).

412. The therapist alone, and not the polygraphist, should make this decision.

413. See *supra* notes 310–12 for a discussion of this proposed solution.

414. However, this solution could lead to much greater invasions of privacy. The Supreme Court has held that the government only needs a “reasonable suspicion” to search a probationer's home, as opposed to probable cause. *United States v. Knights*, 534 U.S. 112, 121 (2001). Whether a failed polygraph would, or should, constitute a “reasonable suspicion” is beyond the scope of this Comment.

415. See Iacono, *supra* note 6, at 1300–01.

process, such as therapists and supervisory officers, with more education about the reliability limitations and Fifth Amendment concerns raised by polygraphs.<sup>416</sup> If the therapist is going to use polygraph results to create a treatment program or assess the examinee's progress, the therapist should be fully informed as to the limitations of the polygraph. For example, if a therapist's personal and professional instincts indicated that the offender had been progressing in his treatment, and a polygraph examination came back "deceptive," the therapist should not give undue deference to the test results. Also, therapists should understand how the Fifth Amendment protections, as espoused in this proposed solution, limit the content of their questions.<sup>417</sup>

Similarly, a supervising officer should understand the limitations of polygraph examinations before acting on them in a way that might violate the liberty or privacy interests of the offender.<sup>418</sup> However, a supervising officer should not relax his vigilance merely because an offender has passed a series of polygraphs. In short, both therapists and supervisors should be educated regularly concerning the limitations of polygraphs to fully understand what weight, if any, to give to polygraph results.

Judges should also have a thorough understanding of the limitations of polygraph examinations. For example, had the judge in *Hamers* been better informed of the various possible explanations for the physiological responses that indicated "deception," he might not have so readily credited the polygraph examination result. Although providing this information to judges would be helpful, the burden for informing the judge in a probation revocation hearing ultimately lies with the petitioner. As indicated above, many of the petitioners, whether pro se or through attorneys, have failed to do this. Therefore, the best solution seems to be to ensure appropriate use of the polygraph before the revocation judge gets involved.

To ensure that convicted sex offenders are protected in a constitutionally adequate fashion, they must retain their Fifth Amendment right to remain silent when they are subjected to a polygraph examination. The best solution for the reliability concerns inherent in the CQT-PCSOT polygraph examination is to hold the results inadmissible for any purpose in the criminal justice system. Polygraphs should be permissible as a condition of release *solely* for treatment purposes, and the greatest penalty that an individual should suffer for failing a polygraph is continued participation in the treatment program until the therapist is satisfied with the individual's progress. To ensure that polygraph examinations are not abused in even this limited context, it is essential that all relevant actors receive regular education concerning the limitations and flaws inherent in polygraph examinations.

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416. See ENGLISH ET AL., *supra* note 7, at 16 (noting role polygraphists, therapists, and supervising officer have in process).

417. Furthermore, if a therapist believes that a particular incriminating question is essential for progress in the treatment, he or she should discuss the matter with a local prosecuting authority to establish whether immunity could be provided to the examinee in order to encourage disclosure of the issue so that the examinee can continue in his treatment.

418. It is beyond the scope of this Comment whether a polygraph result provides, or should provide, sufficient cause or suspicion for a supervising officer to enter a releasee's home, or conduct a search of his car or person, without the releasee's consent.

## IV. CONCLUSION

Sex offenders pose a great risk to men, women, and children everywhere. Accordingly, there is a heightened interest in the close monitoring and rehabilitation of sex offenders. The difficulties inherent in both ensuring compliance and offering effective treatment have driven PCSOT therapists, release officers, and courts to depend on CQT polygraph examinations. Unfortunately, many of them do so with little regard or little knowledge as to the constitutional and practical limitations of CQT polygraphs.<sup>419</sup> The result is a heavy, and growing, reliance on CQT polygraphs as a tool for PCSOT management.<sup>420</sup> As research indicates, aside from constitutional issues, this reliance is misplaced because of the inherent unreliability of the instrument. If the critics are to be believed, not insignificant amounts of individuals are both falsely failing polygraphs, which could result in an innocent individual going to prison, and falsely passing, which could result in a dangerous criminal going unsupervised before he has been rehabilitated.<sup>421</sup>

Part of the problem lies in the lack of judicial action regarding polygraphs. The Supreme Court has not made a definite ruling on the Fifth Amendment rights of a releasee in the context of a PCSOT polygraph. The closest it came was a plurality decision about the rights of prison inmate.<sup>422</sup> Furthermore, the lack of a clear holding regarding polygraph reliability and the place polygraph results hold in the criminal justice system has led to a wide-ranging array of intermediate appellate court decisions.<sup>423</sup>

With no decisions forthcoming from the Supreme Court, it is largely up to local courts, legislatures, and treatment programs to determine the role that PCSOT polygraphs play in the criminal justice system. The appropriate role for therapeutic polygraphs is strictly that: therapeutic. Their inherent unreliability and their constant tension with the Fifth Amendment render them practically and constitutionally unsuitable as criminal justice enforcement mechanisms. Yet they can still be useful as therapeutic tools for helping sex offender therapists identify appropriate treatment measures and strategies. By adopting a Protective-Selective Method of polygraph use,

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419. See, e.g., *Commonwealth v. Fink*, 990 A.2d 751, 758–59 (Pa. Super. Ct. 2010) (providing specific examples of treatment program requiring examinees to answer questions that violate the Federal Constitution). See *supra* notes 226–38, 322–28 and accompanying text for a discussion of the Second Circuit’s constitutionally troubling treatment of the Fifth Amendment implications of PCSOT polygraphs. See also *supra* Part III.A.2.a for a discussion of one state court’s improper deference to polygraph accuracy and methodology.

420. See *supra* notes 15–18 and accompanying text for a discussion of the growing popularity of PCSOT polygraphs.

421. See *Meijer et al.*, note 6, at 424–26 (explaining that heightened physical responses measured by polygraph could be unrelated to deception, resulting in false fails, and that offenders’ distortion of events so that they do not view responses as lies could lead to false passes).

422. See generally *McKune v. Lile*, 536 U.S. 24 (2002).

423. Compare *State ex rel. Koszewski v. Schwarz*, 659 N.W.2d 506 (Wis. Ct. App. 2003) (holding polygraph results inadmissible at all proceedings including probation revocation hearings), with *Commonwealth v. A.R.*, 990 A.2d 1 (Pa. Super. Ct. 2010) (holding polygraph results admissible at probation revocation hearings as evidence of underlying violation), and *State v. Hamers*, No. A09-1308, 2010 Minn. App. LEXIS 493 (Minn. Ct. App. June 1, 2010) (upholding revocation largely based on defendant’s failure of polygraph).

and providing the necessary education to relevant actors, the majority of the benefits of polygraphs can be captured while mitigating the harms to justice that are inherent in overreliance on the tests.