2011 ANNUAL REPORT

VIRGINIA STATE CRIME COMMISSION

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June 27, 2012

TO: The Honorable Robert F. McDonnell, Governor of Virginia
The Honorable Members of the General Assembly of Virginia

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 establishing the Virginia State Crime Commission and setting forth its purpose, please find attached herewith the Commission's 2011 Annual Report.

Very truly yours,

Robert B. Bell, Chair

Table of Contents

Authority of the Crime Commission

Established in 1966, the Virginia State Crime Commission is a legislative agency authorized by Code of Virginia § 30-156 *et seq.* to study, report, and make recommendations on all areas of public safety and protection. In doing so, the Commission endeavors to ascertain the causes of crime and ways to reduce and prevent it, to explore and recommend methods of rehabilitation for convicted criminals, to study compensation of persons in law enforcement and related fields and examine other related matters including apprehension, trial, and punishment of criminal offenders. The Commission makes such recommendations as it deems appropriate with respect to the foregoing matters, and coordinates the proposals and recommendations of all commissions and agencies as to legislation affecting crimes, crime control, and public safety. The Commission cooperates with the executive branch of state government, the Attorney General's Office and the judiciary who are in turn encouraged to cooperate with the Commission. The Commission cooperates with governments and governmental agencies of other states and the United States. The Crime Commission is a criminal justice agency as defined in the Code of Virginia § 9.1-101.

The Crime Commission consists of thirteen members that include nine legislative members, three non-legislative citizen members, and the Attorney General as follows: six members of the House of Delegates to be appointed by the Speaker of the House of Delegates in accordance with the principles of proportional representation contained in the Rules of the House of Delegates; three members of the Senate to be appointed by the Senate Committee on Rules; three non-legislative citizen members to be appointed by the Governor; and the Attorney General or his designee.

Members of the Crime Commission

HOUSE OF DELEGATE APPOINTMENTS

The Honorable Robert B. Bell, Chair
The Honorable Ward L. Armstrong
The Honorable Terry G. Kilgore
The Honorable G. M. (Manoli) Loupassi
The Honorable Beverly J. Sherwood
The Honorable Onzlee Ware

SENATE APPOINTMENTS

The Honorable Janet D. Howell, Vice-Chair
The Honorable Henry L. Marsh, III
The Honorable Thomas K. Norment, Jr.

ATTORNEY GENERAL

The Honorable Kenneth T. Cuccinelli, II

GOVERNOR'S APPOINTMENTS

Mr. Glenn R. Crowshaw*
The Honorable Jim Plowman*
Colonel W. Gerald Massengill
The Honorable Richard E. Trodden

Crime Commission Staff

Kristen J. Howard, Executive Director
G. Stewart Petoe, Director of Legal Affairs
Christina Barnes Arrington, Ph.D., Senior Methodologist
Holly B. Boyle, Policy Analyst
Thomas E. Cleator, Senior Staff Attorney

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** Glenn Croshaw resigned as a member of the Crime Commission effective August 3, 2011. Jim Plowman was appointment by the Governor on October 13, 2011.*

2011 Interim Executive Summary of Activities

Established in 1966, the Virginia State Crime Commission (Crime Commission) is a legislative agency authorized by the Code of Virginia § 30-156 et seq. to study, report, and make recommendations on all areas of public safety and protection. The Commission is a criminal justice agency as defined in the Code of Virginia § 9.1-101. The Commission consists of thirteen members -- nine legislative members, three non-legislative citizen members, and one state official, as follows: six members of the House of Delegates appointed by the Speaker of the House of Delegates in accordance with the principles of proportional representation contained in the Rules of the House of Delegates; three members of the Senate appointed by the Senate Committee on Rules; three non-legislative citizen members appointed by the Governor; and the Attorney General or his designee.

Throughout 2011, the Crime Commission held four Commission meetings: July 25, September 20, November 16, and December 6. During the 2011 General Assembly Session, a total of one mandated study and eight bill referrals were sent to the Commission and approved for review. The Commission also received several letter requests for studies. Additionally, the Commission continues to be involved in the Forensic Science Board's DNA Notification Project.

The Crime Commission was mandated to study federal requirements regarding Virginia's sex offender registry and the extent to which Virginia is in compliance with these requirements (SJR 348). The Commission was also requested to examine the effectiveness of the registry in preventing sexual victimization and to determine the feasibility of implementing a tiered system. For the complete report on the Sex Offender Registry study, please see Senate Document 8 (2012).

