



elements of change

Highlighting Trends and Issues in the
Criminal Justice System

ors

OFFICE OF RESEARCH & STATISTICS

Division of Criminal Justice

Colorado Department of Public Safety



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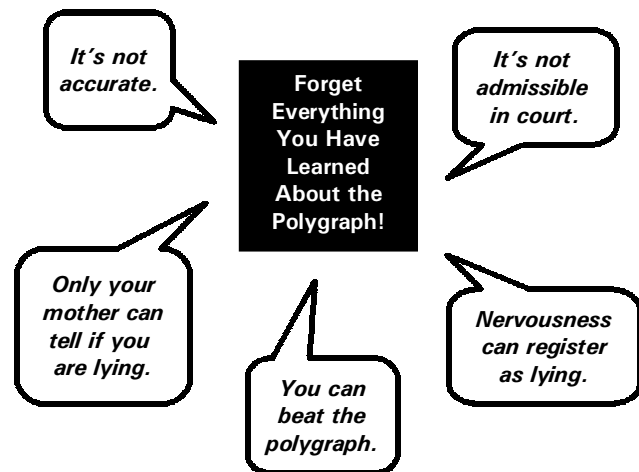
The Polygraph Plays a Key Role as a Containment Tool for Convicted Sex Offenders in the Community

The ORS is finalizing work on a National Institute of Justice (NIJ) research grant evaluating the effectiveness of the post-conviction polygraph exam as a monitoring and behavior containment tool for convicted adult sex offenders. The research is national in scope, drawing data from a telephone survey of over 700 probation and parole supervisors, analysis of 232 offender case files in four states, and field research in 17 sites across the country.

In the January 2000 *Elements of Change* (vol. 5, no. 1) (available at www.cdpsweb.state.co.us/ors), we initially reported data from this NIJ sex offender polygraph study that reflected significant **crossover*** in sex offender criminal behavior.

On the following pages, we continue reporting findings and information learned while conducting this polygraph study:

1. First, the telephone survey results and field research confirmed findings from our 1996 national sex offender study that the "containment approach," which includes the use of the polygraph (and is defined below), is an effective model for the management of convicted adult sex offenders in the community;
2. Second, the survey data allowed us to paint a picture of levels and types of polygraph use among probation and parole agencies across the country (see the data boxes throughout this newsletter for the survey results); and
3. Third, we share with you the background research we conducted on the polygraph while preparing for this project. Substantial and enduring issues surround the polygraph, including such "heavy-hitters" as whether it is reliable, admissible, and ethical. We found these issues compelling, and we want to pass on the discussion.



* **Crossover:**

Crossover occurs when a sex offender deviates from a single M.O. and targets victims in more than one age and/or gender category and/or exhibits multiple types of offending behavior (e.g., rape and exhibitionism).

Source for all data in this newsletter: *The Value of Polygraph Testing in Sex Offender Management: Research Report Submitted to the National Institute of Justice*, Colorado Division of Criminal Justice, Office of Research & Statistics, December 2000.

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The Big Picture: The Polygraph as Part of a Containment Approach for Convicted Sex Offenders

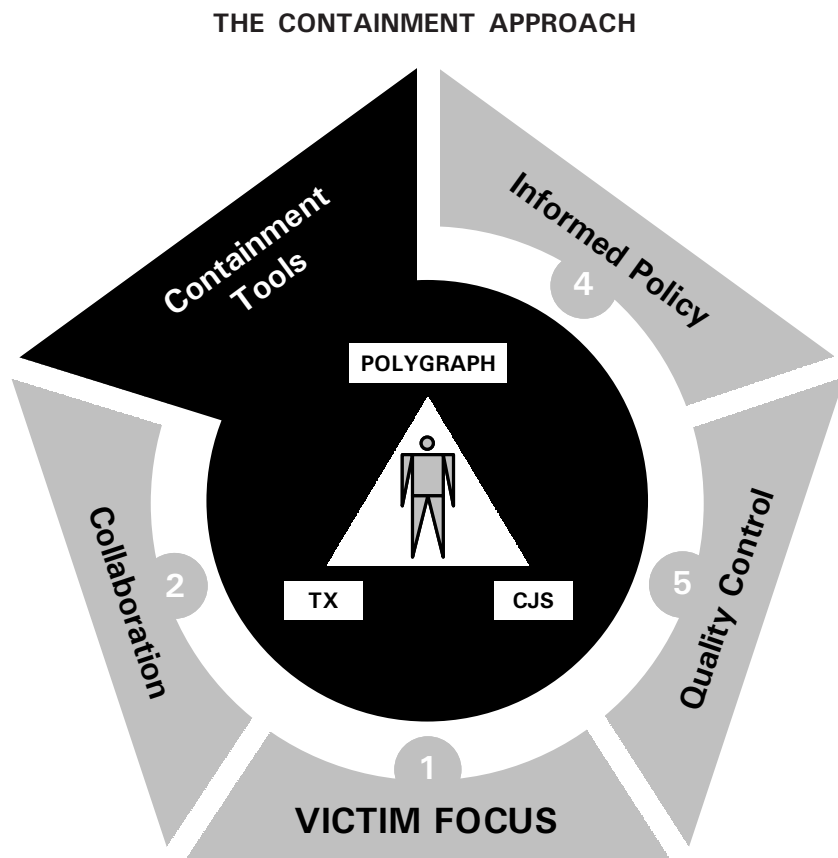
As mentioned above, this report builds on a previous study undertaken by the Colorado Division of Criminal Justice for the National Institute of Justice (English, Pullen, Jones, and Colling-Chadwick, 1995; English, Pullen, and Jones, 1996). This study focused on describing a model approach for the case management of adult sex offenders on probation and parole. Findings included a description of policies and practices that effectively contained the risk of sex offenders serving sentences in the community.¹ This collection of selected policies and practices was labeled by Division of Criminal Justice researchers as a “containment approach.”²

