CRIMINAL LAW — SENTENCING LAW — SECOND CIRCUIT HOLDS PENILE PLETHYSMOGRAPHY CONDITION ACCEPTABLE ONLY IF DEFENDANT-SPECIFIC AND NARROWLY TAILORED TO COMPELLING GOVERNMENT INTEREST. — *United States v. McLaurin*, 731 F.3d 258 (2d Cir. 2013).

Convicted sex offenders face uniquely onerous postincarceration regulations.[1] Federal courts contribute to this regime by imposing special sex-offender supervised release conditions,[2] which can include physiological tests such as penile plethysmography (PPG).[3] A penile plethysmograph is a "pressure-sensitive device" that is placed around a man's penis before he is shown "an array of sexually stimulating images."[4] By "measuring minute changes in his erectile responses,"[5] the test makes it possible to ascertain his sexual attraction to various stimuli.[6] Recently, in *United States v. McLaurin*,[7] the Second Circuit held that because PPG is so invasive that it implicates "a fundamental liberty interest,"[8] it is reasonably related to the statutory sentencing factors only if "narrowly tailored to serve a compelling government interest."[9] The court's dignity-focused scrutiny of PPG suggests that the degrading nature of other supervised release conditions could similarly inspire heightened review of those conditions.

In 2001, David McLaurin, an Alabama resident, pleaded guilty to one state law count of producing child pornography.[10] As part of his plea, McLaurin admitted that he took photographs of his topless thirteen-year-old daughter,[11] but disputed that he uploaded them to the Internet.[12] His daughter claimed "she had requested the photo shoot"

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[1] *See, e.g.*, Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 447–53 (2010) (tracing a "legal architecture" that "support[s] the crackdown on sex offenders," *id.* at 447).

[2] *See* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1013–14 (2013) ("Sex offenders have been subject to particularly intrusive special conditions." *Id.* at 1013.).

[3] *Id.* at 1013–14; *cf.* U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 26–27 (2010) (cataloguing challenges to physiological-testing conditions).

[4] Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & CIV. RTS. L. REV. 1, 2 (2004). For a detailed account of PPG's origins and use, see *id.* at 6–9.

[5] *Id.* at 2.

[6] *See id.* (describing many researchers' positive estimations of PPG's efficacy).

[7] 731 F.3d 258 (2d Cir. 2013).

[8] *Id.* at 262 (quoting United States v. Myers, 426 F.3d 117, 126 (2d Cir. 2005)).

[9] *Id.* (quoting *Myers*, 426 F.3d at 125–26). Conditions of supervised release can be imposed only if they are reasonably related to one of several enumerated sentencing factors. *Id.*

[10] *Id.* at 260; Brief of Appellant at 5, *McLaurin*, 731 F.3d 288 (No. 12-3514-cr).

[11] *See* Brief of Appellant, *supra* note 10, at 5.

[12] *Id.*

to further her "modeling career."[13] McLaurin received a ten-year prison sentence, "most of it suspended."[14] As a result of this conviction, he became subject to both state sex-offender registration laws and the federal Sex Offender Registration and Notification Act[15] (SORNA), which "required McLaurin to 'register, and keep the registration current, in each jurisdiction' where he lived."[16]

In 2008, McLaurin pleaded guilty to two violations of Alabama's registration law.[17] Those charges stemmed from his failure to inform authorities about his move "from one Alabama county to another."[18] In June 2011, McLaurin relocated to Vermont for a job.[19] He alerted Alabama registry authorities of his new address; subsequently, Vermont authorities "instructed him to fill out paperwork" for their registry.[20] However, within weeks of his arrival, McLaurin lost the job that had drawn him to Vermont.[21] He left the state without submitting the required documents — or informing Vermont officials about his departure.[22] McLaurin eventually returned to Alabama.[23] In the fall of 2011, he was indicted, arrested in Alabama, and removed to Vermont for one count of failure to register[24] under SORNA.[25] He pleaded guilty in the United States District Court for the District of Vermont the following April.[26]

Despite exceptional facts — the lower court found the case "unique" because McLaurin "had not attempted to hide his whereabouts" and it did not consider him a recidivism risk — the district judge "sentenced him to fifteen months in prison and five years of supervised release."[27] Over McLaurin's objections, the court imposed a supervised release condition requiring him to participate in sex-offender treatment that could include PPG.[28] McLaurin appealed,