Throughout the year, staff reviewed numerous study issues as a result of bills being referred to the Commission during the 2011 Session of the General Assembly. Specifically, during 2011, the following issues were reviewed: the issues of reckless driving and speeding (HB 1993 and HB 2322), the inherent authority of courts to defer and dismiss in a criminal case (HB 2513), medical fraud control unit investigators (HB 2454), creating animal abuser and domestic abuser registries (HB 1930 and HB 1932), making it a crime for an adult stranger to solicit a child for an automobile ride (HB 2396), as well as the death and rape investigations by campus police departments (HB 2490). As a result of member letter requests, the Commission also examined cyberbullying and the disposition of unrestorably incompetent defendants. The Commission also received study letter requests from the Commission on Youth requesting a review of the protection and purging of juvenile records and barrier crimes that prevent kinship care placements. As a result of last year's extensive protective order study, staff identified several minor protective order issues for the members to consider. Commission members also received a presentation on the status of law enforcement lineup policies from the

Department of Criminal Justice Services as a result of last year's study of HB 207, which found that only 75% of law enforcement agencies were in compliance with the Code of Virginia's requirement that all departments have a written lineup policy. Study presentations can be found on the Commission's website at: http://vscc.virginia.gov.

Three additional issues came to the attention of Crime Commission members during the course of the year and were added to the study work plan – reporting of missing children, synthetic marijuana, and pseudoephedrine/NPLEx. In response to the verdict in Casey Anthony's trial and the resulting enormous public outrage, staff was requested to review legislation regarding the reporting of missing children.

In regard to synthetic marijuana, last year the General Assembly passed legislation that made it illegal to possess, distribute, possess with the intent to distribute, or manufacture several synthetic cannabinoid chemicals. During the fall of 2011, the Department of Forensic Science reported to the Forensic Science Board and the Crime Commission that additional synthetic cannabinoid chemicals were being found in Virginia, and identified by the Lab, that were not illegal to possess or consume, as they had not been included in last year's legislation.

Lastly, the Joint Commission on Health Care advised the Crime Commission members of the growing problem of methamphetamine use and available options to address the sale of pseudoephedrine in Virginia.

In addition to these studies, the Crime Commission's Executive Director serves as a member of the Forensic Science Board pursuant to the Code of Virginia § 9.1-1109(A)(7). The Executive Director also acts as the Chair of the DNA Notification Subcommittee, which is charged with the oversight of notification to convicted persons that DNA evidence exists within old Department of Forensic Science case files that may be suitable for testing.

In accordance with the Code of Virginia § 19.2-163.02, the Commission's Executive Director also serves on the Virginia Indigent Defense Commission and as a member of the Budget Committee and the Personnel and Training Committee.

Animal Abuser Registry

Executive Summary

During the 2011 Regular Session of the Virginia General Assembly, Delegate Daniel Marshall introduced House Bill 1930 (HB 1930) that sought to create an animal abuser registry. The registry would require any adult convicted of felony cruelty to animals or felony animal fighting to register for 15 years. The bill was referred by the House Courts of Justice Committee to the Crime Commission for review.

Crime Commission staff utilized several methodologies to assess the issue, including collecting relevant literature, obtaining data related to animal abuse convictions in Virginia, and examining other states' statutes and registries. There was very little literature available concerning animal abuser registries, but there has been some legislative activity addressing animal abuse and provisions for pets in the past several years by some states. Staff collected data that showed that there were *at least* 104 felony convictions for animal abuse offenses over the past five fiscal years and that there was a steady increase in the number of felony convictions for animal abuse between Fiscal Years (FY) 2007 and FY11. The General Assembly amended several Code sections during this time frame which may have led to the increase in convictions.

As a result of this study effort, no formal recommendations were made by the Crime Commission.

Background

House Bill 1930 was introduced by Delegate Daniel Marshall during the 2011 Regular Session of the Virginia General Assembly.[1] As introduced, the bill would have established an animal abuser registry and required anyone convicted of felony animal abuse offenses, as defined in Va. Code §§ 3.2-6570 or 3.2-6571, who resides within the boundaries of the Commonwealth for more than ten consecutive days, to register in person with the sheriff of the county or city in which they are located.

