

DISPROVING THE “JUST PICTURES” DEFENSE: INTERROGATIVE USE OF THE POLYGRAPH TO INVESTIGATE CONTACT SEXUAL OFFENSES COMMITTED BY CHILD PORNOGRAPHY SUSPECTS

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INTRODUCTION

There is a divide within the criminal justice field about the level of danger that child pornography offenders¹ pose to society. Some readily accept the “just pictures” defense,² believing that child pornography offenders pose no danger to children.³ Those at the other end of the spectrum, however, believe that child pornography offenders also commit contact sexual offenses against children.⁴ This divide can be attributed to a dearth of knowledge about

1. Unless otherwise specified, “child pornography offenders” or “child pornography suspects” refers to those arrested for possession, receipt, and/or distribution of child pornography. Those arrested for child pornography production are excluded from this discussion since most child pornography production necessarily also involves a contact sexual offense. *See infra* Section III.D.

2. Michael L. Bourke & Andres E. Hernandez, *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 185 (2009) (explaining the theory that child pornography offenders look at child pornography instead of sexually abusing children).

3. *See infra* Section I.C.1.

4. *See* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 880–82 (2011) (arguing that child pornography sentence length is the result of “proxy punishment” for undetected cases of child sexual abuse).

child pornography offenders, specifically those who offend via the Internet.⁵ Of course, it seems improbable that either of these extreme positions aptly characterizes all situations. The question is: Towards which end of the spectrum does the true reality lean?

This Note argues that the latter position, while extreme, more closely approximates reality. It is true that child pornography offenders are not necessarily child molesters. While child pornography and child molestation offenses both involve exploitation of minors,⁶ they are distinct crimes comprised of distinct elements.⁷ Yet while “[t]he step from child pornography to sexual contact with children is a huge one, . . . the desire for such contact is arguably implicit in the use of the pornography.”⁸ This Note argues that there is an intrinsic correlation between these two crimes, and, at the very least, that viewing child pornography is an indicator “of a larger, more pervasive, and enduring paraphilic lifestyle.”⁹ A child pornography offense thus raises a red flag of which law enforcement must take notice.

Law enforcement should take advantage of this correlation to help uncover crimes of sexual abuse, which so often go undetected.¹⁰ This Note identifies the polygraph as an important law enforcement tool in child sexual exploitation investigations and recommends its use with child pornography suspects to investigate whether they have perpetrated any contact sexual offenses.

The program that this Note proposes rests on two presumptions that must be true in order for the program to be practical and worthwhile. The first is that many child pornography offenders

5. Bourke & Hernandez, *supra* note 2, at 184.

6. United States v. Falso, 544 F.3d 110, 122 (2d Cir. 2008).

7. Compare 18 U.S.C. §§ 2251–52 (2006) (production, receipt, distribution, and possession of child pornography), with 18 U.S.C. § 2423 (2006) (transportation of minors with intent to engage in criminal sexual activity).

8. Martin C. Calder, *The Internet: Potential, Problems and Pathways to Hands-On Sexual Offending*, in CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER 1, 17 (Martin C. Calder ed., 2004). But see Angela W. Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-Up Study*, 35 LAW & HUM. BEHAV. 466, 476 (2011) (“Individuals who seek out child pornography are exhibiting their sexual interest in children in illegal behavior, but some of these individuals may not have the characteristics generally associated with a willingness or ability to engage in more serious illegal behavior involving direct contact with a victim . . .”).

9. Bourke & Hernandez, *supra* note 2, at 188; see also KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 108 (5th ed. 2010), available at http://www.missingkids.com/en_US/publications/NC70.pdf (“Seeking child pornography is the result of a sexual interest in children not the cause of it.”).

10. See *infra* Section I.C.2.

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have also committed contact sexual offenses. That is, there is a “symbiotic relationship”¹¹ between the commissions of these crimes. While causation is notoriously difficult to prove, especially with regard to pornography and sexual activity,¹² there is, at the very least, a *correlation* between these crimes, such that child pornography usage is a useful indicator of contact sexual offending. The second presumption is that the polygraph is an adequate tool to uncover this information.

Part I contextualizes the proposed post-arrest polygraph program by providing an introduction to child pornography in the modern world. This Part goes on to describe the basic contours of the program, including the reasons why such a program is necessary. Part II discusses how the polygraph is used today, including with sex offenders, and emphasizes the validity of the technique. Part III explains the scientific bases that justify this program, relying on the psychological research underlying the relationship between child pornography and contact sexual offenses. Parts IV and V explain the legal foundations and pragmatic justifications for the program, respectively. Finally, Part VI lays out the specific contours of the program.

I. CHILD PORNOGRAPHY AND THE CRIMINAL JUSTICE SYSTEM

A. *The Spread of Child Pornography*

Child pornography is a pervasive blight on society that continues to spread. It is estimated that there are one million pornographic pictures of children on the Internet and that 200 more are posted each day.¹³ In 2004, the United Nations Human Rights Council found that more than 480,000 child pornography websites

11. TIM TATE, *CHILD PORNOGRAPHY: AN INVESTIGATION* 105 (1990).

12. This is so for several reasons: 1) All data must come from police statistics and retrospective reporting; 2) Ethics restrictions limit what can be demonstrated in a laboratory since subjects cannot be allowed to commit sexual crimes; and 3) Media sensationalism in sex crimes cases may color research findings. Judith Becker & Robert M. Stein, *Is Sexual Erotica Associated with Sexual Deviance in Adolescent Males?*, 14 INT’L J.L. & PSYCHIATRY 85, 85 (1991); cf. MAX TAYLOR & ETHEL QUAYLE, *CHILD PORNOGRAPHY: AN INTERNET CRIME* 72 (2003) (noting methodological and ethical difficulties of experimenting with child pornography and with pedophilic adults). In addition, many offenders report that their contact sexual offenses preceded their use of child pornography. Bourke & Hernandez, *supra* note 2, at 189.

13. Calder, *supra* note 8, at 4–5.

existed, double the number from 2001.¹⁴ Arrests for child pornography possession were estimated at 4901 in 2009,¹⁵ up from 3672 in 2006.¹⁶ In addition, much of this child pornography is quite graphic,¹⁷ and this aspect has also worsened over time.¹⁸

One recent concern is peer-to-peer file sharing networks.¹⁹ These were used by only 4% of child pornography possessors in 2000, but were used by 28% in 2006.²⁰ Most concerning is that those who used peer-to-peer networks in 2006 were more likely to possess images that were more violent, featured sexual penetration, and depicted children under the age of three.²¹ In addition, possession offenders who used these networks were almost five times as likely to have distributed child pornography.²²

Child pornography, while also a documentation of molestation, is itself a grave social harm. “Being photographed while being sexually abused exacerbates the shame, humiliation, and powerlessness that [molestation] victims typically experience.”²³ These pho-

14. CLAYTON A. HARTJEN & S. PRIYADARSINI, *THE GLOBAL VICTIMIZATION OF CHILDREN: PROBLEMS AND SOLUTIONS* 197 (2012).

15. *Findings About Sentencing From a National Survey of Local, State and Federal Law Enforcement Agencies: Hearing on Federal Child Pornography Offenses Before the U.S. Sentencing Commission* (2012) (Statement of Janis Wolak, Senior Researcher, Crimes Against Children Research Center) [hereinafter Statement of Janis Wolak].

16. Janis Wolak et al., *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 *SEXUAL ABUSE: J. RES. & TREATMENT* 22, 28 (2011).

17. An investigation by the European Internet Watch Foundation found that 58% of online child pornography domains “included images of children being sexually penetrated or subjected to sadism or bestiality.” Janis Wolak et al., *Arrests for Child Pornography Production: Data at Two Time Points from a National Sample of U.S. Law Enforcement Agencies*, 16 *CHILD MALTREATMENT* 184, 185 (2011). Some videos also depict graphic images of children being raped, tortured, or even murdered. HARTJEN & PRIYADARSINI, *supra* note 14, at 189.

18. The percentage of pornography found in offenders’ possession showing violence increased from 21% in 2000 to 33% in 2009, and the percentage showing victims under the age of three increased from 19% to 28% during the same time period. Janis Wolak, Crimes Against Children Research Ctr., *What We Know (and Don’t Know) About Internet Sex Offenders: Findings from Research Funded by the US Dept. of Justice, OJJDP*, Presentation at the ATSA 30th Annual Research and Treatment Conference 40 (Nov. 4, 2011) (presentation slides available at <http://www.atsa.com/sites/default/files/ConfHO2011Wolak.pdf>).

19. Such networks allow users to download files from networks of individual computers. Wolak et al., *supra* note 16, at 23.

20. *Id.* at 32.

21. *Id.* at 33.

22. *Id.*

23. Patricia Hunt & Margaret Baird, *Children of Sex Rings*, 69 *CHILD WELFARE* 195, 202 (1990); *see also* S. REP. NO. 104-358, at 2 (1996) (finding use of children in

topographs are a “permanent record” of the initial abuse,²⁴ and their continued existence serves to haunt the victimized child for the rest of his or her life.²⁵ The shame this creates reinforces the child’s sense of responsibility for the abuse and may ensure his or her silence.²⁶ It is for these reasons that child pornography laws are universally uncontested²⁷ and why child pornography offenders must be pursued with the same vigor as all others who victimize children.

B. Introduction to the Interrogative Use of the Polygraph on Child Pornography Suspects

The interrogative polygraph program that this Note envisions will be explained in greater detail in Part VI, but a brief explanation of the program is offered in the interim in order to provide a foundation for this Note. Under the proposed program, a trained polygraph examiner would interrogate all child pornography suspects as a part of their standard interrogation. All requirements of a standard interrogation (e.g., *Miranda* warnings) would, of course, still apply. The polygraph portion of the interrogation would focus on the suspect’s criminal history with regard to contact sexual offenses against children. Key information for the examiner to acquire would include whether the suspect has committed a contact sexual offense against any children and, if so, detailed information about the crime and identifying information of the victim. Any information learned could be used against the suspect in the future only if corroborated by a source external to his²⁸ admission.

pornography to be a form of sexual abuse which can result in physical and/or psychological harm).

24. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

25. S. REP. NO. 104-358, at 2.

26. Hunt & Baird, *supra* note 23, at 201.

27. See Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210 (2001) (“Child pornography law is the least contested area of First Amendment jurisprudence[, and there is no] acceptable ‘liberal’ position when it comes to the sexual victimization of children.”).

28. I will refer to sexual offenders with masculine pronouns since the vast majority of reported offenses, especially with regard to child pornography, are perpetrated by men. See, e.g., Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC PSYCHIATRY 43, 2 (2009) (“[I]t is safe to assume that female child pornography consumers are non-existent.”); Anita Lam et al., *Lay Perceptions of Child Pornography Offenders*, 52 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 173, 179 (2010) (noting unusualness of women possessing child pornography as compared with men); Michael C. Seto, *Pedophilia and Sexual Offenses Against Children*, 15 ANN. REV. SEX RES. 321, 329 (2004) (noting that fewer than 10% of imprisoned adult sex offenders are female). *But cf.* LANNING, *supra*

C. Importance of the Program

Because so few sex crimes are reported to law enforcement, offenders may effectively keep secret their abusive pasts.²⁹ Statistics from sex offender treatment programs (“SOTPs”) demonstrate that a large number of child pornography offenders have undiscovered prior contact sexual offenses.³⁰ Other statistics demonstrate the same. A study by the U.S. Postal Inspections Service found that in 36% of cases of child pornography possession, the possessors also committed child sexual abuse.³¹ A separate study by the U.S. Customs Service found the number to be 80%.³² The proposed interrogative polygraph program is intended to expose those contact sexual offenses that otherwise may never come to light.

1. Recognizing Who Commits Sexual Crimes Against Children

There are misperceptions about the types of people who commit child pornography offenses. Contrary to popular belief, these offenders are generally well educated³³ and “well integrated in . . . society.”³⁴ When the FBI initiated a large crackdown on child pornography in 2002, arrested individuals included “Little League coaches, a teacher’s aide, a guidance counselor, school bus driver, foster care parent and professionals in the medical, educational, military and law enforcement fields.”³⁵ It is because child pornogra-

note 9, at 49 (“Although certainly a minority of cases, I believe the sexual victimization of children by females is far more prevalent than most people believe.”).

29. Peggy Heil & Kim English, *Sex Offender Polygraph Testing in the United States: Trends and Controversies*, in *THE USE OF THE POLYGRAPH IN ASSESSING, TREATING AND SUPERVISING SEX OFFENDERS: A PRACTITIONER’S GUIDE* 181, 184 (Daniel T. Wilcox ed., 2009).

30. See *infra* Section III.E.2; cf. ALEXANDRA GELBER, U.S. DEP’T OF JUSTICE, CRIMINAL DIV., RESPONSE TO “A RELUCTANT REBELLION” 7 (2009), available at <http://www.justice.gov/criminal/ceos/downloads/ReluctantRebellionResponse.pdf> (commenting on how child pornography investigations often ultimately uncover evidence of abuse).

31. *Online Child Pornography: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 109th Cong. 56 (2006) [hereinafter *Online Child Pornography*] (interrogatory responses of Sharon W. Cooper, M.D., Adjunct Professor of Pediatrics, Chapel Hill Sch. Of Med., Univ. of N.C.); see Sarah Wellard, *Cause & Effect*, COMMUNITYCARE.CO.UK (Mar. 15, 2001 12:00 AM), <http://www.communitycare.co.uk/Articles/15/03/2001/30218/Cause-amp-effect.htm>.

32. *Online Child Pornography*, *supra* note 31, at 56.

33. Endrass et al., *supra* note 28, at 2.

34. *Id.* at 5 (noting that a majority of offenders studied held jobs requiring extensive training).

35. Press Release, Fed. Bureau of Investigation, Operation Candyman (Mar. 18, 2002), available at <http://www.fbi.gov/news/pressrel/press-releases/operation-candyman>.

phy offenders do not outwardly appear different and because they are often “pillars of the community”³⁶ that society does not want to believe they could ever harm a child. Some individuals, judges included, still do not take child molestation offenses, let alone child pornography offenses, seriously.³⁷ This is why it is crucial to uncover the true scope of these offenses. The more hidden these crimes are, the easier they are to ignore and the more difficult it becomes to protect those who are exploited.³⁸

In addition to misperceptions about child pornography offenders, there are also misperceptions about who actually perpetrates contact sexual offenses against children. Child molesters do not have “horns and a tail,” but rather are ordinary men in the community. There is a misjudgment of “stranger danger,” while in fact children are statistically at much greater risk of being abused by a family member or an acquaintance.³⁹ Research indicates that the majority of child sexual abuse occurs in the home, at the hands of an individual the child knows.⁴⁰ Thus parental energies may be diverted towards protecting their children from strangers when the true risk may lie, quite literally, closer to home.

36. Ethel Quayle, *The Impact of Viewing on Offending Behaviour*, in *CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER*, 25, 25 (Martin C. Calder ed., 2004).

37. See, e.g., Susan S.M. Edwards, *Prosecuting ‘Child Pornography’: Possession and Taking of Indecent Photographs of Children*, 22 *J. SOC. WELFARE & FAM. L.* 1, 15–16 (2000) (noting judges’ decisions that blamed incest victims for tempting their offenders, attributed child pornography usage to nothing more than a “defendant’s private tastes,” and found “no corruption” in photographs of naked children in possession of a schoolteacher that did not show sexual activity (internal quotation marks omitted)); Mark Hansen, *A Reluctant Rebellion*, *A.B.A. J.*, June 2009, available at http://www.abajournal.com/magazine/article/a_reluctant_rebellion/ (referring to a child abuser as “[a]n actual offender”); Lynne Marek, *Sentences for Possession of Child Porn May Be Too High, Judges Say*, *NAT’L L.J.*, Sept. 9, 2009, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433696610&Sentences_for_possession_of_child_porn_may_be_too_high_judges_say&slreturn=1 (quoting two federal judges who argued that many child pornography offenders are merely “socially awkward first-time offenders” rather than threats to the community).

38. Cf. TATE, *supra* note 11, at 119–20 (describing swimming pool attendant who was found to have pictures of naked children in his desk but was never reported to police).

39. Hessick, *supra* note 4, at 887 (asserting that only about 7% of child sexual abuse cases are committed by strangers); Lam et al., *supra* note 28, at 176.

40. Suzanne Ost, *Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society*, 29 *J.L. & Soc’y* 436, 460 n.91 (2002).

2. Finding and Protecting Victims

The criminal justice system continues to fail to adequately identify cases of child sexual abuse and thus underprosecutes this crime.⁴¹ One need only open the newspaper to be reminded of this as it seems that every few months there is a report of a child molester who has victimized children for years without detection.⁴² A 1988 study of paraphiliacs interviewed under conditions of guaranteed confidentiality found on average that only 3.3% of their self-admitted contact sexual offenses resulted in an arrest.⁴³

Numerous social, cultural, and political attitudinal barriers stand in the way of disclosure of sexual abuse from the perspectives of victimized children, their parents, and child protective agencies.⁴⁴ In some cases, a child will not necessarily know that he or she was molested.⁴⁵ Some children might not know that they were photographed, and others might be so embarrassed or ashamed, especially adolescent boys, that they vehemently deny their victimization.⁴⁶

In addition, there is a low probability of physical evidence in sexual abuse cases.⁴⁷ This means that professionals must rely on

41. See HARTJEN & PRIYADARSINI, *supra* note 14, at 196 (noting that vast majority of cases of child sexual abuse never come to attention of authorities); Hessick, *supra* note 4, at 890 (“Child sex abuse is an underdetected, and thus underprosecuted, crime.”).

42. See, e.g., Mark Viera, *Former Coach at Penn State Is Charged With Abuse*, N.Y. TIMES, Nov. 5, 2011, <http://www.nytimes.com/2011/11/06/sports/ncaafootball/former-coach-at-penn-state-is-charged-with-abuse.html>; Ben Quinn, *Jimmy Savile Alleged to Have Abused Girls as Young as 13*, THE GUARDIAN, Sept. 28, 2012, <http://www.guardian.co.uk/tv-and-radio/2012/sep/28/jimmy-savile-abused-girls-alleged>.

43. Heil & English, *supra* note 29, at 184.

44. See Tina M. Beranbaum et al., *Child Pornography in the 1970s*, in CHILD PORNOGRAPHY AND SEX RINGS 7, 16–18 (Ann Wolbert Burgess & Marianne Lindeqvist Clark eds., 1984) (listing barriers). A 1990 RAND Corp. survey found that 40% of mandated reporters did not report at least one instance of suspected abuse in spite of being legally required to do so. Brad Heath, *Few Penalties for Keeping Child Abuse Secret*, USA TODAY (Dec. 16, 2011, 10:37 AM), <http://www.usatoday.com/news/nation/story/2012-01-02/unreported-child-abuse/51981108/1>.

45. In one FBI case, a hospital worker arrested for child pornography possession confessed to molesting children who were unconscious or medicated at the time and were mostly unaware of what he was doing. FED. BUREAU OF INVESTIGATION, INNOCENT IMAGES INTELLIGENCE UNIT & BEHAVIORAL ANALYSIS UNIT-3, INTELLIGENCE NOTE (July 20, 2011) (on file with author) [hereinafter FBI REPORT].

46. LANNING, *supra* note 9, at 85, 97.

47. Kathleen Coulborn Faller, *The Polygraph, Its Use in Cases of Alleged Sexual Abuse: An Exploratory Study*, 21 CHILD ABUSE & NEGLECT 993, 994 (1997).

other criteria to uncover the abuse.⁴⁸ While child pornography crimes are not necessarily easy to detect,⁴⁹ they are often easier to detect than child sexual abuse. Proof of a child pornography offense is typically easier to obtain because tangible evidence is inherent in the crime, which also means that the victimized child will not necessarily need to testify.⁵⁰ This may in part explain why the number of child pornography suspects referred to United States Attorneys in 2006 was more than four times that for sexual abuse suspects.⁵¹

Child pornography crimes have been some of the fastest growing crimes in the federal justice system in recent years,⁵² and using them as a vehicle through which law enforcement can uncover contact sexual offenses is a much more efficient way of solving these crimes than traditional investigative tactics.⁵³ Simply asking child pornography suspects about contact sexual offenses could be unimaginably fruitful, and the polygraph holds them accountable for their answers.⁵⁴

Discovery of new crimes, and thus discovery of new victims, will shine light on the magnitude of the harm perpetrated against children. Currently, children featured in child sexual abuse images are not included in the calculation of sexual abuse statistics, which generally are determined through victim disclosure or eyewitness re-

48. *Id.*

49. See Bourke & Hernandez, *supra* note 2, at 183–84 (noting how while technology has helped Internet crimes to proliferate, it also makes it easier for offenders to avoid detection); Ian Alexander Elliott et al., *Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders*, 21 *SEXUAL ABUSE: J. RES. & TREATMENT* 76, 89 (2009) (“Internet child pornography offenses are notably difficult to detect[,] and . . . experienced Internet offenders often develop information technology skills during the offending process that allow them to employ proactive strategies to avoid detection.” (internal citation omitted)).

50. Ost, *supra* note 40, at 460.

51. MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS 1 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>.

52. *Id.*

53. See Ost, *supra* note 40, at 460 (“[T]racking down possessors of child pornography may appear to be a more attainable goal than, for example, eradicating child sexual abuse . . .”).