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13 *McLaurin*, 731 F.3d at 260.
14 *Id.*
15 42 U.S.C. §§ 16901–16962 (2006).
16 *McLaurin*, 731 F.3d at 260 (quoting 42 U.S.C. § 16913).
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 Brief of Appellant, *supra* note 10, at 6.
22 *Id.*
23 *See id.* at 6–7.
24 *See* 18 U.S.C. § 2250(a) (2012).
25 *See* Brief of Appellant, *supra* note 10, at 4.
26 *McLaurin*, 731 F.3d at 260.
27 *Id.*
28 *Id.*

arguing that PPG is intrusive and unrelated to the statutory factors judges must consider when ordering discretionary conditions.[29]

The Second Circuit vacated the condition and remanded to the district court.[30] Writing jointly for the panel, Judge Calabresi and Judge Parker[31] held that PPG was "unjustified," "not reasonably related to the statutory goals of sentencing, and violat[ive of] McLaurin's right to substantive due process."[32] The court acknowledged trial courts' "wide latitude" to issue supervised release conditions, which are reviewed only for abuse of discretion.[33] At the same time, the court asserted reviewing panels' responsibility to "carefully scrutinize unusual and severe conditions" — in particular, conditions implicating protected interests.[34]

The Second Circuit first identified the relevant interests. The court remarked that a convicted felon "retains his humanity" and "right to substantive due process."[35] It thus expressed concern that PPG "involv[es] not only a measure of the subject's genitalia but a probing of his innermost thoughts as well"[36] and cited the circuit's recent admission that PPG implicates "liberty interests . . . of a high order."[37] Attentive to PPG's "demeaning" nature,[38] the court found it "a sufficiently serious invasion of liberty such that it could be justified only if it is narrowly tailored to serve a compelling government interest."[39]

Before imposing PPG, a sentencing court must mine the record to ensure that PPG "reasonably relate[s]" to one of the statutory sentencing purposes as they pertain to the defendant.[40] The federal sentencing guidelines "permit sentencing judges to impose conditions of supervised release"[41] if, inter alia, they (1) enable necessary treatment of the defendant; (2) help protect the public from future offenses by him;

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[29] *Id.* at 259. Alternatively, McLaurin claimed the condition was "an impermissible delegation of authority" to his probation officer. Brief of Appellant, *supra* note 10, at 30. The Second Circuit panel did not reach this argument.

[30] *McLaurin*, 731 F.3d at 264.

[31] Judge Cabranes joined the opinion in full. *Id.*

[32] *Id.* at 260.

[33] *Id.* at 261 (quoting United States v. Reeves, 591 F.3d 77, 80 (2d Cir. 2010)).

[34] *Id.* (quoting United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002)) (internal quotation marks omitted).

[35] *Id.*

[36] *Id.* (quoting United States v. Weber, 451 F.3d 552, 562–63 (9th Cir. 2006)) (internal quotation mark omitted).

[37] *Id.* (quoting Bailey v. Pataki, 708 F.3d 391, 402 (2d Cir. 2013)) (internal quotation mark omitted). *Bailey v. Pataki*, 708 F.3d 391, described the indignities of PPG in finding that the New York state executive's civil commitment of people deemed sexually violent predators implicated procedural due process. *See id.* at 402–04.

[38] *McLaurin*, 731 F.3d at 263.

[39] *Id.* at 261.

[40] *Id.* at 262.

[41] *Id.*

(3) deter him from committing future offenses; or (4) relate to some characteristic of the defendant or his offense.[42] Even upon finding a rational connection to one of the first three goals of sentencing, a court must further examine "whether plethysmography is a 'greater deprivation of liberty than is reasonably necessary'" to serve that goal.[43]

The reviewing panel considered the sentencing factors in turn, looking first to whether PPG could contribute to McLaurin's corrective treatment. Critical of the government's inability to point to "benefits to McLaurin," or "any therapeutic benefit" at all,[44] the court rejected the claim that PPG necessarily contributed to his care.[45] The panel questioned PPG's reliability, focusing on "its susceptibility to manipulation via faking" and inconsistent application and scoring.[46] Entertaining the possibility that PPG *might* facilitate treatment for another offender, the judges instructed district courts to make two types of "defendant-specific" findings before ordering a condition that "inflicts the obviously substantial humiliation of having the size and rigidity of one's penis measured and monitored by the government."[47] First, the court must find that PPG's "benefits substantially outweigh any costs to the subject's dignity" and that less intrusive alternatives are unavailable.[48] Second, the court must find "that the technique . . . has been[] assessed for reliability and efficacy, . . . subject[ed] to peer review, and . . . generally accepted in the scientific community."[49]