There are a number of specific crimes listed in the Virginia Code that define felony animal abuse, which include:

- cruelty to animals, second or subsequent act, one act resulted in death;[2]
- killing a dog or cat for hide, fur, or pelt, second or subsequent act;[3]
- torture/mutilation of a dog or cat causing death;[4]
- dogfighting activity;[5]
- using a device or substance to enhance animal's ability to fight; wagering money, etc., on animal fighting;[6]
- paying or receiving admission for animal fighting;[7]

- possessing, training, transporting, or selling an animal for fighting; and,[8]
- allowing a minor child to attend or be involved in animal fighting.[9]

The fiscal implications of HB 1930 would have affected the Virginia Department of Corrections, the Virginia State Police, and local law enforcement agencies. According to the Virginia Criminal Sentencing Commission (VCSC), the proposed legislation would cost state adult correctional facilities $49,321, or two beds in a facility, and it would cost local adult correctional facilities $1,934, or less than one bed by FY17. In addition, the Virginia State Police estimated that about $986,000 would be needed to design and develop a new registry and website, with an additional $126,411 needed each year to support a position to maintain the website. The cost to local law enforcement agencies was not known at the time.[10]

Literature Review

Animal abuse has been capturing increased attention from various groups, including psychologists, sociologists, criminologists and lawmakers. While some organizations have listed various purposes for animal abuser registries, it is hard to determine what outcome or impact these types of registries may have on future animal abusers' behaviors. Staff found information on the impact of such registries to be rather limited; however, there is research available determining whether a link between animal abuse and other types of violence exists. Over the past 30 years, a growing body of literature has documented potential links between animal abuse and other forms of violence including domestic violence, child abuse, and elder abuse. This body of evidence is important to review given that these links are often used to justify the existence of animal abuser registries.

Existing research studies typically focus on whether children who are cruel to animals are disproportionately violent to people later in life; whether children who are victims of violence are more likely to harm animals and be more aggressive towards people later in life; and, whether the existence of animal cruelty in a family tends to be associated with coexisting domestic violence, child abuse, and elder abuse.[11] A brief overview of each will be provided, along with key methodological limitations.

The vast majority of available research has found support for a link between childhood animal abuse and subsequent violence towards people.[12] Much of this research is based on the graduation or progression hypothesis, which assumes that such animal abusers will later progress to acts of violence towards people.[13] Some research places its attention on the diagnostic criteria (DSM-IV) for conduct disorder in children, antisocial personality disorder in adults, and other psychiatric disorders, which recognizes animal cruelty as one possible marker or symptom; however, the diagnostic significance and association with animal cruelty has not been firmly established.[14] Further, other research has challenged the overall assumption that childhood acts of animal cruelty and subsequent violence are associated, with some researchers finding no evidence of a link or a cause-effect relationship.[15]

A number of studies have also documented a link between animal abuse and domestic violence in the home, specifically against women,[16] children,[17] and the elderly.[18] Much of the evidence regarding domestic violence against women is based upon surveys and interviews with women seeking assistance at domestic violence shelters or participating in a domestic violence program.

It must be noted that much of the research mentioned above has serious methodological flaws. Specifically, most of the previous research is based upon small, non-representative samples with inadequate or no control groups,[19] are retrospective in nature,[20] and do not contain a clear, consistent definition or measurement of animal abuse.[21] For instance, most of the studies include extreme samples comprised of serial killers or other convicted felons; or, non-representative samples, such as only women who seek assistance or refuge at domestic violence shelters. These types of samples do not represent the general population as a whole, excluding the diverse range of individuals who do *not* seek assistance from such shelters or programs. Consequently, many important demographics including race, gender, age, sexual orientation, and regional differences have largely been overlooked thus far by the research.