The containment approach is a five-part strategy. Each of the five parts represents a fundamental element of effective management of adult sex offenders. In the current study, we again found these same elements—including the polygraph as a containment tool—must be present to maximize the effects of risk management efforts by criminal justice professionals. A comprehensive containment approach to the risk management of adult sex

offenders must include the following components:

- 1) A clearly articulated community safety/victim-oriented mission. This requires case decisions and cross-agency policies to be based on methods that prevent harm toward current and potential victims by known sex offenders. A strong victim orientation prioritizes community safety and serves as the *foundation* of the containment approach, reflected in the graphic below.
- 2) The coordinated activity of multiple well-informed, multi-disciplinary, intra- and interagency collaborative teams. Participating agencies must be committed to

developing specialized sex crime units where possible and appropriate. This collaboration integrates expertise from the victim community, law enforcement, probation, parole, the treatment community (including prison treatment providers), the court, social services/child protective services, hospital emergency room staff, victim therapists, and the prosecution and defense bars. Teams form and work together as cases proceed through the criminal justice system (and/or child protection system) and develop consistent policies focusing on victim protection and offender accountability. The containment team, highlighted in the



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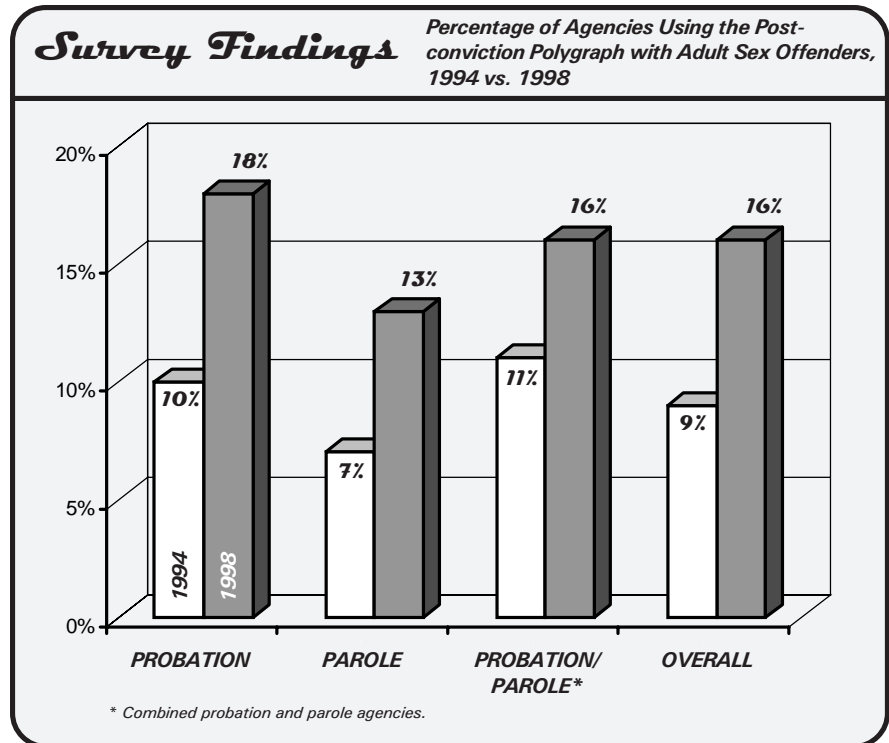
1 Most (60-70%) sex offenders receive sentences to probation and, of those that go to prison, 98% eventually return to the community.

2 Parts of this report are excerpted from *Managing Adult Sex Offenders in the Community: A Containment Approach* (English, Pullen, and Jones, 1996).

next component, is a very specific collaborative grouping and is at the heart of the containment approach.

3) The use of a variety of containment strategies, especially a containment team consisting of the supervising officer, treatment provider, and post-conviction polygraph examiner. The members of the containment team work closely together to obtain the information needed to manage the offender.³ Community containment strategies are coordinated by this three-member team using information obtained from individual offenders during the treatment/polygraph process (confidentiality is waived). Treatment and supervision plans are designed based on verified information about the offender's deviant patterns. Containment tools are applied accordingly. These tools include a wide range of risk management strategies such as intense surveillance, specialized treatment that incorporates regularly scheduled post-conviction polygraph examinations, law enforcement registration, urinalysis testing, electronic monitoring, curfews, and DNA testing. Effective containment limits access to potential victims by monitoring and restricting all activities, including work, leisure time, and internet use. Containment strategies require the consistent use of an ample array of sanctions for pre-assaultive (or precursor) behaviors that some

³ The containment team should expand as needed to include child protection services or the victim's therapist, for example. Although the well-being of current and potential victims is paramount in guiding the decisions of the team (see component #1), the victim is not expected to participate directly in a containment team. It is *not* the victim's responsibility to manage the behavior of the offender.



sex offenders carry out before committing a sexual assault.

