

**REPORT OF THE
OFFICE OF THE LIEUTENANT GOVERNOR ON**

**HABITUAL SEX OFFENDER
SUBCOMMITTEE**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



SENATE DOCUMENT NO. 41

**COMMONWEALTH OF VIRGINIA
RICHMOND
1995**

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COMMONWEALTH of VIRGINIA

Donald S. Beyer, Jr.
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January 21, 1995

The Honorable Donald S. Beyer, Jr
Lieutenant Governor of Virginia
101 North 8th Street
Richmond, Virginia 23219

Dear Governor Beyer,

We are pleased to submit to you the report of the Habitual Sex Offender Subcommittee. This document represents the work of many citizens of our Commonwealth who have had the courage and persistence to consider this most difficult public policy issue.

We have included recommended legislation to translate the findings and conclusions of the subcommittee into law in Virginia. We hope it will be of assistance as the Commission on the Reduction of Sexual Assault Victimization in Virginia contemplates legal remedies to this problem.

Serving on this subcommittee has been a privilege for each of us. The deliberations were spirited and bipartisan. Every member made a significant contribution.

We believe these recommendations will truly make a difference in the lives of Virginians.

Sincerely,

A handwritten signature in cursive script, reading "Deborah MacArthur".

Deborah MacArthur, Executive Assistant
Office of the Lieutenant Governor
Subcommittee Chair

LD477761

SENATE BILL NO. 940

Offered January 23, 1995

A BILL to amend and reenact § 19.2-297.1 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 18.2-67.5:2 and 18.2-67.5:3, relating to criminal sexual assault; penalty.

Patrons—Houck and Howell; Delegate: Puller

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-297.1 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding sections numbered 18.2-67.5:2 and 18.2-67.5:3 as follows:

§ 18.2-67.5:2. Punishment upon conviction of certain subsequent felony sexual assault.

A. Any person convicted of more than one offense specified in subsection B, when such offenses were not part of a common act, transaction or scheme, and who has been at liberty as defined in § 53.1-151 between each conviction shall, upon conviction of the second or subsequent such offense, be guilty of a Class 2 felony. Notwithstanding any other provision of law, twenty years of the sentence imposed shall not be suspended, in whole or in part, provided it is admitted, or found by the jury or judge before whom the person is tried, that he has been previously convicted of at least one of the specified offenses.

B. The provisions of subsection A shall apply to felony convictions for:

1. Abduction with intent to defile in violation of § 18.2-48;
2. Carnal knowledge of a child between thirteen and fifteen years of age in violation of § 18.2-63;
3. Carnal knowledge of certain minors in violation of § 18.2-64.1;
4. Aggravated sexual battery in violation of § 18.2-67.3;
5. Crimes against nature in violation of subsection B of §18.2-361;
6. Adultery or fornication with own child or grandchild in violation of § 18.2-366;
7. Taking indecent liberties with a child in violation of § 18.2-370 or § 18.2-370.1; or
8. Conspiracy to commit any offense listed in subdivisions 1 through 6.

C. For purposes of this section prior convictions shall include adult convictions, and findings of not innocent, adjudications or convictions in the case of a juvenile, under the laws of any state or the United States for any offense substantially similar to those listed under subsection B if such offense would be a felony if committed by an adult in the Commonwealth.

§ 18.2-67.5:3. Punishment upon conviction of certain subsequent violent felony sexual assault.

A. Any person convicted of more than one offense specified in subsection B, when such offenses were not part of a common act, transaction or scheme, and who has been at liberty as defined in § 53.1-151 between each conviction shall, upon conviction of the second or subsequent such offense, be sentenced to life imprisonment and shall not have all or any portion of the sentence suspended, provided it is admitted, or found by the jury or judge before whom he is tried, that he has been previously convicted of at least one of the specified offenses.

B. The provisions of subsection A shall apply to convictions for:

1. Rape in violation of § 18.2-61;
2. Forcible sodomy in violation of § 18.2-67.1;
3. Object sexual penetration in violation of § 18.2-67.2; or
4. Conspiracy to commit any offense listed in subdivisions 1 through 3.

C. For purposes of this section prior convictions shall include adult convictions, and findings of not innocent, adjudications or convictions in the case of a juvenile, under the laws of any state or the United States for any offense substantially similar to those listed under subsection B if such offense would be a felony if committed by an adult in the Commonwealth.

§ 19.2-297.1. Sentence of person twice previously convicted of certain violent felonies.

A. Any person convicted of two or more separate acts of violence when such offenses were not part of a common act, transaction or scheme, and who has been at liberty as defined in § 53.1-151

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1 between each conviction, shall, upon conviction of a third or subsequent act of violence, be sentenced
 2 to life imprisonment and shall not have all or any portion of the sentence suspended, provided it is
 3 admitted, or found by the jury or judge before whom he is tried, that he has been previously
 4 convicted of two or more such acts of violence. For the purposes of this section, "act of violence"
 5 means (i) any one of the following violations of Chapter 4 (§ 18.2-30 et seq.) of Title 18.2:

6 a. First and second degree murder and voluntary manslaughter under Article 1 (§ 18.2-30 et seq.);
 7 b. Mob-related felonies under Article 2 (§ 18.2-38 et seq.);
 8 c. Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.);
 9 d. Any malicious felonious assault or malicious bodily wounding under Article 4 (§ 18.2-51 et
 10 seq.);

11 e. Robbery under § 18.2-58 and carjacking under § 18.2-58.1; or

12 f. ~~Any~~ Except as otherwise provided in § 18.2-67.5:2 or § 18.2-67.5:3, criminal sexual assault
 13 punishable as a felony under Article 7 (§ 18.2-61 et seq.);

14 (ii) conspiracy to commit any of the violations enumerated in clause (i) of this section; and (iii)
 15 violations as a principal in the second degree or accessory before the fact of the provisions
 16 enumerated in clause (i) of this section.

17 B. Prior convictions shall include convictions under the laws of any state or of the United States
 18 for any offense substantially similar to those listed under "act of violence" if such offense would be a
 19 felony if committed in the Commonwealth.

20 The Commonwealth shall notify the defendant in writing, at least thirty days prior to trial, of its
 21 intention to seek punishment pursuant to this section.

22 C. Any person sentenced to life imprisonment pursuant to this section shall not be eligible for
 23 parole and shall not be eligible for any good conduct allowance or any earned sentence credits under
 24 Chapter 6 (§ 53.1-186 et seq.) of Title 53.1. However, any person subject to the provisions of this
 25 section, *other than a person who was sentenced under subsection A for criminal sexual assault*
 26 *convictions specified in subdivision f, (i) who has reached the age of sixty-five or older and who has*
 27 *served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older*
 28 *and who has served at least ten years of the sentence imposed may petition the Parole Board for*
 29 *conditional release. The Parole Board shall promulgate regulations to implement the provisions of this*
 30 *subsection.*

31 2. That the provisions of this act may result in a net increase in periods of imprisonment in state
 32 correctional facilities. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is
 33 \$395,560.

Official Use By Clerks

Passed By The Senate

without amendment

with amendment

substitute

substitute w/amndt

Date: _____

 Clerk of the Senate

Passed By

The House of Delegates

without amendment

with amendment

substitute

substitute w/amndt

Date: _____

 Clerk of the House of Delegates

EXECUTIVE SUMMARY

Virginians are ready to fight crime -- however, some are apprehensive about strategy, especially when battling sex offenders. The number of reported sex offenses, particularly those against children, is growing. Victims of sex offenders frequently have permanent effects on their lives. The untreated victims of childhood sexual abuse often pass on their own unresolved pain to next generation's offender; the cycle continues. Medical, psychological and corrections research all show that sex offenders are among the most difficult people to treat. The same research also reports that some sex offenders will have hundreds of victims.

Not all sex offenders are the same; some are habitual offenders, others opportunists. Offenders commit crimes indiscriminately and repeatedly against the vulnerable in our society. American and international research reports that different types of offenders may respond to different treatment methods. Only a small percentage -- habitual sex offenders -- are resistant to present-day treatment.

National data suggests few of these offenders, whatever their typology, ever enter the criminal justice system. For those convicted, rehabilitation is a major challenge. In Virginia, 65 percent of sex offenders are repeat offenders.

Are sex offenders criminals or victims of mental illness? Different states have looked at different answers to this essential question. The state of Washington has a statute allowing indefinite commitment of the offender to secure mental health facilities. The law is based on the premise that habitual sex offenders suffer from a mental defect or disease which renders them unresponsive to existing mental illness treatments.

HJR 193 requested the Commission on the Reduction of Sexual Assault Victimization in Virginia to study the confinement of habitual sex offenders, with a concentration on Washington's existing statute. The Commission was requested to determine the feasibility and appropriateness of adapting the Washington statute and program for implementation in Virginia.

After reviewing the state of Washington statute and a similar

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statute from case law in Minnesota, as well as Virginia sex offender conviction data, the Habitual Sex Offender Subcommittee of the Sexual Assault Commission has unanimously agreed on two clear points. First, sex offenses are criminal acts. Second, we in Virginia must punish the convicted offender within the confines of the criminal justice system.

We recognize that many sex offenders do have mental illness, and they should receive treatment while incarcerated for their crimes. For those offenders who commit repeated violent sex crimes, the subcommittee recommends life in prison without early release.

RECOMMENDATIONS

1. Amend the Code of Virginia to allow for enhanced punishment of habitual sex offenders.
2. Direct the Department of Planning & Budget and the Department of Corrections to project the costs associated with these recommendations.