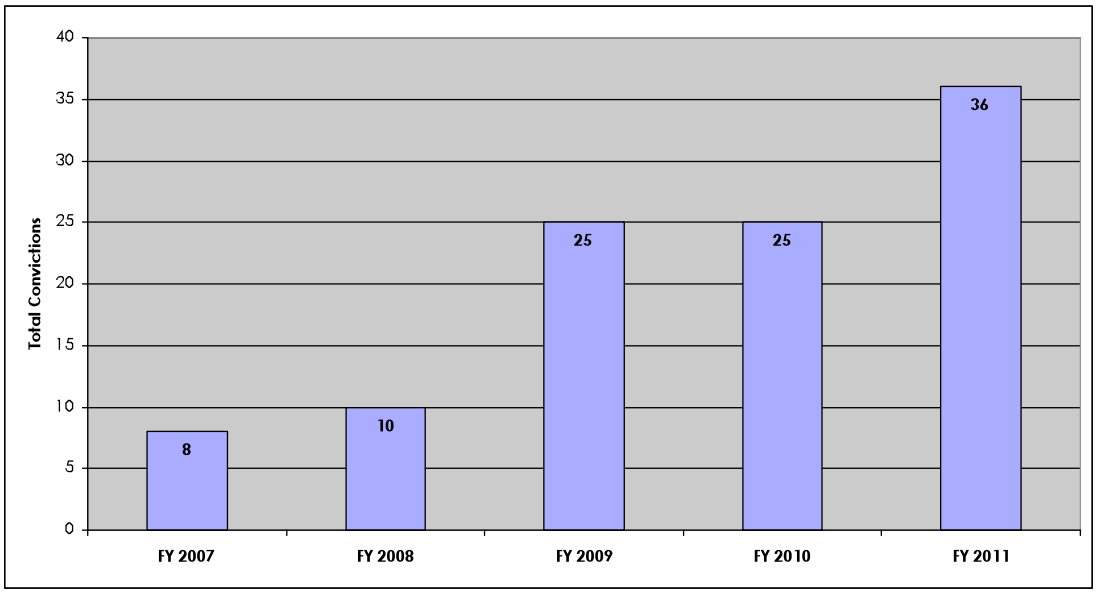
Another limitation mentioned above that is important to appreciate is that defining animal abuse is quite difficult and complex. Definitions of animal abuse vary enormously across different times, locations, cultures and beliefs.[22] Likewise, the definitions utilized in research studies to measure animal abuse have not been consistent, encompassing a wide continuum of behaviors from threatening to harm animals to the actual killing of an animal.[23]

Despite the limitations described above, there does seem to be enough evidence to warrant the issue of animal cruelty and human violence to be examined further. However, there does not appear to be any evidence to suggest a clear cause-effect relationship between the two issues. One researcher, for instance, sums up the issue very well: "It is clear from the research that not all children who are cruel to animals go on to be violent adults and not all adults who harm animals are also violent to their partners and/or children. Nevertheless, the research does indicate that there is some correlation between children abusing animals and children harming people, and between adults abusing animals and adults abusing family members."[24] This lack of causality may hold important implications for the utility of animal abuser registries.

Conviction Data

Staff requested data from the VCSC to obtain a better understanding of felony animal abuse convictions across the Commonwealth. Specifically, conviction data was requested for eight specific crimes listed in Va. Code § 3.2-6570. As illustrated in Figure 1, there were *at least* 104 felony convictions for animal abuse offenses over the past five fiscal years.

Figure 1: Total Number of Felony Convictions for Animal Abuse, FY07-FY11



Source: Supreme Court of Virginia's Circuit Court Management System.

Note: Figures do not include Fairfax, Alexandria, and Prince William for FY2007-FY2010. During FY2011, Prince William joined the Supreme Court's system and Virginia Beach left the system. Localities not participating in a particular year are not included in that year's figures.

Of the 104 felony animal abuse convictions across FY07-FY11:

- 42 were for the torture or mutilation of a dog or cat causing death (§ 3.2-6570(F));
- 21 were for possessing, training, transporting, or selling an animal for fighting (§ 3.2-6571(B,5));
- 14 were for device/substance used to enhance animal's ability to fight (§ 3.2-6571(B,2)); and,
- 27 were for other applicable offenses.

There was a steady increase in the number of felony convictions for animal abuse between FY07 and FY11. An explanation for this increase could be a result of the General Assembly amending Va. Code § 3.1-796.122, relating to animal cruelty. The definition of animal cruelty was expanded to include maliciously depriving any companion animal of necessary food, drink, shelter, or emergency veterinary treatment. This section was then recodified into Va. Code § 3.2-6570, effective October 2008.