McLaurin concisely disposed of the three remaining statutory sentencing factors. Turning to public protection, the court observed that, since the law will not penalize thoughts absent an unlawful act, a "poor test score" could not "justify further detention or more restrictive conditions of release."[50] Therefore, PPG could not protect the public from any future offenses committed by McLaurin.[51] Next, the court discarded any link between PPG and deterrence, dismissing its use to prevent future conduct as "odd," as PPG arouses an offender with images of "conduct closely related to the sexual crime of conviction."[52] Finally, Judge Calabresi and Judge Parker explored whether PPG

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[42] *See* 18 U.S.C. §§ 3553(a), 3583(c) (2012).

[43] *McLaurin*, 731 F.3d at 262 (quoting 18 U.S.C. § 3583(d)(2)).

[44] *Id.*

[45] *Id.* at 262–63.

[46] *Id.* at 263 (quoting United States v. Weber, 451 F.3d 552, 564 (9th Cir. 2006)) (internal quotation mark omitted).

[47] *Id.*

[48] *Id.*

[49] *Id.* (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)).

[50] *Id.*

[51] *See id.* at 264.

[52] *Id.*

"reasonably related to the nature and circumstances of the offense and the history and characteristics" of McLaurin.[53] Concerned by the remoteness of his conviction,[54] and characterizing the instant offense as a "failure to fill out paperwork" rather than a "substantively sexual crime," they found no reasonable link between McLaurin's criminal history and the "government-mandated measurement of his penis."[55]

McLaurin's cabining of sentencing-court discretion is unusual: though sex-offender postincarceration regulations face accumulating critiques,[56] they have rarely been trimmed back.[57] By requiring narrow tailoring and on-the-record factfinding prior to the imposition of PPG, *McLaurin* is among a group of PPG cases that have taken a dignity-focused, heightened-scrutiny approach,[58] addressing concerns about the homogenous treatment of sex offenders. The Second Circuit's emphasis on the defendant's dignity interests suggests that the intrusiveness of special sex-offender supervised release conditions could lead courts to lend teeth to statutory tailoring mandates.

Individual tailoring is built into the federal sentencing guidelines,[59] yet, as *McLaurin* hints, oppressive conditions can be applied quite broadly.[60] The range of conditions imposed can also be quite extensive: circuits have upheld mandated physiological testing, such as polygraphs,[61] as well as absolute bans on Internet use[62] and possession of any pornographic material.[63] Even bans on library access have

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[53] *Id.* (internal quotation mark omitted).

[54] *See id.* ("McLaurin's only conviction for an actual sexual offense was for photographing his daughter topless in 2001.").

[55] *Id.*

[56] *See* Joseph J. Fischel, *Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary*, 17 DUKE J. GENDER L. & POL'Y 277, 285–88 (2010) (cataloguing prominent critiques).

[57] If anything, popular outrage tends to inspire increasingly creative and burdensome postconviction sanctioning. *See* Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 19–21 (2008) (outlining pattern of justification for increasingly severe sex-offender laws).

[58] *E.g.*, Harrington v. Almy, 977 F.2d 37, 44 (1st Cir. 1992) (commenting that "nonroutine manipulative intrusions on bodily integrity will be subject to heightened scrutiny" and that "[PPG], from all that appears, is hardly routine"); *accord* United States v. Weber, 451 F.3d 552, 563–64 (9th Cir. 2006) (adopting First Circuit's reasoning with respect to the "degrading" nature of PPG).

[59] *See, e.g.*, United States v. Malenya, 736 F.3d 554, 559–61 (D.C. Cir. 2013) (criticizing the lower court's application of "standard conditions," *id.* at 560, with "vague" and overbroad language as insufficiently tailored to the defendant, *id.* at 561).

[60] For example, courts have applied special sex-offender conditions to defendants who have a prior sex-offense conviction, even when the instant offense was nonsexual. *See, e.g.*, United States v. Dupes, 513 F.3d 338, 343–45 (2d Cir. 2008) (upholding sex-offender supervised release conditions in securities-fraud sentence of defendant with prior sex-offense conviction).

[61] *See, e.g.*, United States v. Johnson, 446 F.3d 272, 280 (2d Cir. 2006).

[62] *See, e.g.*, *id.* at 281–83.