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HABITUAL SEX OFFENDERS

PROBLEM DEFINITION

The prevalence of reported sex offenses by adults, especially those against children, is growing. Virginians who are victimized by sex offenders have permanent alterations in their life trajectories. The impact of the abuse cannot be quantified. Abusers are often trusted adults. In August 1994, a Department of Criminal Justice Services study reported that eighty percent of all victims of convicted sex offenders were children.

Furthermore, fifty percent of these were under thirteen years of age.¹ Only a small portion of the abusers ever enter the criminal justice system. "National surveys confirm that only one in six rapes is ever reported to the police."² Those offenders who do reach the system are puzzling to the therapists and correctional treatment team. Research shows that sex offenders are some of the most difficult people to treat. Many offenders are unidentified survivors of abuse themselves.

Habitual sex offenders present two major challenges to society. Each offender may abuse hundreds of children, and traditional incarceration does not appear to deter offenders from re-offending when released. The recidivism rate for untreated habitual sex offenders is estimated to be as high as 65%.

These two factors: one, the exponential number of new victims created by each sex offender and, two, a high recidivism rate when compared to other types of crimes, demand an innovative but forceful response. Virginians must escalate the campaign to protect our citizens, especially our children, from sexual predators.

STRATEGY

The question in the management of treatment resistant sex offenders is: How then, can we, as Virginians, protect the vulnerable populations in our state while respecting the constitutional rights of repeated sex offenders?

Challenged by this question, the Habitual Sex Offender Subcommittee of the Sexual Assault Commission began by exploring two options:

Habitual sex offenders present two major challenges. Each offender may abuse hundreds of children, and traditional incarceration does not deter offenders from reoffending when released.

1. indeterminant sentencing of habitual sex offenders based on their continued danger to the community, and
2. biomedical treatment.

On further investigation and research, the subcommittee unanimously decided to recommend a third approach for Virginia: enhanced criminal punishment for habitual sex offenders.

HISTORY OF THE PROBLEM

While historically, sex offenses can be traced to pre-Biblical times, the management of these offenders has been complex and enigmatic. For example, during the 1800's in this country, surgical castration was a legal punishment option for rape, especially rape across races. Believing this punishment/treatment approach to be discriminatorily applied and being beyond the bounds of humane and acceptable treatment, surgical castration laws were struck down by the Supreme Court. Frustrated by the lack of success of counseling and rehabilitative therapies, alternatives for effective treatment were sought. Attempts to chemically control testosterone levels through the use of female hormone therapy were begun in 1944, in addition to surgical castration. The State of Virginia carried a statute for surgical castration until 1966.

In 1966, the first reported use of depot medroxyprogesterone acetate (MPA) (Depo Provera), to reduce the sexual drive in a transvestite habitual sexual offender was begun.³ The efficacy of this treatment caused health care providers to explore drug therapy as one alternative for the management of treatment resistant sex offenders.

In Virginia, a Joint Legislative Audit & Review Commission (JLARC) study, "Substance Abuse And Sex Offender Treatment Services For Parole Eligible Inmates", found that almost ten percent of [Virginia's] 14,841 inmates who were incarcerated in 1990 in a State prison or field unit had been convicted of some type of sexual offense.⁴ On July 28, 1994, the Virginia Department of Corrections housed a total of 3,049 sexual offenders. This figure includes both male and female sexual offenders; most of the offenders are male. The oldest offender

The oldest offender in prison is an 86 year old male who was 83 at the time of his last offense.

is an 86 year old male who was 83 at the time of the offense. In August 1994, a Department of Criminal Justice Services (DCJS) study profiled the offender as a young, white, adult male having less than a high school education. The same study reported that over one-fourth of the offenders were unemployed at the time of the offense. Based on probation officer reports, twenty-seven percent showed evidence of alcohol abuse; sixteen percent showed evidence of drug abuse. One in four offenders had at least one family member with a felony conviction.⁵ Only 29 females are now serving time in Virginia for a sexual offense. While less than one percent (1%) of the offenders in the corrections system are women, women were the victims of offenders eighty-six (86%) percent of the time.⁶ By comparison, one in seven sex offenses involved a male victim and a male offender. Children accounted for ninety-four (94%) percent of all victims of aggravated sexual battery convictions. Children accounted for sixty-two (62%) percent of all victims of rape/sodomy convictions.⁷ Ethnicity of these offenders is closely distributed between Caucasian and African-American. Less than one (1%) percent are from other ethnic backgrounds.

Juvenile offenders tried as juveniles constitute an extremely small segment, less than one (1%) percent, of all sex offenders confined in Virginia. However, in a 1993 report, a disproportional thirty Community Service Boards of the Department of Mental Health, Mental Retardation, and Substance Abuse Services provided treatment for the juvenile sex offender and victim. This report does note that fewer services are available from CSB's or other child mental health services for the offender than for the juvenile sex offender and victim. However, when we look at the scope of service by the CSB's, the number is increasing. The CSB report further notes that duration of treatment is more than one year for 43% of the offenders and victims.⁸

SCOPE AND DISTRIBUTION OF THE PROBLEM

The scope of the problem is not clearly defined because many sexual offenses are not reported at the time of incidence. Child sexual abuse victims may not report abuse until years after the occurrence(s). Historically, rape had been under-reported, particularly marital and date rape. Some offenders may never reach the criminal justice system. Those offenders who do enter the justice system vary in behavior from exhibitionism to rape.

Summary of Selected Findings

- 3 out of 4 sex offenses occurred in a private residence.
- 80% of the victims of convicted sex offenders were under the age of 18.
- 4 out of 5 convicted sex offenders knew their victim.
- Child victims were more likely than adults to be assaulted in their own home and repeatedly victimized by their attacker.
- Almost one-half of convicted sex offenders had previously undergone some form of mental health treatment.
- 63% of convicted sex offenders had a prior criminal conviction.
- 10% of the offenders used a weapon -- 3% used a firearm.
- 3 out of 4 sexual assaults resulted in some measurable form of injury.
- 55% of all convicted sex offenders received a prison sentence.
- Both judges and juries gave longer prison sentences if the victim and offender were strangers and if the victim was an adult.

The Uniform Crime Reporting Section of the Virginia State Police reports that the number of reported forcible rape offenses for 1993 was 2,084. In 1992, the number was 2,008, seventy nine (79%) percent of which resulted in an arrest. Although sex crimes (rapes and other sex offenses) accounted for one (1%) percent of all arrests in Virginia in 1992, sex offenders accounted for only six (6%) percent of all new admissions to Virginia's prisons. By comparison, drug offenders accounted for five (5%) percent of all arrests and thirty one (31%) percent of all new prison admissions.⁹

There were 3,425 arrests for other sexual offenses (adult offenders=2,964, juvenile=461). Unfortunately, child molestation is not reported separately; therefore, child molestation may be included in reports of other sexual offenses or under forcible rape. Convictions for sexual assault have remained stable over several years, but dispositions have varied.

According to Offender Based Transaction Statistics for 1990, sixty four (64%) percent resulted in conviction. One out of three cases was dismissed. Convicted offenders who victimize a family member, particularly a child, routinely receive less severe sentences than offenders who assault strangers.¹⁰

In 1994, the Department of Social Services registered 5,196 complaints of child sexual abuse. These statistics reflect only those complaints lodged against persons responsible for the direct care of the child. The following table provides a breakdown of the types of alleged sexual abuse complaints by a caretaker.

REPORT OF CHILD SEXUAL ABUSE BY CARETAKER FOR 1994			
TYPE OF ABUSE ALLEGED	NUMBER COMPLAINTS	FOUNDED	SUBSTANTIATED
Intercourse	1,029	378	103
Exploitation	192	29	14
Sexual Molestation	2,986	843	285
Other	1,775	256	130
TOTAL	5,982	1,506	532

Although sex crimes accounted for 1% of all arrests in Virginia in 1992, sex offenders accounted for only 6% of all new admissions to Virginia's prisons.

Situational child molesters are more prevalent offenders (about seventy (70%) percent of the offenders) in society but commit fewer sexual crimes. Preferential child molesters represent only about 10% of sexual offenders, but perpetrate the greater number of offenses. However, situational offenders are increasing more rapidly than the preferential offenders.

The U. S. Department of Justice reports that an untreated preferential child molester may offend 300 to 400 children in a lifetime. Kenneth V. Lanning, (personal communication, 7/6/94) Supervisory Special Agent of the Behavioral Science Unit of the FBI, reports untreated male preferential child molesters who prefer young adolescent boys may sexually abuse 200 to 1,000 adolescent males in the abuser's lifetime.

The untold pain and anger created by such abuse, usually unreported, sets the stage for creating new perpetrators. These resulting physical and psychological stressors inflict lasting damage to the personality.

The Virginia Department of Corrections reports that fifty (50%) percent of the offenders now incarcerated have been the victims of childhood sexual abuse themselves. (Richeson, personal communication, 7/13/94). The literature also reports that about twenty five (25%) percent of all sex offenders ever convicted have documented histories of sexual abuse (Smith, personal communication, 7/20/94).

The majority of sex offenders are not apprehended for each sex crime committed. Recognizing the repetitive nature of the crime, it is probable that these offenders may have committed more offenses than the one for which they are convicted.

The criminal justice system struggles to find an effective method of management of these criminals. We must develop an effective system to protect the community, while at the same time to rehabilitate and thus minimize recidivism. Types of sentences are varied, as revealed in the DCJS study. "Under Virginia's statutes, the punishment for rape/forcible sodomy is to be imprisoned for five years to life. Similarly, the punishment range for aggravated sexual battery is one year to 20 years. While the imposed sentence must conform to the statutes, judges can and do suspend any or all of the sentence, which accounts for no effective time to be served in some cases."¹¹

***The F.B.I.
reports
untreated
male
preferential
child
molesters
who prefer
young
adolescent
boys may
sexually
abuse 200 to
1,000
adolescent
males in the
abuser's
lifetime.***

criminal behavior which constitute recidivism, and the types of sexual offenders who constitute the sample population.