54. The Association for Treatment of Sexual Abusers recommends utilizing the polygraph as a supplement to offenders’ self-reporting precisely because of the accountability it affords. Tim F. Branaman & Sheree N. Gallagher, *Polygraph Testing in Sex Offender Treatment: A Review of Limitations*, 23 *AM. J. FORENSIC PSYCHOL.* 45, 46 (2005).

porting.⁵⁵ This artificially and dramatically deflates the apparent number of victimized children.⁵⁶ This is especially true for male children whose victimization is particularly underreported.⁵⁷ Therefore in order to accurately account for all child sexual abuse victims, we must identify those photographed children who are also sexually abused.

At a more individualized level, uncovering hidden victims is important for the victims' well-being. Many of these children may have been too afraid or too embarrassed to come forward and have thus had to deal with their victimization on their own. At the very least, knowing their offender has been caught and can no longer victimize them or others can bring some level of comfort.⁵⁸

3. Fairer System of Punishment

Many claim that child pornography sentences are as lengthy as they are because they serve as a proxy punishment for contact sexual offenses;⁵⁹ however, this “run[s] directly counter to notions of due process and fairness in the criminal justice system.”⁶⁰ Rather than a system of punishment by presumption, a much fairer way to punish is actually to uncover the criminal activity and sentence offenders accordingly. If the polygraph uncovers the offenses a child pornography offender has actually committed, this obviates the need for such a proxy and ensures we are punishing offenders for the crimes they have actually perpetrated. Instead of assuming all child pornography offenders have committed a contact sexual offense, law enforcement should assume the burden of discovering those who have actually committed such offenses, and then take appropriate legal action.

55. CHILD EXPLOITATION & OBSCENITY SECTION, U.S. DEP'T OF JUSTICE, REPORT TO LEPSG ON THE “GLOBAL SYMPOSIUM FOR EXAMINING THE RELATIONSHIP BETWEEN ONLINE AND OFFLINE OFFENSES AND PREVENTING THE SEXUAL EXPLOITATION OF CHILDREN,” at 11 (2009).

56. *Id.*

57. Jan Hindman & James M. Peters, *Polygraph Testing Leads to Better Understanding Adult and Juvenile Sex Offenders*, 65 FED. PROBATION 8, 11 (2001).

58. There are, however, concerns about whether it is appropriate to track down victims given this intrusion into the victims' privacy rights. See KIM ENGLISH ET AL., THE VALUE OF POLYGRAPH TESTING IN SEX OFFENDER MANAGEMENT: RESEARCH REPORT SUBMITTED TO THE NATIONAL INSTITUTE OF JUSTICE 15 n.11 (2000), available at <http://dcj.state.co.us/ors/pdf/docs/revisedpolyrpt6.pdf>. Notification of victims must also, of course, be handled with care, in order to avoid public embarrassment of the child. LANNING, *supra* note 9, at 86.

59. Hessick, *supra* note 4, at 864.

60. *Id.* at 884.

II. USEFULNESS OF THE POLYGRAPH AS AN INVESTIGATIVE TOOL

A “mythical aura” surrounds the polygraph, such that its results are regarded as “presumptively accurate.”⁶¹ The general perception is that those protesting a failed test are merely perpetuating their lies.⁶² Popular culture’s portrayal of the polygraph contributes further to the perception of the polygraph’s infallibility.⁶³

Yet in reality “[t]here is no such thing as a lie detector,” per se.⁶⁴ Rather, the polygraph detects changes in physiological responses in the autonomic nervous system, including heart rate, respiration rate, and electrodermal changes.⁶⁵ When an individual is being deceptive, his heightened anxiety levels result in an increase in this autonomic activity.⁶⁶

However, polygraphy remains one of the most effective means of finding out the truth, which is why it is routinely utilized by law enforcement agencies across the country.⁶⁷ Every federal law enforcement agency has polygraph examiners on its staffs, and new examiners are trained every year at the Department of Defense Polygraph Institute (“DoDPI”).⁶⁸ One judge was quoted as saying that “the polygraph is as effective as any tool that I know of in getting out disclosures.”⁶⁹ One study found that the accuracy of the polygraph compared quite favorably against that of other diagnostic

61. *Farmer v. City of Fort Lauderdale*, 427 So. 2d 187, 191 (Fla. 1983).

62. *See id.* (“[A]ny protestations against [the polygraph’s] validity are generally viewed as being made in the obvious self-interest of those failing the test.”).

63. *See* Daniel T. Wilcox & Lars Madsen, *Pre-Conviction and Post-Conviction Polygraph Testing: A Brief History*, in *THE USE OF THE POLYGRAPH IN ASSESSING, TREATING AND SUPERVISING SEX OFFENDERS: A PRACTITIONER’S GUIDE*, *supra* note 29, at 31, 32–33 (providing an example of a polygraph’s use on a British reality television show).

64. Stan Abrams, *The Use of Polygraphy with Sex Offenders*, 4 *ANNALS SEX RES.* 239, 244 (1991).

65. CAROL RONKEN & HETTY JOHNSTON, *BRAVEHEARTS INC., THE USE OF POLYGRAPH TESTING IN MONITORING CHILD SEX OFFENDERS* 6 (2007).

66. *Id.*

67. Abrams, *supra* note 64, at 241; *see also* Sean Ahlmeyer et al., *The Impact of Polygraphy on Admissions of Victims and Offenses in Adult Sexual Offenders*, 12 *SEXUAL ABUSE: J. RES. & TREATMENT* 123, 137 (2000) (“The present results support the polygraph as an effective intervention for eliciting admissions . . . that no other process seems to be able to equally impact.”).

68. Charles R. Honts & Mary V. Perry, *Polygraph Admissibility: Changes and Challenges*, 16 *LAW & HUM. BEHAV.* 357, 357 (1992).

69. Abrams, *supra* note 64, at 260.

tools in the fields of psychology and medicine.⁷⁰ The accuracy of the polygraph was found to be only slightly less than the diagnostic accuracy of using an ultrasound to detect acute appendicitis or breast cancer, for example, and it was found to be slightly *more* accurate than the ability of an MRI or X-ray to diagnose breast cancer.⁷¹

Over the years, the polygraph has evolved from a trade into a profession.⁷² The field of polygraphy has a canon of ethics, a large published body of knowledge, independent professional organizations that are not tied to commercial interests, and at least one university research center.⁷³ Critics do argue, however, that, when compared to other scientific fields, the level of advancement in research on the polygraph compares unfavorably.⁷⁴ This Part provides an introduction to the polygraph and discusses various aspects of its use, as well as how it has been used with sex offender populations.

A. *The Polygraph in the Criminal Justice System*

Law enforcement agents use the polygraph as one investigative tool to determine whether there is probable cause to effect an arrest⁷⁵ or conduct a search,⁷⁶ to support the credibility of an inform-

70. Donald J. Krapohl, *Why the Polygraph Remains the Gold Standard*, THE ART OF DETECTING DECEPTION, CPIRC NEWS (Canadian Private Investigators' Res. Ctr., Ville Mont-Royal, Que.), Mar. 2006, at 2.

71. *Id.*

72. *Id.* at 3.

73. *Id.*

74. William G. Iacono, *Effective Policing: Understanding How Polygraph Tests Work and Are Used*, 35 CRIM. JUST. & BEHAV. 1295, 1303 (2008).

75. *See, e.g.,* Cervantes v. Jones, 188 F.3d 805, 813 n.9 (7th Cir. 1999) (“[P]olygraph results are one of many factors which may be used in determining whether, from an objective viewpoint, probable cause for an arrest existed . . .”), *recognized as overruled on other grounds by* Newsome v. McCabe, 256 F.3d 747 (7th Cir. 2001) *in* Gauger v. Hendle, 349 F.3d 354, 358 (7th Cir. 2003); Craig v. Singletary, 127 F.3d 1030, 1046 (11th Cir. 1997) (“Indications of deception on a polygraph examination may be taken into account in determining whether probable cause exists.”); Bennett v. City of Grand Prairie, 883 F.2d 400, 405–06 (5th Cir. 1989) (“[There is] no reason to create a *per se* rule barring magistrates . . . from using their sound discretion to evaluate the results of polygraph exams, in conjunction with other evidence, when determining whether probable cause exists to issue an arrest warrant.”).

76. *See, e.g.,* State v. Cherry, 810 P.2d 940, 942 (Wash. Ct. App. 1991) (“The reasons for excluding polygraph results at trial do not apply to a search warrant affidavit.”).

ant when establishing probable cause,⁷⁷ and to interrogate suspects.⁷⁸ Parties may also use the polygraph as evidence in probation hearings,⁷⁹ in criminal cases by stipulation,⁸⁰ or in post-conviction proceedings such as sentencings or motions for new trials.⁸¹

After the Supreme Court decided *Daubert v. Merrell Dow*,⁸² state and federal courts began evaluating the validity of the polygraph, deciding admissibility of polygraph evidence on a case-by-case basis.⁸³ State and federal courts have established varying rules on polygraph admissibility, but generally polygraph evidence is either per se inadmissible or otherwise disfavored.⁸⁴

77. See, e.g., *State v. Coffey*, 788 P.2d 424, 426 (Or. 1990); *State v. Clark*, 24 P.3d 1006, 1015 (Wash. 2001) (en banc).

78. See, e.g., *State v. Clifton*, 531 P.2d 256, 258 (Or. 1975).

79. See, e.g., *State v. Travis*, 867 P.2d 234, 237–38 (Idaho 1994) (allowing the use of a polygraph examination as evidence in a probation revocation proceeding because the proceeding lacked a jury, the court relied on other evidence beyond the polygraph results, and the probationer consented to the examination); see also *State v. Lumley*, 977 P.2d 914, 920–21 (Kan. 1999) (holding that a polygraph condition was a valid probation condition in certain circumstances; the court noted that “[t]he relaxed standard of proof and the fact that a probation revocation decision is a judicial decision rather than a jury decision . . . support a determination that polygraph test results are sufficiently reliable to be considered evidence in probation revocation hearings”). But see *Turner v. Commonwealth*, 685 S.E.2d 665, 667 (Va. 2009) (finding polygraph evidence insufficiently reliable to be admissible in probation revocation proceedings).

80. In some states a prosecutor may agree to release a defendant who is able to pass a polygraph test subject to the stipulation that the results of the test can be admissible in court if the defendant fails the polygraph. W.G. Iacono & D.T. Lykken, *The Validity of the Lie Detector: Two Surveys of Scientific Opinion*, 82 J. APPLIED PSYCHOL. 426, 426 (1997).

81. Charles R. Honts et al., *The Case for Polygraph Tests*, in 5 MODERN SCI. EVIDENCE: L. & SCI. EXPERT TESTIMONY § 40:20, § 40:36 (David L. Faigman et al. eds., 2011).

82. 509 U.S. 579 (1993) (creating an ad hoc test for admissibility of scientific evidence).

83. Wilcox & Madsen, *supra* note 63, at 34.

84. See, e.g., *United States v. Scheffer*, 523 U.S. 303, 312 (1998) (finding per se rule excluding all polygraph evidence to be permissible); *United States v. Montgomery*, 635 F.3d 1074, 1094 (8th Cir. 2011) (noting that such evidence is admissible but disfavored); *United States v. Prince-Oyibo*, 320 F.3d 494, 501 (4th Cir. 2003) (upholding per se ban); *United States v. Lea*, 249 F.3d 632, 638 (7th Cir. 2001) (“[A]dmission of polygraph evidence is within the discretion of the district court, which is required to engage in a Fed. R. Evid. 403 balancing test.”); *United States v. Thomas*, 167 F.3d 299, 308 (6th Cir. 1999) (reaffirming that such evidence is admissible but disfavored); *United States v. Cordoba*, 104 F.3d 225, 228 (9th Cir. 1997) (allowing admission based on trial judge’s discretion); *United States v. Posado*, 57 F.3d 428, 434 (5th Cir. 1995) (eliminating per se rule against admissibility); *United States v. Piccinonna*, 885 F.2d 1529, 1535–36 (11th Cir. 1989) (permitting such evidence only by stipulation or to impeach or corroborate

A common post-conviction use of the polygraph is in SOTPs, either while a sex offender is incarcerated or while he is on probation.⁸⁵ While post-conviction polygraph testing was used with sex offenders as early as 1973, the first formal program was not established until 1991.⁸⁶ Use of the polygraph in such programs has since greatly increased.⁸⁷ This demonstrates the frequency with which the polygraph is used with sex offenders and that its application to child pornography suspects would not be a radical departure from past practice.

B. *How the Polygraph Works*

While there are different types of polygraph tests,⁸⁸ this Note is concerned with the Comparison Question Test (“CQT”).⁸⁹ The crux of the CQT is that the polygrapher compares the subject’s physiological responses to “relevant questions” with his or her responses to “comparison questions.” Relevant questions deal with the specific subject matter that is the focus of the examination, while comparison questions concern general prior bad acts that are common to most individuals (e.g., lying, cheating).⁹⁰ The comparison questions are deliberately vague and are designed so that they are difficult for anyone to answer truthfully.⁹¹ In theory, innocent individuals will exhibit stronger physiological reactions to comparison questions than they will to relevant questions.⁹² A stronger reaction to the relevant questions than to the comparison questions is

witness testimony); *State v. Porter*, 698 A.2d 739, 758–59 (Conn. 1997) (holding such evidence to be per se inadmissible); *People v. Baynes*, 430 N.E.2d 1070, 1077 (Ill. 1981) (finding such evidence inadmissible even when stipulated); *State v. A.O.*, 965 A.2d 152, 160 (N.J. 2009) (“As a general rule, polygraph results are not admissible in evidence”); *Lee v. Martinez*, 96 P.3d 291, 306 (N.M. 2004) (finding control question polygraph to be sufficiently reliable).

85. See *infra* Section II.E. for additional information about SOTPs.

86. Wilcox & Madsen, *supra* note 63, at 42.

87. A 2009 survey reported that nearly 80% of adult community treatment programs and over half of institutionally based ones were using polygraphy. Don Grubin, Editorial, *The Polygraph and Forensic Psychiatry*, 38 J. AM. ACAD. PSYCHIATRY & L. 446, 449 (2010).

88. See Iacono & Lykken, *supra* note 80, at 427–28 (describing Control Question Test, Guilty Knowledge Test, and Directed Lie Test).

89. The Comparison Question Test was known as the Control Question Test, until the American Polygraph Association renamed it in 1999. Iacono, *supra* note 74, at 1300. See *id.* at 1296–98, for a detailed description of the CQT.

90. See Iacono & Lykken, *supra* note 80, at 427 (using “did you ever lie to get out of trouble?” as comparison question example).

91. *Id.*

92. *Id.* The assumption is that innocent individuals will either lie in response to the comparison questions or will at least be very concerned about whether they

thus indicative of deception.⁹³ For example, an accused child molester who is guilty will theoretically have a stronger reaction to questions regarding the molestation (e.g., whether he touched a particular part of the child's body), which are the relevant questions, than to questions about whether he had ever told a self-serving lie, which are the comparison questions. Were this individual innocent, his physiological responses to the comparison questions would typically be stronger than those to the relevant questions. A lack of a substantial difference between the physiological responses to the questions leads to an inconclusive result.⁹⁴

The first, and most important,⁹⁵ part of the examination is the pre-test interview. Here the polygrapher aims to convince the subject that his or her lies will be detected, continually emphasizing the importance of being truthful at all times.⁹⁶ This creates circumstances that will lead an innocent subject to be more disturbed by the comparison questions than by the relevant questions.⁹⁷ The pre-test interview may take several hours, whereas the test itself is generally quite brief.⁹⁸

The test typically consists of ten questions, three of which are relevant questions, and each relevant question is asked in conjunction with a different comparison question.⁹⁹ The relevant questions are repeated three times, each time in a different order.¹⁰⁰ Most polygraph examiners use a laptop to digitize and record the physiological responses to the relevant and comparison questions.¹⁰¹ The

will be seen as truthful. Theodore P. Cross & Leonard Saxe, *Polygraph Testing and Sexual Abuse: The Lure of the Magic Lasso*, 6 CHILD MALTREATMENT 195, 196 (2001).

93. Iacono & Lykken, *supra* note 80, at 428.

94. Cross & Saxe, *supra* note 92.

95. Abrams, *supra* note 64, at 247 ("It is here that the difference between a good polygraphist and an outstanding one becomes obvious.")

96. *Id.* In one study of offenders' perceptions of accuracy, 82% perceived the polygraph to be "moderately," "quite," or "extremely" accurate. Don Grubin & Lars Madsen, *Accuracy and Utility of Post-Conviction Polygraph Testing of Sex Offenders*, 188 BRIT. J. PSYCHIATRY 479, 481 (2006).

97. William G. Iacono & Christopher J. Patrick, *Polygraph ("Lie Detector") Testing: Current Status and Emerging Trends*, in THE HANDBOOK OF FORENSIC PSYCHOLOGY 552, 555 (Irving B. Weiner & Allen K. Hess eds., 2006).

98. A ten-question test takes only about four minutes. Abrams, *supra* note 64, at 250.

99. Iacono, *supra* note 74, at 1296. The CQT may also include other questions, but only the relevant and comparison questions are used in evaluating deception. *Id.*

100. *Id.*

101. *Id.*

examiners then use computer software to compare the magnitude of the physiological responses.¹⁰²

In a polygraph-aided interrogation, if the polygraph examiner finds that the subject is being deceptive, then the subject is interrogated at the conclusion of the test.¹⁰³ The examiner confronts him or her with the results and tries to elicit a confession.¹⁰⁴ A trained examiner is adept at using what he or she knows about the subject’s character and demeanor during the interview, the facts of the crime, and the CQT outcome to convince the subject that it is in his interest to confess.¹⁰⁵

C. *Testing the Reliability and the Validity of the Polygraph*

This Section begins with an overview of relevant terminology that appears in the polygraph literature. In the context of the polygraph, “reliability” refers to the consistency of the scoring of the physiological data, whereas “validity” refers to the accuracy of the instrument.¹⁰⁶ The “sensitivity” of a polygraph examination indicates how well the examination correctly detects deception and the “specificity” indicates how well it correctly identifies nondeception.¹⁰⁷ “Positive predictive power” denotes the percentage of individuals being deemed deceptive who are actually deceptive, and “negative predictive power” denotes the percentage of individuals deemed nondeceptive who truly are nondeceptive.¹⁰⁸ Reliability and validity are the two most important metrics for assessing a polygraph and will now be discussed at length.

The reliability of the CQT is quite high and it is not unusual for independent evaluators to agree 100% of the time on the results of an examination.¹⁰⁹ Examiners in private practice typically claim that about 10% of CQT examinations end inconclusively; however, a 1991 study found that about 20% of police polygraph examinations were inconclusive.¹¹⁰ Critics often misclassify inconclusive re-

102. *Id.*

103. Cross & Saxe, *supra* note 92, at 197.

104. *Id.*

105. Iacono, *supra* note 74, at 1298.

106. Honts et al., *supra* note 81, at § 40:25.

107. Lars Madsen, *The Accuracy of Polygraphy in the Treatment and Supervision of Sex Offenders*, in *THE USE OF THE POLYGRAPH IN ASSESSING, TREATING AND SUPERVISING SEX OFFENDERS: A PRACTITIONER’S GUIDE*, *supra* note 29, at 155, 156.

108. *Id.* at 156–57.

109. Honts et al., *supra* note 81, at § 40:25.

110. Iacono, *supra* note 74, at 1296.

sults as errors.¹¹¹ In reality, examiners simply conduct a second test at a later date to get a definite result.¹¹²

The polygraph can be studied in two settings, in laboratory studies and in field studies, with each having its own drawbacks. Laboratory studies, by their nature, involve subjects with little to risk and with little reason to fear detection, as opposed to subjects of a field study, who potentially have a lot at stake in taking the polygraph.¹¹³ In laboratory studies, physiological differences will necessarily be less pronounced since the subject will not be as emotionally invested in the procedure, making deception more difficult to detect and error rates higher.¹¹⁴ This Note refers to this problem as the “triviality problem.”

Field studies, however, often suffer from an inability to verify their results. In a field study, the results must be verified against some “ground truth” (i.e., there must be some outside method for determining whether the examinee was being deceptive since the experimenter cannot otherwise know what the truth is), which is extremely difficult to establish.¹¹⁵ Indicators of the truth, such as physical evidence, eyewitness testimony, or DNA evidence, are often unavailable, especially in sexual abuse cases, so most studies use a confession as the source of ground truth.¹¹⁶

111. RONKEN & JOHNSTON, *supra* note 65, at 8.

112. *Id.*

113. Gerry D. Blasingame, *Suggested Clinical Uses of Polygraphy in Community-Based Sexual Offender Treatment Programs*, 10 SEXUAL ABUSE: J. RES. & TREATMENT 37, 41 (1998).