[63] *See, e.g.*, United States v. Rearden, 349 F.3d 608, 619–20 (9th Cir. 2003).

been attempted.[64] Often, conditions need not be justified on the record.[65] In fact, *McLaurin* implicitly acknowledged that many conditions are more or less unquestioned, such as geographic restrictions.[66]

The use of PPG is neither standard nor infrequent,[67] and at least one other circuit has generally authorized its imposition.[68] Despite this evidence of some acceptance of PPG by courts, the Second Circuit rebuked the district court for its "generalized" observations about PPG's utility and its justification of PPG as a "standard" condition.[69] This criticism accords with the Ninth Circuit's view in *United States v. Weber*,[70] which also demanded individualized factfinding for PPG conditions and warned lower courts that a "generalized assessment based on the class of sex offenders generally" would not be enough to warrant PPG.[71] *McLaurin*'s call for individualized findings is a victory for convicted sex offenders who face release conditions that are overbroad and disproportionate to their crimes.

Why was the *McLaurin* panel so skeptical about PPG? Judges Calabresi and Parker raised substantive due process concerns sounding in human dignity, concerns oft-rejected by courts reviewing challenges to various sex-offender postrelease conditions.[72] *McLaurin* is replete with references to individual dignity and its violation.[73] The court focused on the "humanity" that remains "even when dealing with convicted felons."[74] In particular, the court questioned a condition that exacts "substantial humiliation" and invades a person's secret, "unacted-upon prurient sexual thoughts."[75] Reflecting these concerns, the panel constrained PPG conditions more narrowly than any other circuit has to

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64 *See* U.S. SENTENCING COMM'N, *supra* note 3, at 21; *see also*, United States v. Bender, 566 F.3d 748, 753 (8th Cir. 2009) (noting that absolute bans on library access run afoul of constitutional rights).

65 *See, e.g.*, United States v. Banks, 464 F.3d 184, 190 (2d Cir. 2006) (observing that in sentencing, "there is no requirement that the court mention the required factors, much less explain how each factor affected [its] decision"); *Rearden*, 349 F.3d at 619. *But see, e.g.*, United States v. Weber, 451 F.3d 552, 560 n.10 (9th Cir. 2006) (recognizing that some circuits demand on-the-record explanations).

66 *See McLaurin*, 731 F.3d at 264.

67 *See* Odeshoo, *supra* note 4, at 7–8 (discussing studies that show the use of PPG in 32%, 18%, and 25% of treatment programs). While imposing PPG as a supervised release condition may be uncommon in the Second Circuit, *see McLaurin*, 731 F.3d at 261 n.1, some federal district courts include it on the preprinted forms they use to record conditions, *see* U.S. SENTENCING COMM'N, *supra* note 3, at 27.

68 *See* United States v. Dotson, 324 F.3d 256, 261 (4th Cir. 2003).

69 *McLaurin*, 731 F.3d at 260, 263 (internal quotation marks omitted).

70 451 F.3d 552.

71 *Id.* at 569.

72 *See, e.g.*, Bret R. Hobson, Note, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?*, 40 GA. L. REV. 961, 972 (2006).

73 *See McLaurin*, 731 F.3d at 261–63.

74 *Id.* at 261–62.

75 *See id.* at 263.

date.[76] The result of a PPG-level affront to dignity may thus be especially close judicial review and circumscription.

Perhaps *McLaurin* is unique. The bizarre, repulsive nature of plethysmography ("Orwellian" by the Ninth Circuit's standards[77]) may cause courts to be singularly harsh in evaluating its utility. Future courts may distinguish PPG by calling it "extraordinarily invasive"[78] and "exceedingly intrusive" — as *McLaurin* did.[79] The panel alluded to cultural discomfort with the plethysmograph by commenting upon its association with homosexual conversion therapy,[80] while giving only cursory consideration to PPG's receipt in science and practice.[81] By suggesting that PPG targets "daydreaming,"[82] the judges dismissed justifications that other courts and treatment professionals accept, such as encouraging offenders to be candid about their desires. This determination contrasts with the court's approach in *United States v. Johnson*,[83] affirming a polygraph condition over defendant's objections regarding the test's unreliability.[84]

Then again, perhaps the court's willingness to scrutinize PPG conditions may prove significant because other special supervised release conditions *also* cause serious indignities for sex offenders. For example, a controversial special supervised release condition is GPS monitoring via an ankle bracelet.[85] PPG is certainly less useful than GPS monitoring — PPG has a spotty reputation for efficacy, whereas tracking can confirm whether an offender complies with certain release terms. Moreover, GPS monitoring does not involve the genitalia. But the *McLaurin* court did object to the humiliation PPG precipitates, and tracking devices expose released offenders to dual grave humiliations: the released offender must constantly display an outward symbol of his past criminality, and the device bares intimate details of his life to the scrutiny of government officials. As New York's highest