Also in 2008, Va. Code § 3.1-796.124, related to dog fighting, was greatly expanded to generalize the statute to include any form of animal fighting. As part of the revision, the existing Va. Code § 3.1-796.125, which defined misdemeanor crimes related to attendance at dog fights and the fighting of animals other than dogs, was repealed and incorporated into Va. Code § 3.1-796.124. The penalty for attending a dog fight was thus raised from a Class 1 misdemeanor to a Class 6 felony, while the penalty for fighting animals other than dogs was raised from a Class 3 to a Class 1 misdemeanor. The existing Class 6 felony was expanded to include the use of a device or substance

intended to enhance any animal's ability to fight and allowing a minor to participate in or attend an animal fight. Effective October 2008, this section was recodified into Va. Code § 3.2-6571.[25]

Other Registries

Staff conducted a review of animal abuser registries and found that while there are no state run public registries, there are some local ordinances that have established animal abuser registries in individual localities. On October 12, 2010, Suffolk County, New York, created the nation's first public animal abuser registry by local ordinance. The registry requires online registration for five years following conviction. The Suffolk County SPCA volunteered to create the registry and the locality only incurs a minimal cost to maintain the registry. Currently, the registry is only accessible through the Suffolk Country SPCA website and is serving as a template as there are no actual offenders listed on the registry.[26] On May 17, 2011, Rockland County, NY, created the nation's second public animal abuser registry by local ordinance. The registry also requires online registration for five years following conviction and makes it a punishable offense for anyone to sell an animal to an individual on the registry.

In 2010, there were six states that proposed legislation that would have created an animal abuser registry.[27] As of September 20, 2011, there were 18 states, including Virginia, that proposed legislation to create an animal abuser registry.[28]

In 2010, California attempted to pass legislation that would have created the nation's first state run animal abuser registry. State lawmakers worked closely with members of the Animal Legal Defense Fund, a California-based animal protection group. The proposed financing for the bill would have come from a three percent tax on pet food sold in California. Eventually, the bill failed as a result of a lack of funding. Similar types of animal abuser registries have been introduced in other states, including Virginia, but thus far none of the legislation has been successful.[29]

The growing recognition of the emotional significance of pets in the lives of family violence victims has resulted in 43 states recodifying various forms of animal abuse as felonies; several states mandating cross-reporting of child abuse, animal abuse and domestic violence; and the inclusion of pets in protective orders granted in cases of intimate partner violence.[30] The recent legislative trend to allow the inclusion of pets in protective orders, by law, is something to be noted.[31]

Conclusion

While Virginia does not presently have an animal abuser registry, it does have criminal statutes that seek to protect companion animals. If Virginia were to create an animal abuser registry, as contemplated by HB 1930, it would be the first state-run registry of its kind.

Studies show a potential link between individuals who abuse animals and those who go on to abuse people. While some people believe an animal abuser registry could be used as a tool in predicting future behavior for certain offenders, as well as tracking and treating abusers, others believe that a registry would simply be another tool of limited utility that could end up stigmatizing a group of individuals, sometimes unfairly.

As a result of this study effort, no formal recommendations were made by the Crime Commission.

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[1] H.B. 1930, 2011 Va. General Assemb. Reg. Sess. (Va. 2011).
[2] VA. CODE ANN. § 3.2-6570 (2011).
[3] Id.
[4] Id.
[5] VA. CODE ANN. § 3.2-6571 (2011).
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Fiscal impact statement for House Bill 1930 (2011), http://lis.virginia.gov/cgi-bin/legp604.exe?111+oth+HB1930IMP.
[11] Peterson, M.L., & Farrington, D.P., Cruelty to animals and violence to people. *Victims and Offenders,* 2, 21-43 (2007).
[12] Baldry, A.C., The development of the P.E.T. Scale for the measurement of physical and emotional tormenting against animals in adolescents. *Society and Animals*, 12(1), 1-17 (2004); Baldry, A.C., Animal abuse among preadolescents directly and indirectly victimized at school and at home. *Criminal Behavior and Health,* 15(20), 97-110 (2005); Becker, K.D., Stuewig, J., Herrera, V.M., & McCloskey, L.A., A study of firesetting and animal cruelty in children: Family influences and adolescent outcomes. *Journal of the American Academy of Child and Adolescent Psychiatry,* 43(7), 905-912 (2004); Felthous, A.R., Childhood antecedents of aggressive behavior in male psychiatric patients. *Bulletin of the American Academy of Psychiatry and Law*, 8, 104-110 (1979); Hellman, D.S., & Blackman, N., Enuresis, firesetting and cruelty to animals: A triad predictive of adult crime. *American Journal of Psychiatry,* 122, 1431-1435 (1996); Kellert, S.R., & Felthous, A.R., Childhood cruelty toward animals among criminals and noncriminals. *Human Relations,* 38, 1113-1129 (1985); Merz-Perez, L., Heide, K., & Silverman, I., Childhood cruelty to animals and subsequent violence against humans. *International Journal of Offender Therapy and Comparative Criminology*, 45(5), 556-573 (2001); Ressler, R.K., Burgess, A.W., & Douglas, J.E, *Sexual homicide: Patterns and motives.* Lexington, MA: Lexington Books (1988); Schiff, K., Louw, D., & Ascione, F.R., Animal relations in childhood and later violence against humans. *Acta Criminologica,* 12(3), 77-86 (1999); Tallichet, S.E., Hensley, C., O'Bryan, A., & Hassel, H., Targets for cruelty: Demographic and situational factors affecting the type of animal abused. *Criminal Justice Studies,* 18(2), 173-182 (2005); Tingle, D., Barnard, G.W., Robbins, G., Newman, G., & Hutchinson, D., Childhood and adolescent characteristics of pedophiles and rapists. *International Journal of Law and Psychiatry,* 9, 103-116 (1986).
[13] Felthous, A.R., Aggression against cats, dogs and people. *Child Psychiatry and Human Development,* 10, 169-177 (1980); Felthous, A.R., & Youdowitz, B., Approaching a comparative