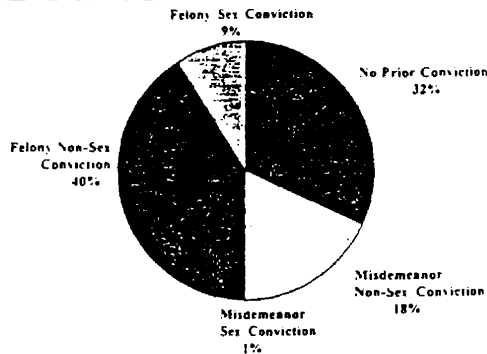
Many comparisons are like comparing apples and oranges. Even without clear comparisons, these studies inform the reader of the seriousness of the recidivism rate for sex offenders.

The effectively treated sex offender has a reported recidivism rate of eighteen (18%) to thirty (30%) percent, as opposed to approximately sixty five (65%) percent recidivism rate for the population of untreated sex offenders as a whole.

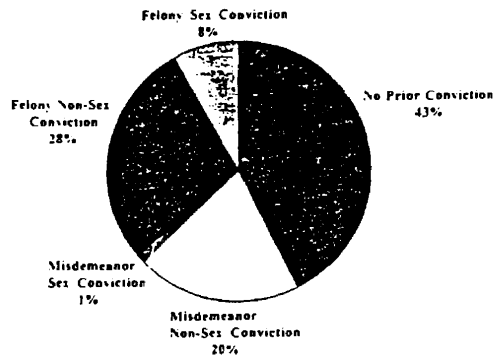
According to the DCJS report, prior convictions for criminal offenses were significant. Sixty-three (63%) percent of all convicted sex offenders have a prior criminal conviction. Prior convictions are depicted in the following charts.

Prior Convictions:

Rape/Forcible Sodomy Offenders



Aggravated Sexual Battery Offenders



Average Prison Sentence:

	Judicial Sentences	Jury Sentences
Rape/Forcible Sodomy Offenders	19.0 yrs	29.2 yrs
Stranger Victim	25.8	35.1
Child Victim	18.0	29.4
Adult Victim	30.1	36.7
Friend/Acquaintance Victim	13.8	18.0
Child Victim	13.2	20.8
Adult Victim	15.0	14.6
Family Victim	16.2	19.5
Child Victim	16.0	19.5
Adult Victim	17.6	*
Aggravated Sexual Battery Offenders	7.6 yrs	9.1 yrs
Stranger Victim	8.4	11.3
Child Victim	7.4	6.8
Adult Victim	11.8	11.0
Friend/Acquaintance Victim	8.5	6.7
Child Victim	8.4	7.2
Adult Victim	10.5	*
Family Victim	6.7	9.6
Child Victim	6.7	9.2
Adult Victim	9.5	*

*Insufficient number of jury cases with adult victims

CAUSES OF THE PROBLEM

In order to understand the problem of sexual offenses, one must understand the behaviors that constitute an offense. The specific behaviors classified as sexual offenses are listed in Table # 5.

To understand the sex offender, one must understand how the behavior develops. Dr. William Pithers, Director of the

Prison Incarceration Rate By Victim/Offender Relationship:

	Number of Cases	Incarceration Rate
Rape/Forcible Sodomy Offenders	1148	81%
Stranger Victim	517	88%
Child Victim	135	78%
Adult Victim	318	91%
Friend/Acquaintance Victim	323	80%
Child Victim	194	79%
Adult Victim	99	82%
Family Victim	308	72%
Child Victim	281	72%
Adult Victim	19	73%
Aggravated Sexual Battery Offenders	516	45%
Stranger Victim	127	49%
Child Victim	87	43%
Adult Victim	27	77%
Friend/Acquaintance Victim	172	52%
Child Victim	156	53%
Adult Victim	10	17%
Family Victim	217	42%
Child Victim	213	42%
Adult Victim	3	50%

Note: See as victim is unknown for 102 of the Rape/Sodomy cases and 20 of the Aggravated Sexual Battery cases

Vermont Sex Offenders Program, reports five stages in the anatomy of a sex crime.

"Each stage is a potential treatment opportunity.

"The sex offense begins with the perpetrator feeling intense emotions such as anger, loneliness, or depression.

"Next the perpetrator develops fantasies. Fantasies may begin as benign thoughts about loving and holding the soon-to-be victim, but quickly turn to erotic and sexual fantasies of the victim and the perpetrator together.

"Thought distortion begins shortly after that, as the perpetrator, in the third stage, begins to justify his behavior. Such thoughts as, "I am just teaching the child how to _____", or "There is nothing wrong with this; it is just a societal prohibition here, but other countries allow it and no one gets hurt."

"The fantasy and justification allow for a plan to be formed in the fourth stage. The perpetrator, like any actor who must play a role, rehearses his role--friend or trusted adult. In the final stage, after he has rehearsed and worked out the plan step by step, he enacts the plan, leaving in it's wake a devastated victim. The victim must then carry the pain of the abuse."¹⁴

Some victimizers enact this plan hundreds of times in their life time, some only a few times. Some abusers are habitual sex offenders and others are opportunists.¹⁵

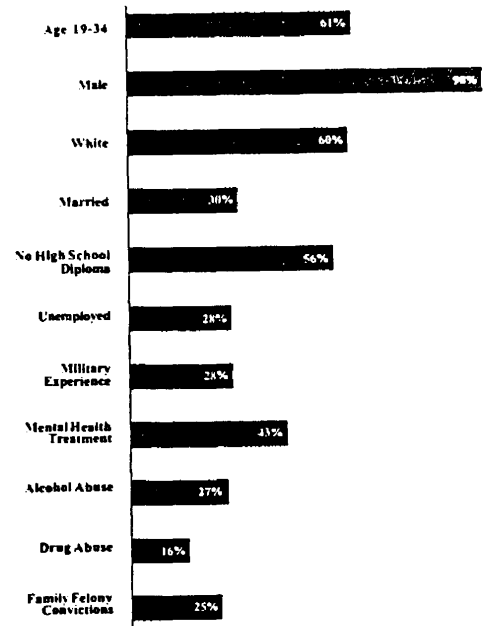
The profile of the typical incarcerated Virginia sex offender is presented in Table 6.

PARAPHILIAC PERSONALITY DISORDER¹⁶

There is a sound body of data in clinical case studies, court reports, and criminal statistics, to support the existence of a sex offender or paraphiliac personality disorder. It is characterized by excessive pre-occupation with sexuality by fantasy or behavior that deviates from societal norms and values, and is physically and/or psychologically harmful to victims.

Who Are The Convicted Sex Offenders?

Profile:



BEHAVIORS IDENTIFIED AS SEXUAL OFFENSES

- Sexual Assault
- Rape
- Sodomy
- Carnal Abuse
- Sexual Battery
- Penetration with object
- Fondling of child
- Incest
- Homosexual act with minor
- Indecent exposure
- Peeping Tom
- Indecent liberties
- Adultery
- Aiding & Abetting Rape
- Carnal knowledge

Major features are low personal and social controls, unwillingness to conform to legal and societal standards, lack of empathy for victims, cognitive distortion, and denial or minimization of deviant sexual behaviors.

Recent data reflects increased concern that deviant sexual behavior is far more complex than has been assumed.^{17 18 19} Typologies specific for one type of sex offense have expanded but do not include crossover of several types of offenses.²⁰

Offender psychodynamics can be highly individualized, more complex than sexual offense typologies suggest.

Personality disorder is defined as a persistent pattern of behaviors and traits rooted in the history and development of the individual personality. Current diagnostic criteria (DSM-IV, 1994)²¹ describe personality traits as "enduring pattern of perceiving, relation to, and thinking about the environment and oneself... in a wide range of important social and cultural contexts."

Clinical case studies and court reports support the hypothesis that using and abusing others sexually is an enduring perception of self and others in social and cultural contexts.

DSM-IV describes how personality disorders develop from pathological traits that become "inflexible and maladaptive and cause significant functional impairment or subjective distress."²² They are "often recognized by adolescence or earlier and continue throughout most of adult life."

Diagnosis of personality disorder is confirmed "only when the characteristic factors are typical of the person's long term functioning and are not limited to discrete episodes". Being fired, divorced, or arrested for a sex offense is a significant functional impairment with subjective distress.

Sex offender case histories confirm a high incidence of early onset.

Inappropriate sexuality in paraphiliac personality disorder is usually of early onset, in infancy and early childhood. This behavior can be learned and conditioned by the offender's own victimization.

Diagnosis of personality disorder is confirmed only when the characteristic factors are typical of the person's long-term functioning and are not limited to discrete episodes.

The offenders own victimization provides a model for future offenses.

It is a historical disorder, rooted in the past, and it is both acute and chronic. Erotic fantasy, deviant and individualized, directly contributes to sexual acting out which usually progresses from passive to active sexual acting out, repeated and reinforced, escalating into rape, incest, or molestation.

The offender's own victimization, real, feared, fantasized, or perceived as real by inept therapy, provides a model for future offenses. A study of 1149 randomly selected sex offenders in Virginia showed that about half of them were under age 13, had multiple offenses, and one in four had been sexually assaulted themselves.²³

There is a paraphiliac pathology loop that develops in early life. Deviant fantasy includes preoccupation with a love object that in turn, leads to unrealistic expectations and cognitive distortion, a distinguishing feature of paraphilia. Fantasies acted out in inappropriate sexual behavior, if untreated, are reinforced and become embedded in personality dynamics, more deeply over time.