4) **Consistent, informed public policies** (legislative, judicial, executive, administrative and programmatic). These policies should be based on research and best practices. Effective policies address gaps in risk management activities and allow the supervising officer to quickly respond to offender behaviors that are out of compliance with treatment requirements and supervision conditions.

5) **Resources dedicated to state and local quality control efforts.** Quality control is directed at 1) program monitoring and evaluation activities, and 2) professional standards of practice. Comprehensive quality control efforts ensure that strategies aimed toward victim safety and the humane treatment of offenders are not compromised.

Why Is the Post-Conviction Polygraph Necessary as a Containment Tool...?

In the 1996 study, our recommendation to use the post-conviction polygraph examination as a component of a containment approach (a recommendation confirmed by the current research project) was among the most controversial findings. After all, the polygraph has a controversial history in criminal justice. Criminal justice professionals often think that the polygraph's findings are not admissible in court. Also, stories of its use on crime suspects who have "fooled" the machine have led the general public and many criminal justice professionals to distrust the polygraph.

These concerns about the polygraph can distract criminal

INFORMATION IS OBTAINED USING THREE TYPES OF POST-CONVICTION POLYGRAPH EXAMINATIONS:

1. **SEXUAL HISTORY DISCLOSURE POLYGRAPH EXAMS.** Sexual history disclosure polygraph examinations are used to verify the accuracy and completeness of the sexual history information a sex offender provides during treatment. This information is obtained using a very specific treatment tool: the sex history document. This treatment task requires the offender to document the gender, age and method of assault for every past victim. The sex history document is then provided to the polygraph examiner who, after reading it carefully along with other case file information, asks the offender very specific questions about the accuracy of parts of his or her sex history. In most cases, the completed sex history document is long, disclosing many prior assaults and attempted assaults, and many different types of assaults as well. Without the clear expectation by criminal justice and treatment officials that the offender be accurate and truthful on the sex history assignment -- to be completed within six months of commencing treatment -- why would the offender disclose this potentially embarrassing and illegal information to the treatment provider?*
2. **DENIAL AND OTHER SPECIFIC-ISSUE EXAMS.** Denial exams verify the details of the conviction offense. These tests are usually given when the offender's version of the crime varies from the victim's version, or the offender continues to deny committing the crime of conviction. Specific-issue exams are also used to address a single concern or suspicion that arises during an offender's probation or parole, such as suspected contact with children. Specific-issue tests are also recommended as a follow-up to deceptive results on previous exams to clarify the nature of the deception.
3. **MAINTENANCE OR MONITORING EXAMS.** Maintenance or monitoring exams are used to verify whether a probationer or parolee is complying with the terms and conditions of community supervision and cooperating with treatment expectations. These exams require the polygraph examiner, the treatment provider and the supervising officer to work together to identify questions that target high-risk behavior related to the assault patterns described in the offender's sexual history document. The information gained from post-conviction polygraphs—whether sex history, denial or maintenance exams—is then used to develop or modify treatment and supervision strategies so that these are congruent with the offender's risk and need areas.

These examinations do not stand alone in a sex offender management program. Rather, the use of the polygraph occurs in the context of a very important synergistic process that results from close, consistent collaboration among the polygraph examiner, the treatment provider and the supervising officer. The three professionals, and the activities they undertake, are interdependent in fully functioning containment teams, with each professional reinforcing the work of the other. When this interdependency does not occur, as we observed in some jurisdictions, the team suffers from diminished capacity.**

* Because the information is usually incriminating, interagency teams must include representatives from victim's organizations and local prosecutors so that agreements regarding prosecution for *past* crimes or instances of limited immunity are discussed. Most commonly, the prosecution makes the decision to prosecute past crimes on a case-by-case basis, and frequently there is insufficient information to prosecute. Victim's organizations must make recommendations about the value of contacting past and recent victims from whom there has been no outcry, weighing privacy rights against the value of intervention.

** Evidence of diminished capacity included the following: infrequent communication and sharing of information among team members; significant delays in scheduling the polygraph examination; lack of adequate preparation of the offender for the examination; insufficient contact and planning by team members before the examination; and team members who felt frustrated with each other or whose relationship with the offender was stronger than with each other.

justice professionals from a fundamental issue in sex offender management: the need for complete and accurate information to (a) determine risk to the public, and (b) develop a treatment plan that reflects the offender's needs. The expectation that the sex offender be honest and forthright, as a condition of community supervision, is often lost in debates about the post-conviction polygraph. Complete information about the scope and frequency of a sex offender's deviant activities is available only from the offender, yet most sex offenders have made secrecy and dishonesty a part of their lifestyle.

...Because Sex Offenders Are Masters of Secrecy

Most sex offenders have fooled many people, often for many years,⁴ and few containment professionals believe that a sex offender will suddenly begin telling the truth when placed under correctional supervision (Pullen et al., 1996). The skill that has allowed these offenders to manipulate many victims allows them to manipulate criminal justice system officials as well (see Strate et al., 1996, for a discussion of criminal justice policies that reinforce this type of manipulation). This lack of disclosure by sex offenders led the International Association for the Treatment of Sexual Abusers (ATSA, 1993) to state, in its

4 Sex offenders report the time between their first sex crime and their first arrest or conviction to be, on average, 13 to 16 years (Freeman-Longo, 1985 and Ahlmeyer et al., 2000, respectively).