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[76] In *Weber*, for example, the Ninth Circuit left open the possibility that PPG could be used in pursuit of several of the statutory purposes of punishment. *See* 451 F.3d at 566. In *McLaurin*, the Second Circuit arguably foreclosed public protection and deterrence as justifications. *See* 731 F.3d at 263–64. *McLaurin* borrows heavily from the *Weber* concurrence, which would have banned state-imposed PPG. *Compare Weber*, 451 F.3d at 571 (Noonan, J., concurring) ("By committing a crime and being convicted of it, a person does not cease to be a person. . . . The prisoner retains his humanity . . . ."), *with McLaurin*, 731 F.3d at 261 ("A person, even if convicted of a crime, retains his humanity.").

[77] *Weber*, 451 F.3d at 570 (Noonan, J., concurring); *accord id.* at 554 (majority opinion) ("[O]ne would expect to find a description of [PPG] gracing the pages of a George Orwell novel . . . .").

[78] *McLaurin*, 731 F.3d at 260.

[79] *Id.* at 262.

[80] *Id.* at 261.

[81] *See id.* at 260–61; *cf. Weber*, 451 F.3d at 564–66 (considering the literature).

[82] *McLaurin*, 731 F.3d at 263.

[83] 446 F.3d 272 (2d Cir. 2006).

[84] *See id.* at 277–78.

[85] *See, e.g.*, United States v. Porter, 555 F. Supp. 2d 341 (E.D.N.Y. 2008).

court explained, tracking allows the state to traipse along for "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour-motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on."[86] As such devices become cheaper, it is easy to imagine tracking conditions becoming ubiquitous.[87] The searching gaze of the *McLaurin* panel could limit this intrusion to the cases that merit it most.

Similarly, sex offenders have been identified as a population that could be tracked via radio frequency identification, which would involve chips inserted under the skin.[88] The viability of such a condition under the current supervised release framework has been theorized.[89] Yet the idea of a permanent body manipulation that allows the state to follow an individual's every step appears to fall short of the respect for humanity at the heart of *McLaurin*.

Drawing courts' attention to indignities suffered when harsh conditions are indiscriminately imposed on sex offenders may lead to stricter observance of individual fit requirements embedded in the sentencing guidelines. Critics question the blanket imposition of costly restrictions — some of which have been found ineffective[90] — upon such a wide variety of offenders.[91] And anecdotes abound about how overbroad registration and notification requirements, amped up by SORNA,[92] have led to threats, job loss, property loss, and even deaths.[93] *McLaurin* exemplifies the sort of salutary compromise — between dignity and public protection — that can arise when courts insist upon treating offenders as individual people.

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[86] People v. Weaver, 909 N.E.2d 1195, 1199 (N.Y. 2009). Justice Sotomayor recently agreed, observing that the record created by a GPS device attached to a subject's car "reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring).

[87] *See supra* note 57.

[88] *See* Isaac B. Rosenberg, *Involuntary Endogenous RFID Compliance Monitoring as a Condition of Federal Supervised Release — Chips Ahoy?*, 10 YALE J.L. & TECH. 331, 333 & n.5, 335 & n.15 (2008).

[89] *See id.* at 345–51.

[90] *See, e.g.*, Yung, *supra* note 1, at 472–81 ("America wages a War on Sex Offenders at its peril." *Id.* at 481.); HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 4–12 (2007), *available at* http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf; *Unjust and Ineffective*, THE ECONOMIST, Aug. 8, 2009, at 21, *available at* http://www.economist.com/node/14164614.

[91] *See* Adam Shajnfeld & Richard B. Krueger, *Reforming (Purportedly) Non-Punitive Responses to Sexual Offending*, 25 DEV. MENTAL HEALTH L. 81, 82 (2006) ("[Sex offender] requirements are typically insensitive to differences in motivation and intent, the nature of the offense and its impact on the victim, and the likelihood of recidivism and risk to society."); Yung, *supra* note 1, at 455 ("Sex offenders are treated as a uniform population even though they are an incredibly diverse group representing different dangers and risk levels.").

[92] *See* 42 U.S.C. §§ 16901–16962 (2006).

[93] *See generally* HUMAN RIGHTS WATCH, *supra* note 90, at 78–99.