Societal norms and values are contradictory and subsequently fade, yielding to the individual's own deviant belief system. This leads to inappropriate or eccentric behavior, and can deteriorate further into depression, delusion, dissociation, or bizarre sex crimes.

The offender's own victimization provides a model for future offenses.

The denial and minimization, typical of confronted or challenged paraphiliacs, is a defense response to a newly fabricated basic belief and value system. Others *are* sex objects and abusing them is *normal* according to paraphiliac logic. This belief system is exceptionally well fortified and defies reason and reality.

While sexual predators are paraphiliacs, not all child molesters are habitual sex offenders. Just as the types of offenses vary, so do the types of offenders. The FBI offers a convenient topology for classification of offenders sexually abusing children. Offenders are classified as either situational or preferential child molesters.

The sex offender's personality disorder is characterized by excessive pre-occupation with sexuality by fantasy or behavior that deviates from societal norms and values and is physically and/or psychologically harmful to victims.

Situational child molesters are individuals who do not have a preference for children, but rather, are opportunistic. The offender desires sexual contact and will have sex with any vulnerable individual, whether child, elderly, disabled, or sick. The situational offender exhibits four types of behavior: regressed behavior, morally indiscriminate behavior, sexually indiscriminate behavior, and socially unusual, or misfit, behavior.

REGRESSED SITUATIONAL SEX OFFENDER.

Because of his own regressed behavior he may choose sexual partners who are younger. His primary criteria is availability; therefore, his own children become targets.

MORALLY INDISCRIMINATE SITUATIONAL SEX OFFENDER.

This offender has sociopathic qualities; he lies, cheats, and steals. Everyone is vulnerable to his exploitation. His victims are chosen primarily by vulnerability and opportunity.

SEXUALLY INDISCRIMINATE SITUATIONAL SEX OFFENDER.

This situational offender seems to be more circumspect behaviorally expect for sex. He appears to have low tolerance to boredom and likes to "try-anything" related to sex. His offending behavior seems to be motivated by a desire for sexual experimentation of something new and different.

INADEQUATE SITUATIONAL SEX OFFENDER.

Of all the offenders, this offender is hardest to define. The group can include persons with psychoses, mental retardation, eccentric personality disorders, or senility. Motivation for offending stem from the offender's insecurity and curiosity. Children seem less threatening than peers for exploring sexual fantasies.

Others are sex objects and abusing them is normal according to the sex offender's logic.

By contrast, preferential child molesters have a definite sexual preference for children. Three behavioral patterns emerge.

SEDUCTIVE PREFERENTIAL SEX OFFENDER.

A seductive offender is the pedophile who courts the child into a relationship. This offender may have large groups of children. He is particularly adapt at relating to children.

INTROVERT PREFERENTIAL SEX OFFENDER.

The introvert has poor interpersonal skills and tends to molest very young children. He may even marry and have children so he can have access to children to satisfy himself sexually.

SADISTIC PREFERENTIAL SEX OFFENDER.

This offender must inflict pain or suffering to be sexually satisfied. These offenders are more likely to abduct or murder their victim.

Classification of the female offender and the adolescent offender has yet not been established.

Reported cases of female offenders are insufficient to establish a typology; however, those female offenders now known seem to show characteristics of the situational offenders. Preferential female offenders are rare.

Similarly, adolescent offenders are not yet classified. However, law enforcement data suggest that many adolescent offenders fit in the morally indiscriminate category.²⁴

OPTIONS ANALYSIS

The question the subcommittee wrestled with was "How do we protect the vulnerable populations in our State while respecting the constitutional rights of habitual sex offenders?"

Pursuant to House Joint Resolution 193, the Sexual Assault Commission convened a subcommittee to study the feasibility of indefinite incarceration, concentrating on the current State of Washington statute as a possible model for Virginia.

Crime is the number-one concern of Virginians. Sex crimes against our children terrify us the most. The perception of many Virginians is that the criminal justice system protects the perpetrator, while ignoring or even blaming the victim.

Media attention is often given to cases in which sex offenders serve only a portion of their sentences before returning to the community to offend again and again.

We cherish our rights as law-abiding citizens but feel compelled to draw the line on the rights of habitual sex offenders. Some Constitutional theorists believe that restricting the rights of one segment of the population for the greater public good diminishes the rights of all. This concept is falling on increasingly deaf ears. Debate is intensifying on how to balance society's needs for safety versus individual liberty.

Americans base their legal system on the principle that if an individual commits a crime, he pays the required debt to society, and the slate is wiped clean. Some treatment providers consider sex offenders to be un-treatable, with the probability of re-offense remaining high.

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To what extent can we punish, based on the **chance** that an individual will re-offend?

The Habitual Sex Offender Subcommittee began by looking at legislation adopted by the State of Washington, as well as similar legislation from other states.

OPTION I. Indeterminant Sentencing

In Minnesota, a mandate requiring indefinite incarceration of habitual sex offenders was constitutionally challenged.

Phillip Jay Blodgett, a repeat sex offender, was committed to a security hospital for an indeterminate period with a diagnosis of "psychopathic personality". He appealed his sentence to the Minnesota Supreme Court of Appeals, alleging violations of due process and equal rights protection. In this case, the Minnesota Supreme Court held:

Arguably, then, the question is not whether the sexual predator can be confined, but where. Should it be in a prison or in a security hospital?

Or put it another way: Is it better for a person with an uncontrollable sex drive to be given an enhanced prison sentence, or to be committed civilly? The state of Washington, with a somewhat different program, has opted for the second alternative. For the legislature which must provide the necessary prison cells or hospital beds, there are no easy answers. Nor are there easy answers for society which, ultimately, must decide to what extent criminal blame is to be assigned to people who are what they are.

At issue is the safety of the public on the one hand and, on the other, the liberty interests of the individual who acts destructively for reasons not fully understood by our medical, biological and social sciences. In the final analysis, it is the moral credibility of the criminal justice system that is at stake.

In the present imperfect state of scientific

"At issue is the safety of the public on the one hand and, on the other, the liberty interests of the individual who acts destructively for reasons not fully understood by our medical, biological and social sciences."

knowledge, where there are no definitive answers, it would seem a state legislature should be allowed, constitutionally, to chose either or both alternatives for dealing with the sexual predator.²⁵

Washington's Sexually Violent Predator Law

In May 1987, Earl K. Shriner, a mentally retarded man with a long criminal record, completed a ten year sentence in the state of Washington for kidnapping and assaulting two teenage girls.²⁶ Prison officials tried but failed to commit Shriner as mentally ill.²⁷ Despite a psychiatrists report that Shriner had "unusual sexually sadistic fantasies and plans to carry them out," officials were unable to show that Shriner had committed a "recent overt act" that indicated dangerousness,²⁸ as required under Washington's commitment law for the mentally ill.²⁹ Two years later, near Tacoma, Washington, Shriner raped a seven year old boy, cut off his penis, and abandoned him near death.³⁰

Shriner's crime caused a public outrage in Washington, forcing Governor Booth Gardner to appoint a task force to reform state laws concerning sexual offenders.³¹ The task force produced an omnibus bill that included a new civil commitment procedure intended to confine "sexually violent predators."³²

Under the Sexually Violent Predator Law,³³ the state of Washington may confine a person who has completed punishment for a "sexually violent offense"; that is, a violent crime involving an innocent victim and undertaken for sexual pleasure.³⁴ The statute requires a hearing prior to confinement, at which time the state must show beyond a reasonable doubt that the person "suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence."³⁵ At the hearing, the person may choose either a judge or a jury as neutral factfinder, and has access to mental health professionals as well as legal counsel.³⁶

Once confined, a "sexually violent predator" is entitled to a new hearing before a judge or jury only upon showing probable cause that the person is unlikely to commit a sexually violent offense.³⁷ If, at the hearing, the State cannot show beyond a

The state of Washington may confine a person who has completed punishment for a "sexually violent offense," that is, a violent crime involving an innocent victim and undertaken for sexual pleasure.

reasonable doubt that he or she remains a sexual predator, the person is released.³⁸ Otherwise, the person remains in a treatment facility until the State determines that he or she is safe for release.³⁹

The Subcommittee rejected the state of Washington approach because of concerns about constitutional issues and the current ineffectiveness of treatment for habitual sex offenders.

As a less restrictive alternative to offender incarceration, the Sexual Assault Commission requested the Institute of Law, Psychiatry and Public Policy at the University of Virginia to study the biomedical treatment of habitual sex offenders.