Practitioner's Handbook, that therapists should not rely solely on offenders' self reports. Rather, to determine compliance with treatment requirements, ATSA made recommendations for the use of the polygraph to validate the offender's self-report. The polygraph—referred to as the psycho-physiological detection of deception (PDD)—and its use with sex offenders is akin to using urinalysis testing with drug offenders. It is a method of monitoring very specific behaviors.

Research on sex offenders reveals an astonishing level of secret sexual abuse activity. Because of this secrecy, official record data are inadequate to describe a sex offender's complete assault history. Ahlmeyer, Heil, McKee, and English (2000) used the post-conviction polygraph to encourage disclosures for treatment and found that, for a sample of sex offenders in prison, fewer than one percent of victims of hands-on and hands-off crimes were identified using official record data.

Hesitancy of victims to come forward also helps offenders maintain secrecy. Lamb and Edgar-Smith (1994) studied 60 sexual assault victims. Twenty percent of the sample had been abused for over five years, and half of this group had been assaulted on a weekly basis. Yet, still, this group did not disclose the abuse for, on average, ten years after the assaults began. Young victims who know the offender are least likely to report the crime (Smith et al., 2000). Fewer than 80 percent of rapes are reported to law enforcement (Kilpatrick, et al., 1992), and arrests are made in less than 30

<i>Survey Findings</i>		
<i>Percentage of Agencies with Specialized Sex Offender Caseloads:</i>		
	<i>1994</i>	<i>1998</i>
<i>Probation</i>	<i>28%</i>	<i>45%</i>
<i>Parole</i>	<i>35%</i>	<i>62%</i>
<i>Probation/Parole*</i>	<i>31%</i>	<i>47%</i>
<i>OVERALL</i>	<i>31%</i>	<i>53%</i>

* Combined probation and parole agencies.

percent of cases reported (Snyder, 2000).

The polygraph examination can be used quite specifically to reveal the hidden crimes and behaviors of individual sex offenders. The polygraph is able to go beyond official record data and the conviction crime(s), providing critical information for the treatment provider and the supervising officer: what types of deviant behaviors the offender has engaged in, what ages and genders of victims have been targeted, the offender's method of accessing potential victims, and the behaviors and activities that precede assaults. Without information about the extent to which offenders have engaged in specific behaviors—and against whom—providing effective treatment and supervision intervention becomes unlikely.

Is the Post-Conviction Polygraph Accurate and Reliable?

The most recent published review of polygraph reliability and validity studies was conducted by Forensic Research,

Inc., of Severna Park, Maryland for the American Polygraph Association in 1997.⁵ Reviews of field studies⁶ indicated that between 96 and 98 percent of exams accurately identified deception. The test-retest reliability of field examination charts has averaged 92 percent.⁷ Using studies of mock crimes conducted in laboratory settings, 82 percent of exams resulted in correctly identifying deception.⁸

Many variables can affect the accuracy of polygraph examinations. To conduct a valid examination, a polygraph examiner must be properly trained in sex offender post-conviction examinations and administer an accepted testing procedure and scoring system (Ansley, 1997). The American Polygraph Association has published standards of practice for examiners conducting post-conviction sex offender examinations (Dutton, 2000), and these standards are intended to limit variation in practice across

5 Copies of this paper may be purchased from the American Polygraph Association National Office, 951 Eastgate Loop, Suite 800, Chattanooga, Tennessee 37411-5608.

6 Field studies involve determining accuracy by following up on real cases where the examination results were confirmed by confession.

7 A few cautions when considering accuracy rates: 1) For nearly all studies, inconclusive results—meaning insufficient information was available to score the exam—are excluded from the averages, and this may overstate accuracy rates. However, calculating these inconclusive findings as deceptive would understate accuracy rates. 2) studies that *did not* use numerical scoring (mostly before 1980) have somewhat subjective findings. For more information on concerns about polygraph accuracy and the quality of polygraph research, see Lykken's *Tremor in the Blood* (1998).

8 Critics of mock crime research say that detecting deception is difficult because the polygraph client has nothing significant at stake, and physiological measures are less reactive because fear of detection is difficult to manufacture. Hence, the error rate will be higher in these studies compared to field studies.

examiners. Examiners must follow the APA standards to maximize accuracy and reliability.

A valid exam requires that the relevant test questions be clear to the examinee and narrow in scope. Also, accuracy depends in part on the extent to which the examiner prepares for the examination. This means that the treatment provider and the supervising officer must work with the examiner prior to the exam.⁹

Is Polygraph Information Admissible in Court?


Often during the exam process—or during a treatment session prior to the exam—the offender will reveal that he or she has recently engaged in high-risk behavior. Such behavior reflects a lack of internal control on the offender's part, and so external controls (i.e., sanctions that restrict activity) must be applied. When polygraph exams reveal a new crime, courts vary in their willingness to accept this information as sufficient for revocation—whether the offender has confessed to a new crime or fails a question targeting a new crime. Since the standard of proof is “a preponderance of the evidence” in revocation hearings, rather

⁹ A thorough review of written case material is required to maximize accuracy. Without sufficient knowledge of the case, examiners might unknowingly develop questions that tap into outside issues, evoking a physiological response that is unrelated to the exam topic. Lack of preparation may result in the examiner letting the offender's story dictate the examination questions. The problem is confounded if a deceptive examinee gains confidence (and worries less) because he or she believes the examiner has insufficient knowledge about the case. On the other hand, a non-deceptive examinee will worry more if the examiner appears unprepared.