114. ENGLISH ET AL., *supra* note 58, at 22 n.22.

115. Cross & Saxe, *supra* note 92, at 199.

116. *Id.* Use of a confession as the source of ground truth, however, may introduce a selection bias because confessions are elicited in the post-test interview only when an examiner has determined that the examinee was deceptive. *Id.* Thus guilty individuals who beat the polygraph are not included in this data, *id.*, nor are innocent individuals wrongly accused of deception who do not confess, Madsen, *supra* note 107, at 164. It is argued that these exclusions artificially inflate polygraph accuracy rates. Cross & Saxe, *supra* note 92, at 199. Yet some argue that this misconstrues law enforcement investigative practices because, since not all crimes have a single culprit, the decision to stop polygraphing is based more on whether the investigators are satisfied that all perpetrators have been identified than whether an examinee is found to be deceptive. Donald J. Krapohl et al., *Does the Confession Criterion in Case Selection Inflate Polygraph Accuracy Estimates?*, 4 FORENSIC SCI. COMM. (2002), available at <http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2002/index.htm/krapohl.htm>. While a confession may at times be a “potential source of contamination,” it is an overstatement to say that it always is. *Id.* In reviewing all of the polygraphs conducted by the U.S. Army Criminal Investigation Detachment Polygraph Division between January 1, 1995 and February 3, 1997, DoDPI researchers found that out of the 3349 examinations

In terms of validity, the most definitive review of polygraph testing to date was conducted by the National Research Council. It estimated that polygraph accuracy is between 80% and 90%, concluding that the polygraph's accuracy is “well above chance, though well below perfection.”¹¹⁷ One compilation of twelve field studies involving 2174 exams averaged a 98% accuracy rate across studies.¹¹⁸ The validity in laboratory studies is quite a bit lower, with an average accuracy rate of 81%, although this is thought to be because of the triviality problem.¹¹⁹

There are two known laboratory studies that have overcome the triviality problem and were able to confirm their results against a ground truth. One study examined drug use by sex offenders in a treatment program, where the drug use was easily verifiable by testing a hair sample, and the offenders could have incurred significant sanctions if their illicit drug use were to have been found out.¹²⁰ When compared against a blind evaluation, the polygraph had a 100% sensitivity rate, a 79% specificity rate, a 29% positive predictive power, and a 100% negative predictive power.¹²¹

The second study involved twenty-one policemen who were given an aptitude test.¹²² All of the officers had an opportunity to cheat and were polygraphed about whether they did.¹²³ The officers did not know that the researchers designed the experiment in a way that allowed them to identify those who had cheated.¹²⁴ These men had a strong incentive to pass the polygraph since they were told that the results could affect their careers.¹²⁵ Two cheaters

that were conducted, there were 1146 confessions. *Id.* There were no reports of false confessions. *Id.*

117. Don Grubin, *The Case for Polygraph Testing of Sex Offenders*, 13 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 177, 179 (2008) (internal quotation marks omitted).

118. Ahlmeyer et al., *supra* note 67, at 125; *see also* ENGLISH ET AL., *supra* note 58, at 22 (noting accuracy rates ranging from 96 to 98% in field studies).

119. ENGLISH ET AL., *supra* note 58, at 22 & n.22. This is likely why only 17% of Society for Psychophysiological Research members thought that it was reasonable for a court to give “substantial weight” to the results of laboratory studies in assessing the validity of the CQT in real situations. Iacono & Lykken, *supra* note 80, at 431.

120. Madsen, *supra* note 107, at 160.

121. *Id.* at 158, 160. The low deception base rate in this study (8%) may have been the cause of the low positive predictive power. *Id.* at 158. Where base rates of deception are low, even a highly accurate test will produce more false positives than true positives. *Id.* at 161.

122. *Id.* at 167.

123. *Id.*

124. *Id.*

125. *Id.*

and thirteen non-cheaters were tested and the examiner correctly identified both cheaters and eleven of the thirteen non-cheaters.¹²⁶ Eight other examiners blindly re-scored the charts and correctly identified the two cheaters fifteen out of sixteen times and the innocent participants 81% of the time.¹²⁷

There are at least two ways to test the validity and reliability of an administered polygraph. Blind verification of the chart by a second examiner is one important way to test the reliability of the polygraph because of the subjectivity of polygraphing.¹²⁸ The original examiner may be influenced by his or her knowledge of the facts in two ways: the behavioral confirmation effect and the cognitive confirmation effect.¹²⁹ The former is where the examiner's assumptions about the examinee's guilt or innocence subconsciously influence the measurements (e.g., the examiner may present the questions with different intonation or emphasis) while the latter occurs when these assumptions influence the examiner's interpretation of the chart.¹³⁰

In terms of validity, when blind evaluations were conducted on confirmed nondeceptive cases in one study, the blind evaluators were correct 89% of the time, while the original polygrapher was correct 95% of the time.¹³¹ In confirmed deceptive cases (i.e., the examinee later confessed or was convicted), the blind evaluators were correct 94% of the time, and the original scorers were correct 99% of the time.¹³²

Retesting is a second way to measure reliability.¹³³ The retest must be conducted by the same examiner since a retest with a different examiner may contain different comparison questions, differently worded relevant questions, and a different manner displayed by the examiner, all of which could affect the results of the examination.¹³⁴ However, if the examiner conducting the sec-

126. *Id.* at 167–68.

127. *Id.*

128. Vergil L. Williams, *Response to Cross and Saxe's "A Critique of the Validity of Polygraph Testing in Child Sexual Abuse Cases,"* 4 J. CHILD SEXUAL ABUSE 55, 65 (1995).

129. Madsen, *supra* note 107, at 172.

130. *Id.* at 172–73

131. Williams, *supra* note 128, at 66.

132. *Id.*

133. *Id.* at 65.

134. See William G. Iacono & David Lykken, *The Case Against Polygraph Tests*, in 5 MODERN SCI. EVIDENCE: L. & SCI. EXPERT TESTIMONY, *supra* note 81, at §§ 40:45, :71.

ond test is the same, knowledge of the results of the first test may influence how the examiner conducts and scores the second test.¹³⁵

Retesting also has inherent problems. The first test may affect the examinee’s confidence in the accuracy of the procedure, which is important for the overall accuracy of the CQT.¹³⁶ For example, an innocent subject who has lost confidence in the test because he or she was found to be deceptive during the first test may react more strongly to the relevant questions the second time around, while a guilty suspect who has avoided detection on the first test might be less disturbed by the relevant questions on the second test.¹³⁷ Habituation, the principle that physiological reactions diminish with repeated exposure to stimuli, may also impact repeated testing.¹³⁸ That is, an examinee may be less responsive to the questions in the second test, which may influence the outcome.¹³⁹ However, the degree to which habituation affects the accuracy rate of a polygraph examination is unknown.¹⁴⁰

D. Criticisms of the Polygraph

Criticisms of the CQT methodology abound. Critics argue, for example, that accusations of deception or questions about sexual thoughts or behaviors are the source of the physiological responses analyzed.¹⁴¹ In other words, these physiological responses may be the result of anxiety, nervousness, excitement, or sexual arousal, rather than deception.¹⁴² Critics also postulate that innocent individuals will be sufficiently alarmed by the content of the relevant questions and the possible consequences of failing the test that they will exhibit a relatively stronger reaction to those questions.¹⁴³

In a poll of members of the Society for Psychophysiological Research (“SPR”) and the American Psychological Association (“APA”), only about one-third of each membership said that the CQT “is based on scientifically sound psychological principles” and less than one-quarter of each group thought that polygraph results should be admissible evidence.¹⁴⁴ Only about one-quarter of SPR

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Branaman & Gallagher, *supra* note 54, at 56.

141. RONKEN & JOHNSTON, *supra* note 65, at 6.

142. *Id.*

143. Cross & Saxe, *supra* note 92, at 196.

144. Iacono & Lykken, *supra* note 80, at 430.

members agreed with the assertion that the CQT was accurate at least 85% of the time, while the APA members, on average, estimated the accuracy of the CQT to be around 60%.¹⁴⁵ Yet the SPR members who considered themselves to be most informed about the CQT were more than twice as likely to affirm the accuracy of the method than were those who considered themselves least informed.¹⁴⁶

The effectiveness of the polygraph depends on a number of factors, including “the physical, mental, and emotional state of the subject; the instrument being used; the testing environment; and the expertise of the examiner,” with the quality of the examiner being most important.¹⁴⁷ But these types of variables can bias to some extent all types of research if they are not sufficiently controlled,¹⁴⁸ which is why it is crucial to normalize external conditions and ensure that the polygraph examiner is highly experienced.¹⁴⁹

The competency of the examiner is of the utmost importance because the CQT is not necessarily a wholly objective test.¹⁵⁰ Much of the selection and formulation of questions, as well as interpretation of the physiological reactions of the subject, is at the examiner’s discretion.¹⁵¹ While guilty and innocent scorings are rarely confused, polygraphers may disagree as to whether a chart should be classified as decisive or inconclusive.¹⁵² However, much of the subjectivity can be removed from the process through computer analysis of the chart.¹⁵³

Critics of the CQT often mention the use of countermeasures, behaviors that an individual may use to attempt to alter the results of the polygraph examination,¹⁵⁴ as an area of concern.¹⁵⁵ Counter-

145. *Id.* at 431.

146. *Id.* The APA members were not asked this question. *See id.* at 431–32.

147. Abrams, *supra* note 64, at 244–45. “Even the tone of voice and manner in which the questions are read can affect the outcome.” Blasingame, *supra* note 113, at 39.

148. Ahlmeyer et al., *supra* note 67, at 125.

149. RONKEN & JOHNSTON, *supra* note 65. It is vital that an examiner who polygraphs sex offenders have a reasonable level of expertise in polygraphing this population. Blasingame, *supra* note 113, at 39.

150. When asked whether they thought the CQT was independent of examiner skill and subjective judgment, only 10% of the APA membership queried agreed. Iacono & Lykken, *supra* note 80, at 432.

151. Klaus Fiedler et al., *What Is the Current Truth About Polygraph Lie Detection?*, 24 BASIC & APPLIED SOC. PSYCHOL. 313, 315 (2002).

152. *Id.*

153. *Id.* Computers are now used by most polygraphers. *See infra* text accompanying notes 107–08.

154. Honts et al., *supra* note 81, at § 40:33.

measures can include drug use¹⁵⁶ or even something as unsophisticated as biting one’s tongue or pressing one’s toes to the floor.¹⁵⁷ When asked whether they thought the CQT could be beaten through the use of countermeasures, SPR members almost unanimously agreed that it could.¹⁵⁸

Some studies have found countermeasures to be effective when even experienced examiners were unable to detect their use, either by observing the subject’s overt behavior or by inspecting the polygraph chart.¹⁵⁹ All of the countermeasure research data is from laboratory studies, however, since it would be unethical, and possibly illegal, to train criminal suspects to apply countermeasures when being polygraphed.¹⁶⁰ Because of the triviality problem, results of such studies must be analyzed with a critical eye. Further, a 2003 National Academy of Sciences Report found that no scientific examinations of countermeasures have studied their use in settings “where systematic efforts are made to detect and deter them.”¹⁶¹

In the SOTP setting, a 2009 study found that well-trained and experienced examiners *can* easily detect most countermeasure techniques, and offenders are then warned to cease using such tactics.¹⁶² Furthermore, if the polygrapher is unsure as to whether countermeasures are being used, a second polygrapher can examine a videotape of the polygraph session and the polygraph charts in order to get a second opinion.¹⁶³ Also, computerized chart analysis can better detect the use of countermeasures and has been shown to reduce the false negative rate¹⁶⁴ by half.¹⁶⁵

155. See, e.g., Honts & Perry, *supra* note 68, at 374 (noting the “threat” posed by countermeasures).

156. Honts et al., *supra* note 81, at § 40:33.

157. Honts & Perry, *supra* note 68, at 374.

158. Iacono & Lykken, *supra* note 80, at 431.

159. Honts et al., *supra* note 81, at § 40:34; see also Blasingame, *supra* note 113, at 41 (“[E]xperiments training subjects to use toe pressing and tongue biting during control questions and relaxation during relevant questions reduce the accuracy from 84% to 34%.”); Honts & Perry, *supra* note 68, at 374 (presenting a study where no guilty subject who received brief countermeasure training was correctly detected). *But see* Abrams, *supra* note 64, at 251 (presenting study where subjects were taught to “beat the test” and were allowed to practice, but perfect accuracy in detection was still achieved).

160. Honts et al., *supra* note 81, at § 40:34.

161. *Lee v. Martinez*, 96 P.3d 291, 301 (N.M. 2004) (internal quotation marks omitted).

162. Heil & English, *supra* note 29, at 206.

163. *Id.*

164. A false negative occurs when a liar is erroneously deemed to have been nondeceptive. Madsen, *supra* note 107, at 156. A false positive occurs when a truth-teller is erroneously diagnosed as being deceptive. *Id.*

Additionally, countermeasures are of lesser concern in criminal populations because proper usage requires specific training not readily available to most apprehended sex offenders.¹⁶⁶ Without such training, subjects who spontaneously attempt countermeasures are actually more likely to *fail* the polygraph than pass.¹⁶⁷ Finally, even when countermeasures are used, they more often produce an inconclusive result than a non-deceptive one.¹⁶⁸ The subject can then be retested until the test generates a conclusive result.

Opponents of polygraphing claim that the mere psychological effect of believing that deception can be detected is sufficient to provoke disclosures, known as the bogus pipeline theory.¹⁶⁹ That many admissions are obtained prior to the actual testing (or prior to a retest) due to the anticipation of the examination supports this to some extent.¹⁷⁰ Nevertheless, it is only the physiological reaction that accompanies deceptive answers that allows an interrogator to know whether a suspect is being deceitful.¹⁷¹ Furthermore, it is often the case that disclosures come only *after* a failed test.¹⁷² Therefore while the polygraph may be an imperfect tool in some respects, its shortcomings do not negate its usefulness as a law enforcement tool.

E. Polygraphing Sex Offender Populations

Much of the research on child pornography offenders and contact sexual offenders comes from SOTPs. Some of these programs are facility treatment programs, in which offenders volunteer to participate while in prison.¹⁷³ The rest are community treatment programs, involving either inpatient or outpatient treatment at a

165. Honts et al., *supra* note 81, at § 40:34.

166. Grubin, *supra* note 117, at 182.

167. Charles R. Honts & Wendy R. Alloway, *Information Does Not Affect the Validity of a Comparison Question Test*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 311, 317–18 (2007).

168. Heil & English, *supra* note 29, at 206.

169. Jos Buschman et al., *Sexual History Disclosure Polygraph Examination with Cybercrime Offences: A First Dutch Explorative Study*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 395, 406 (2010).

170. Abrams, *supra* note 64, at 258; Blasingame, *supra* note 113, at 38 (noting that offenders disclose additional victims, paraphilia, and offenses in anticipation of the polygraph examination).

171. Buschman et al., *supra* note 169, at 406.

172. Grubin, *supra* note 117, at 184.

173. See, e.g., Bourke & Hernandez, *supra* note 2, at 185.

community treatment facility, to which individuals “self-refer,”¹⁷⁴ are referred by others,¹⁷⁵ or are required to go as a condition of probation or parole.¹⁷⁶ Some studies include individuals from both programs.¹⁷⁷

When examining sex offenders, researchers are usually careful to separate out different types of offenders.¹⁷⁸ For example, child pornography-only offenders (or “Internet offenders”) are analyzed separately from contact-only offenders, who are each analyzed separately from mixed offenders.¹⁷⁹ Further, when examining child pornography offenders, generally only individuals convicted of possession, distribution, or receipt of child pornography are included.¹⁸⁰ Those convicted of production of child pornography are,

174. See, e.g., Don Grubin, *A Trial of Voluntary Polygraphy Testing in 10 English Probation Areas*, 22 *SEXUAL ABUSE: J. RES. & TREATMENT* 266, 268 (2010); Janina Neutze et al., *Predictors of Child Pornography Offenses and Child Sexual Abuse in a Community Sample of Pedophiles and Hebephiles*, 23 *SEXUAL ABUSE: J. RES. & TREATMENT* 212, 233 (2011).

175. See, e.g., Robert L. Emerick & Wendy A. Dutton, *The Effect of Polygraphy on the Self-Report of Adolescent Sex Offenders: Implications for Risk Assessment*, 6 *ANNALS SEX RES.* 83, 86 (1993) (program participants referred by juvenile justice system, Child Protective Services, parents, and others); Jennifer A. McCarthy, *Internet Sexual Activity: A Comparison Between Contact and Non-contact Child Pornography Offenders*, 16 *J. SEXUAL AGGRESSION* 181, 185 (2010) (federal and state agencies, Child Protective Services, family court, and private attorneys).

176. See, e.g., Buschman et al., *supra* note 169, at 398; Grubin & Madsen, *supra* note 96, at 480. If a parolee does not participate in a required community treatment program, he will be sent back to prison. See Ahlmeyer et al., *supra* note 67, at 126.

177. See, e.g., Ahlmeyer et al., *supra* note 67, at 126; Michele Elliott et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 *CHILD ABUSE & NEGLECT* 579, 580 (1995).

178. This applies to studies both inside and outside the SOTP context.

179. See, e.g., Buschman et al., *supra* note 169, at 398; Dennis Howitt & Kerry Sheldon, *The Role of Cognitive Distortions in Paedophilic Offending: Internet and Contact Offenders Compared*, 13 *PSYCHOL., CRIME & L.* 469, 473 (2007). In some studies, however, the authors are less clear. Elliott et al., for example, separated Internet offenders from contact sexual offenders but included offenders who made indecent images of children in the “Internet offender” category if they had no index contact sexual offense. Elliott et al., *supra* note 49, at 80. It is not clear whether these individuals were simply not *charged* with molestation or whether there actually was no molestation. The results of any of these ambiguous studies are not used in this Note’s analysis.

180. See, e.g., Bourke & Hernandez, *supra* note 2, at 186; Michael C. Seto et al., *Explanations Given by Child Pornography Offenders for Their Crimes*, 16 *J. SEXUAL AGGRESSION* 169, 171 (2010).

as is appropriate, typically excluded from the analysis¹⁸¹ or, on occasion, included with the contact sexual offenders.¹⁸²

1. Limitations of Sex Offender Treatment Program Studies

Given who participates in these programs (and who does not), at least six important limitations of SOTP studies must be kept in mind. First, those who have actively sought treatment may be more willing to make disclosures than those who are required to enter into treatment.¹⁸³ But a willingness to make more disclosures does not mean that these men have committed more contact sexual offenses than other child pornography offenders. That these men have volunteered for treatment, and thus have recognized that they have a problem, implies that they are *less* dangerous than those offenders who see no need for treatment.¹⁸⁴

Second, there is the issue of overreporting. Individuals who agree to participate in the program are placed in a housing unit that is separate from the rest of the prison population.¹⁸⁵ Some thus allege that offenders are incentivized to make disclosures (even if they are false) in order to remain in the program and stay in this housing unit or to curry favor with the researchers or others.¹⁸⁶ Critics of one the most famous SOTP studies, the “Butner Study,”¹⁸⁷ allege that the program incentivized overreporting because it was “highly coercive” and because offenders who did not continue to admit to further crimes were discharged from the program.¹⁸⁸ However, there was no incentive for inmates to disclose

181. See, e.g., Bourke & Hernandez, *supra* note 2, at 186; Buschman et al., *supra* note 169, at 398.

182. See, e.g., Ethel Quayle & Max Taylor, *Model of Problematic Internet Use in People with a Sexual Interest in Children*, 6 CYBERPSYCHOL. & BEHAV. 93, 96 (2003).

183. Ahlmeyer et al., *supra* note 67, at 135.

184. Interview with Dr. Michael Bourke, Chief Psychologist, U.S. Marshals Service (Jan. 19, 2012).

185. See, e.g., Bourke & Hernandez, *supra* note 2, at 185.

186. See, e.g., Neutze et al., *supra* note 174, at 232 (“[S]ome of the convicted offenders may be participating in treatment solely in order to win transfer to a lower-security setting or to improve their chances of parole.”).

187. See *infra* notes 417–27 and accompanying text for a more extensive discussion of the Butner Study.

188. E.g., *United States v. Johnson*, 588 F. Supp. 2d 997, 1006 (S.D. Iowa 2008) (internal quotation marks omitted); *The Implications of Recidivism Research and Clinical Experience for Assessing and Treating Federal Child Pornography Offenders: Hearing on Federal Child Pornography Offenses Before the U.S. Sentencing Comm’n*, 11–12 (2012) (written testimony of Richard Wollert, Professor, Washington State University Vancouver) (alleging that inmates feared removal to general prison population if they did not make admissions).

victims¹⁸⁹ and no inmate in fifteen years of the program was ever removed for “insufficient” disclosures.¹⁹⁰ In addition, since there is no parole in the federal system, there was no incentive for inmates to overreport criminal activity in order to “look good” for the parole board.¹⁹¹

Further, and most importantly, the Butner Study was a *retrospective* study that was conducted using archival data long after treatment had been completed and many of the inmates had left the correctional institution.¹⁹² This means that it was impossible for any unconscious reinforcement by the researchers to influence disclosures.¹⁹³ In fact, what the results demonstrate is that the offenders who did *not* disclose the most victims were the ones who were most likely to stay in treatment, whereas those who *did* disclose more victims were more likely to be kicked out of the program.¹⁹⁴ Finally, the polygraph examinations found no evidence of overreporting with any of the subjects.¹⁹⁵

A third limitation of SOTP studies is that they typically involve small sample sizes, which means that broader application is somewhat limited.¹⁹⁶ They also usually lack control groups;¹⁹⁷ however, this is not material since rather than being designed to manipulate

189. Interview with Dr. Bourke, *supra* note 184.

190. E-mail from Dr. Michael Bourke, Chief Psychologist, U.S. Marshal’s Service, to author (Feb. 23, 2012, 20:47 EST) (on file with author).