OPTION II. Biomedical Treatment of Sex Offenders⁴⁰

Among the treatment choices for sex offenders, three are essentially biomedical: antiandrogen medication, surgical castration, and stereotaxic neurosurgery.⁴¹ The purpose of both antiandrogen treatment and physical castration is to remove the effect of androgens on the male body. Androgens are the male sex hormones, one of which is testosterone. Testosterone is the most important of the androgens in the maintenance of and effect on male sexual behavior.⁴² Reducing the level of testosterone, either by antiandrogen treatment or castration, results in a reduction in sex drive, sexual fantasy, and sexual arousal.⁴³ Stereotaxic neurosurgery is a process in which minute lesions are burned into the offender's brain tissue with an electrode.⁴⁴ Stereotaxic neurosurgery is performed primarily in Europe, where studies have shown that the procedure reduces aggression and erotic fantasy.⁴⁵

Physical Castration

Castration is a surgical procedure in which the male's testes are removed.⁴⁶ Because the testes produce ninety five (95%) percent of the male's testosterone, castration effectively eliminates testosterone production.⁴⁷ The side effects of castration include gynecomastia (partial development of the breast), partial loss of body hair, osteoporosis, and an increase in subcutaneous body fat.⁴⁸ Castration as a form of psychiatric

The subcommittee rejected the Washington state approach because of concerns about constitutional issues and the lack of effectiveness of current treatment for sex offenders.

treatment was first performed in Switzerland in 1892 to "cure" an "imbecile's" testicular pain and "hypersexuality."⁴⁹ Prisoners in the United States were first castrated in 1899 by Dr. Sharp in Indiana to reduce their sex drives.⁵⁰ Beginning in 1928, eight European nations passed enabling statutes allowing the voluntary castration of sex offenders, and these practices continue today.⁵¹

Four studies examining the effect of castration on recidivism in sex offenders are widely cited: (1) a 1963 German study by Langeluddeke; (2) a 1973 Swiss study by Cornu; (3) a 1959 Norwegian study by Bremer; and (4) a 1968 Danish study by Sturup.⁵² The studies show a varying degree of recidivism in castrated sex offenders, but all report a generally low rate, 2.2% - 4.1%, as opposed to 58% - 84% in non-castrated sex offenders.⁵³

Effect of Physical Castration on Recidivism

Study	Number of Offenders	Followup Period	Recidivism Rate-Post	Recidivism Rate-Prior
Langeluddeke	1036	6 Weeks - 20 Years	2.3%	84%
Cornu	127	5 Years	4.1%	76.8%
Bremer	102	5-10 Years	2.9%	58%
Sturup	18	7-32 Years	0%	Not reported
Sand	900	Up to 30 years	2.2%	Not reported

The study by Langeluddeke examined the records of 1036 sex offenders involuntarily castrated in Germany from 1934 to 1944. The study used a control group of 685 non-castrated sex offenders.⁵⁴ Recidivism rates were based on post-castration

sex crime convictions; the follow-up period was six weeks to twenty years.⁵⁵ Before surgery, the recidivism rate (i.e., numbers of offenders with more than one sex crime prior to castration) for the group of 1036 was eighty four (84%) percent; after surgery the rate dropped to 2.3%.⁵⁶ The control group, in contrast, recidivated at a rate of thirty nine (39%) percent.⁵⁷

The study by Cornu examined 127 sex offenders who had been "voluntarily" castrated, and a control group of 50 sex offenders who had refused castration and were sentenced to longer prison terms.⁵⁸ The recidivism rates, 4.1% post-treatment versus 76.8% pre-treatment, were calculated, based on arrest records and personal interviews.⁵⁹ Cornu reported a decrease in the recidivism rate for non-sexual crimes as well as sex offenses; however, exact figures are not given.⁶⁰ The other studies showed similar reductions in the rates of recidivism.

Some critics see rape as a crime of violence, not sex, and doubt the efficacy of castration.⁶¹ However, a study in Denmark of 38 of the country's most serious rapists between 1935 and 1961 suggests that castration may be quite effective in preventing other sex offenses as well.⁶² Eighteen of the rapists studied had been castrated. Twenty had not. In a follow-up period ranging from 7 to 32 years, none of the castrated rapists committed another sex offense, while the 20 non-castrated rapists showed a ten (10%) percent recidivism rate.

These studies have been criticized for methodological flaws. Heim and Hursch point out, for example, that neither Langeluddeke nor Cornu took into account the level of sexual activity before surgery among the castrated sample population. In addition, with the exception of Sand, these studies failed to allow for the natural decrease in sexual activity that comes with advancing age. Finally, given the unreliability of self-reporting, to the extent that the "asexualization" found among castrates was based on interview data, the results may be suspect.

The results confirm our overall impression that sexual manifestations caused by castration vary considerably, and that castration effects on male sexuality are not predictable with certainty.⁶³

As Bradford points out, however, "even allowing the largest margin for methodological difficulties, [castration] has a massive

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As Bradford points out, however, "even allowing the largest margin for methodological difficulties, [castration] has a massive impact on sexual recidivism in the post castration state."⁶⁴

Chemical Castration

Chemical castration, or antiandrogen treatment, is a process in which antiandrogens, synthetic chemicals similar to female sex hormones, are administered.⁶⁵ The medication reduces (and in large doses, effectively eliminates) production of testosterone. There are two primary androgens: cyproterone acetate (CPA) and depot medroxyprogesterone acetate (MPA, or Depo Provera). Dosages for these drugs vary from 100 to 600 milligrams per week, with most patients receiving 200 to 300 milligrams per week. Side effects include fatigue, weight gain, cold sweats, hypertension, hypogonadism, insomnia, and hot and cold flashes.

CPA is not currently approved for use in the United States, although it is widely used in other countries. CPA reduces the male sex drive within 1-2 week of administration. Sexual responsiveness returns to "normal" within 2-3 weeks after end of treatment. Depo Provera is an injectable form of MPA, and its effects are similar to CPA. The FDA approved Provera for use in the United States in 1988.

One would expect that since both CPA and MPA are intended to reduce testosterone production, "chemical castration" would have essentially the same effect on sex offender recidivism as physical castration. And, in fact, the recidivism rates for sex offenders treated with CPA and MPA appear to parallel the recidivism rates for surgical castrates.⁶⁶

Cyproterone acetate (CPA)

Ortmann's 1980 report synthesizes data from seven studies that examined the recidivism rate for sex offenders before and after treatment with CPA.⁶⁷ These studies are summarized in the following table. Based on his review of these studies, Ortmann concludes that "(o)n antihormone treatment, the relapse rate is very low, even falling to zero when those who relapsed while on insufficient antihormone treatment are not included."⁶⁸

"Even allowing the largest margin for methodological difficulties, castration has a massive impact on sexual recidivism in the post castration state."

Effects of CPA on Recidivism

Study	Number of Offenders	Followup Period	Recidivism Rate-Post	Recidivism Rate-Prior
Baron 1977	6	1 Year	16%	50%
Jost(a) 1974	11	3 Months - 3 Years	9%	54.5%
Jost(b) 1974	10	1 - 4 Years	10%	100%
Appelt 1974	6	9 Months - 1 1/2 Years	30%	100%
Davies 1974	16	6 Months - 3 Years	0%	100%
Fahndrich 1974	15	6 Months - 3 Years	6%	93.3%
Horn 1972	33	1 - 4 Years	6%	100%

Depo Provera (MPA)

Depo Provera's effect as an antiandrogen was first observed in 1958. Few studies, however, have been undertaken to observe the effect of Depo Provera on recidivism in sex offenders. Gagne's study, conducted in 1985, showed a 27.6% recidivism rate among offenders who received Depo Provera for one year.⁶⁹ The value of this study is questionable, however, as the recidivism rate was based on the offender's activity in the two years following cessation of the drug. Moreover, the recidivism measure was either the offender's arrest, or self-reported urges to engage in deviant sexual behavior.

Meyer's study, conducted from 1980-1990, involved 40 sex offenders who voluntarily received intramuscular injections of MPA. Recidivism rates were based on both subsequent arrest for a sex offense and self-report of such an offense.⁷⁰ 18% of offenders receiving Depo Provera recidivated, compared to 58% of offenders not receiving the drug.⁷¹

Although sample sizes were small, Meyer reported greater treatment success with habitual sex offenders than with rapists. The post-treatment recidivism rates for the two groups were thirteen (13%) percent and thirty nine (39%) percent respectively. Other factors affecting outcome in Meyer's study

"The recidivism rates for sex offenders treated with CPA and MPA appear to parallel the recidivism rates for surgical castrates."

included: (1) pre-treatment testosterone concentration (sixty five (65%) percent of all subjects with concentrations above 800 ng/dl recidivated, compared to twenty two (22%) percent of those with concentrations below 490 ng/dl); (2) determination as to whether the offender was "fixated" or "regressed" (regressed offenders recidivated at a significantly higher rate off provera (seventy (70%) percent compared to forty (40%) percent), and at a slightly higher rate on provera (nineteen (19%) percent compared to eighteen (18%) percent; and (3) "pair bonding" (offenders ever having been married recidivated at a lower rate than those who had never married); and substance abuse (substance abusers recidivated at a higher rate).

Other studies reporting recidivism rates among sex offenders treated with depo provera show rates similar to Meyer's: Berlin and Coyle ⁷² show a fifteen (15%) percent recidivism rate, compared to seventy seven (77%) percent for those not on provera; Money⁷³ shows a thirty (30%) percent rate, compared to one hundred (100%) percent for those not on provera.