Survey Findings

About the Polygraph Exam (in 1998):

Average Time for Exam	2 Hours
<i>Time Range Reported</i>	<i>.5 - 5.5 Hours</i>
Average Cost of Exam	\$200
<i>Price Range Reported</i>	<i>\$75 - \$625</i>



than “beyond a reasonable doubt” required at a criminal trial, and since probation and parole are usually considered privileges, not rights, sometimes polygraph information is provided to the court or parole authorities in revocation hearings. But, this practice is uncommon, and most officials use polygraph information to step up supervision and surveillance.

Concerns about the use of polygraph information in court typically pertain to explicit standards governing evidence presented in criminal or civil proceedings. State statutes vary regarding the admissibility of polygraph information as evidence in a court of law.¹⁰ These concerns tend to fall into the following categories:

1. The lack of agreement about whether polygraph theory and practice is a scientifically valid technique;
2. The lack of a known (certain) error rate;

¹⁰ Most commonly, states consider polygraph evidence *per se* inadmissible in courts of law. A few states admit polygraph evidence in some limited circumstances, by stipulation of both parties. A recent challenge to the *per se* inadmissibility statutes of many states was defeated in the Supreme Court case *United States v. Scheffer*, WL141151, 1998.

3. The lack of *controlling* standards of practice in the polygraph professions; and
4. Questions about juries giving polygraph findings excessive weight in the decision making process and weakening their role as determiners of truth.

Most case law pertains to the admission of polygraph evidence for a determination of guilt or innocence. For seventy years, federal and state courts were uniform in ruling polygraph evidence to be inadmissible under the criteria for scientific evidence described in the 1923 case *Frye v. United States* (293 F. 1013, CDAC 1923). *Frye* held that scientific evidence, to be admissible in court, must be based on scientific methods that have the general acceptance of the relevant expert community. In 1993, the Supreme Court held that certain Federal Rules of Evidence should govern the admissibility of scientific evidence and required the judge to make a preliminary assessment of the relevance and reliability¹¹ of the evidence (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* [509 U.S. 579, 1993]).

The *Daubert* case opened the door for the admissibility of polygraph data in post-conviction sex offender management because it gives district courts the authority to determine if evidence is relevant and reliable. In *Kansas v. Lumley* (WL 218704, 1999), for example, the defendant appealed a prison sentence that resulted from his untruthful answer to a polygraph question re-

¹¹ In the context of the admissibility of evidence, reliability means scientific validity.

garding contact with a child. Upon appeal, the judge found that polygraph reliability was sufficiently robust to be acceptable for a parole or probation revocation hearing that requires a lesser standard of proof than a finding of guilt. Further, the judge indicated that without the polygraph examinations and the admission of the results of the examination *as a condition of probation*, the sex offender community supervision program could not be maintained.

In *State v. Travis* (125 Idaho 1, 867 P.2d 234, 1994), the court found that, while the defendant's agreement to a probation condition requiring him to submit to a polygraph examination did not establish admissibility of the results, Travis was uncooperative and resisted supervision. His probation was revoked. Similarly, *Patton v. State* (580 NE.2d 693, Ind. App.1992) found "...the rehabilitative benefits of the polygraph examination condition must be obtained without the examination results being admissible in any subsequent court proceeding" (*Polygraph 29*, 121:2000).

Our field research found that the polygraph exam is best used to inform treatment and enhance risk-focused supervision of offenders in the community—not as a make-or-break legal tool. As one containment professional noted, "We never use the P-word in court." From the telephone survey we learned from over half (56 percent) of the respondents¹² that probation and parole officers increased surveillance when violations of supervision were

12 This is the percentage of agencies that used the polygraph at least sometimes.

disclosed during a polygraph exam. One in four respondents said that a deceptive finding on a polygraph test could result in treatment termination.

Indeed, a deceptive polygraph exam should result in significantly increased surveillance along with other efforts to obtain additional information about the offender. Collateral information must be obtained from interviews with family members and potential victims, the victim's therapist, employers, and discussions with law enforcement officers. At a minimum, a deceptive finding on the examination reflects the offender's lack of cooperation with the containment approach and his or her lack of commitment to the honesty necessary to make the life changes expected by the containment team. This lack of cooperation with the containment team may link to willingness to commit new crimes.

Is the Polygraph's Use with Convicted Sex Offenders Legal and Ethical?¹³

Officials using sex offense-specific treatment or the post-conviction polygraph, or both, must formally address the issue of what to do with new information learned as a result of the treatment/polygraph process.

13 Almost one in five (18.2 percent) survey respondents replied that barriers to using the polygraph included legal and ethical issues. Significantly more respondents from the Northeast (24.5 percent) and Central (21.4 percent) sections of the country identified this concern as a barrier to implementing the post-conviction polygraph. (A lack of resources was most frequently reported as a barrier to using the polygraph with sex offenders.)

Survey Findings

Of the Agencies Using the Polygraph in 1998, 43% Had Not Had Polygraph-Specific Training.

These decisions are at the heart of the legal and ethical considerations surrounding use of the polygraph in community-based sex offender management. Resolving them requires conversations with the prosecuting attorney, representatives from victim organizations, and other stakeholders.