typology of assaultive female offenders. *Psychiatry*, 40, 270-276 (1977); Kellert, *supra* note 12; Wright, C., & Hensley, C., From animal cruelty to serial murder: Applying the graduation hypothesis. *International Journal of Offender Therapy and Comparative Criminology,* 47(1), 71-88 (2003).

[14] *See,* for example, Frick, P.J., Van Horn, Y., Lahey, B.B., Christ, M.A.G. et al., Oppositional defiant disorder and conduct disorder: A meta-analytic review of factor analyses cross-validation in a clinical sample. *Clinical Psychology Review,* 13, 319-340 (1993); Gleyzer, R., Felthous, A.R., & Holzer, C.E., Animal cruelty and psychiatric disorders. *Journal of the American Academy of Psychiatry and the Law,* 30(2), 257-265 (2002); Loeber, R., Keenan, K., Lahey, B., Green, S., & Thomas, C., Evidence for a developmentally based diagnoses of oppositional defiant disorder and conduct disorder. *Journal of Abnormal Child Psychology,* 21, 377-410 (1993); Miller, C., Childhood animal cruelty and interpersonal violence. *Clinical Psychology Review,* 21(5), 735-749 (2001).

[15] Arluke, A., Luke, C., & Ascione, F.R., The relationship of animal abuse to violence and other forms of antisocial behavior. *Journal of Interpersonal Violence,* 14(9), 963-975 (1999); Beirne, P., From animal abuse to interhuman violence? A critical review of the progression thesis. *Society and Animals,* 12(1), 39-65 (2004); Miller, K.S., & Knutson, J.F., Reports of severe physical punishment and exposure to animal cruelty by inmates convicted of felonies and by university students. *Child Abuse and Neglect,* 21(5), 59-82 (1997).

[16] Ascione, F.R., Battered women's reports of their partners' and their children's cruelty to animals. *Journal of Emotional Abuse,* 1(1), 119-133 (1998); Becker et al., *supra* note 12; Faver, C.A., & Strand, E.B., To leave or to stay?- Battered women's concern for vulnerable pets. *Journal of Interpersonal Violence,* 18(12), 1367-1377 (2003); Flynn, C.P., Woman's best friend: Pet abuse and the role of companion animals in the lives of battered women. *Violence Against Women,* 6(2), 162-177 (2000); Jorgenson, S., & Maloney, L., Animal abuse and victims of domestic violence. In F.R. Ascione and P. Akrow (Eds.), *Child abuse, domestic violence and animal abuse* (pp. 143-158). West Lafayette, IN: Purdue University Press (1999); Manning, 2000; Quinlisk, J.A., Animal abuse and family violence. In F.R. Ascione and P. Akrow (Eds.), *Child abuse, domestic violence and animal abuse* (pp. 168-175). West Lafayette, IN: Purdue University Press (1999).

[17] Ascione, F. R., Children who are cruel to animals: A review of research and implications for developmental psychology. *Anthrozoos,* 6(4), 226-247 (1993); DeViney, E., Dickert, J., & Lockwood, R., The care of pets within child abusing families. *International Journal for the Study of Animal Problems,* 4, 321-329 (1983); Flynn, *supra* note 16.