Antiandrogens have been used only sparingly with adolescent offenders; no recidivism studies are reported. Although paraphiliac arousal may occur earlier, Bradford warns against the use of androgens before age 16, "the outside limit for the expected development of puberty." Adolescence may seem an ideal time for biomedical intervention -- deviant arousal patterns have been shown to manifest by age 15 -- but treatment must proceed with caution, as the hormonal changes that occur at this stage are critical to the normal development of secondary sex characteristics (e.g., growth, body hair). "Basic understanding of the hormonal aspects of puberty, as well as pharmacological principles involved in the treatment of paraphiliacs, is crucial when considering the pharmacological treatment of offenders."⁷⁴

Studies on the efficacy of antiandrogen treatment have been criticized on a variety of methodological grounds. The most common criticism is that the studies fail to employ large control groups. Critics have also assailed the studies for failing to distinguish between violent and non-violent offenders. Finally, the reliability of self-reporting is always questionable. Meyer, who authored the 10-year study shown in the Table, asserts however, that the lowered re-offense rates were "significant,"

Although sample sizes were small, Meyer reported greater treatment success with pedophiles that with rapists -- recidivism rates of 13% and 39% respectively.

regardless of the slight differences in treatment groups.⁷⁵

Effects of MPA (Depo Provera) on Recidivism

Study	Number of Offenders	Followup Period	Recidivism Rate of Patients Receiving MPA	Recidivism Rate of Patients Refusing MPA
Meyer	40	10 Years	18%	57%

Legal Issues

Physical castration, as part of a sentence for a convicted sex offender, is clearly barred by case law. As early as 1918, a Nevada Court, held that the involuntary castration of rapists was cruel and unusual punishment, in violation of the Eighth Amendment to the U.S. Constitution.⁷⁶ More recently, in 1985, the South Carolina Supreme Court also held that castration, in this case offered in lieu of a 30-year sentence, was cruel and unusual punishment.⁷⁷

The legality of chemical castration, however, has not been resolved. Only one case has addressed the issue of chemical castration imposed as part of a sex offender's sentence. In *People v. Gauntlett*⁷⁸, decided in 1984, the Michigan Court of Appeals found that Depo Provera treatment, imposed as a condition of probation, was unlawful on the grounds that the drug was experimental and not yet proven safe and effective.⁷⁹ The court also expressed doubt that consent could be termed "informed", given the limited amount of information given to the defendant by the trial court judge.⁸⁰ The opinion did not extend to any constitutional issues. The use of chemical castration of sex offenders in general, however, admittedly raises the following legal issues.

Informed Consent

For the decision to be informed, an offender volunteering for antiandrogen treatment must have the opportunity to weigh the

Physical castration, as part of a sentence for a convicted sex offender, seems to be clearly barred by the case law. In 1918, a Nevada court held that the involuntary castration of rapists was cruel and unusual punishment, in violation of the Eighth Amendment to the U.S. Constitution.

risks and benefits of the treatment.⁸¹ Depo Provera has side effects which include excessive weight gain, malaise, migraine headaches, leg cramps, hypertension, gastrointestinal complaints, gallstones, and diabetes mellitus. These side effects, as well as the meaning and significance of successful treatment, must be understood by the offender before informed consent is possible.⁸² Informed consent also requires the element of voluntary action.

Consent may not be considered voluntary when the inmate is forced to choose between extended incarceration and chemical castration. In the celebrated case, *Kaimowitz v. Michigan Dept. of Mental Health*⁸³, a Michigan court held that an involuntarily committed mental patient could not voluntarily consent to psychosurgery where his release depended on his consent.⁸⁴ "It is impossible for an involuntarily detained mental patient to be free of ulterior forms of restraint or coercion when his very release from the institution may depend on his cooperating with the institutional authorities and giving consent to experimental surgery."⁸⁵

Cruel and Unusual Punishment

Although the state has broad power to punish those who violate its laws, punishment is subject to the Eighth Amendment's prohibition against cruel and unusual punishment.

Just as castration has been considered cruel and unusual punishment by courts in the United States, the administration of antiandrogen treatment, under some circumstances, may also be considered cruel and unusual. A punishment may be deemed cruel and unusual on any of three grounds: (1) that it is inherently "cruel"⁸⁶ (2) that it is disproportionate to the crime for which it is imposed;⁸⁷ and (3) that it is more severe than necessary to accomplish the state's penal purpose.⁸⁸ As long as the offender's crime was serious and no other less restrictive intervention treatment offered a better prospect of success, the latter two grounds would likely be insufficient to bar even the forced administration of antiandrogens as violative of the Eighth Amendment. The significant side effects of the antiandrogens and subsequent intrusion into the offender's sexual functioning, however, might be considered inherently cruel.

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which it is
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***(3) that it is
more severe
than
necessary to
accomplish
the state's
penal
purpose.***

Alternatively, the courts might view antiandrogen treatment as analogous to treatment with antipsychotic medication and, thus, not cruel and unusual as long as proper procedures are followed.

In *Harper v. Washington*, the U.S. Supreme Court ruled that a prison inmate could be forcibly medicated with antipsychotic medication on a finding that such treatment was in the inmate's best (medical) interests and was necessary for the safety of the inmate or those around him or her.⁸⁹ In *Rennie v. Klein*, a federal court in New Jersey ruled that involuntary medication with antipsychotic drugs did not violate the Eighth Amendment, because the drugs had been established to be effective and were to be administered as an integral part of the patient's overall treatment plan.⁹⁰ The court employed a four-pronged test to determine whether the treatment amounted to punishment: (1) Does the drug have a therapeutic value? (2) Is the administration of the drug recognized as accepted medical practice? (3) Is the drug to be administered as part of an ongoing therapeutic program? (4) Are the drug's adverse effects unreasonably harsh?⁹¹

Due Process Considerations

Section I of the Fourteenth Amendment to the Constitution prohibits the State from taking a person's life, liberty, or property without due process of law. Whether the courts would recognize a liberty interest in having a libido is not clear.⁹² The courts, however, have recognized a fundamental, though qualified, right to procreate.⁹³ Since treatment with antiandrogens may cause infertility, the right to procreate may be implicated.

SUBCOMMITTEE RECOMMENDATIONS

After careful study of the state of Washington's law for indefinite incarceration of habitual sex offenders, while endorsing the indefinite incarceration for management of habitual sex offenders, the Subcommittee recommended that the state of Washington's habitual sex offender bill not be proposed for implementation in the State of Virginia. The state of Washington procedures were reviewed and success rates were compared, using the different methods of management.

Surgical castration, though effective in reducing recidivism in sex

The legality of chemical castration has not been resolved by the courts.

Consent may not be considered voluntary when the inmate is forced to choose between extended incarceration and chemical castration.

offenders, was banned long ago in the United States and is not likely to re-emerge as a dispositional option. Chemical castration, also shown to reduce recidivism, has not yet been tested by the courts. Stereotaxic neurosurgery for the most part, remains untested in this country.

After reviewing sexual offender management programs of several additional states, and in lieu of offering the state of Washington law, the subcommittee chose to draft a bill unique to Virginia and the offender population of Virginia.

The subcommittee chose to draft language unique to Virginia and the offender population of Virginia.

Table 6, summarizing Virginia sex offenders convicted in 1993, reveals a wide variation in sentencing patterns. This data, combined with the information found in the Criminal Justice Research Center report, Convicted Sex Offender - Justice Research in Virginia, August 1994, led the Subcommittee members to make several policy decisions. The first conclusion is that sex offenses are criminal acts and should be punished within the confines of the criminal justice system.

Secondly, the Subcommittee recognizes that many sex offenders are mentally ill and supports psychiatric treatment during incarceration for their crimes. Treatment not only minimizes risk to, but actually enhances, public safety, as opposed to merely providing therapy to the perpetrator.

Third, the Subcommittee recommends life in prison without the possibility of early release for those offenders who commit repeated violent sex crimes.

Lastly, the Subcommittee recommends that two convictions of certain sex offenses be considered a Class 2 felony.

Whether the courts would recognize a liberty interest in having a libido is not clear.

The subcommittee chose to draft language unique to Virginia and the offender population of Virginia.

VIRGINIA SEX OFFENDERS CONVICTED 1993

	Agg. Sexual Battery 18.2-67.3 Force, Threat FELONY 1-20	Agg. Sexual Battery 18.2-67.3 Victim <13 FELONY 1-20	Carnal Knowledge 13-14, Perp w/i 3 yrs, 18.2-67.4 CL 4 MISDEMEANOR	Carnal Knowledge 13-14, 18.2-64.1 CLASS 4 FELONY	Carnal Knowledge By Custodian 18.2-64.1 CLASS 6 FELONY	Obj Sexual Penetration w force/threat 18.2-67.2 FELONY 5 years to life	F. Rape w/female via mental incap 18.2-61 CLASS 6 FELONY 5-life	F. Rape w/female via force /threat 18.2-61 FELONY 5-life	F. Rape w/female under 13 18.2-61 FELONY	Forcible Sodomy by force, threat or incap. 18.2-67.1 CLASS 6 FELONY 5-life	Forcible Sodomy, victim < 13 18.2-67.1 FELONY	Marital Sexual Assault 18.2-67.2 1 year to 20 years	Obj Sexual Penetration, victim < 13, 18.2-67 FELONY 5 years to life	Rape - type no clear from record 18.2-61	Incest w/ own child or grandchild 18.2-366 CLASS 5 FELONY	Incest w/ own child or grandchild 13-17, 18.2-366 CLASS 5 FELONY	Sodomy - parent to child 18.2-67.1 FELONY 5 years to life	Indecent liberties with Children 18.2-370 CLASS 6 FELONY	Indecent liberties w/child by custodian 18.2-370 CLASS 6 FELONY
Number of cases	41	200	14	61	2	1	14	109	58	29	73	6	1	2	2	4	2	55	45
% of total cases	5.9	29	2	8.7			1.9	15.9	8.1	3.9	10.3							7.9	6.6
Race %																			
white	69	18	29	50		0	42	56	56	42	78	0	0	50	100	50	100	81	80
black	32	77	71	40		100	50	39	35	58	20	83	100	50	-	50	-	15	20
other	-	5	-	10		-	8	5	9	-	2	17	-	-	-	-	-	4	-
Sex %																			
male	100	100	93	93		100	100	100	94	96	100	100	100	100	100	100	100	96	100
female	-	-	7	7		-	-	-	6	4	-	-	-	-	-	-	-	4	-
Age at offense %																			
18-21	12	8	28	33		-	17	6	16	4	9	-	-	-	-	-	-	2	-
22-25	18	9	29	24		-	17	11	7	11	9	-	-	-	-	-	-	11	4
26-30	10	11	21	15		-	17	39	18	31	19	17	100	50	-	-	-	24	13
31-35	18	19	7	10		-	17	22	20	15	18	17	-	-	-	50	100	13	9
36-65	37	45	14	17		100	25	22	36	34	44	68	-	-	100	50	-	43	74
over 65	5	7	-	-		-	(8)	-	2	4	2	-	-	-	-	-	-	6	-
Eff. sentence %																			
no incarceration	38	30	50	39	50	-	8	22	11	7	10	50	-	50	-	-	-	41	49
jail	15	16	14	8	-	-	-	6	-	4	3	17	-	-	-	25	-	20	18
prison	47	54	36	53	50	100	92	72	89	89	87	33	100	50	100	75	100	39	33
Effective sentence																			
Mean in months	42.3	155	25.8	54		96	1774	1265	775	2445	1144	72	43	120	132	80	48	36	36
Mean in years	3.5	13	2	4.5		8	148	105	64.5	203.7	95.3	6	3.6	10	11	6.7	4	3	3

HJ193 Sex offenders.