Survey Findings

For Agencies Using the Polygraph in 1998, Where Did the Idea Originate?

<i>Treatment Provider</i>	36%
<i>Exposed to Idea via Training, Networking, Reading</i>	21%
<i>Polygraph Examiner, Board, Legislation, Other CJ Source</i>	12%
<i>Probation/Parole Officer</i>	10%
<i>Don't Know</i>	31%

Categories not mutually exclusive.

Ethical concerns usually center on issues of self-incrimination, due process, and privacy. The Fifth Amendment of the U.S. Constitution protects citizens against self-incrimination. The issue is important in the context of post-conviction polygraphs because of the expectation and requirement that the offender will waive confidentiality and make a full disclosure of his or her sexual history, including prior victims. The question of self-incrimination thus arises because an offender who discloses prior or current victims may be at risk of further prosecution or revocation.

Case law has established many of the conditions for claiming one's Fifth Amendment rights. Generally, Fifth Amendment rights are automatic when a person is in custody and temporarily deprived of liberty (hence the Miranda warning). If a person is not in custody, courts have generally found that he or she must actively invoke his or her Fifth Amendment rights. In *Marcum v. State* (983 S.W.2d 762 Tex. App. 14th Dist., Sept. 17, 1998), the court found that a polygraph examination administered as part of a court-ordered condition of probation is not considered an in-custody interrogation for purposes of triggering the need to give a Miranda warning.

Survey Findings

Of the Agencies Using the Polygraph in 1998, 26% Reported that ALL Sex Offenders Received the Polygraph.

Obtaining additional information about *past* victims was a significant concern to many criminal justice officials we interviewed in the field. They indicated that information gained about prior victims required a response such as an investigation, an arrest, or prosecution. To respond to this issue, policy makers in many jurisdictions developed the following solutions:

1) **Limited Immunity.** In some jurisdictions that use post-conviction polygraph exam, prosecutors provide limited or even full immunity from prosecution for prior crimes uncovered as a result of the treatment/polygraph process. Usually, an offender is given immunity from prosecution only for specific types of crimes.

Typically, limited immunity agreements stay in effect only as long as the offender complies with treatment and supervision conditions and does not reoffend. Of course, immunity agreements do *not* cover any *new* crimes committed while the offender is under probation or parole supervision.

Officials who support granting limited immunity argue that learning about prior victims is more important for treatment and public safety than prosecuting individual offenders for prior crimes that, without this containment strategy, would never be known. Officials in some jurisdictions also believe that identifying prior victims allows these victims to be contacted and offered services.

Several of the prosecuting attorneys we interviewed supported the concept of immunity agreements because they believe that the information about additional victims, gained through the treatment/polygraph process is, in effect, coerced and therefore could not be used to prosecute the offender. Others said that, with or without immunity agreements, an offender's disclosure of prior criminal sexual behavior does not mean there will be sufficient evidence to prosecute a case. In Jackson County, Oregon, the prosecutor agreed to grant immunity for prior crimes of a similar nature: "Although not all prosecutors would agree, our community has concluded that to prosecute all reported offenses would infringe on the offender's Fifth Amendment rights and thus would prohibit the therapeutic use of the polygraph" (Knapp, 1996:13-9).

Survey Findings

For Agencies Using the Polygraph in 1998:

64% Indicated the Polygraph Was Regularly Used to MONITOR COMPLIANCE with supervision.

52% Indicated the Polygraph Was Regularly Used to OBTAIN A SEXUAL HISTORY.

46% Indicated the Polygraph Was Regularly Used When the Offender Was IN DENIAL about the Current Conviction.

Categories not mutually exclusive.

(See page 4 for definitions of these types of polygraph exams.)

On the other hand, some prosecutors consider it professionally unpalatable and politically unwise to extend any immunity from prosecution for past crimes to sex offenders. These attorneys worry about uncovering a prior heinous sexual crime that will elude prosecution as a result of limited immunity agreements. In such jurisdictions, there may be a formal (or informal) agreement between the prosecutor's office and the probation/parole agency to make decisions on a case-by-case basis. In these jurisdictions, the prosecutor exercises his or her broad statutory discretion about whether to initiate further investigation and file a criminal case on prior sexual crimes. Often, the offender is told that compliance with treatment and supervision requirements is likely to have an effect on such decisions.

If a prosecutor determines that enough evidence exists to prosecute a case, but the offender is complying with treatment and supervision require-

ments, the attorney may request a sentence that allows the offender to remain in the community, perhaps extending the probation or parole period. This option may work best in jurisdictions that are small enough to maintain consistent informal agreements.

2) Don't Ask, Don't Tell (names, that is). In the absence of formal or informal immunity agreements with the prosecutor's office, the containment team at several sites noted that it manages information on past victims by asking the sex offender to omit identifying names or other information when disclosing prior sexual victims. For example, instead of using a victim's name, the offender might list victim #1, victim #2, etc., when he or she reports sexual history information. Using this approach minimizes or eliminates the risk for the offender of being prosecuted for past sexual crimes.

If this technique of non-identification of the victim name is used, both treatment providers and criminal justice supervisors should take extra precautions to ensure that the unidentified victims are not relatives or acquaintances with whom the offender may currently be having contact. Because most victims know or are acquainted with their offender (Kilpatrick et al., 1992), care must be taken to be sure that a current or recent victim is not missed as a result of an offender's non-disclosure of names.