191. Bourke & Hernandez, *supra* note 2, at 189.

192. E-mail from Dr. Michael Bourke, Chief Psychologist, U.S. Marshal’s Service, to author (Feb. 23, 2012, 23:25 EST) (on file with author). Some other sex offender studies outside of the SOTP context also have examined data retrospectively. See, e.g., Ron Langevin & Suzanne Curnoe, *The Use of Pornography During the Commission of Sexual Offenses*, 48 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 572, 576 (2004); Seto et al., *supra* note 180, at 171.

193. Interview with Dr. Bourke, *supra* note 184.

194. *Id.* Those with fewer disclosures were typically quieter individuals who kept to themselves, whereas those with more disclosures had more antisocial tendencies and were more likely to be involved in prison altercations, which was grounds for removal from the treatment program. *Id.*

195. Bourke & Hernandez, *supra* note 2, at 189.

196. Grubin, *supra* note 117, at 183; see also Sarah Laulik et al., *An Investigation into Maladaptive Personality Functioning in Internet Sex Offenders*, 13 PSYCHOL., CRIME & L. 523, 525–26 (2007) (thirty offenders); Jean Proulx et al., *Pathways in the Offending Process of Extrafamilial Sexual Child Molesters*, 11 SEXUAL ABUSE: J. RESEARCH & TREATMENT 117, 119 (1999) (forty-four offenders); Daniel T. Wilcox & Daniel E. Sosnowski, *Polygraph Examination of British Sexual Offenders: A Pilot Study on Sexual History Disclosure Testing*, 11 J. SEXUAL AGGRESSION 3, 16 (2005) (fourteen offenders).

197. Grubin, *supra* note 117, at 183; see also *United States v. Johnson*, 588 F. Supp. 2d 997, 1006–07 (S.D. Iowa 2008) (criticizing Butner Study for lacking control group).

an independent variable, these studies are of a “pre-post design,” constructed to look at one factor—a factor *not* manipulated by the researchers—over a period of time.¹⁹⁸

Fourth, the SOTP research, like most psychological research, consists of convenience samples (i.e., the subjects were not randomly selected).¹⁹⁹ This, like the small sample size, plays a role in how much can be extrapolated from the collected data, which is a limitation that the Butner Study’s authors themselves noted.²⁰⁰

The fifth, and perhaps most notable limitation, is that SOTPs, by their very nature, only encompass individuals who have already been identified by the criminal justice system. This imports some level of sample bias into these studies, since offenders who get caught may be different from offenders who escape detection. Yet because of the difficulty in finding offenders who have gone undetected and will agree to participate in a study, rare is the study that examines this other class of individuals.²⁰¹

Finally, for those SOTPs that use the polygraph, critics also pounce on the use of the polygraph as an invalid and highly problematic tool.²⁰² These criticisms were dealt with in an earlier Section.²⁰³ In addition, the polygraph offsets another limitation of SOTPs—that they typically must rely on the self-reporting of the offender.²⁰⁴

198. E-mail from Dr. Bourke, *supra* note 192 (comparing research design to measurement of weather patterns over time).

199. *See, e.g.*, Johnson, 588 F. Supp. 2d at 1006 (criticizing Butner Study); Ron Kokish et al., *Post-Conviction Sex Offender Polygraph Examination: Client-Reported Perceptions of Utility and Accuracy*, 17 *SEXUAL ABUSE: J. RES. & TREATMENT* 211, 214 (2005); McCarthy, *supra* note 175, at 193.

200. *See* Bourke & Hernandez, *supra* note 2, at 190 (“While it is premature to define the relationship parameters at this time, future research should focus on clarifying these issues . . . to expand the generalizability of these findings.”).

201. Riegel conducted an anonymous Internet survey of 290 self-identified “Boy-Attracted Pedosexual Males,” 228 of whom reported never having any involvement with law enforcement. David L. Riegel, Letter to the Editor, *Effects on Boy-Attracted Pedosexual Males of Viewing Boy Erotica*, 33 *ARCHIVES SEXUAL BEHAV.* 321, 321 (2004). While it is possible that this was a more representative sample than data from prison or clinical populations, this still was a convenience sample. *Id.* at 322. While their responses were anonymous, these men chose to participate in the study, *id.* at 321, and there was no way to know how truthful they were being.

202. *See, e.g.*, Johnson, 588 F. Supp. 2d at 1006.

203. *See supra* Section II.D.

204. *See, e.g.*, Neutze et al., *supra* note 174, at 233; Proulx et al., *supra* note 196, at 127.

2. Using the Polygraph to Reveal Undetected Contact Sexual Offenses

The polygraph is a particularly important tool with regard to sex offenders because of the “secretiveness and denial that often accompany” their offending behavior.²⁰⁵ Complete information is, of course, only available from the offender himself.²⁰⁶ While for single-issue testing polygraph accuracy is typically reported to be between 85% and 95%,²⁰⁷ polygraph examinations that focus on less specific issues, as is the nature of sex offender testing, are often much less accurate²⁰⁸ and have been the subject of fewer studies.²⁰⁹ The level of specificity of sex offender testing is similar to that of an employee screening polygraph examination, the average accuracy of which is about 80%.²¹⁰

The levels of deception in sex offender populations, however, may actually boost the accuracy of the polygraph. Those who have a stronger motivation to lie are more readily detectable when they lie because this affects their physiological response.²¹¹ And sex offenders, especially in a pre-conviction examination, certainly have great motivation to avoid detection.²¹² The National Research Council determined that “once levels of deception in a target population rise to over 10 percent, [the] polygraph becomes viable.”²¹³ A deception rate of over 10% is virtually guaranteed amongst sex offenders, a supermajority of whom will lie about their offending behavior when confronted.²¹⁴

As deception base rates increase, positive predictive power increases and negative predictive power decreases, although a lower specificity and sensitivity exaggerate these changes.²¹⁵ At a 90% deception rate, with 90% sensitivity and specificity, the positive predic-

205. Abrams, *supra* note 64, at 261.

206. RONKEN & JOHNSTON, *supra* note 65, at 10.

207. Krapohl et al., *supra* note 116, at 2.

208. Anthony R. Beech et al., *The Internet and Child Sexual Offending: A Criminological Review*, 13 *AGGRESSION & VIOLENT BEHAV.* 216, 223 (2008); Kokish et al., *supra* note 199, at 212.

209. See Branaman & Gallagher, *supra* note 54, at 51.

210. Heil & English, *supra* note 29, at 197–98.

211. Abrams, *supra* note 64, at 251; cf. Heil & English, *supra* note 29, at 200 (“It is an underlying theory of polygraph testing that the subject must have something at stake for the test to register a physiological response.”).

212. See, e.g., Ahlmeyer et al., *supra* note 67, at 134 (finding eighty percent deception rate among studied offenders).

213. Grubin, *supra* note 87, at 447.

214. See, e.g., Madsen, *supra* note 107, at 163 (noting that research has suggested that up to 90% of offenders are dishonest about their offending behavior and offense history).

215. *Id.* at 162.

tive power becomes 99%, and the negative predictive power becomes 50%.²¹⁶ When sensitivity and specificity are 95%, these numbers become 99% and 68%, respectively.²¹⁷ This means that in sex offender populations, assuming a 90% deception rate,²¹⁸ 99% of those who are diagnosed as deceptive on their polygraph examination are actually being deceptive.

Critics argue that the polygraph is not an effective tool with sex offenders because of their cognitive distortions²¹⁹ and their tendency to rationalize and minimize their actions.²²⁰ But rather than invalidate the use of the technique, this merely necessitates precise wording of the questions asked. Questions must be morally neutral and specifically define events so as not to allow for subjectivity.²²¹ However, it is true that it may be difficult to design suitable comparison questions related to sexual abuse,²²² because many of a sex offender's undetected crimes are likely to be covered by a typical comparison question (e.g., "Have you ever committed a sex act that you were ashamed of?").²²³

There is a general concern that "psychopaths might be able to deceive [a] polygraphist because of their poorly developed sense of guilt," but the research has not borne this out.²²⁴ While psychopaths may lack a conscience, they, like their nonpsychopathic criminal counterparts, do still have *some* fear of being found out due to the consequences.²²⁵ Furthermore, this is less of an issue in this context since most child pornography offenders are not psychopathic.²²⁶

216. *Id.*

217. *Id.*

218. *See infra* note 247.

219. Cognitive distortions are sexualized beliefs that offenders have about their victims and behaviors in order to justify the sexual abuse of children. Andrew Bates & Caroline Metcalf, *A Psychometric Comparison of Internet and Non-Internet Sex Offenders from a Community Treatment Sample*, 13 J. SEXUAL AGGRESSION 11, 16 (2007). *See* Anne Burke et al., *Child Pornography and the Internet: Policing and Treatment Issues*, 9 PSYCHIATRY, PSYCHOL. & L. 79, 82 (2002), for a table listing various examples of cognitive distortions.

220. Cross & Saxe, *supra* note 92, at 200.

221. Williams, *supra* note 128, at 58–59.

222. Cross & Saxe, *supra* note 92, at 200.

223. Iacono, *supra* note 74, at 1299.

224. Abrams, *supra* note 64, at 251; *cf.* Blasingame, *supra* note 113, at 41 (noting the same lack of confirmatory research for "[p]ersonality-disordered clients" in general).

225. Abrams, *supra* note 64, at 251. *But see* Faller, *supra* note 47, at 995 (questioning whether sex offenders are desensitized to anxiety and are so accustomed to lying to cover their abusive acts that a polygraph would not be effective).

226. *See infra* note 512 and accompanying text.

In the context of SOTPs, the polygraph is used as more of a diagnostic tool, which is generally considered to be a more favorable utilization. A large proportion of the SPR membership, ranging from 44% in one survey to 62% in another, agreed that the polygraph can be a useful diagnostic tool when it is considered with other information.²²⁷

Numerous studies have demonstrated the effectiveness of the polygraph in generating disclosures of additional sexual crimes and victims by offenders in SOTPs.²²⁸ In general, sex offenders who are polygraphed during treatment admit to having four to six times as many victims as those who are not,²²⁹ and some studies demonstrate an even larger polygraphic effect.²³⁰ Through the polygraph, it has also been found that offenders tend to significantly underreport whether they masturbate to child pornography,²³¹ the level of graphicness of their preferred pornography,²³² their tendency to watch pornography featuring very young children,²³³ whether they have abused children of both genders,²³⁴ the number of relationships they have exploited,²³⁵ and the level of force used in their

227. Iacono & Lykken, *supra* note 80, at 427.

228. *See, e.g.*, Abrams, *supra* note 64, at 260 (total disclosures of deviant acts grew from 2085 to 13,680); Ahlmeyer et al., *supra* note 67, at 132 (mean number of victims increased from four to 169 and mean number of offenses increased from ten to 885); Emerick & Dutton, *supra* note 175, at 89–90 (mean number of child victims of adolescent sex offenders increased from 1.87 to 2.85 and mean number of assaults increased from 20.65 to 76.59); Wilcox & Sosnowski, *supra* note 196, at 9–11 (total number of victims increased from 673 to 2598 and total number of offenses increased from 1285 to 5853); *cf.* Grubin, *supra* note 174, at 274 (noting that new disclosures were reported in 70% of polygraph examinations).

229. James M. Peters, *Assessment and Treatment of Sex Offenders: What Attorneys Need to Know*, 42 *ADVOC.* 21, 23 (1999).

230. *See, e.g.*, Grubin, *supra* note 174, at 271 (finding that polygraphed offenders were more than fourteen times more likely to make disclosures).

231. Jos Buschman & Stefan Bogaerts, *Polygraph Testing Internet Offenders*, in *THE USE OF THE POLYGRAPH IN ASSESSING, TREATING AND SUPERVISING SEX OFFENDERS: A PRACTITIONER'S GUIDE*, *supra* note 29, at 113, 119 (increasing from 67% to 100%).

232. *Id.*

233. *Id.* at 120.

234. Emerick & Dutton, *supra* note 175, at 90–91 (finding that the percentage of adolescent sex offenders acknowledging assaulting children of both genders almost doubled). Those who had abused both boys and girls abused more than twice as many victims on average as those who abused children of only one gender. *Id.* at 91.

235. *Id.* at 91–92 (finding that percentage who admitted to abusing children from multiple social relationships increased from 28.9% to 46.7%).

contact sexual offenses.²³⁶ The polygraph has also shown that offenders do not accurately reveal how old they were when they committed their first contact sexual offense²³⁷ or how old they were when they started masturbating to child pornography.²³⁸ Polygraphed offenders also report being victims of sexual abuse in dramatically lower numbers.²³⁹

The FBI conducted a study of 251 randomly selected cases resulting in conviction, 63% of which were solely child pornography possession cases.²⁴⁰ Out of the 234 cases in which polygraph information was available, approximately a dozen suspects were polygraphed.²⁴¹ 69% of these individuals were deemed deceptive, and the other 31% of the tests were inconclusive.²⁴² None of the polygraphed offenders passed conclusively.²⁴³ One polygraphed child pornography offender initially denied any sexual attraction to children but confessed to the molestation of twenty-two victims in more than 100 assaults over four years during his polygraph pre-test.²⁴⁴ During the examination itself, deception was still indicated on whether this offender had sexual contact involving penetration or oral sex with any of these children.²⁴⁵ During the post-test interview, he admitted that such sexual acts “‘could have’ happened.”²⁴⁶

The data available from two confidential surveys of offenders who partook in a SOTP further supports the validity of the use of the polygraph in such programs. Based on the data, the polygraph's sensitivity was just over 80% in both studies, the specificity was 85% in one study and 92% in the other, the positive predictive power was 47% in one and 69% in the other, and the negative predictive power was 97% in both.²⁴⁷ The low positive predictive power in

236. *Id.* at 92–93 (finding that the percentage alleging a non-coercive assault declined by over one-third).

237. Wilcox & Sosnowski, *supra* note 196, at 13 (dropping from average age of 27.9 to 16.3).

238. Buschman et al., *supra* note 169, at 403 (plunging from average age of forty-one to eighteen).

239. Hindman & Peters, *supra* note 57, at 10.

240. FBI REPORT, *supra* note 45.

241. Records were clear that offenders were asked to take a polygraph in nineteen cases, although in seventeen cases it was unknown if the offender had been polygraphed or not. *See id.*

242. FBI REPORT, *supra* note 45.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Madsen, *supra* note 107, at 158.

both studies can be explained by the low deception base rates (14% and 12%, respectively).²⁴⁸

Two studies conducted an anonymous survey of the offenders themselves to try to investigate the frequency of offender deception in SOTPs and the ability of the polygraph to detect this deception. One study found that 28% of the sex offenders they sampled admitted deception,²⁴⁹ 83% of whom said that they had gotten caught.²⁵⁰ In all, 21% of the offenders studied said that they had been wrongly diagnosed as deceptive when they were telling the truth, and 5% said they were wrongly deemed truthful when they were actually lying.²⁵¹

A similar study, which looked at individual polygraph examinations instead of individual offenders, found that offenders reported having been truthful in 90% of the polygraphs taken while examiners rated 84% of the charts as nondeceptive.²⁵² Offenders reported that they were incorrectly labeled deceptive in 6% of the total examinations they took and incorrectly rated nondeceptive in 3%.²⁵³ These studies collectively demonstrate that, while not perfect, the polygraph is a useful and sufficiently accurate tool in uncovering a history of contact sexual offending by sexual offenders that, in all likelihood, would not otherwise have been detected.

III.

THE CONNECTION BETWEEN CHILD PORNOGRAPHY AND CONTACT SEXUAL OFFENSES

There are multiple reasons why individuals may look at child pornography. The primary categories for child pornography users in the literature, as classified by their motivations for looking at the pornography, are recreational users (also known as “situational offenders” or “dabblers”), sexual compulsive users, preferential offenders, miscellaneous offenders,²⁵⁴ and sexual “profiteers.”²⁵⁵ Recreational users access child pornography on impulse or out of

248. *See id.*

249. It is important to note that because of the way the CQT is designed, some offenders may incorrectly believe they have “beaten” the polygraph since they may be unaware whether they are being deceptive to the comparison or relevant questions. Madsen, *supra* note 107, at 159–60.

250. Grubin & Madsen, *supra* note 96, at 480.

251. *Id.*

252. Kokish et al., *supra* note 199, at 216, 218.

253. *Id.* at 216.

254. Calder, *supra* note 8, at 8–9.

255. HARTJEN & PRIYADARSINI, *supra* note 14, at 200.

curiosity based on a penchant for pornography and a desire to look at a wide range of pornographic material.²⁵⁶ Sexual compulsive users view child pornography because of the extremeness of its content rather than a particular preference for children.²⁵⁷ Preferential offenders mostly consist of pedophiles with a definite preference for children.²⁵⁸ Miscellaneous offenders consist of media reporters and concerned citizens who have crossed the line from investigation into offending, as well as pranksters and older teenagers attempting to sexually interact with younger teenagers.²⁵⁹ Profiteers do not necessarily enjoy looking at child pornography but rather use it for financial gain.²⁶⁰ This Note is primarily focused on the relationship between preferential offenders and child molestation because preferential offenders are the most likely to molest children²⁶¹ and because the data seems to indicate that preferential offenders make up the majority of child pornography offenders.²⁶²

The primary motivation for preferential offenders is pedophilia,²⁶³ defined as a persistent sexual interest in prepubescent children.²⁶⁴ The terms “pedophile” and “child mo-

256. Calder, *supra* note 8, at 8–9.

257. Quayle et al. examined a case study of an offender who began using the Internet to look at adult pornography and progressed to child pornography as part of a “continuum of engagement.” Ethel Quayle et al., *The Internet and Offending Behaviour: A Case Study*, 6 J. SEXUAL AGGRESSION 78, 86–89 (2000). As satiation with other types of pornography set in, he progressed to more extreme images. *Id.* at 94.

258. Calder, *supra* note 8, at 9.

259. *Id.*

260. HARTJEN & PRIYADARSINI, *supra* note 14, at 200.

261. EVA J. KLAIN ET AL., CHILD PORNOGRAPHY: THE CRIMINAL-JUSTICE-SYSTEM RESPONSE, AMERICAN BAR ASS’N CTR. ON CHILDREN & LAW 4 (2001), available at <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=201355>.

262. See *infra* notes 307–09 and accompanying text.

263. See Calder, *supra* note 8, at 9.

264. Neil Malamuth & Mark Huppín, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 792 (2007) (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 572 (4th ed., text rev. 2000)). Technically speaking, a “pedophile” is attracted to children thirteen years old or younger, *id.*, while an individual who has a sexual preference for pubescent children or older adolescents would be deemed a hebephile or ephebophile, respectively, see Peter Briggs et al., *An Exploratory Study of Internet-Initiated Sexual Offenses and the Chat Room Sex Offender: Has the Internet Enabled a New Typology of Sex Offender?*, 23 SEXUAL ABUSE: J. RES. & TREATMENT 72, 75 (2011). These clinical terms, however, are not frequently used even by mental-health professionals, see LANNING, *supra* note 9, at 19, and, even when they are used, they are not used with consistent meanings, see, e.g., Janis Wolak et al., *Online “Predators” and Their Victims: Myths, Realities, and Implications for Prevention and Treatment*, 63 AM. PSYCHOLOGIST 111, 119 (2008) (defining

lester” are frequently conflated, but this misconstrues the complex relationship between sexual desires and sexual actions.²⁶⁵ While a pedophile might sexually prefer children and fantasize about acting on these desires, without such action, he is not a child molester.²⁶⁶ Further, child molesters violate children for a variety of reasons, of which true sexual desire is only one.²⁶⁷ An offender may, for example, fear adult partners; seek out children out of impulse, curiosity, or anger; or be sexually aroused by the power and control he can exert over a child or by the danger and excitement of the forbidden act.²⁶⁸ To be sure, many child molesters are pedophiles and many pedophiles are child molesters,²⁶⁹ but failing to appreciate the differences between these two groups, and attributing action to nothing more than carnal desires, is a gross oversimplification.

There are many reasons why an offender might commit a sexual offense against a child beyond sexual preference; however, when looking at pornography, viewers are likely to choose a type that corresponds to their sexual interests.²⁷⁰ In other words, it is unlikely that individuals who do not find child pornography to be sexually stimulating would view it, given the severe penalties for doing so.²⁷¹ It may also be the case, however, that child pornography offenders do not act on their pedophilic interests because of a desire to avoid emotional closeness in sexual relationships. That is, they reduce their sexual relationships to pictures in order to avoid people.²⁷² Offenders may also use child pornography as a way to

“ephebophile” to refer to men attracted to adolescent boys). Thus for simplicity and for clarity, I will use “pedophile” in its colloquial sense—an adult attracted to minor children.

