

In a recent report, however, the National Academy of Sciences seriously questioned the accuracy of polygraph evaluation.⁸⁵ The report examined the accuracy of polygraph testing in the context of the screening of government employees to identify spies or national security risks. The report concluded that the polygraph was inadequate as a tool for national security screening for two reasons. First, the report noted that when the polygraph is used for such a screening function, i.e., to identify people who have engaged in wrongdoing from a population that is overwhelmingly innocent of such wrongdoing, it is significantly less accurate than when used in the investigation of specific incidents.⁸⁶ Second, the report noted that when used to screen large numbers of individuals who are innocent of wrongdoing, the polygraph inevitably produces unacceptable numbers of false-positives, resulting in inaccurately impugning the reputations of large numbers of governmental employees.⁸⁷ The report, in distinguishing between such screening use of the polygraph and its use in the investigation of specific incidents, noted that “[m]uch of the evidence assessing the validity of polygraphs . . . is based on their use in the investigation of specific, known events such as crimes.”⁸⁸ The NAS acknowledged that the use of polygraphs for such investigatory purposes produces results that are well above chance, but is still far from perfect.⁸⁹

The weaknesses in the use of polygraph testing for screening purposes are largely absent when polygraph examination is used for purposes of compliance monitoring, the purpose for which it would be used in sex offender reentry court. In screening uses of the polygraph, the polygraph examiner has had no prior dealings with the individual examinee, and therefore has had no occasion to establish baseline patterns for the individual’s physiological reactions to questioning. In the sex offender reentry court context, by contrast, examinees will likely be examined by the same examiner consistently over time, allowing the examiner to learn the

true negative), and incorrectly labeling a truthful person as being deceptive forty-seven percent of the time (a false positive). *Id.*

⁸⁵ NAS REPORT, *supra* note 42; see APA Response to the National Academy of Sciences (NAS) Report (n.d.), at <http://www.polygraph.org/nasresponse.htm> (last visited June 15, 2004) (discussing deficiencies in the NAS REPORT); Faigman et al., *supra* note 84 (discussing NAS REPORT).

⁸⁶ NAS REPORT, *supra* note 42, at 4, 215-16.

⁸⁷ *Id.* at 47; Wygant, *supra* note 42, § 39.

⁸⁸ Press Release, The National Academies, Polygraph Testing Too Flawed for Security Screening (Oct. 8, 2002), available at <http://www4.nationalacademies.org/news.nsf/isbn/0309084369?OpenDocument> (last visited June 15, 2004).

⁸⁹ NAS REPORT, *supra* note 42, at 4; Wygant, *supra* note 42, at 313, § 39.

intricacies of the individual and thus increasing the accuracy of the examiner's interpretation of physiological responses. In addition, in the monitoring context involved in sex offender reentry court, the consequences of being caught in a deception are grave (loss of liberty), compared to the consequences of deception for a governmental employee subjected to polygraph screening (not obtaining a government job or possibly losing one). The literature, referring to this as "strength of issue," concludes that when the consequences of deception are great, the likelihood of detection is stronger.⁹⁰

Furthermore, polygraph examination for screening purposes typically involves the asking of generalized questions, such as "have you ever participated in an organization dedicated to overthrowing the government?" By contrast, polygraph evaluation for screening purposes is highly fact-specific and concrete in nature, asking questions such as "have you been in the Lincoln Elementary schoolyard in the past two weeks?" The literature establishes that the accuracy of polygraph evaluation is significantly higher when questions involving case-specific facts are used than when more generalized questions are involved.⁹¹ The use of the polygraph to detect espionage, the specific screening function found to be unreliable in the National Academy of Sciences Report, is a fishing expedition that covers many types of behavior and involves as many as eighteen to twenty relevant questions and thirty or more comparison questions. In the use of the polygraph for monitoring of sex offenders, by contrast, only two or three relevant questions are asked and these questions target specific behaviors in a context in which the examiner already knows a considerable amount about the offender.⁹²

Therefore, for several reasons, the weaknesses identified by the National Academy of Sciences in the use of polygraph evaluation for espionage or security risk screening purposes are largely absent in the context of polygraph testing for compliance monitoring purposes. The NAS itself acknowledged that the use of the

⁹⁰ "Strength of Issue" is the measure of the consequences feared by the test subject if the test indicates the subject is lying. Wygant, *supra* note 42, § 36. When the polygraph is used as a monitoring device in conjunction with probation, strength of issue is high. *Id.* In a review of fourteen studies of polygraph accuracy at the University of Utah, it was concluded that there is a decisively strong correlation between valid, accurate results and strength of issue. *Id.*; John C. Kircher et al., *Meta-analysis of Mock Crime Studies of the Control Question Polygraph Technique*, 12 L. & HUM. BEHAV. 79, 81, 87 (1988).

⁹¹ Faigman et al., *supra* note 84; Wygant, *supra* note 42, §§ 39, 58-60.

⁹² Personal communication from Kim English, dated March 10, 2003.

polygraph for investigative purposes (i.e., the investigation of specific incidents of wrongdoing) was considerably more accurate than its use for screening purposes.⁹³ Because compliance monitoring involves greater exposures by the examiner to the examinee and a greater “strength of issue” than even in the investigatory context, the use of polygraph evaluations for compliance monitoring purposes is even more accurate than for investigatory purposes. The weaknesses identified by the NAS concerning the accuracy of polygraph evaluation in the espionage screening context do not, therefore, suggest that polygraph evaluation will not be sufficiently accurate for the monitoring purpose we contemplate.