Opinions are mixed on the "don't ask, don't tell" approach to handling criminal sexual history information. In some jurisdictions, the containment team

believes that using this policy is the only way to ensure that sex offenders will provide information. To some professionals we interviewed, however, concealing specific victim information was seen as unacceptable—undermining the philosophy and the practice of full disclosure, reinforcing the idea that certain secrets are required, and continuing the offender's objectification of victims. Many jurisdictions that require full identification of prior victims have not found a clear way to approach identified victims, or their parents, from whom there has been no outcry.¹⁴

Survey Findings

For Agencies Using the Polygraph in 1998, Situations When the Exam Was Used:

<i>Suspicion, Hunch, Red Flag</i>	<i>52%</i>
<i>Critical Incident</i>	<i>30%</i>
<i>Drugs, Contact w/Child, High Profile Case</i>	
<i>Following a Violation</i>	<i>11%</i>
<i>Assist Case Management</i>	<i>10%</i>
<i>Tx Termination, Reduction in Supervision</i>	
<i>Defense Request, Family Reunification Decision, Retest for Deception/Inconclusive</i>	<i>7%</i>

Categories not mutually exclusive.

Whatever 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. However, reports of prior victims made to child protection agencies often result in minimal consequences to the of-

¹⁴ One exception to this is Oregon therapist Jan Hindmann who works to ensure that victims identified by sex offenders in treatment receive services.

fender. The small amount of information generally available, the lack of knowledge about a victim's current location, the lack of outcry by the victim or family, and the high caseloads common to most child protection agencies combine to make it unlikely that these cases will receive much priority in the system.

INFORMATION ABOUT NEW CRIMES COMMITTED WHILE THE OFFENDER IS ON PROBATION OR PAROLE

When an offender reports a *new crime* committed while under probation or parole supervision, the issues are very different. In this case, the offender's Fifth Amendment rights may be in effect, or may be invoked if a new case is under investigation. When disclosure occurs as a result of the treatment/polygraph process, the supervising officer or local law enforcement officials must further investigate the suspicion or allegation.¹⁵

PRIVACY CONCERNS

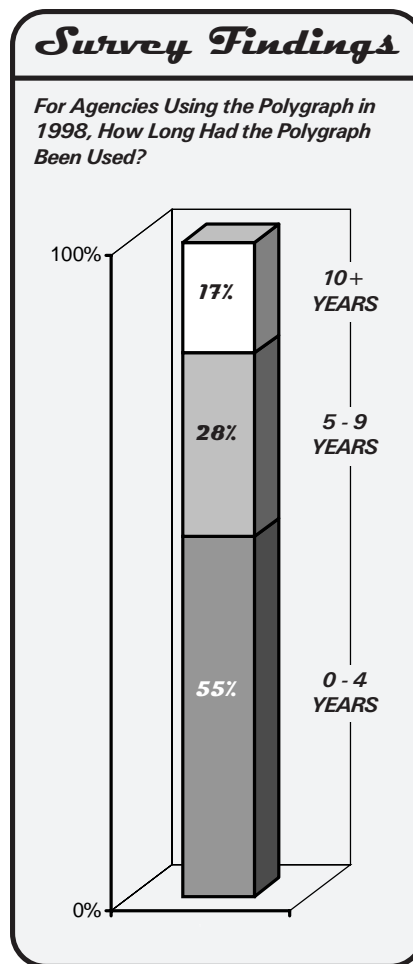
Privacy concerns surrounding the use of post-conviction polygraphs are an important part of a broader philosophical discussion about the role of government and the justice system in our lives. Some people are disturbed by the expectation that an offender will be coerced into sharing his or her entire sexual history as well as current deviant criminal and non-criminal behav-

¹⁵ Coordination with local law enforcement should precede any additional polygraph testing, so that a post-conviction polygraph does not inadvertently interfere with a law enforcement investigation of the alleged new crime.

iors and fantasies during the treatment/polygraph process. Indeed, sex offenders taking post-conviction polygraph examinations are subject to practices that considerably reduce their privacy rights. Sex offenders are required to waive confidentiality. Treatment contracts and conditions of probation or parole set the expectation of full disclosure of sexual history, at-risk behaviors, and new crime information.

However, current theories about the role secrecy plays in the lives of sex offenders and the power and control issues that appear to plague most offenders' lives have led risk-focused professionals to believe that it is therapeutic—rather than unethical—to encourage sex offenders to give up all secrets related to sexual deviance. Without the requirement for full honesty and disclosure, the offender is allowed to decide what the containment team knows about his or her offending patterns. Maintenance exams are necessary because some sex offenders display characteristics of antisocial personality disorder and/or psychopathy. “Because pathological lying and use of deceit are among the distinguishing characteristics of antisocial personality disorder and psychopathy, great care will have to be taken by those charged with supervision to ensure that conditions of supervision are being followed” (Harris, Rice and Quinsey, 1998:104).