265. LANNING, *supra* note 9, at 29.

266. *Id.*

267. *Id.*

268. Wolak et al., *supra* note 264, at 119.

269. LANNING, *supra* note 9, at 30; *see also* Malamuth & Huppín, *supra* note 264, at 793 (estimating that between 40% and 50% of child molesters are clinically pedophilic).

270. Michael C. Seto, James M. Cantor & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. ABNORMAL PSYCHOL. 610, 613 (2006); *cf.* United States v. Curtin, 489 F.3d 935, 948 (9th Cir. 2007) (finding defendant’s possession of stories about sexual contact with minors to be relevant evidence towards his subjective intent to engage in such activity).

271. *See* Malamuth & Huppín, *supra* note 264, at 793 n.112 (noting that a person who possesses child pornography must have sufficient motivation to break the law); Seto, Cantor & Blanchard, *supra* note 270, at 613 (questioning why nonpedophilic men would choose illegal child pornography given the abundance of legal adult pornography).

272. Kelly M. Babchishin et al., *The Characteristics of Online Sex Offenders: A Meta-Analysis*, 23 SEXUAL ABUSE: J. RES. & TREATMENT 92, 108 (2011).

deal with negative moods²⁷³ or to escape reality.²⁷⁴ A form of “pseudo-intimacy” may develop between the offender and particular images that allows him to experience a level of social cohesion more important to him than sexual arousal.²⁷⁵ But this hypothesis also cuts the other way. A diminished capacity for intimacy also enables offenders to more easily objectify the children pictured and reduces their ability to empathize with them.²⁷⁶ Significantly, intimacy deficits are themselves another possible cause of contact sexual offending.²⁷⁷

Findings imply that most child pornography offenders are in fact preferential offenders with true pedophilic desires.²⁷⁸ Child pornography offending has been found to be more indicative of pedophilia than committing a contact sexual offense against a child.²⁷⁹ Child pornography offenders also show a greater demon-

273. Ian A. Elliott & Anthony R. Beech, *Understanding Online Child Pornography Use: Applying Sexual Offense Theory to Internet Offenders*, 14 *AGGRESSION & VIOLENT BEHAV.* 180, 183 (2009).

274. In one study of child pornography offenders, the offenders said that avoiding real life was the most important function of the pornography for them. Brigitta Surjadi, *Internet Offending: Sexual and Non-Sexual Functions Within a Dutch Sample*, 16 *J. SEXUAL AGGRESSION* 47, 54–55 (2010).

275. See Elliott & Beech, *supra* note 273, at 183; see also Laulik et al., *supra* note 196, at 532 (“Internet offenders may engage with Internet sites that depict indecent images of children as a means to meet their sexual needs without the intimacy of a relationship.”).

276. Laulik et al., *supra* note 196, at 532.

277. David Middleton et al., *An Investigation into the Applicability of the Ward and Siegert Pathways Model of Child Sexual Abuse with Internet Offenders*, 12 *PSYCHOL., CRIME & L.* 589, 594 (2006) (noting that offenders may be motivated to offend during times of prolonged loneliness or at times of rejection).

278. Bourke & Hernandez, *supra* note 2, at 185 (“[O]nly a very small minority of offenders (e.g., psychopaths) who commit child pornography crimes are motivated by non-sexually deviant interests; rather, most are motivated by a pre-existing sexual interest in minors.”). In one sample of offenders, over 40% admitted to having a sexual interest in children. Seto et al., *supra* note 180, at 175. In reality, it is likely that in reality this proportion is even higher given offenders’ incentives to deny and minimize their deviant behavior. See *infra* notes 371, 519. Only a slightly smaller proportion of this sample, for example, claimed to have accessed this pornography by accident. Seto et al., *supra* note 180, at 175.

279. Seto, Cantor & Blanchard, *supra* note 270, at 612–13 (finding that child pornography offenders were three times more likely than contact-only offenders to demonstrate physical sexual attraction to children); cf. *United States v. Brand*, 467 F.3d 179, 197–98 (2d Cir. 2006) (holding that child pornography and pedophilia are sufficiently linked such that child pornography was admissible “prior act” evidence in trial for a contact sexual offense); *United States v. Byrd*, 31 F.3d 1329, 1336 n.9 (5th Cir. 1994) (allowing pedophilia to be used to demonstrate predisposition for child pornography to defeat entrapment defense). However, when compared with other child pornography offenders, those with contact sexual offenses

strated preference for child pornography than adult pornography, which is not seen as frequently in contact sexual offenders.²⁸⁰

While many offenders initially deny having such desires, over the course of treatment, the vast majority will acknowledge their pedophilic interests.²⁸¹ This link between child pornography and pedophilia is particularly significant because pedophilia may be the most dangerous motivation for committing contact sexual offenses.²⁸² Child molesters with pedophilia molest 88% of all child victims and commit 95% of the sex acts against children.²⁸³ Therefore the possibility that child pornography offenders with strong attractions to children may be perpetrating contact sexual offenses is particularly worrisome.

A. Direct Causal Relationship

It is axiomatic that child pornography production²⁸⁴ is a direct cause of contact sexual offenses against children because the production of child pornography necessarily requires the exploitation of a child.²⁸⁵ Child pornography production is thus inextricably

are more likely to be pedophilic than those without. See McCarthy, *supra* note 175, at 188 (diagnosing 68% of child pornography offenders in sample with contact sexual offenses as pedophilic, compared to 38% of pornography-only offenders).

280. Seto, Cantor & Blanchard, *supra* note 270, at 613.

281. Bourke & Hernandez, *supra* note 2, at 185.

282. See Seto et al., *supra* note 180, at 178 (“[C]hild pornography offenders who are motivated by a sexual interest in children or by indiscriminate sexual interests may pose a greater concern with regard to risk to offend against children than those who are motivated as a result of compulsive behaviour involving the internet [sic] or pornography, curiosity or other non-paedophilic reasons.” (internal citation omitted)); *Child Pornography Offending—Pathways, Community, Treatment: Public Hearing on Federal Child Pornography Offenses Before the U.S. Sentencing Comm’n*, 5 (2012) (presentation by Gene G. Abel, Med. Director, Behavioral Med. Inst. Atlanta) (noting that child molesters with pedophilia molest 88% of all child victims and commit 95% of the sex acts against children).

283. Abel, *supra* note 282.

284. Only 5% of child pornography defendants in 2006 were charged with production. Hansen, *supra* note 37. It is estimated that there were 859 arrests for production in 2006, up from an estimated 402 between July 2000 and June 2001. Wolak et al., *supra* note 16, at 189, 193.

285. LANNING, *supra* note 9, at 110–11; Beech et al., *supra* note 208, at 218. It is true that not all child pornography production requires the physical abuse of a child. See Wolak et al., *supra* note 16, at 193 (noting that about one-third of arrests for child pornography production in 2006 were not paired with a contact sexual offense). But even children photographed without their knowledge have been victimized, meaning that child pornography featuring a real child *cannot* be created without child exploitation. Cf. KLAIN ET AL., *supra* note 261, at 39 (“[S]ome children are photographed without their knowledge . . . [y]et depending on how the offender uses the material, all these children can be considered exploited.”).

linked with sexual abuse.²⁸⁶ In fact, many argue that the phrase “child pornography” is inappropriate because it trivializes the abuse that it depicts and draws an unwarranted comparison to adult pornography.²⁸⁷

Outside of production, the relationship between child pornography and contact sexual offenses becomes so attenuated that a causal relationship is virtually impossible to prove. While much research has been done on the effects of *adult* pornography on behavior, even this research is far from conclusive. The data tends to show “a positive, albeit small-to-moderate, association between greater pornography consumption and sexually aggressive tendencies.”²⁸⁸ This association is stronger for nonconsensual pornography,²⁸⁹ which child pornography invariably,²⁹⁰ though perhaps not ostensibly,²⁹¹ is. Experimental studies demonstrate similar conclusions, which indicate that pornography consumption may cause the increase in sexual aggression.²⁹²

This research suggests, however, that pornography has a greater effect on those individuals who already exhibit sexually aggressive tendencies.²⁹³ Additionally, those with antisocial tendencies,²⁹⁴ which child pornography offenders may not always have,²⁹⁵

286. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY, FINAL REPORT 406 (1986) [hereinafter MEESE COMMISSION] (“[C]hild pornography is child abuse.”).

287. Beech et al., *supra* note 208, at 218; see also Edwards, *supra* note 37, at 1 (comparing use of the term “child pornography” to use of the term “ethnic cleansing”).

288. Malamuth & Huppín, *supra* note 264, at 814.

289. *Id.*

290. See Ost, *supra* note 40, at 455 (noting that children always lack capacity to consent to involvement in pornography).

291. See Belinda Winder & Brendan Gough, “I Never Touched Anybody—That’s My Defence”: A Qualitative Analysis of Internet Sex Offender Accounts, 16 J. SEXUAL AGGRESSION 125, 130 (2010) (noting that children pictured in pornography often appear to be happy).

292. Malamuth & Huppín, *supra* note 264, at 814.

293. E.g., Drew A. Kingston et al., *Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders*, 34 AGGRESSIVE BEHAV. 341, 348 (2008); Malamuth & Huppín, *supra* note 264, at 815. But see MEESE COMMISSION, *supra* note 286, at 324–27 (noting that exposure to sexually violent material increases aggression and causes viewers to have less sympathy for victims of sexual violence).

294. Malamuth & Huppín, *supra* note 264, at 816.

295. There is some debate about whether or not child pornography offenders are antisocial. See McCarthy, *supra* note 175, at 182 (noting two studies that found antisocial orientation to be significant for child pornography offenders and two that did not). On average, they do score lower than contact sexual offenders do with respect to antisocial tendencies such as impulsivity, rejection of personal re-

and a proclivity for deviant sex, which all pedophilic child pornography offenders do have by nature of their sexual orientation, may also become more sexually aggressive after repeated exposure to deviant pornography.²⁹⁶

Berl Kutchinsky, while a professor at the University of Copenhagen, conducted perhaps the most famous study on the effect of pornography on sexual crimes. After pornography was decriminalized in Denmark in the 1960s, sexual offenses against girls decreased 69.1%—from 282 incidents in 1959 to eighty-seven incidents in 1969.²⁹⁷ Given the problems with extrapolating from general crime data,²⁹⁸ Kutchinsky analyzed whether other factors could have been responsible for the decline in sexual crimes.²⁹⁹ He concluded that there was no other explanation for the decrease in sex offenses against girls other than the increased availability of pornography.³⁰⁰ Kutchinsky also noted a similar result in West Germany after pornography was legalized in 1973.³⁰¹ Kutchinsky’s study has, however, been heavily criticized for a variety of reasons.³⁰² These criticisms and a lack of data demonstrating a similar effect make Kutchinsky’s conclusion somewhat dubious.

sponsibility, substance abuse, and antisocial behavior than contact sexual offenders, Michael C. Seto et al., *Online Solicitation Offenders are Different from Child Pornography Offenders and Lower Risk Contact Sexual Offenders*, 36 L. & HUM. BEHAV. 320, 320 (2012). In general, however, there is a dearth of research in this area. Babchishin et al., *supra* note 272, at 108 (noting need for additional studies into self-control and impulsivity of child pornography offenders).

296. Malamuth & Huppel, *supra* note 264, at 816.

297. Berl Kutchinsky, *The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience*, 29 J. SOC. ISSUES 163, 166 (1973).

298. See Becker & Stein, *supra* note 12, at 86 (noting that in nonlaboratory studies there are too many covariates to be able to determine cause and effect).

299. See generally Kutchinsky, *supra* note 297 (examining possible changes in public and police attitudes towards sexual crime).

300. *Id.* at 178 (“So far no one has been able to point to any factor other than the availability of pornography which could explain the specific course of the decrease in sex offenses against girls.”); Berl Kutchinsky, *Pornography and Its Effects in Denmark and the United States: A Rejoinder and Beyond*, 8 COMP. SOC. RES. 301, 313 (1985) (“[T]he ‘substitution hypothesis’ seems to be the most likely explanation for the [] decrease [].”).

301. Kutchinsky, *supra* note 300, at 319.

302. See, e.g., Ernest D. Giglio, *Pornography in Denmark: A Public Policy Model for the United States?*, 8 COMP. SOC. RES. 281, 291 (1985) (finding that Kutchinsky did not include all serious reported sexual offenses against minors in his data set); TATE, *supra* note 11, at 56 (noting that juvenile boys, who account for at least half of all reported cases of molestation, were excluded from study); MEESE COMMISSION, *supra* note 286, at 941–44 (advising skepticism about Kutchinsky’s results and discussing other similar studies that do not support these results).

While child pornography production obviously has a direct causal relationship with contact sexual offending, the relationship between viewing such pornography and contact sexual offending is extraordinarily difficult to prove. Although a causal relationship would bolster the argument for this Note's proposed post-arrest polygraph program, that such a relationship cannot be proven does not undermine the need for such a program. As is discussed more below, a correlation between these two types of offending is sufficient basis to justify this program.

B. Influential/Stimulative Relationship

While proving a causal relationship is fraught with difficulty, there is significant evidence that child pornography may have an influential or stimulative effect on the perpetration of contact sexual offenses against children. The literature discusses several possible reasons why child pornography may stimulate an offender's urge to commit contact sexual offenses.

1. False Impressions

Some theorize that child pornography creates various false impressions that may increase a child pornography offender's likelihood and desire to offend. The offender may believe that due to child pornography's profusion, the events depicted in the pornography are common.³⁰³ This in turn may normalize and legitimize the abuse and reduce the offender's inhibitions to transgress,³⁰⁴ as well as validate his actions and assure him that his behavior is acceptable.³⁰⁵

Child pornography also fosters and encourages distorted perceptions of children. It promotes a perception of children as being submissive objects who can (and should) be used for sexual exploitation,³⁰⁶ which serves to dehumanize children and desensitize the offender to the harm being done to the exploited child.³⁰⁷ Since children often appear happy in pornographic images, offenders may be led to believe that the child victims are enjoying the

303. Beech et al., *supra* note 208, at 222.

304. Middleton et al., *supra* note 277, at 590; HARTJEN & PRIYADARSINI, *supra* note 14, at 191.

305. TATE, *supra* note 11, at 24.

306. See Ost, *supra* note 40, at 455 (“[B]ecause of the completely unequal relationship of power between adult and child, the child can only ever feature as a passive subject, exploited as a sexual object by the adult.”).

307. Bourke & Hernandez, *supra* note 2, at 188.

sexual acts depicted.³⁰⁸ The image of the smiling child reinforces a perceived innocence of the activity as viewers equate the smiling in the image with the consent of the victimized child.³⁰⁹

Social learning theory dictates that people learn indirectly about their social world by observation and that behavior portrayed as rewarding encourages individuals to mimic that behavior.³¹⁰ Thus when child pornography offenders see children depicted as enjoying themselves, these offenders will not only want to act out what they see, but may also be inspired to produce pornography themselves.³¹¹ In this way, pornography “becom[es] the model that encourages and generates viewers to take photographs themselves” and inspires the offender to commit contact sexual offenses.³¹²

2. Positive Reinforcement and the Internet

Child pornography serves to reinforce both the offender’s sexual attraction to children and his self-justifications for not only having such an attraction, but also for acting on it.³¹³ As an offender masturbates to child pornography, his engagement in fantasy, and the subsequent conditional pairing of this with masturbation and orgasm, lowers his inhibitions for committing a contact sexual offense.³¹⁴ Sexual arousal may also increase the motivation for, and perceived attraction of, contact sexual offending.³¹⁵ The illegality of the pornography can magnify and heighten this arousal,³¹⁶ and such a heightened state of arousal impedes the ability of the offender to appreciate the immediate and long-term harms done to the exploited child.³¹⁷

308. Winder & Gough, *supra* note 291, at 130.

309. *Id.*

310. TAYLOR & QUAYLE, *supra* note 12, at 71.

311. *See id.* at 186.

312. *Id.* at 25 (describing offender who commented that looking at child pornography reinforced his already-present pedophilic interest and made him want to act on it).

313. Beech et al., *supra* note 208, at 222.

314. *Id.*; *see also* Kerry Sheldon & Dennis Howitt, *Sexual Fantasy in Paedophile Offenders: Can Any Model Explain Satisfactorily New Findings from a Study of Internet and Contact Sexual Offenders?*, 13 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 137, 140 (2008) (noting how masturbation reinforces fantasy behavior and allows the offender to progress to contact sexual offending). *But see* Seto, *supra* note 28, at 342 (finding evidence of such Pavlovian conditioning to be equivocal).

315. Malamuth & Huppin, *supra* note 264, at 791.

316. Calder, *supra* note 8, at 11.

317. Elliott & Beech, *supra* note 273, at 185 (“[S]tates of sexual arousal[] can affect the individual’s willingness[] and/or ability to infer mental states in others.”).

While some offenders purposefully masturbate to images of children in order to prevent themselves from engaging in contact sexual offenses,³¹⁸ this may actually increase their risk of committing such offenses.³¹⁹ One study of child pornography offenders found that those who had also committed contact sexual offenses were more likely to masturbate to the child pornography in their possession than those who had not committed contact sexual offenses (91% as compared to 51%, respectively).³²⁰ This positive reinforcement initiates a cycle whereby the offender utilizes child pornography even more frequently.³²¹

This positive reinforcement is exacerbated by the nature of the Internet itself. The Internet is a “unique criminological environment”³²² that lowers users’ inhibitions and incites them to do things that they otherwise might not.³²³ The anonymity, opportunity to offend, and lack of supervision that the Internet provides allow motivated offenders to download and distribute child pornography with relative ease.³²⁴ These defining attributes of the Internet lower the barrier for some individuals to succumb to temptations that they otherwise would have effectively controlled.³²⁵

One problematic characteristic of the Internet is deindividuation, “a psychological state where inner restraints are lost when individuals are not seen or paid attention to as individuals.”³²⁶ This leads people to behave more selfishly and more aggressively and results in impulsive disinhibited behavior.³²⁷ The Internet’s dehumanizing effect enables offenders to further normalize and legiti-

318. *See infra* Section III.D.

319. Elliott & Beech, *supra* note 273, at 189 (“[C]hild pornography use represents a maladaptive strategy to avoid contact offending against children, and . . . fantasy rehearsal and masturbation makes failure to achieve these avoidant goals more likely.”).

320. McCarthy, *supra* note 175, at 189.

321. *Cf.* Laulik et al., *supra* note 196, at 532–33 (noting use of pornography to relieve negative moods).

322. Elliott & Beech, *supra* note 273, at 185.

323. *See* Calder, *supra* note 8, at 11 (noting how the Internet lowers sexual inhibitions); Quayle et al., *supra* note 257, at 93–94 (presenting a case study of an offender for whom the Internet allowed offending behavior to emerge that was not part of “his previous repertoire of behaviour”).

324. *See* Babchishin et al., *supra* note 272, at 93.

325. *See id.*

326. Christina Demetriou & Andrew Silke, *A Criminological Internet “Sting”: Experimental Evidence of Illegal and Deviant Visits to a Website Trap*, 43 *BRIT. J. CRIMINOLOGY* 213, 214 (2003) (citation omitted) (internal quotation marks omitted).

327. *Id.*

mize deviant behaviors,³²⁸ which may be why child pornography offenders are more likely to be sexually deviant than contact sexual offenders.³²⁹ Deindividuation has been linked with a range of criminal behavior, such as stealing, murder, and other violent activity,³³⁰ all of which, like sexual abuse, involve a disregard for the welfare of others.

Another way that the Internet positively reinforces pedophilic behavior is that pedophiles often convene online, forming communities that encourage and sustain each other's offending.³³¹ These communities provide a sense of peer support and validation.³³² The exchange of pornographic images acts as additional social reinforcement that validates and legitimizes the offenders' activities.³³³ One study of child pornography offenders found that 50% of those who had also committed contact sexual offenses communicated with other pedophiles online, compared with 11% of those without contact sexual offenses.³³⁴ This community encouragement, combined with other influences, may inspire child pornography offenders to commit contact sexual offenses.

3. Fantasy

The fantasies that child pornography evokes may serve as additional positive reinforcement of an offender's desires. The relationship between fantasy and offending is admittedly complex and under-researched.³³⁵ It is clear, however, that just as normal individuals fantasize about things they would never do in real life,³³⁶ some pedophiles fantasize about sexual acts with children that they will never attempt to carry out.³³⁷ Rather than a precursor to crime, such fantasies may actually be a “substitute for action, a largely sepa-

328. Elliott et al., *supra* note 49, at 78.

329. Seto et al., *supra* note 295, at 320.

330. Demetriou & Silke, *supra* note 326, at 214.

331. Beech et al., *supra* note 208, at 221–22.

332. *Id.* at 222.

333. Calder, *supra* note 8, at 11; *cf.* Bourke & Hernandez, *supra* note 2, at 188 (observing that these online communities serve as online “trading posts”).

334. McCarthy, *supra* note 175, at 189.

335. Dennis Howitt, *Pornography and the Paedophile: Is it Criminogenic?*, 68 BRIT. J. MED. PSYCHOL. 15, 16 (1995).

336. One study found that non-offender women reported having particular sexual fantasies that they adamantly did not want to realize. Sheldon & Howitt, *supra* note 314, at 138.