[18] Lockwood, R., Making the connection between animal cruelty and abuse and neglect of vulnerable adults. *The Latham Letter,* 23(1), 1-24 (2002); Rosen, B., Watch for pet abuse- It might save your client's life. In F.R. Ascione and P. Akrow (Eds.), *Child abuse, domestic violence and animal abuse* (pp. 340-347). West Lafayette, IN: Purdue University Press (1999).

[19] Baldry, 2004 and 2005, *supra* note 12; Ressler et al., *supra* note 12; Tallichet et al., *supra* note 12; Tingle et al., *supra* note 12.

[20] Peterson, *supra* note 11.

[21] *See,* for example, Becker, F., & French, L., Making the links: Child abuse, animal cruelty and domestic violence. *Child Abuse Review,* 13(6), 399-414 (2004); Boat, B., Abuse of children and abuse of animals-Using the links to inform child assessment and protection. In F.R. Ascione and P. Akrow (Eds.), *Child abuse, domestic violence and animal abuse* (pp. 83-100). West Lafayette, IN: Purdue University Press (1999); Merz-Perrez, *supra* note 13; Peterson, *supra* note 11.

[22] Becker, *supra* note 12.

[23] *See,* for example, Baldry, *supra* note 12; Piper, H., Johnson, M., Myers, S., & Pritchard, J., Children and young people harming animals: Intervention through PSHE? *Research Papers in Education,* 18(2), 197-213 (2001); Merz-Perez, *supra* note 12.

[24] Bell, L., Abusing children—Abusing animals. *Journal of Social Work,* 1(1), 223-234 (2001), p. 226.

[25] 2008 Va. Acts. chs. 543, 707, 860.

[26] As of September 27, 2011. *Available at* http://www.suffolkspca.org/Abuser%20Registry.html.

[27] California, Louisiana, New Jersey, New York, Pennsylvania, and Rhode Island. Information taken from the Animal Legal Defense Fund, Expose Animal Abusers website, http://exposeanimalabusers.org/article.php?id=1231.
[28] Alabama, Connecticut, Florida, Hawaii, Maine, Massachusetts, Nevada, New Hampshire, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, and Washington. *Supra* at note 27.
[29] Other states that have proposed similar legislation include Colorado, Connecticut, Louisiana, Massachusetts, Minnesota, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Washington. *Supra* at note 27.
[30] Id.
[31] Id.

Barrier Crimes

Executive Summary

Based on the Virginia Commission on Youth's (COY) 2011 report on kinship care in Virginia, a letter was sent to the Crime Commission, requesting a study of how Virginia's barrier crime statutes affect kinship care placements, and whether it might be possible to ease the prohibition on relatives serving as foster home providers if anyone in the household has ever been convicted of felony drug possession or a non-egregious misdemeanor. It was also requested that the Crime Commission examine all of Virginia's barrier crimes statutes, to determine if they should be clarified, and to identify any existing gaps in their lists of offenses.

Virginia has one of the most restrictive barrier crimes statutes in the country for purposes of qualifying to be a foster care provider. Any conviction for any of the offenses listed in Va. Code § 63.2-1719 serves as a permanent bar to ever being a foster parent. This prohibition also applies in cases where a relative of the child offers to provide foster care, a situation referred to as kinship care. As a result of Virginia's stringent barrier crimes laws, for the past two fiscal years, 80 individuals were precluded from serving as kinship care providers to a relative. Federal law does not permit states to adopt differing standards between kinship care providers and other foster care homes. However, federal law does allow states to create a waiver process for kinship care homes, provided that the process involves a case-by-case determination of the suitability of the home, and no safety standards are waived.

The four barrier crimes statutes in Virginia do not individually list every offense that is included. Instead, some of the offenses are referred to in a general sense; e.g., "arson as set out in Article 7 (§ 18.2-77 et seq.) of Chapter 4 of Title 18.2." This makes the statutes difficult to read—it is not easy to tell, without referring to other parts of the Code of Virginia, whether a particular criminal offense is included or not. Even more problematic is the fact that several serious felonies have been created by the Virginia legislature, but have not been added to the barrier crimes statutes: abduction for purposes of forced labor, violations of protective orders and family abuse protective orders, and extortion.