Another question related to the issue of privacy is whether the polygraph examination is more intrusive than other forms of community supervision of convicted offenders. Conditions of probation or parole commonly restrict associations (e.g., with



other felons) and often require drug tests or prohibit the use of drugs and alcohol. Frequently, conditions of community supervision prohibit sex offenders from having unsupervised contact with children, even the offender's own children. In addition, the supervision contract (conditions of probation or parole) presumes that the offender will honestly answer questions posed by the supervising officer. The focus on sex, arousal, and assault patterns in sex offender management seems consistent with the focus on drugs and alcohol for substance abusing offenders, or on lifestyle and medication management for mentally ill offenders.

In sum, the post-conviction polygraph exam is to sex offenders what the urinalysis test is to drug offenders: a verification of information the offender self-reports to the treatment provider and supervising officer. The post-conviction polygraph, like the UA, is a case management tool that targets the high-risk lifestyle associated with this crime type. The post-conviction polygraph emphasizes the need for sex offenders to be honest about the parts of their lives that have been secretive and dangerous to others. The polygraph's use should be combined with many other tools that encourage supervision compliance.

In Summary, Some Feedback from the Field

The containment approach can be difficult to implement, and as explored above, use of the polygraph is sometimes considered to be controversial. So, research data aside, we gathered feedback from probation and parole supervisors as to whether or not the polygraph's use was important and had changed the way sex offenders were managed.

Three out of four (76 percent) survey respondents reported that the use of the post-conviction polygraph enhances knowledge of the offender, and two out of three (67 percent) said that its use led to better case management and supervision. One respondent remarked, “It helps find out [sex offenders'] true behaviors and not just what they tell us.” Another said that the use of the polygraph “provides more security, more control, more restrictions for those

who need them.” Over half of the respondents (58 percent) said they believe the polygraph helps prevent new crimes: “[Sex offenders] are less likely to reoffend because we catch them earlier” and “we can detect recidivism patterns.” And, as one respondent noted, “They know we are watching them.” Just over 40 percent of the probation and parole supervisors we spoke with said the polygraph helped provide better and more appropriate treatment.

More data and findings from this study will be available in an upcoming report. Please look for the report on our website (www.cdpsweb.state.co.us/ors).

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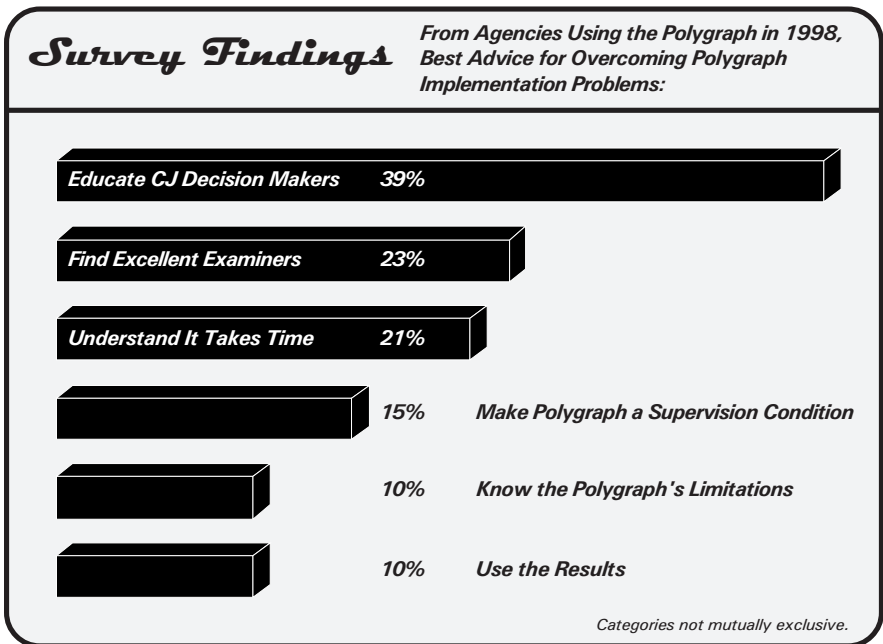
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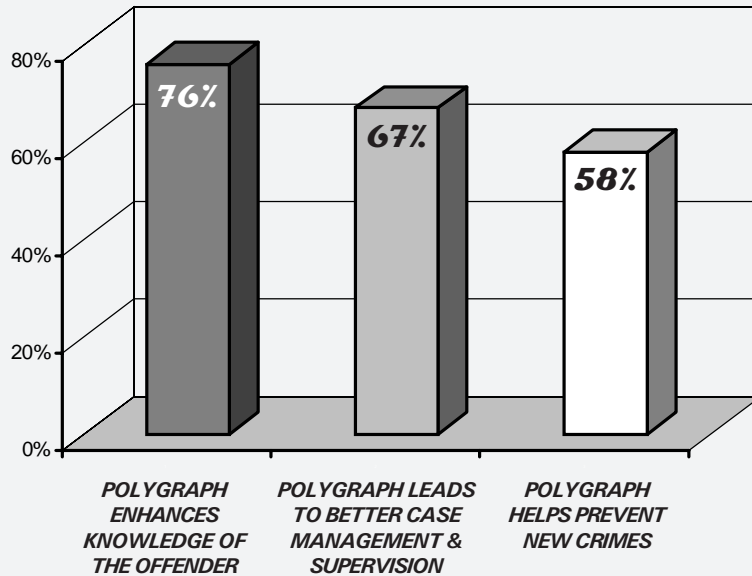
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Survey Findings

Opinions on the Post-Conviction Polygraph from a 1998 Survey of Over 700 Probation and Parole Supervisors Across the Country:



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