337. *See* Howitt, *supra* note 335, at 15.

rate stream of experience or a substitute for reality.”³³⁸ This is the claim of many child pornography offenders.³³⁹

This is borne out by some of the research, as contact sexual offenders have been found to have lower fantasy rates.³⁴⁰ It may be the case that these offenders need to commit contact sexual offenses in order to generate masturbatory fantasies about children,³⁴¹ whereas the higher intelligence of Internet child pornography offenders may allow them to generate fantasies more effectively or efficiently.³⁴² However, the ability to fantasize is no longer a prerequisite to the use of pornography given the proliferation of hard-core picture pornography.³⁴³

While it can be argued that child pornography offenders’ fantasies prevent or displace criminal activity, these fantasies may play some role in offending. Generally speaking, “sexual fantasies can lead to physiological arousal, which, in turn, can motivate the preparation for actual sexual behaviour.”³⁴⁴ Fantasy, often through the lens of pornography, may serve as a blueprint for offending (i.e., the fantasy lays the foundation for how the offense will take

338. DENNIS HOWITT, PAEDOPHILES AND SEXUAL OFFENCES AGAINST CHILDREN 161 (1995); *see also infra* Section III.D.

339. Offenders’ own statements about their child pornography usage must, however, be taken with a grain of salt given the potential selfish motives of making such statements. HOWITT, *supra* note 338, at 165; *see also* Neutze et al., *supra* note 174, at 216 (“[C]hild sexual abuse offenders seem to exhibit a tendency to portray themselves in a favorable light.”). Statements by offenders about their pornography habits are often made in order to deflect blame and responsibility. *See* Seto et al., *supra* note 180, at 171 (hypothesizing that offenders would make excuses for their pornography usage in order to diminish their level of culpability).

340. *See* Sheldon & Howitt, *supra* note 314, at 153.

341. *Id.* This may be why child molesters report a significant increase in masturbatory fantasies after their first offense and why many contact sexual offenses involve touching and similar activities that don’t immediately result in orgasm—the offending is a means of generating fantasy for later masturbation rather than to achieve immediate sexual satisfaction. *Id.*; *see also* BERL KUTCHINSKY, LAW, PORNOGRAPHY, AND CRIME: THE DANISH EXPERIENCE 260 (Annika Snare ed., 1999) (“[T]he purpose of the offender when committing a sex crime is to obtain some sort of sexual satisfaction, which ultimately expresses itself in orgasm. Very often, this orgasm is obtained through masturbation while or immediately after committing the crime.”).

342. Sheldon & Howitt, *supra* note 314, at 153 (“[T]he lower education level of contact offenders may mean that they do not have the same ability to fantasize as Internet offenders.”).

343. *See* KUTCHINSKY, *supra* note 341, at 261.

344. Edward C. Nelson, *Pornography and Sexual Aggression*, in THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOUR 171, 184 (Maurice Yaffe & Edward C. Nelson eds., 1982).

place).³⁴⁵ This is particularly salient because of the desensitizing effect of pornography.³⁴⁶ Pornography-generated fantasy may also be used to stimulate sexual arousal, possibly in preparation for an offense.³⁴⁷

These findings demonstrate that pornography’s use in fantasy contributes to contact sexual offenses that are related to these fantasies. This additional relationship between child pornography and contact sexual offending indicates the need for the proposed post-arrest polygraph program.

4. Cognitive Distortions

Child pornography and contact sexual offenders alike are susceptible to cognitive distortions that allow them to excuse their offensive behavior, minimize its harmful effects, or attribute responsibility to someone or something else.³⁴⁸ Child pornography offenders, for example, justify their actions by arguing that looking at child pornography is a victimless crime and that they would never actually commit a contact sexual offense.³⁴⁹

Repeated engagement with such pornography, however, might stimulate the development of distortions that relate to the appropriateness and consequences of contact offending.³⁵⁰ As the pornographic image is normalized and objectified, it is reduced to a commodity, “divorcing the physical image and its sexual utility from the abusive nature of the reality it depicts [and] fuelling the amoral perspective that they are ‘only pictures.’”³⁵¹ This may lead the offender to justify deeper forms of engagement such as trading, or even producing, pornographic images.³⁵²

345. Sheldon & Howitt, *supra* note 314, at 139.

346. *See supra* note 339 and accompanying text.

347. *Cf.* Sheldon & Howitt, *supra* note 314, at 139; *see also supra* note 15.

348. Burke et al., *supra* note 219, at 82.

349. *Id.* These cognitive distortions may even contribute to a child pornography offender’s ability to abstain from committing a contact sexual offense. For example, Quayle et al. studied one man who saw nothing wrong with fantasizing about sex with children but, for him, having sex with an underage girl would have been crossing a line past the point of no return. Quayle et al., *supra* note 257, at 92. “It may be that fear of losing control . . . may in fact be a protective mechanism that reduces the likelihood of actual sexual contact with children.” *Id.* at 94.

350. Elliott & Beech, *supra* note 273, at 184.

351. *Id.*

352. *Id.*

Contact sexual offenders tend to have greater cognitive distortions³⁵³ and less victim empathy than do child pornography offenders,³⁵⁴ which in combination could potentially facilitate commission of contact sexual offenses by reducing the psychological barriers to offending.³⁵⁵ The greater victim empathy and fewer cognitive distortions may thus make child pornography offenders less likely to commit contact sexual offenses.³⁵⁶

However, not all cognitive distortions develop pre-offense. They may indeed develop *ex ante* in order to overcome inhibitions against offending,³⁵⁷ but they may also be rationalizations that offenders generate *ex post* to justify their deviant behavior.³⁵⁸ Another possibility is that these cognitive distortions are actually reflections of the distorted personal experiences of the offender.³⁵⁹ Such distortions would substantially predate any offenses and would be rooted in the offender's early childhood experiences of sexual abuse or sexual play with other children.³⁶⁰ Thus an offender might, for example, believe that children are sexual beings simply because he himself was sexualized or sexually active as a child.³⁶¹

Even if a child pornography offender may be more in touch with the reality of sexual abuse and its harmful effects on children (i.e., he has fewer cognitive distortions), his risk of perpetrating a contact offense may increase if he develops additional cognitive distortions and increased deficits in victim empathy.³⁶² It is thus highly significant that child pornography may itself actually *enhance* the cognitive distortions of offenders, who may, for example, believe that the featured child wants to engage in sexual activity based on what they see in the pornography.³⁶³ “[T]he longer the fantasy is

353. *E.g.*, Elliott et al., *supra* note 49, at 87. *But see* Middleton et al., *supra* note 277, at 601 (finding that almost half of child pornography offenders studied displayed no psychological deficits); Neutze et al., *supra* note 174, at 230–31 (finding no differences between contact sexual and pornography offenders in terms of emotional deficits or victim empathy).

354. Offenders' empathic deficits may be a display of “selective inhibition” employed in order to avoid the experience of shame and guilt rather than “a true empathic deficit.” TONY WARD ET AL., *THEORIES OF SEXUAL OFFENDING* 144 (Clive R. Hollin & Mary McMurrin eds., 2006).

355. Babchishin et al., *supra* note 272, at 109.

356. Elliott et al., *supra* note 49, at 87.

357. Howitt & Sheldon, *supra* note 179, at 470.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. Elliott et al., *supra* note 49, at 88.

363. Beech et al., *supra* note 208, at 222.

maintained and elaborated on, the greater the chances that the behaviour will be acted out in real life,” such as an escalation from viewing child pornography to the use of chat rooms and the telephone and eventually to sexual contact.³⁶⁴ At the very least, someone who continuously accesses child pornography becomes desensitized to the deviant sexual acts that the images depict³⁶⁵ and also to physical force if the viewed pornography depicts violence.³⁶⁶ Thus it appears that the problem is less that pornography directly causes sexual crimes than that the use of pornography increases an individual’s tolerance for sexual violence and depresses his concerns about the children who are being victimized.³⁶⁷ This is why the proposed post-arrest polygraph program is necessary to suss out contact offenders who are arrested for child pornography offenses.

C. Strictly Correlative Relationship

The correlation between child pornography and contact sexual offenses may exist in part because child pornography is often used as a part of a contact sexual offense. It may, for example, be used to blackmail the victim (both to ensure the secrecy of the abuse and to pressure the child into continuing the abusive relationship) or as a medium of exchange with other offenders in order to gain “access to photographs or even phone numbers of other children.”³⁶⁸

Child molesters may also use pornography to prepare for committing contact sexual offenses³⁶⁹ as well as to seduce children into sexual activity.³⁷⁰ One study found that 21% of sex offenders used pornography immediately prior to their offense in preparation for the offense.³⁷¹ About one-fifth to one-quarter of child molesters admits to using pornography to “groom”³⁷² or seduce potential victims.³⁷³ Particularly when the desired victim is extremely young, sex

364. Calder, *supra* note 8, at 11.

365. *Id.* at 17.

366. Dean D. Knudsen, *Child Sexual Abuse and Pornography: Is There a Relationship?*, 3 J. FAM. VIOLENCE 253, 259 (1988).

367. *Id.* at 262.

368. TATE, *supra* note 11, at 24.

369. S. REP. NO. 104-358, at 2.

370. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990); Calder, *supra* note 8, at 16.

371. Elliott et al., *supra* note 177, at 586.

372. “Grooming” refers to the process by which a child molester attempts to gain a child’s trust and lower his or her inhibitions towards engaging in sexual activity. Calder, *supra* note 8, at 11.

373. See, e.g., Langevin & Curnoe, *supra* note 192, at 579 (20.97% of child sex offenders studied); Wolak et al., *supra* note 16, at 18 (finding that 27% of offenders arrested for child pornography possession between July 2000 and June 2001

offenders often show the victim pictures of other children engaged in sexual activity to impart upon the child the idea that “if other children are doing it, then it must be all right for [me] to do it.”³⁷⁴ The proliferation of the Internet has exacerbated the usage of pornography in the actual criminal activity³⁷⁵ since such usage of pornography increases with ease of access.³⁷⁶

It is more common for child molesters to use pornography in association with criminal offenses, both prior to and during the offense itself, than it is for rapists.³⁷⁷ In fact, generally speaking the most deviant offenders, a category that inherently includes child molesters acting based on sexual preference,³⁷⁸ tend to use pornography most often.³⁷⁹ And while the pornography used may be adult pornography as well as child pornography,³⁸⁰ those who view more

admitted to using pornography in their crimes and 25% admitted to using it to “groom”).

374. MEESE COMMISSION, *supra* note 286, at 411; *see also* S. REP. NO. 104-358, at 2 (“[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children ‘having fun’ participating in such activity.”). Adult pornography is also often used to groom children for sexual activity. MEESE COMMISSION, *supra* note 286, at 411 n.74.

375. *See* Bourke & Hernandez, *supra* note 2, at 183 (attributing increase in Internet offenses in part to increasing availability of computers and Internet access); Langevin & Curnoe, *supra* note 192, at 584–85 (suggesting that the use of pornography during sexual crimes should be studied more closely because the Internet may increase use of pornographic materials).

376. In Langevin and Curnoe’s sample, 89% of the men who used pornography in their crimes said that it was readily available, compared to only 30% of those who did not use pornography in their crimes. Langevin & Curnoe, *supra* note 192, at 582.

377. Daniel Lee Carter et al., *Use of Pornography in the Criminal and Developmental Histories of Sexual Offenders*, 2 J. INTERPERSONAL VIOLENCE 196, 206 (1987) (finding that 19% of the rapists used pornography in their crimes, compared to 40% of the child molesters); Langevin & Curnoe, *supra* note 192, at 579–80 (finding that almost three times as many offenders against children used pornography, as compared to offenders against adults). This discrepancy may be because the typical offense against an adult involves a forcible attack in a secluded setting while children tend to be much more controllable and may be lured by or threatened with pornography much more easily. *Id.* at 583–84.

378. *Cf.*, e.g., McCarthy, *supra* note 175, at 188–89 (noting child molesters’ desires to share their “deviant sexual interest in minors” with others).

379. *See*, e.g., Langevin & Curnoe, *supra* note 192, at 579 (finding that offenders with both boy and girl victims used pornography most often in their crimes); Proulx et al., *supra* note 196, at 124 (finding that 13.3% of noncoercive offenders used pornography prior to their offense as opposed to 50% of the coercive ones).

380. A 1997 study found that while child molesters were generally higher users of pornography than non-molesters, the most common type of material used was adult pornography. Malamuth & Huppert, *supra* note 264, at 797.

deviant pornography (e.g., child pornography) tend to sexually abuse more victims.³⁸¹

Numerous studies have shown that many offenders arrested on child pornography charges have histories of contact sexual offenses.³⁸² In an aggregation of some of these studies, a total of 17.3% were known to have committed contact sexual offenses, most of which involved child victims.³⁸³ Yet, while, according to official records, only 12.2% of offenders had prior contact sexual offenses, 55.1% disclosed commission of contact sexual offenses against children when self-reporting their offense history.³⁸⁴

Arguably the largest study to examine this, and the study most relevant to this Note, is the aforementioned “Butner Study.” The subjects studied were 155 child pornography offenders³⁸⁵ who voluntarily participated in an SOTP at Butner Federal Correctional Institution in North Carolina.³⁸⁶ Information was gleaned from the presentence investigation report (“PSIR”)³⁸⁷ as well as polygraph examinations.³⁸⁸ At the time of sentencing, forty of the men (26%) had documented contact sexual offenses, and there were a total of seventy-five known victims, an average of 1.88 per offender.³⁸⁹ By the end of treatment, however, including after use of the polygraph, 131 (85%) admitted to having committed a contact sexual offense, and the number of reported victims increased to 1777, an average of 13.56 per offender.³⁹⁰ The forty offenders with known histories at the time of sentencing disclosed an average of 19.4 victims throughout treatment, and the 115 without disclosed an aver-

381. Those who viewed child pornography averaged 7.6 child abuse victims, while those who viewed teen pornography only averaged 4.1 victims. Abel, *supra* note 282, at 33.

382. See, e.g., Michael C. Seto, R. Karl Hanson & Kelly M. Babchishin, *Contact Sexual Offending by Men with Online Sexual Offenses*, 23 *SEXUAL ABUSE: J. RES. & TREATMENT* 124, 128–30 (2011) (listing studies demonstrating correlation).

383. *Id.* at 132.

384. *Id.* at 132–33.

385. There were 155 total subjects, but only eighty were offered polygraph examinations, none of whom declined to participate. Bourke & Hernandez, *supra* note 2, at 185–86. None of the participating offenders was convicted of child pornography production. *Id.* at 186.

386. *Id.*

387. The PSIR contains information about past arrests and convictions, descriptions of any sustained allegations of sexual misconduct (i.e., by a child protective services agency), and other criminal offense history information (e.g., admissions made to law enforcement). *Id.* at 186.

388. *Id.* at 185.

389. *Id.* at 187.

390. *Id.*

age of 8.7.³⁹¹ At the end of treatment, of the twenty-four offenders who continued to deny having committed a hands-on offense, nine were polygraphed and only two “passed,” both of whom “remarked that while they hadn’t molested a child prior to their arrest for the instant offense, with access and opportunity they would have been at risk for engaging in hands-on molestation.”³⁹²

No psychopaths were treated in the Butner SOTP³⁹³ and all subjects were volunteers.³⁹⁴ This means that the Butner Study’s results may actually be an *underestimate* of the level of contact sexual offending by child pornography offenders in general since the entrenched pedophiles with no moral obstacles to committing contact sexual offenses and unempathic psychopaths were *de facto* excluded from the sample.³⁹⁵ The Butner Study’s results are powerful evidence that child pornography offenders are very often not, in fact, “just pictures” offenders.

The Butner Study is far from the only study to demonstrate the correlation between child pornography and contact sexual offenses. Buschman and Bogaerts found that twenty-one of the sixty-three child pornography offenders they polygraphed admitted to contact sexual offenses, up from zero before the polygraph was employed.³⁹⁶ A total of thirty-six (up from one pre-polygraph) admitted to seeking out contact sexual offenses and a total of twenty-nine (up from three) admitted to making plans for having sex with children.³⁹⁷ Of the twenty-five child pornography offenders studied by Buschman et al., only one self-reported that he had “cruised in public places” with the intention of seeking contact with a child, but fourteen did so after the polygraph.³⁹⁸ While three reported before the polygraph that they made plans for having sex with children, an additional five did so after.³⁹⁹ Of the 107 child pornography offenders McCarthy studied, fifty-one were found to be contact sexual offenders, nine of whom only admitted to a contact sexual offense

391. *Id.*

392. *Id.* at 188.

393. Interview with Dr. Bourke, *supra* note 184. Offenders found to be psychopathic were expelled from treatment because research shows that psychopaths get worse with treatment. *Id.*

394. *See supra* note 217 and accompanying text.

395. Interview with Dr. Bourke, *supra* note 184.

396. Buschman & Bogaerts, *supra* note 231, at 121. These twenty-one offenders admitted to offending against thirty-seven victims. *Id.* at 122.

397. *Id.* at 121.

398. Buschman et al., *supra* note 169, at 405.

399. *Id.*

after failing a polygraph.⁴⁰⁰ These studies provide strong evidence for a correlative link between child pornography offending and contact sexual offending, as well as for the polygraph’s usefulness in demonstrating this link.

An examination of law enforcement data shows that 30% of those arrested for child pornography possession in 2009 were charged concurrently with a sexual abuse crime, down from 55% in 2000.⁴⁰¹ This decline in the proportion of so-called “dual offenders” may at least in part be explained by changes in how child pornography possession cases were initiated.⁴⁰² For example, in 2009 it was much more common for child pornography possession to be the initial offense investigated with the abuse being discovered later (20% of the cases⁴⁰³ versus 53% in 2000⁴⁰⁴), as opposed to the reverse.⁴⁰⁵ This number is “almost certainly low” since it is only based on what the investigators found in the course of investigating and making an arrest.⁴⁰⁶ This exemplifies the difficulty in discovering child sexual abuse if the abuse is not the offense that initiated the investigation,⁴⁰⁷ which is strong support for this Note’s proposed post-arrest polygraph program.

D. Preventative Relationship

There is some support in the literature for the theory that the use of child pornography actually *prevents* contact sexual offenses.⁴⁰⁸ This is often known as the “substitution hypothesis”⁴⁰⁹ or the “catharsis hypothesis.”⁴¹⁰

Taylor and Quayle interviewed thirteen child pornography offenders, some of whom explained that after masturbation they no longer found child pornography to be as alluring.⁴¹¹ Some simply

400. McCarthy, *supra* note 175, at 185–86.

401. Statement of Janis Wolak, *supra* note 15.

402. *Id.*

403. *Id.*

404. Wolak, *supra* note 16, at 33–34.

405. This is due to the increase in child pornography crimes as a result of the proliferation of the Internet. *See infra* note 491.

406. Wolak, *supra* note 15.

407. *See* Wolak, *supra* note 16, at 34 (“[W]hen cases originate with investigations of [child pornography] possession, police must determine whether an offender has sexually abused a specific, identified child . . . and this can be difficult.”); *infra* Section I.C.2.

408. *See, e.g.*, Carter et al., *supra* note 377, at 206 (noting that child molesters are more likely than rapists to use pornography to relieve impulse to offend).

409. Kutchinsky, *supra* note 300, at 313.

410. Carter et al., *supra* note 377, at 207.

411. TAYLOR & QUAYLE, *supra* note 12, at 79, 81.

stopped looking at the pornography and for others the images “became almost aversive in the absence of sexual arousal.”⁴¹² One discussed how he could control his urges to “start something with a child” by looking at child pornography and masturbating.⁴¹³ Another did say, however, that pornography “made [him] want to do the things [he] wanted to do [and] gave [him] more courage to do them.”⁴¹⁴ This offender would then copy what he saw in the images and sometimes even produce his own pornography.⁴¹⁵

In Riegel’s survey of pedophiles, 73.9% of respondents said that it was “invariably” or “usually” true that viewing “boy erotica”⁴¹⁶ was a useful substitute for sexual contact with boys, while only 8.3% said that this was “rarely” or “never” true.⁴¹⁷ Similarly, 68% said it was “invariably” or “usually” true that the erotica had no effect on their behavior, and 84.5% said such erotica “rarely” or “never” increased their tendency to seek out boys for sex.⁴¹⁸ Some men specifically commented that viewing boy erotica actually sublimated and redirected their sexual energies away from attempted or actual sexual contact and that they felt less inclined to seek out boys.⁴¹⁹ These were of course self-reports by pedophilic men, but they were made anonymously in an environment where no consequences were expected from the admissions.⁴²⁰

Interestingly, when Seto, Reeves, and Jung reviewed explanations that child pornography offenders gave to police after apprehension, or to clinicians during post-conviction treatment, they found entirely different results.⁴²¹ Only 6% said that their pornog-

412. *Id.* at 81.

413. *Id.* (internal quotation marks omitted).

414. *Id.* at 81–82 (internal quotation marks omitted).

415. Quayle & Taylor, *supra* note 182, at 101; *see also* TATE, *supra* note 11, at 110 (quoting child pornography offender who tired of looking at magazines and began to put into practice what he saw depicted).

416. Child erotica is “any material, relating to children, that serves a sexual purpose for a given individual” and is not necessarily sexually explicit. LANNING, *supra* note 9, at 68.