HOUSE JOINT RESOLUTION NO. 193

Requesting the Commission on the Reduction of Sexual Assault Victimization in Virginia to study confinement of habitual sexual offenders.

Agreed to by the House of Delegates, March 2, 1994

Agreed to by the Senate, February 28, 1994

WHEREAS, the state of Washington has enacted a unique law which allows the indefinite incarceration of habitual sex offenders; and

WHEREAS, the law provides for housing violent, predatory sex offenders at a special prison if jurors examining the offenders' records and psychological profiles find that they are likely to offend again; and

WHEREAS, the constitutionality of Washington's statute has been upheld by the Washington Supreme Court; and

WHEREAS, some studies show that many sex crimes are committed by a small, extremely dangerous group of offenders; and

WHEREAS, many believe that these individuals suffer from a mental defect or disease which renders them unamenable to existing mental illness treatments; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Commission on the Reduction of Sexual Assault Victimization in Virginia be requested to study confinement of habitual sexual offenders, with a concentration on Washington's existing statute. The Commission is requested to determine the feasibility and appropriateness of adapting the Washington statute and program for implementation in Virginia.

All agencies of the Commonwealth shall provide assistance to the Commission, upon request.

The Commission shall complete its work in time to submit its findings and recommendations to the Governor and the 1995 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

#NS

DEFINITIONS

Adultery -- Voluntary sexual intercourse by a married person with someone other than his or her spouse.

Adultery and fornication by persons forbidden to marry; incest. - A. Any person who commits adultery or fornication with any person whom he or she is forbidden by law to marry shall be guilty of a Class 1 misdemeanor except as provided by subsection B. Any person who commits adultery or fornication with his daughter or granddaughter, or with her son or grandson, or her father or his mother, shall be guilty of a Class 5 felony. However, if a parent or grandparent commits adultery or fornication with his or her child or grandchild, and such child or grandchild is at least thirteen years of age but less than eighteen years of age at the time of the offense, such parent or grandparent shall be guilty of a Class 3 felony. **Section 18.2-366.**

Aggravated Sexual Battery - A. An accused shall be guilty of aggravated sexual battery if he or she sexually abuses the complaining witness, and

1. The complaining witness is less than thirteen years of age, or
2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation, or through the use of the complaining witness's mental incapacity or physical helplessness, and
 - a. The complaining witness is at least thirteen but less than fifteen years of age, or
 - b. The accused causes serious bodily or mental injury to the complaining witness, or
 - c. The accused uses or threatens to use a dangerous weapon. **Section 18.2-67.3.**

Anal Intercourse -- A sexual act consisting of insertion of the penis into the anus.

Anilingus -- Oral stimulation of the anus for sexual stimulation.

Animate Object -- A living object or body part.

Carnal knowledge -- Pertaining to bodily passions; including the acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, animate and inanimate object sexual penetration.

Carnal knowledge of child between thirteen and fifteen years of age. - If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony.

However, if such child is thirteen years of age or older but under fifteen years of age and consents to sexual intercourse and the accused is a minor and such consenting child is three years or more the accused's junior, the accused shall be guilty of a Class 6 felony. If such consenting child is less than three years the accused's junior, the accused shall be guilty of a Class 4 misdemeanor.

In calculating whether such child is three years or more a junior of the accused minor, the actual dates of birth of the child and the accused, respectively, shall be used.

For the purpose of this section, (i) a child under the age of thirteen years shall not be considered a consenting child and (ii) "carnal knowledge" includes the acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and animate and inanimate object sexual penetration. **Section 18.2-63.**

Carnal knowledge of certain minors. - If any person providing services, paid or unpaid, to juveniles under the purview of the Juvenile and Domestic Relations District Court Law, or to juveniles who have been committed to the custody of the State Department of Youth and Family Services, carnally knows, without the use of force, any minor fifteen years of age or older, when such minor is confined or detained in jail, is detained in any facility mentioned in Section 16.1-249, or has pursuant to Section 16.1-278-8, knowing or having good reason to believe that (i) such minor is in such confinement or detention status, (ii) such minor is a ward of the Department of Youth and Family Services, or (iii) such minor is on probation, furlough, or leave from or has escaped or absconded from such confinement, detention, or custody, he shall be guilty of a Class 6 felony.

For the purposes of this section, "carnal knowledge" includes the acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and animate and inanimate object sexual penetration. **Section 18.2-64.1.**

Child -- In Virginia, a person under the age of eighteen.

Consent -- A voluntary agreement by a person, in the possession and exercise of sufficient mental capacity, to make an intelligent choice to do something proposed by another.

Cunnilingus -- A sexual act in which the mouth or lips come into contact with the female sexual organs.

Exploitation -- To make use of selfishly or unethically.

Fellatio -- A sexual act in which the mouth or lips come into contact with the penis.

Forcible sodomy. - An accused shall be guilty of forcible sodomy if he or she engages in cunnilingus, fellatio, anilingus, or anal intercourse with a complaining witness who is not his or her spouse, or causes a complaining witness, whether or not his or her spouse, to engage in such acts with any other person, and

1. The complaining witness is less than thirteen years of age, or
2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. An accused shall be guilty of forcible sodomy if (i) he or she engages in cunnilingus, fellatio, anilingus, or anal intercourse with his or her spouse, and (ii) such act is accomplished against the will of the spouse, by force, threat or intimidation of or against the spouse or another person.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence. **Section 18.2-67.1.**

Fornication -- Unlawful sexual intercourse between two unmarried persons.

Inanimate Object -- An object not having the qualities associated with living organisms.

Intercourse -- Sexual relations, coitus.

Marital sexual assault. - A. An accused shall be guilty of marital sexual assault if (i) he or she engages in sexual intercourse, cunnilingus, fellatio, anilingus or anal intercourse with his or her spouse, or penetrates the labia majora or anus of his or her spouse with any object other than for a bona fide medical purpose, or causes such spouse to so penetrate his or her own body with an object, and (ii) such act is accomplished against the spouse's will by force or a present threat of force against the spouse or another person. **Section 18.2.67.2:1.**

Object penetration. - A. An accused shall be guilty if inanimate or animate object sexual penetration if he or she penetrates the labia majora or anus of a complaining witness who

is not his or her spouse with any object, other than for a bona fide medical purpose, or causes such complaining witness to so penetrate his or her own body with an object or causes a complaining witness, whether or not his or her spouse, to engage in such acts with any other person or to penetrate, or to be penetrated by, an animal, and

1. The complaining witness is less than thirteen years of age, or
2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. An accused shall be guilty of inanimate or animate object sexual penetration if (i) he or she penetrates the labia majora or anus of his or her spouse with any object other than for a bona fide medical purpose, or causes such spouse to so penetrate his or her own body with an object and (ii) such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another person.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence. **Section 18.2-67.2.1.**

Paraphiliac -- A personality disorder characterized by perverted sexual desire.

Penetration -- The insertion of the penis, however slight, into the vagina.

Rape. - A. If any person has sexual intercourse with a complaining witness who is not his or her spouse or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished (i) against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person, or (ii) through the use of the complaining witness's mental incapacity or physical helplessness, or (iii) with a child under age thirteen as the victim, he or she shall be guilty of rape. **Section 18.2-61.**

Sexual battery. - A. An accused shall be guilty of sexual battery if he or she sexually abuses the complaining witness against the will of the complaining witness, by force, threat or intimidation, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. Sexual battery is a Class 1 misdemeanor. (1981. c. 397.) **Section 18.2-67.4.**

Sexual molestation -- To accost and harass sexually.

Taking indecent liberties with children. - Any person eighteen years of age or over, who, with lascivious intent, shall knowingly and intentionally:

(1) Expose his or her sexual or genital parts to any child under the age of fourteen years to whom such person is not legally married or propose that any such child expose his or her sexual or genital parts to such person; or

(2) [Repealed.]