In addition to the false positive problem in the use of the polygraph discussed by the NAS Report, a question may be raised as to whether the polygraph has a false negative problem. In other words, can the examinee take countermeasures that will produce negative (i.e., exonerating) results even when the individual is guilty of wrongdoing? Many sex offenders are diagnosed with personality disorders. It is commonly assumed that, because they lack a guilty conscience, psychopaths are able to lie with impunity. Can such psychopaths beat the polygraph? These questions were extensively examined in a district court opinion in *United States v. Galbreth*.⁹⁴ Based on extensive expert testimony the court found these concerns to be insubstantial. The court noted studies cited by the expert witnesses indicating that psychopaths could not beat a properly conducted polygraph test, and that it is “at least as effective with psychopaths as with other individuals.”⁹⁵ He also concluded that no studies had demonstrated that drugs were an effective countermeasure to the polygraph, and that the possibility that physical countermeasures (such as biting the tongue or tensing the leg muscles) would succeed in creating false negative results “is very slight.”⁹⁶ The polygraph, therefore, would appear to produce a false negative problem that is no greater than that presented by other accepted modes of scientific evidence, such as fingerprint and urinalysis evidence.⁹⁷

⁹³ See *supra* note 86 and accompanying text.

⁹⁴ 908 F. Supp. 877 (D.N.M.1995).

⁹⁵ *Id.* at 889.

⁹⁶ *Id.*

⁹⁷ See *supra* note 83.

2. Use of Polygraph Results

In any event, we do not question the inadmissibility of polygraph evidence in criminal or civil litigation.⁹⁸ The sex offender reentry court would not use the results of polygraph testing for purposes of proving guilt concerning any past sex offenses. Indeed, we think that, to the extent polygraph examination probes into the existence of past criminal activity, the offender should be given a form of use-immunity with regard to the information revealed in the offender's responses and to other information gathered from links or leads provided by his responses.⁹⁹ Otherwise, such use of the offender's responses would raise serious Fifth Amendment and due process problems.¹⁰⁰

The reentry court's use of this information would be restricted to its risk management functions. Although the offender's responses to polygraph examination, together with other evidence, might lead to the imposition of sanctions by the reentry court judge, including revocation of parole for a released prisoner or of conditional release for an offender committed as an SVP, this use would not violate the Fifth Amendment ban on compulsory self-incrimination as long as the responses themselves were not admitted into evidence.¹⁰¹ These answers would also alert the community containment team that further investigation is warranted.

If in response to polygraph testing that suggests the offender has been deceptive in answering questions asked in the examination, the offender admits wrongdoing,¹⁰² can his admission be admitted into evidence consistent with the Fifth Amendment for purposes of determining whether probation or parole should be revoked? As long as the offender has agreed as part of the behavioral contract to respond truthfully to polygraph questioning, the answer would appear to be "yes." In *Minnesota v. Murphy*¹⁰³ the U.S. Supreme Court held that a state may compel answers to incriminating questions without violating the Fifth Amendment as long as the probationer had agreed to do so as a condition of probation and provided that the answers may not

⁹⁸ See *United States v. Scheffer*, 523 U.S. 303 (1998) (rejecting admissibility of polygraph evidence). For a persuasive criticism of *Scheffer*, see Robin D. Barovick, *Between a Rock and a Hard Place: Polygraph Prejudice Persists after Scheffer*, 47 BUFF. L. REV. 1533 (1999).

⁹⁹ *Kastigar v. United States*, 406 U.S. 441 (1972).

¹⁰⁰ *Cassamassima v. State*, 657 So. 2d 906 (Fla. Dist. Ct. App. 1995) (en banc).

¹⁰¹ *Id.*

¹⁰² NAS REPORT, *supra* note 42, at 214 ("There is substantial anecdotal evidence that admissions and confessions occur in polygraph examinations . . .").

¹⁰³ 465 U.S. 420 (1984).

be used in a criminal proceeding. The Court noted that a probation revocation proceeding is not itself a criminal trial; therefore, the Fifth Amendment does not apply when the probationer accepts this requirement as a probation condition.

Although *Murphy* involved a requirement that the probationer answer truthfully to questions asked by his probation officer, and did not involve polygraph testing, the court's analysis would appear to apply equally in the polygraph context provided the offender had agreed to submit to polygraph testing as a condition of release on probation, parole, or conditional release from SVP commitment. Because these release programs serve a "vital penological purpose," the "minimal incentives to participate" offered offenders would not amount to compulsory self-incrimination when they agree to participate in a treatment program that includes polygraph examination.¹⁰⁴ Thus, while polygraph results suggesting that the offender lied would not themselves be admissible at a probation or parole revocation hearing, an offender's refusal to respond to the polygraph examiner's questioning when he agreed to do so as a condition of release, or any admission that he might make that he violated a condition of release, would be admissible in a hearing to determine whether release should be revoked. While the offender could invoke his Fifth Amendment privilege to refuse to answer a particular question in polygraph examination, if his refusal to respond is itself a violation of an agreed-upon condition of his release, his invocation of the privilege can serve as a basis for revoking his probation or parole.

The increased information provided by the use of polygraph examination by the reentry court as a component of a multidisciplinary containment approach can considerably improve the court's ability to manage the risk of reoffending, protect the safety of the community, and facilitate the offender's rehabilitation and reintegration into the community.

E. Impact of Sex Offender Reentry Court on Sex Crimes by Familiars, Notification Laws, and Sex Offender Rehabilitation

The reentry court model proposed here also can do much to address the largely neglected problem of sex crimes committed by intimates or others familiar to the victim. The SVP laws and registration and community notification laws overemphasize the problem of sex crimes committed by strangers, neglecting the well-established fact that the overwhelming majority of sex offenses

¹⁰⁴ *McKune v. Lile*, 536 U.S. 24, 29 (2002).