417. Riegel, *supra* note 201, at 322.

418. *Id.* Only 8.1% said erotica “invariably,” “usually,” or “frequently” increased such a tendency. *Id.*

419. *Id.* When asked how they felt after viewing the erotica, 25.6% said “very much relieved and at peace” and 27.4% said “somewhat better.” *Id.*

420. *See id.* at 321. It is worth noting that in spite of these conditions, while 95.2% reported a “moderate” to “very strong” attraction to boys, 86.9% reported that this was at least as much of a mentoring interest as it was a sexual one, *id.*, which gives some insight into the cognitive distortions of these men.

421. Seto et al., *supra* note 180, at 171, 175.

raphy use was a substitute for contact sexual offending.⁴²² A substantial minority (roughly 40%) admitted pedophilic interests,⁴²³ one of the most significant risk factors for contact sexual offending.⁴²⁴ While there is some support for the substitution hypothesis, the evidence indicates that this is not the case for a significant number of child pornography offenders.

E. How Courts Understand this Relationship

The courts have not frequently examined the relationship between child pornography and child abuse, although this relationship has, on occasion, been examined in evaluating whether there is probable cause to conduct a search for child pornography. In determining probable cause, courts must “make a practical, common-sense decision” based on “all the circumstances set forth in the affidavit”⁴²⁵ The circuit courts differ on how much evidence of sexual abuse factors into this “practical, common-sense decision” when considering whether there is probable cause to search for child pornography. However, save for the Eighth Circuit, they have generally been strict about differentiating between the two crimes and not allowing one to be sufficient evidence for probable cause of the other without information in the affidavit linking these crimes.⁴²⁶

422. *Id.* at 175.

423. *Id.* The authors hypothesized that offenders would be more likely to explain away their crimes, rather than admit to a sexual interest in children, in the police setting as opposed to the clinical setting. *Id.* at 171. Yet the offenders in the clinical setting actually provided *more* explanations for their criminal activity. *Id.* at 177. While the two samples were about as likely to admit to a sexual interest in children, the offenders in the police setting, based on the breadth and content of their pornography collections, appeared to be more sexually deviant than the offenders in the clinical sample, which indicates that those in the police setting were actually more likely to have a sexual interest in children that they simply denied having. *Id.*

424. *See id.* at 178. It is also highly likely that the true number of pedophiles in this sample is higher as it is likely that some individuals who denied such a sexual interest were being deceitful. *Id.*

425. *Illinois v. Gates*, 462 U.S. 213, 214 (1983).

426. *See, e.g., Dougherty v. City of Covina*, 654 F.3d 892, 899 (9th Cir. 2011) (finding officer’s conclusory statement tying defendant’s alleged acts of molestation and leering to possession of child pornography insufficient to support the search for pornography); *Virgin Islands v. John*, 654 F.3d 412, 419 (3d Cir. 2011) (“[A]llegations [of child molestation] are not sufficient to establish—or even to hint at—probable cause as to the wholly separate crime of possessing child pornography.”); *United States v. Falso*, 544 F.3d 110, 113, 123 (2d Cir. 2008) (holding that molestation conviction is insufficient to establish probable cause to search for child pornography and that affidavit must draw correlation between individual’s

This commitment to maintaining a clear division between child pornography and child molestation in probable cause determinations indicates that the circuit courts, excepting the Eighth Circuit, tend to believe that these are separate crimes that are not *necessarily* related. While a thorough discussion of this reasoning is beyond the scope of this Note, the majority of the circuit courts have taken the correct approach. Child pornography and child molestation are indeed separate crimes, and evidence of one of these crimes, without more, does not indicate that the other crime is also occurring. It is important to note, however, that these courts' reasoning does not indicate a resistance to accepting that child pornography offending and child molestation are related. Rather, such reasoning is only a reaction against the idea that child pornography offenders and child molesters are one and the same.

IV. CONSTITUTIONAL CONSIDERATIONS OF INTERROGATIVE POLYGRAPHING

Society has already made the determination that sex offenders are different from other criminals and that sexual offenses are different from other types of crimes, as evidenced by their differential treatment in the criminal justice system.⁴²⁷ As a result, sex offenders already "bring[] somewhat diminished constitutional rights in tow."⁴²⁸

While being interrogated, however, child pornography suspects always retain their Fifth Amendment right against self-incrimination,⁴²⁹ with or without the polygraph. Thus the post-arrest

propensity to commit both crimes); *United States v. Hodson*, 543 F.3d 286, 292 (6th Cir. 2008) (finding evidence of molestation in affidavit insufficient to establish probable cause for child pornography without providing link between these crimes). *But see United States v. Colbert*, 605 F.3d 573, 577 (8th Cir. 2010) (finding evidence that defendant attempted to lure child to his apartment sufficient to establish probable cause to search for child pornography). There do not appear to be any cases dealing with pornography being used to support probable cause to search for evidence of molestation. This is probably because physical evidence of child molestation is a rarity, so searching for such evidence would often be futile. *See supra* notes 47–48.

427. *See, e.g.*, FED. R. EVID. 414–15 (allowing evidence of similar crimes in cases of child molestation); James Vess, *Ethical Practice in Sex Offender Assessment*, 23 *SEXUAL ABUSE: J. RES. & TREATMENT* 381, 382 (2011) (noting increase in laws regarding sex offender registration, community notification, and civil commitment). As of 1998, thirty-five states used polygraph testing to aid in monitoring sex offenses. Branaman & Gallagher, *supra* note 54, at 45.

428. Malamuth & Huppín, *supra* note 264, at 789.

429. *See U.S. CONST. amend. V.*

polygraph-assisted interrogation proposed in this Note would proceed just as would an interrogation without the polygraph. That is, the suspect would be read his *Miranda* rights, which include the right to remain silent and the right to an attorney.⁴³⁰ Should a suspect invoke his right to remain silent at any time, the interrogation must cease immediately.⁴³¹ Similarly, should a suspect request an attorney, the interrogation must cease until an attorney is present.⁴³² Because a suspect would never be compelled to answer any of the questions posed to him, a post-arrest polygraph interrogation would not run afoul of the Fifth Amendment.⁴³³

The use of the polygraph during an interrogation does nothing to alter the standard Fifth Amendment analysis. That is, the addition of the polygraph to the interrogation is not constitutionally significant.⁴³⁴ A suspect could choose to terminate the interview at any time and have “the machine detached from him in a matter of moments.”⁴³⁵ While a suspect may feel some sort of obligation or compulsion by nature of the interrogative atmosphere, this would be no different from any other constitutionally permitted interrogation.⁴³⁶ Nor is it sufficient that the questions asked to the offender will be incriminating; if he seeks not to incriminate himself, the suspect must assert his privilege.⁴³⁷ If he does in fact choose to answer, this choice is considered to be a voluntary one⁴³⁸ and is

430. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

431. *Id.* at 444–45.

432. *Id.*

433. *Cf. United States v. Lee*, 315 F.3d 206, 212 (3d Cir. 2003) (citing *Owens v. Kelley*, 681 F.2d 1362, 1369 (11th Cir. 1982)) (“The polygraph condition also does not violate Lee’s Fifth Amendment right because the condition does not *require* him to answer incriminating questions.” (emphasis added)); *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (“The answers of . . . a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege.”).

434. *See Lee*, 315 F.3d at 212 (“[T]he presence of a polygraph machine . . . do[es] not constitute compulsion for Fifth Amendment purposes.”); *State v. Clifton*, 531 P.2d 256, 258 (Or. 1975) (“[A] confession is not rendered inadmissible because given following a polygraph examination, provided that it is shown to have been given freely and voluntarily.”).

435. *See Lee*, 315 F.3d at 212 (“[S]hould [he] choose to terminate the interview and exit the room while being questioned, he may do so by having the machine detached from him in a matter of moments.”).

436. *Cf. id.* (“If appellant feels obligated or compelled to stay through the end of the proceeding, we are not persuaded that this differs in any significant way from an ordinary probation interview at which the probationer may feel that same obligation.”).

437. *Murphy*, 465 U.S. at 429.

438. *Id.*

deemed to be a waiver of his right to remain silent.⁴³⁹ Once the suspect consents to a waiver of his *Miranda* rights, his consent can only be invalidated if it is found that his will was overborne.⁴⁴⁰

Yet the use of a polygraph during an interrogation is not in and of itself considered to overbear the suspect's will.⁴⁴¹ Law enforcement "may use some psychological tactics in eliciting a statement from a suspect."⁴⁴² But as long as the suspect's decision to confess "is a product of the suspect's own balancing of competing considerations, the confession is voluntary."⁴⁴³ In other words, the interrogation must be "so manipulative or coercive" that the suspect is deprived "of his ability to make an unconstrained, autonomous decision to confess" in order for the confession to be deemed involuntary.⁴⁴⁴ As long as proper procedures are followed, the polygraph does not rise to this level of coercion.⁴⁴⁵

There is an additional Fifth Amendment issue of whether the polygraph test "may compromise the [suspect]'s right to remain silent."⁴⁴⁶ This right to remain silent is derived from the Fifth Amendment's privilege against self-incrimination, which "protects an accused . . . from being compelled to testify against himself."⁴⁴⁷ The polygraph is unique in that while a suspect may verbally assert

439. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2263 (2010).

440. *See Dickerson v. United States*, 530 U.S. 428, 434 (2000).

441. *See Wyrick v. Fields*, 459 U.S. 42, 47–48 (1982) (per curiam) (finding post-polygraph confession to be voluntary); *Rupe v. Wood*, 93 F.3d 1434, 1444 (9th Cir. 1996) (holding that polygraph-assisted confession was voluntary even after the examiner told defendant that he appeared to have failed the exam and that he would be better off if he told the truth); *cf. Ortiz v. Uribe*, 671 F.3d 863, 870 (9th Cir. 2011) (finding detective's advice to defendant that he must tell the truth on his polygraph examination not to be coercive); *United States v. Bird*, 409 F. App'x 681, 684 (4th Cir. 2011) (finding possible use of defendant's physical condition and possible alcoholism insufficient to vitiate voluntary waiver of rights and consent to polygraph examination); *Sotelo v. Ind. State Prison*, 850 F.2d 1244, 1250 (7th Cir. 1988) (finding examiner's use of empathy did not overbear defendant's will).

442. *Miller v. Fenton*, 796 F.2d 598, 605 (3d Cir. 1986) (citing *Haynes v. Washington*, 373 U.S. 503, 514–15 (1963)).

443. *Id.*

444. *Id.*

445. *See, e.g., United States v. Little Bear*, 583 F.2d 411, 414 (8th Cir. 1978) (requiring that the suspect be apprised of the rights to refuse to take the polygraph, to discontinue it at any point, and to decline to answer any questions, due "to the often coercive impact of a lie detector test[]"). *But see Wyrick*, 459 U.S. at 47 (finding that the suspect's request for a polygraph examination initiated the interrogation and waived his right to be free of contact with the authorities without an attorney).

446. *United States v. Lee*, 315 F.3d 206, 213 (3d Cir. 2003).

447. *Schmerber v. California*, 384 U.S. 757, 761 (1966).

his Fifth Amendment privilege, the polygraph may indicate that he is being deceptive based on its detection of his physiological response, even if he gives no verbal response.⁴⁴⁸ This physiological response is considered to be “testimonial,” and thus falls within the scope of the Fifth Amendment, because it is responsive to the question, thereby conveying information to the polygraph examiner.⁴⁴⁹ Because of this, if a suspect does in fact invoke his Fifth Amendment privilege, “and his involuntary physiological reaction is recorded by the polygraph sensors, the polygraph recording should not be used” against him.⁴⁵⁰ A suspect’s demeanor during the examination would, however, still be admissible, because such evidence is not testimonial and therefore not protected by the Fifth Amendment.⁴⁵¹

Nor would use of the polygraph constitute a Fourth Amendment violation. Although administration of a polygraph involves placing sensors on the skin of the suspect, since the objective of the examination is to obtain testimonial rather than physical evidence, the proper inquiry is instead a Fifth Amendment one.⁴⁵² Not surprisingly, the few federal courts to address the issue have concluded that a polygraph examination is not a search within the meaning of the Fourth Amendment.⁴⁵³ The proposed post-arrest polygraph program therefore comports with both Fourth and Fifth Amendment jurisprudence and is constitutionally sound.

448. See *Lee*, 315 F.3d at 213 (“[E]ven though [a defendant] may verbally assert his Fifth Amendment privilege, the polygraph machine may indicate that he is not being truthful based on his physiological response.”).

449. See *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (defining a testimonial communication as one that “relate[s] a factual assertion or disclose[s] information” (internal quotation marks omitted)).

450. See *Lee*, 315 F.3d at 213 (discussing the principle in context of a probationer).

451. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1030 (9th Cir. 2001); see also *Muniz*, 496 U.S. at 592 (finding a suspect’s “physical manner” to be nontestimonial evidence); cf. *Schmerber*, 384 U.S. at 761 (holding that compelled physical evidence—in this case, a blood test—is nontestimonial).

452. *Greenawalt v. Ind. Dep’t of Corr.*, 397 F.3d 587, 591 (7th Cir. 2005) (“The Fourth Amendment was not drafted, and has not been interpreted, with interrogations in mind.”).

453. See *United States v. Jordan P.W.*, 168 F. App’x 150, 150–51 (9th Cir. 2006); *Stehney v. Perry*, 907 F. Supp. 806, 822 (D.N.J. 1995), *aff’d*, 101 F.3d 925 (3d Cir. 1996).

V.
PRAGMATIC CONSIDERATIONS OF
INTERROGATIVE POLYGRAPHING

A. *Expenditure of Resources*

Whether there are sufficient resources to institute an interrogative polygraphing program is an important consideration. The FBI, for example, estimated that as of fiscal year 2005, it had a total of approximately \$5.8 million in recurring funding needs for its polygraph program, although its annual budget was cut by more than half in that same year.⁴⁵⁴ A 1998 nationwide poll of probation and parole agencies found that the average reported cost of a polygraph examination was \$200.⁴⁵⁵

This survey found that only 16% of the agencies polled used the post-conviction polygraph with adult sex offenders.⁴⁵⁶ In assessing the reticence of those agencies that did not use the polygraph, over 73% said that lack of resources⁴⁵⁷ was the largest barrier to use.⁴⁵⁸

There are nevertheless ways that law enforcement could keep costs down. For example, polygraphers (and equipment) can be shared among law enforcement agencies, limiting personnel costs. The FBI could also serve as a centralized agency for conducting such polygraphing given its experience and resources when it comes to polygraphing.⁴⁵⁹ Furthermore, “[f]rom a law enforcement perspective, a cost-benefit analysis supports the use of the [polygraph].”⁴⁶⁰ The benefit of solving important cases like sex crimes, even if only on occasion, far outweighs the cost of a typical polygraph program.⁴⁶¹ Without the use of the polygraph, many of these crimes would go unsolved,⁴⁶² and this would be a lost opportunity

454. EVALUATION & INSPECTIONS DIV., OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, USE OF POLYGRAPH EXAMINATIONS IN THE DEPARTMENT OF JUSTICE 56 (2006) [hereinafter *OIG REPORT*].

455. ENGLISH ET AL., *supra* note 58, tbl. 33 at 30.

456. *Id.* at 7.

457. The study disaggregated “lack of resources” and “lack of polygraph examiners,” but I include these both under the umbrella heading of a “lack of resources.”

458. ENGLISH ET AL., *supra* note 58, at 7, 16–17, tbl. 11 at 17. An additional 18.2% said legal and/or ethical issues were the biggest barrier. *Id.* at tbl. 11 at 17.

459. *See supra* Part II.E.

460. Iacono, *supra* note 74, at 1304.

461. *Id.*

462. Polygraph examinations are used most often by law enforcement when all other means of resolving a case have been exhausted. *Id.* Sexual crimes are the paradigmatic example of this because evidence is so often inconclusive. *Id.*

to help repair some of the social harm caused by contact sexual offenders.⁴⁶³ If the proposed interrogation program were to reveal even a small portion of what offenders have revealed in SOTPs, the program would be well worth its cost.

Pragmatically, should the program be successful, the discovery of additional offenders and additional crimes would lead to additional strain on the criminal justice system.⁴⁶⁴ Because of the ease with which child pornography offenses can be committed via the Internet,⁴⁶⁵ child pornography arrests and convictions have greatly increased over the last two decades.⁴⁶⁶ In part because of this country’s already overburdened criminal justice and prison systems, some officials are hesitant to use the polygraph because when the government elicits additional incriminating information through polygraphing, it is required to act on this information, increasing the liability of the government agency.⁴⁶⁷ In other words, “[o]ptions and resources are so limited that ‘not knowing’ [is] a form of protection” for the government.⁴⁶⁸ Of course, the entire idea of turning a blind eye to crime is antithetical to the presence of the criminal justice system.

B. *The Department of Justice and the Polygraph*

Due to the FBI’s experience and resources with regard to polygraphing,⁴⁶⁹ it is important to consider the logistics behind the federal government’s use of the polygraph. Executive branch polygraph policy is the product of a patchwork of executive orders and other presidential policy statements, case law, regulations, and ad-

463. See *New York v. Ferber*, 458 U.S. 747, 758 & n.9 (1982) (noting and listing long-lasting effects of child abuse on exploited children).

464. Bates & Metcalf, *supra* note 219, at 11–12 (detailing how a sweeping police initiative against child pornography led to many individuals with no previous criminal history being caught and convicted for a sexual offense).

465. TAYLOR & QUAYLE, *supra* note 12, at 9 (“Anyone with a modicum of technical expertise can access child pornography”); *id.* (noting that much of Internet child pornography is free); Bates & Metcalf, *supra* note 219, at 12 (noting that the “Accessibility, Affordability and Anonymity” of the Internet facilitate downloading child pornography).

466. At one SOTP in the United Kingdom, there were a total of thirty-nine individuals who committed “photographic offenses” in the program between June 1995 and December 2001. Bates & Metcalf, *supra* note 219, at 12. Between 2002 and 2003, ninety-nine were classified as having committed such offenses. *Id.* These offenders increased from 3% to 29% of the offender pool in less than ten years. *Id.*

467. ENGLISH ET AL., *supra* note 58, at 43.

468. *Id.*

469. See *infra* note 482 and accompanying text.

ministrative decisions.⁴⁷⁰ The Department of Justice has few policies regarding the use of the polygraph but is generally supportive of its limited use during criminal investigations.⁴⁷¹ The FBI has been using the polygraph as an investigative tool in criminal investigations for over thirty-five years⁴⁷² and employed over 119 personnel in its Polygraph Unit in 2006.⁴⁷³ The FBI, which conducts the majority of government polygraphing for criminal investigations,⁴⁷⁴ has its own policies and procedures that define who is subject to examination; establish the professional, ethical, and technical standards for conducting an examination; set quality control and assurance standards and procedures; and define the rights afforded to individuals who undergo polygraph testing.⁴⁷⁵ These policies note that the polygraph is an investigative tool and should not be the sole basis for any investigative decisions.⁴⁷⁶ All FBI polygraph examinations are voluntary and a subject's consent to undergo an examination must be in writing.⁴⁷⁷

All FBI polygraph examiners are selected from special agent personnel and must complete training at a certified polygraph training facility.⁴⁷⁸ After this training and before certification, all examiner candidates must complete both an additional week of specialized training in the Polygraph Unit and a one-year internship with a senior examiner.⁴⁷⁹ Once certified, examiners must meet annual training and performance standards to retain their certification.⁴⁸⁰ As of December 2005, the Polygraph Unit's supervisory personnel had an average of eighteen years of investigative experience and nine years of polygraph experience.⁴⁸¹ Field examiners had an average of seventeen and nine years, respectively.⁴⁸²

General quality control of the program is provided by the Polygraph Unit, internal oversight is provided by the FBI's Inspection

470. OIG REPORT, *supra* note 454, at 7.

471. *Id.* at 13 & n.25.

472. *Id.* at iii.

473. *Id.* at 40.

474. *Id.* at 28–29, 52 (finding that between 2002 and 2005, FBI conducted 6203 of the 8356 criminal investigation polygraphs).

475. *Id.* at ii–iii.

476. *Id.* at iii.

477. *Id.* at 42.

478. *Id.* at 54. The DoDPI is the central provider of training for federal polygraph examiners. *Id.* at 10.

479. *Id.* at 54.

480. *Id.*

481. *Id.*

482. *Id.*

Division, and external quality assurance is provided by the DoDPI Quality Assurance Program.⁴⁸³ For every individual examination, a supervisory polygraph official must conduct an internal quality control review before rendering a final opinion on the results of the polygraph.⁴⁸⁴ If the reviewer does not agree with the examiner, a second examiner must review the results before they are considered final.⁴⁸⁵

Between 2002 and 2005, FBI examiners issued conclusive opinions in 92.2% of all examinations, well above the industry standard of 80%.⁴⁸⁶ Of the examinations where deception was indicated, 61% ended in an admission or confession by the examinee confirming the polygraph result, also a high rate within the polygraph community.⁴⁸⁷ The Executive Branch, due to its experience and resources, is uniquely suited to serve as a home for the proposed post-arrest polygraph program in order to conserve scant law enforcement resources.