(3) Propose that any such child feel or fondle the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child; or

(4) Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under Section 18.2-361; or

(5) Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any of the purposes set forth in the preceding subdivisions of this section; or

(6) Receive money, property, or any other remuneration for allowing, encouraging, or enticing any person under the age of eighteen years to perform in or be a subject of sexually explicit visual material as defined in Section 18.2-374.1 or who knowingly encourages such person to perform in or be a subject of sexually explicit material; shall be guilty of a Class 6 felony. **Section 18.2-370.**

Taking indecent liberties with child by person in custodial or supervisory relationship. - Any person eighteen years of age or older who maintains a custodial or supervisory relationship over a child under the age of eighteen, including, but not limited to the parent, step-parent, grandparent, step-grandparent, or who stands in loco parentis with respect to such child and is not legally married to such child, and who, with lascivious intent, knowingly and intentionally (i) proposes that any such child feel or fondle the sexual or genital parts of such person or that such person feel or handle the sexual or genital parts of the child, or (ii) proposes to such child the performance of an act of sexual intercourse or any act constituting an offense under Section 18.2-362, or (iii) exposes his or her sexual or genital parts to such child, or (iv) proposes that any such child expose his or her sexual or genital parts to such person, or (v) proposes to the child that the child engage in sexual intercourse, sodomy or fondling of sexual or genital parts with another person, or (vi) sexually abuses the child as defined in Section 18.2-67.10(6), shall be guilty of a Class 6 felony. **Section 18.2-370.1.**

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CHAPTER 71.09 RCW

SEXUALLY VIOLENT PREDATORS

Sections

- 71.09.010 Findings.
- 71.09.020 Definitions.
- 71.09.025 Notice to prosecuting attorney prior to release.
- 71.09.030 Sexually violent predator petition--Filing.
- 71.09.040 Sexually violent predator petition--Judicial determination--Transfer for evaluation.
- 71.09.050 Trial--Rights of parties.
- 71.09.060 Trial--Determination--Commitment procedures.
- 71.09.070 Annual examinations of persons committed under chapter.
- 71.09.080 Detention and commitment to conform to constitutional requirements.
- 71.09.090 Petition for release--Procedures.
- 71.09.100 Subsequent discharge petitions.
- 71.09.110 Department of social and health services--Duties--Reimbursement.
- 71.09.120 Release of information authorized.
- 71.09.900 Index, part headings not law--1990 c 3.
- 71.09.901 Severability--1990 c 3.
- 71.09.902 Effective dates--Application--1990 c 3.

RCW 71.09.010 Findings. The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement. The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act. [1990 c 3 § 1001.]

RCW 71.09.020 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.

(2) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(3) "Predatory" means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

(4) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection. [1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

NOTES:

Effective date--1990 1st ex.s. c 12: See note following RCW 13.40.020.

RCW 71.09.025 Notice to prosecuting attorney prior to release. (1)(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in RCW 71.09.020(1), the agency with jurisdiction shall refer the person in writing to the prosecuting attorney of the county where that person was charged, three months prior to:

(i) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense;

(ii) The anticipated release from total confinement of a person found to have committed a sexually violent offense as a juvenile;

(iii) Release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to RCW 10.77.090(3); or

(iv) Release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to RCW 10.77.020(3).

(b) The agency shall inform the prosecutor of the following:

(i) The person's name, identifying factors, anticipated future residence, and offense history; and

(ii) Documentation of institutional adjustment and any treatment received.

(2) This section applies to acts committed before, on, or after March 26, 1992.

(3) The agency, its employees, and officials shall be immune from liability for any good-faith conduct under this section.

(4) As used in this section, "agency with jurisdiction" means that agency with the authority to direct the release of a person serving a sentence or term of confinement and includes the department of corrections, the indeterminate sentence review board, and the department of social and health services. [1992 c 45 § 3.]

NOTES:

Severability--Application--1992 c 45: See notes following RCW 9.94A.151.

RCW 71.09.030 Sexually violent predator petition--Filing.

When it appears that: (1) The term of total confinement of a person who has been convicted of a sexually violent offense is about to expire, or has expired on, before, or after July 1, 1990; (2) the term of total confinement of a person found to have committed a sexually violent offense as a juvenile is about to expire, or has expired on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.090(3); or (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.020(3); and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation. [1992 c 45 § 4; 1990 1st ex.s. c 12 § 3; 1990 c 3 § 1003.]

NOTES:

Severability--Application--1992 c 45: See notes following RCW .94A.151.

Effective date--1990 1st ex.s. c 12: See note following RCW 13.40.020.

RCW 71.09.040 Sexually violent predator petition--Judicial determination--Transfer for evaluation. Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody and the person shall be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. [1990 c 3 § 1004.]

RCW 71.09.050 Trial--Rights of parties. Within forty-five days after the filing of a petition pursuant to RCW 71.09.030, the court shall conduct a trial to determine whether the person is a sexually violent predator. At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. When the person wishes to be examined by a qualified expert or professional person of his or her own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The person, the prosecuting attorney or attorney general, or the judge shall have the right to demand that the trial be before a jury. If no demand is made, the trial shall be before the court. [1990 c 3 § 1005.]

RCW 71.09.060 Trial--Determination--Commitment procedures.
(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in RCW 71.09.020(4)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services in a secure facility for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care, and treatment shall be provided at a facility operated by the department of social and health services. If the court or jury is not satisfied beyond a

reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to or has been released pursuant to RCW 10.77.090(3), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.090(3) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

(3) The state shall comply with RCW 10.77.220 while confining the person pursuant to this chapter. The facility shall not be located on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population. [1990 1st ex.s. c 12 § 4; 1990 c 3 § 1006.]

NOTES:

Effective date--1990 1st ex.s. c 12: See note following RCW 13.40.020.

RCW 71.09.070 Annual examinations of persons committed under chapter. Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year. The person may retain, or if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her, and such expert or professional person shall have access to all records concerning the person. The periodic report shall be provided to the court that committed the person under this chapter. [1990 c 3 § 1007.]

RCW 71.09.080 Detention and commitment to conform to constitutional requirements. The involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment. [1990 c 3 § 1008.]

RCW 71.09.090 Petition for release--Procedures. (1) If the secretary of the department of social and health services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. The petition shall be served upon the court and the prosecuting attorney. The court, upon receipt of the petition for release, shall within forty-five days order a hearing. The prosecuting attorney or the attorney general, if requested by the county, shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of his or her choice. The hearing shall be before a jury if demanded by either the petitioner or the prosecuting attorney or attorney general. The burden of proof shall be upon the prosecuting attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to engage in predatory acts of sexual violence.

(2) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be at large. The committed person shall have a right to have an attorney represent him or her at the show cause hearing but the person is not entitled to be present at the show cause hearing. If the court at the show cause hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and is not likely to engage in predatory acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting attorney or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in predatory acts of sexual violence. [1992 c 45 § 7; 1990 c 3 § 1009.]

NOTES:

Severability--Application--1992 c 45: See notes following RCW 9.94A.151.

RCW 71.09.100 Subsequent discharge petitions. Nothing in this chapter shall prohibit a person from filing a petition for discharge pursuant to this chapter. However, if a person has previously filed a petition for discharge without the secretary's approval and the court determined, either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that he or she was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find that the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing. [1990 c 3 § 1010.]

RCW 71.09.110 Department of social and health services--Duties--Reimbursement. The department of social and health services shall be responsible for all costs relating to the evaluation and treatment of persons committed to their custody under any provision of this chapter. Reimbursement may be obtained by the department for the cost of care and treatment of persons committed to its custody pursuant to RCW 43.20B.330 through 43.20B.370. [1990 c 3 § 1011.]

RCW 71.09.120 Release of information authorized. In addition to any other information required to be released under this chapter, the department is authorized, pursuant to RCW 4.24.550, to release relevant information that is necessary to protect the public, concerning a specific sexually violent predator committed under this chapter. [1990 c 3 § 1012.]

RCW 71.09.900 Index, part headings not law--1990 c 3. See RCW 18.155.900.

RCW 71.09.901 Severability--1990 c 3. See RCW 18.155.901.

RCW 71.09.902 Effective dates--Application--1990 c 3. See RCW 18.155.902.

DEPARTMENT OF PLANNING AND BUDGET
1995 FISCAL IMPACT STATEMENT

- | | |
|--|--|
| 1. Patron: Houck, R. | 2. Bill No. SB 940 |
| | House of Origin: |
| 3. Committee: Senate Courts of Justice | <input checked="" type="checkbox"/> Introduced |
| | <input type="checkbox"/> Substitute |
| | <input type="checkbox"/> Engrossed |
| 4. Title: Criminal Sexual Assault; Penalties | Second House: |
| | <input type="checkbox"/> In Committee |
| | <input type="checkbox"/> Substitute |
| | <input type="checkbox"/> Enrolled |

5. Summary/Purpose: Provides that persons convicted of three felony sex offenses are not eligible for the old-age exception to the life imprisonment provisions under the "three time loser" laws. Second-time sex offenders would be subject to the following new penalty provisions: class 2 felony (with a minimum of 20 years) for abduction with intent to defile, carnal knowledge, aggravated sexual battery, incest, indecent liberties, crimes against nature involving children and conspiracy to commit those offenses; and, life imprisonment, not subject to suspension or an old-age exemption, for rape and forcible sodomy, object sexual penetration and conspiracy to commit those offenses.

6. Fiscal Impact Estimates are: Preliminary. See item #8.

7. Budget amendment necessary: Yes. Item 557.

8. Fiscal, program, and policy implications:

The Department of Corrections believes that this bill will result in the increased need for 22 beds within the correctional system by fiscal year 2005.

By dividing the present cost to house and administer the inmate population by the number of inmates being housed, the annual cost to the state is \$17,980 per inmate. This number takes into account all costs associated with staffing and running the prisons and administering the inmates.

Multiplying the \$17,980 average cost per inmate by the expected increase in inmates results in the need for \$395,560 in additional funding in FY 2005. The \$395,560 amount is used to establish the appropriate highest annual cost number over the next ten years consistent with Section 30-19.1:4.B. of the Code of Virginia. This is the amount shown in the introduced version of this bill.

Besides an annual operating cost of \$17,980 per additional inmate per year, additional capital costs are incurred from new prison construction. Assuming additional prisons would be built using debt, the capital cost per inmate per year can be calculated over 20 years based on debt service payments. This amount can vary from \$2,500 to \$6,700 per year per inmate, depending upon the inmate's security classification.