C. Willful Compliance

Creating a voluntary polygraph program for use with child pornography suspects is clearly useless if suspects will not consent to participate. However, research on interrogations in general and psychological research about child molesters in particular provides strong evidence that many suspects will willingly agree to be polygraphed. For example, out of nineteen cases studied by the FBI in which a subject was asked to take a polygraph, approximately two-thirds agreed.⁴⁸⁸

1. Waiver of *Miranda* Rights

Law enforcement officers who administer polygraph examinations have stated that “Mirandizing their examinees does not impair their ability to obtain admissions.”⁴⁸⁹ This is consistent with other research that has been done in the post-*Miranda* years. Over 80% of suspects waive their *Miranda* rights and willingly talk to the police

483. *Id.* at 57. After several years of being in noncompliance with federal polygraph standards, the FBI polygraph program was certified by the DoDPI in 2006. *Id.* at 63.

484. *Id.* at 57.

485. *Id.*

486. *Id.* at 65.

487. *Id.*

488. FBI REPORT, *supra* note 45.

489. Abrams, *supra* note 64, at 257–58.

after being explicitly told of their right to remain silent.⁴⁹⁰ One major reason for this is that some suspects presume that remaining silent is indicative of guilt.⁴⁹¹ It is a minimal inferential leap to say that the same psychology would be at work when faced with the decision to agree to take a polygraph. A suspect who does not want to appear guilty would theoretically not want to reject a polygraph or even to request a lawyer before undergoing one. Even educated suspects, which child pornography suspects typically are,⁴⁹² often not only waive their right to remain silent, but also do not ask for an attorney for fear that it would be tantamount to an admission of guilt.⁴⁹³ Another reason why offenders may waive their rights and speak to police is because they think that they can talk their way out of trouble.⁴⁹⁴ An offender similarly may consent to a polygraph because of misplaced confidence in his ability to defeat the polygraph, thinking that he will conclusively convince the police of his innocence.

2. Catharsis

Except for those few offenders who are psychopathic, the psychological tension within sex offenders is extraordinary.⁴⁹⁵ The largest impediment to offenders' willingness to disclose their crimes is shame.⁴⁹⁶ Once they are able to get beyond the shame and self-loathing, however long it takes, the vast majority are ready and willing to get this information off of their chests and find a way to get better.⁴⁹⁷ Many child molesters have volunteered to be chemi-

490. Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understanding*, 90 MINN. L. REV. 781, 792–93 (2006).

491. *Id.* at 793.

492. Endrass et al., *supra* note 28, at 2.

493. Godsey, *supra* note 490, at 794.

494. George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1999 (2004).

495. Interview with Dr. Bourke, *supra* note 184.

496. *Id.*

497. *Id.*; see also Sue Westwood et al., *Good Practice in Eliciting Disclosures from Sex Offenders*, 17 J. SEXUAL AGGRESSION 215, 224 (2011) (“Practitioners suggested that in some instances offenders were frightened by their own actions or intentions, or recognised that they needed help to stop offending. Disclosing information was seen to provide an outlet through which offenders sought help and intervention.”). Tate discusses a convicted child molester who testified before a 1985 Senate hearing and referred to pedophilia as a “hell” that he had to live through. TATE, *supra* note 11, at 6 (internal quotation marks omitted); see also FBI REPORT, *supra* note 45 (“At the conclusion of the interview, . . . the subject thanked the interviewing agents for his arrest because he said he would not have been able to stop exploiting children otherwise.”).

cally castrated,⁴⁹⁸ not only to avoid a long prison sentence, but also to free themselves of the deviant urges that control them.⁴⁹⁹ While polygraphing may bring about consequences that castration does not, it is certainly a much less painful procedure.⁵⁰⁰

Winder and Gough found that most of the offenders they interviewed had positive perceptions of psychological treatment, however difficult and uncomfortable it may have been for them.⁵⁰¹ These offenders who, prior to treatment, saw nothing wrong with child pornography began to recognize the culpability of their offenses and the harm that they had done and were appreciative of that.⁵⁰² While most offenders resist disclosing their prior offenses, once they do, they typically feel a sense of relief.⁵⁰³ The difficulty is getting the offender to that place of relief, which is why it is crucial that the polygrapher be well trained and have experience working with sex offenders.

D. Willful Admissions

Child pornography offenders are psychologically different from other criminals. One study found that such offenders fell within one standard deviation of normal scores on a personality test, meaning that they tend to have a “normal” personality profile.⁵⁰⁴ Many other criminals are self-centered and pleasure-seeking; therefore, because they are motivated by antisocial characteristics and have a lesser capacity for guilt, they do not care as much about the secret-keeping aspect of their criminal activity.⁵⁰⁵ Child pornography offenders and child molesters both score within relatively normal ranges when screened for psychopathy, although child mo-

498. See Lystra Batchoo, Note, *Voluntary Surgical Castration of Sex Offenders: Waiving the Eighth Amendment Protection from Cruel and Unusual Punishment*, 72 BROOK. L. REV. 689, 699 & n.64 (2007) (providing examples of offenders who volunteered for chemical castration).

499. See Candace Rondeaux, *Can Castration Be a Solution for Sex Offenders?*, WASH. POST, July 5, 2006, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/04/AR2006070400960.html> (describing an offender who surgically castrated himself while in prison to escape his desires).

500. Chemical castration can also have adverse side effects. Batchoo, *supra* note 498, at 707–08.

501. Winder & Gough, *supra* note 291, at 136. One offender called treatment “life changing.” *Id.*

502. *Id.* at 136–37.

503. Heil & English, *supra* note 29, at 209.

504. Laulik et al., *supra* note 196, at 524.

505. Interview with Dr. Bourke, *supra* note 184. *But see supra* note 259 and accompanying text.

lesters are found to score slightly higher.⁵⁰⁶ Along these lines, most offenders who victimize children are motivated by sexual drive rather than antisocial behavior.⁵⁰⁷

This means that child pornography offenders, like other individuals with normal personality profiles, care deeply what others think about them.⁵⁰⁸ External evidence may thus have a greater impact on them than it would on, say, rapists because of their greater concern about self-presentation.⁵⁰⁹ One such example of external evidence is the results of a polygraph. Offenders may be more compelled to reveal information when they are polygraphed because they may see a deceptive result as solid evidence against them.⁵¹⁰ They may also consider the polygraph examination to be a good “excuse” to reveal information that they had previously denied or kept hidden and would have found difficult to otherwise disclose.⁵¹¹

Realistically it is unlikely that offenders will make admissions immediately upon the initiation of polygraph-assisted interrogation. Since there is a lot at stake, 87% of sex offenders will deny or minimize their offending in their first interview.⁵¹² Child molesters do, however, tend to admit to the existence of offenses more frequently than rapists, although they are more likely to deny the extent of their offenses.⁵¹³

There are also different techniques that can be used to encourage disclosures, such as emphasizing the benefits of making

506. Child molesters had a mean score of 9.30 on the Psychopathy Checklist: Screening Version while internet child pornography offenders had a mean of 4.53; a score of 0-12 is characterized as nonpsychopathic. L. Webb et al., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 *SEXUAL ABUSE: J. RES. & TREATMENT* 449, 454, 458 (2007).

507. Interview with Dr. Bourke, *supra* note 184.

508. Patricia M. Nugent & Daryl G. Kroner, *Denial, Response Styles, and Admittance of Offenses Among Child Molesters and Rapists*, 11 *J. INTERPERSONAL VIOLENCE* 475, 482 (1996). Child molesters score higher on the “Fear of Negative Evaluation Scale,” which measures social anxiety, than nonoffenders, violent offenders, and property offenders. Jackie Craissati & Grace McClurg, *The Challenge Project: Perpetrators of Child Sexual Abuse in South East London*, 20 *CHILD ABUSE & NEGLECT* 1067, 1072-73.

509. Nugent & Kroner, *supra* note 508, at 482.

510. Grubin, *supra* note 174, at 276.

511. *Id.*

512. David Middleton, *Current Treatment Approaches*, in *CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER* 99, 100.

513. Nugent & Kroner, *supra* note 508, at 482 (“Child molesters tended to deny the extent of the offense, whereas rapists denied the degree of force.”).

disclosures and providing informal positive reinforcement.⁵¹⁴ Even something as simple as saying “please” and “thank you” has been found to have an impact on offenders’ willingness to disclose criminal information.⁵¹⁵

The best practical evidence for the willingness of child pornography suspects to make admissions comes from the SOTPs. It is true that these are post-conviction programs and that sometimes offenders are immunized from prosecution or are encouraged not to disclose specific victim identifying information;⁵¹⁶ however, it is often the case that polygraph “results are given significant weight, either directly or indirectly by treatment providers and supervision officers who make post-conviction decisions determining the degree of community supervision versus incarceration.”⁵¹⁷

In the Butner SOTP, for example, every confession and every disclosure that an inmate made went into his discharge report, and this information was sometimes used adversely to the inmate.⁵¹⁸ It could be used in probation modification, as evidence that the offender was convicted of another offense, and in civil commitment determinations.⁵¹⁹ Inmates were aware of this when they consented to participate in the program. They were specifically told that they did not need to provide any identifying information for their victims, and that if they did the treatment providers had the legal and ethical obligation to report that information.⁵²⁰ Yet whether or not identifying information was provided was not dispositive of whether the disclosure could be used adversely to the inmate.⁵²¹

514. Westwood et al., *supra* note 497 at 224–25 (“Many offenders, especially sex offenders, will be unused to hearing anything positive about themselves or their behaviour, so this can be a means of promoting positive change.”).

515. *Id.* at 225.

516. ENGLISH ET AL., *supra* note 58, at 18, 20.

517. Branaman & Gallagher, *supra* note 54, at 57.

518. Interview with Dr. Bourke, *supra* note 184; *see also* McKune v. Lile, 536 U.S. 24, 45 (2002) (noting that federal sex offender treatment program did not offer participants use immunity); ENGLISH ET AL., *supra* note 58, at 15 n.11, 19 (“Most commonly, the prosecution makes the decision to prosecute past crimes on a case-by-case basis . . .”).

519. Interview with Dr. Bourke, *supra* note 184. In the English et al. study, over half of the probation and parole officers surveyed increased surveillance when violations of supervision were disclosed during a polygraph examination. ENGLISH ET AL., *supra* note 58, at 25.

520. E-mail from Dr. Bourke, *supra* note 192.

521. *Id.*

E. Truthfulness of Admissions

In addition to *whether* disclosures will be made, another concern is the *accuracy* of any disclosures made. Some offenders report making false confessions in SOTPs, especially those with high neuroticism and low conscientiousness, perhaps because confessing was their way of coping with a difficult interview situation.⁵²² False confession rates are reasonably low in criminal justice contexts,⁵²³ but individuals with personality disorders, a group that includes many sex offenders, may be predisposed to making false admissions.⁵²⁴ Yet reports of false confessions cannot always be taken at face value. Grubin discusses one offender who admitted during a polygraph examination to having had a sexual relationship with a fifteen-year-old victim, but then recanted and claimed to have fabricated his account.⁵²⁵ However, when this information was passed on to the police, they located the victim and she confirmed the initial admission.⁵²⁶

Because of the heightened stress associated with fears of police involvement and possible retributive action, there is a greater risk of false positive results in pre-conviction testing.⁵²⁷ This is why information derived from a polygraph examination must be corroborated in order to justify criminal prosecution.⁵²⁸ To further address accuracy concerns, the polygraph can also apply a “successive hurdles” approach.⁵²⁹ In such an approach, if a suspect scores “deceptive” on the initial test, there will be a follow-up test that is narrowly confined to the single issue of most concern.⁵³⁰ This second single-issue test will then have a higher accuracy rate due to its greater specificity, likely closer to the 89% accuracy rate of a standard sin-

522. Grubin & Madsen, *supra* note 96, at 482.

523. Little research has been conducted on the issue of false confessions, but two studies of prison inmates found that 12% had made false confessions to the police at some point in their lives. Lars Madsen & Daniel T. Wilcox, *The Empirical Evidence for the Value of Post-Conviction Polygraph in the Treatment and Supervision of Sex Offenders*, in *THE USE OF THE POLYGRAPH IN ASSESSING, TREATING AND SUPERVISING SEX OFFENDERS: A PRACTITIONER’S GUIDE*, *supra* note 29, at 49, 59. One 2004 study of 1050 students found that only 4% who had previously been interrogated by police claimed to have made false admissions to the police. *Id.* at 60.

524. *Id.*

525. Grubin, *supra* note 174, at 275.

526. *Id.*

527. Daniel E. Sosnowski & Daniel T. Wilcox, *Basics of Post-Conviction Sex Offender Polygraph Testing*, in *THE USE OF THE POLYGRAPH IN ASSESSING, TREATING AND SUPERVISING SEX OFFENDERS: A PRACTITIONER’S GUIDE*, *supra* note 29, at 65, 85.

528. *See infra* Part VI.

529. Heil & English, *supra* note 29, at 198.

530. *Id.*

gle-issue test.⁵³¹ But even if the second test were to have the lower accuracy rate of 80%, the chances of a false positive on the first test followed by a false negative test (i.e., the innocent suspect who is truthful during the first polygraph but makes a false confession during the second) are only 4%.⁵³² If this single-issue test were repeated a second time, the chances of a false confession being affirmed by the polygraph drop to 0.24%.⁵³³ Retesting thus greatly reduces the risk of false positives and enhances the credibility of the test.

VI. PROPOSED INTERROGATIVE POLYGRAPHING PROGRAM

To discover the true scope of contact sexual offenses against children, it is critical to be thorough and methodical. Thus under an interrogative polygraph testing program, every defendant arrested for a child pornography offense, as part of his standard interrogation, would be polygraphed regarding any past contact sexual offenses that he may have committed. While some of these offenders would inevitably be non-preferential offenders and thus not the target of this program, it would be too administratively burdensome to screen these men out at the outset without defeating the purpose of the program.⁵³⁴

Every suspect would have the same rights during his polygraphed interrogation as he would in a nonpolygraphed interrogation. That is, he would be read his *Miranda* rights, which include the right to remain silent and the right to an attorney. He would not only be permitted to invoke these at any time, but it would remain within his rights to continue the interrogation without the polygraph. Because the scope of the polygraph session would only deal with offenses with which the suspect has not been

531. *Id.* at 198, 202.

532. *Id.* at 202.

533. *Id.* at 202–03.

534. It is true that certain behaviors and certain characteristics of an offender’s pornography collection can be indicative of whether the offender is a preferential offender or not. See KLAIR ET AL., *supra* note 261, at 9–10 & n.26 (describing such behaviors and characteristics). Yet because preferential offenders make up the majority of child pornography offenders anyway, *id.* at 4, for fear of using too porous a sieve, it makes more sense to let the polygraph do the screening work instead. Non-preferential offenders should pass the polygraph without problem, and, should these individuals be deemed deceptive (i.e., a false positive), they would then be screened out either by a retest or by the corroboration requirement.

charged, the suspect would not have a Sixth Amendment right to counsel.⁵³⁵

The polygraph-assisted interrogation would consist of the standard parts of any investigative polygraph session.⁵³⁶ During the pre-test interview, the suspect would be psychologically prepared for the examination. He would be convinced of the accuracy of the device as well as the importance of his telling the truth and the possible consequences of deception (i.e., this would be a catalyst for investigation). The polygraph session itself would be videotaped in order to provide an additional line of defense against the use of countermeasures.⁵³⁷

During the polygraph, the suspect would then be questioned about whether he had previously committed any contact sexual offenses. These questions must be carefully formulated to sufficiently distinguish them from the comparison questions and to ensure that they are sufficiently objective so as to prevent an offender from being able to rationalize away the criminality of his actions. Questions should focus on whether the suspect has in fact victimized any children, and, if he has, the polygraph examiner should seek to elicit detailed information about the crime and identifying information about the victim. This initial phase would screen out any individuals who have not victimized children, including any non-preferential offenders.

If deception were to be detected, the polygrapher then would further interrogate the suspect in the post-test interview with the aim of trying to induce a confession and uncover any previously unknown criminal activity. Any admissions made throughout this process could be used adversely to the suspect, subject to the conditions set forth below.

First, any inconclusive results or indications of deception would necessitate two follow-up procedures: 1) a blind reading by a trained polygrapher who is unfamiliar with the facts of the case; and 2) at least two retests. Even in a fairly straightforward case, at least three administrations of a particular test are needed for accuracy,⁵³⁸ reducing the likelihood of false positives and false confessions.⁵³⁹ In order to pursue an investigation, in the absence of an explicit confession, both the original polygrapher and the blind

535. See *Texas v. Cobb*, 532 U.S. 162, 172 (2001).

536. See *supra* Section II.B.

537. See *supra* note 179 and accompanying text.

538. *Abrams*, *supra* note 64, at 250.

539. See *supra* Section V.D.

reader must agree that the results of the second retest (i.e., the third test) indicated deception.

Second, no admission could be used adversely to a suspect in any way without some external corroboration. Rather than serving as prima facie evidence of guilt, a failed test would generate a hypothesis about where to focus investigative resources.⁵⁴⁰ The corroboration must be external to the interrogation, such that a suspect's confession would be insufficient. Possible examples of external corroboration include victim confirmation, medical evidence, or a statement from another victim, a witness, or another knowledgeable party (e.g., someone to whom the victim revealed the abuse). Hearsay would not be a complete bar to adverse action. “[S]o long as polygraph results are not used in isolation, the effect of [any] false negatives when they do occur should not be great.”⁵⁴¹

Any corroborated admission could then be used adversely to the suspect in a number of ways. It could be used by the prosecutor as leverage in plea bargaining for the original child pornography offense, to spur prosecution of any previously unknown crimes, or as evidence of dangerousness in civil commitment proceedings. This information could also be used as evidence at trial, either in the trial of the original child pornography offense or in the trial of any uncovered contact sexual offenses under Federal Rule of Evidence 414.⁵⁴²

In treatment programs, many therapists recommend immunizing statements that offenders reveal.⁵⁴³ I do not, however, think it is wise to allow undisclosed criminality to remain undetected, nor does the Supreme Court believe that immunization is necessary.⁵⁴⁴ While this may be helpful to treatment of offenders, this does nothing to help the victims and is not as wide-sweeping of a solution as an interrogative polygraph program.⁵⁴⁵

540. See Iacono, *supra* note 74, at 1305 (“[T]he CQT cannot be used as the ultimate arbiter of truthfulness.”).

541. Grubin, *supra* note 117, at 183.

542. See FED. R. EVID. 414. Because pornography cases are defined in the United States Code as offenses of child molestation, child molestation evidence is admissible under Rule 414(a), to the extent that it is relevant, in prosecutions of child pornography crimes. *United States v. Price*, No. 09-30107, 2011 WL 3859700, at *1 (C.D. Ill. Sept. 1, 2011).

543. See, e.g., Hindman & Peters, *supra* note 57, at 13.

544. Cf. *McKune v. Lile*, 536 U.S. 24, 34–35 (2002) (permitting mandatory participation in SOTP where offenders were not granted blanket use immunity).

545. See *supra* Part I.C.

CONCLUSION

There is general agreement that the polygraph can be a valuable tool in an interrogative setting.⁵⁴⁶ It is true that the polygraph is not foolproof, but no methodology is.⁵⁴⁷ Medical tests may not be infallible, but that does not lead us to dismiss their results out of hand.⁵⁴⁸ Rather such tests, like the polygraph, serve as building blocks towards the ultimate goal of solving larger problems.

While some offenders can certainly “beat” the polygraph, many more can “beat” therapists and supervisors in programs where the polygraph is not used,⁵⁴⁹ as people are generally not very good lie detectors.⁵⁵⁰ “While it is certainly possible for offenders to fabricate admissions, there is no indication that this happens more often when the polygraph is used than when it is not,”⁵⁵¹ and, at least with the polygraph, a retest can better substantiate any admissions.⁵⁵²

Use of the polygraph in the post-conviction context has been compared to using urinalysis testing with drug offenders—a way to monitor a very specific type of behavior for a very specific type of offender.⁵⁵³ Just as the polygraph can successfully serve as a monitoring tool in the post-conviction setting, it can serve as an investigative tool in the post-arrest setting, just as with fingerprinting or DNA collection.⁵⁵⁴ No evidence discovered during an investigation is ever dispositive, and polygraph evidence is no different. The polygraph is merely one more tool in the arsenal and another way to more effectively protect victimized children.

546. Iacono & Lykken, *supra* note 80, at 427.

547. RONKEN & JOHNSTON, *supra* note 65, at 1.

548. Jill S. Levenson, *Sex Offender Polygraph Examination: An Evidence-Based Case Management Tool for Social Workers*, 6 J. EVIDENCE-BASED SOC. WORK 361, 366 (2009).

549. Grubin, *supra* note 117, at 182–83.

550. Grubin, *supra* note 87, at 446 (“In experimental settings, the ability of the average person to catch a liar is typically little more than chance and . . . [s]o-called professional lie catchers do not do much better . . .”).

551. Heil & English, *supra* note 29, at 202.

552. *See supra* note 144.

553. ENGLISH ET AL., *supra* note 58, at 11.

554. *See* Sally E. Renskers, *Trial by Certainty: Implications of Genetic “DNA Fingerprints”*, 39 EMORY L.J. 309, 330 (1990) (“The value of DNA fingerprinting as an investigative tool is unprecedented, save possibly for the advent of fingerprints at the turn of the century.”).