The Crime Commission recommended that a waiver process be created for kinship care situations, so that a felony conviction for drug possession, or a misdemeanor conviction for an arson offense, would not continue to be a permanent bar to a relative serving as a kinship care provider. The waiver process must include an individual determination that the applicant not pose a risk to the safety of the child, and ten years must have passed from the time of the conviction. Only felony drug possession convictions could be waived; felony convictions for drug distribution or possession with the intent to distribute would still be a lifetime bar to providing kinship care. The Crime Commission also recommended that the felony crimes of abduction for purposes of forced labor, violations of protective orders and family abuse protective orders, and extortion, be

included in all four of Virginia' barrier crimes statutes. The Crime Commission declined to endorse the concept of rewriting Virginia's barrier crimes statutes so that all the criminal offenses are listed individually.

Background

In 2011, COY sent an official request to the Crime Commission to study the issue of how kinship care placement in Virginia is affected by the applicable barrier crimes statute, Va. Code § 63.2-1719.[1] It was determined by COY, as a result of their 2010 study on the topic, that for purposes of kinship care, Virginia's barrier crimes statute is overly restrictive.[2] It was also found that all four of Virginia's barrier crimes statutes,[3] not just the one that pertains to kinship care, are confusing and inconsistent, with existing gaps in the statutes.[4] The COY requested the Crime Commission examine the barrier crimes statutes, and offer recommendations on making them consistent.

Analysis

CRIMINAL CONVICTION BARRIERS TO KINSHIP CARE

Under Virginia law, anyone who has ever been convicted of any of the crimes listed in Va. Code § 63.2-1719 is ineligible to serve as a foster parent.[5] There are no "look back" provisions, or expiration periods, for any of these crimes, with the exception of misdemeanor assault and battery in violation of Va. Code § 18.2-57.[6] Unless a person has had their civil rights restored by the Governor,[7] a conviction for any offense listed under Va. Code § 63.2-1719 creates a lifetime bar to serving as a foster parent. This prohibition also applies if any individual living in the proposed foster home has been convicted of any of the offenses.[8] Under Virginia law, no exception can be made, even if a relative of the child offers to serve as a foster care provider.[9]

Virginia's barrier crimes prohibitions for foster care are amongst the most stringent in the country and exceed what is required by federal law.[10] This may be a contributing factor to Virginia ranking last in the country in terms of kinship care placements.[11] According to information provided by the Virginia Department of Social Services, in both Fiscal Year (FY) 2010 and FY11, there were 80 individuals who were barred from providing kinship care after a criminal background check revealed a criminal conviction for one of the offenses listed under Va. Code § 63.2-1719. By way of comparison, in FY10, 656 relatives of foster children were deemed to be eligible to provide foster care after a criminal background check; 297 children were subsequently placed in kinship care. For FY11, 778 relatives were deemed to be eligible after a criminal background check, and 294 children were placed in kinship care. These figures contrast with the 3,493 children who were placed in non-relative foster homes in FY10, and the 3,345 children placed in non-relative foster homes in FY11.

While the number of potential kinship care placements is much smaller than the total number of children who are placed in foster care each year, public policy generally

regards it as desirable to place foster children in the homes of relatives, when feasible. Nationally, there has been an initiative to increase the use of kinship care when a foster care placement is required.[12] Several dozen additional children might be placed into kinship care each year, if Virginia created a time limit for certain of the less egregious offenses in Va. Code § 63.2-1719, such as simple possession of a Schedule I or II controlled substance, or a misdemeanor arson conviction, with such time limits only being applicable to kinship care.

However, federal law does not permit states to create separate standards for kinship care homes, compared with the standards for foster care homes. The same standards must apply to each.[13] If a state violates this federal requirement, it is subject to losing federal funds.[14]

One solution to this problem would be to allow exemptions for these criminal convictions for all foster care families, not just kinship care providers. Another possibility is suggested by federal law, which allows states to create a waiver process for kinship care applicants who would otherwise be unable to meet all of the requirements for a foster care home.[15] Such waivers must be made "only on a case-by-case basis for non-safety standards."[16] A prior felony conviction for drug possession would not constitute a safety standard violation, provided at least five years had passed from the time of the conviction.[17]

VIRGINIA'S BARRIER CRIMES STATUTES

The four barrier crimes statutes located in the Code of Virginia do not individually list every specific offense that is included.[18] Rather, many of the prohibited offenses are referred to generally, using such phrases as "arson as set out in Article 1 (§ 18.2-77 et seq.) of Chapter 5 of Title 18.2."[19] As a result, these statutes can be difficult for the general public to read, and also can create ambiguities.[20] Therefore, it has been proposed that the barrier crimes statutes be rewritten, with all the criminal offenses clearly listed.[21]

Even more problematic is when the Virginia legislature creates a new criminal offense, but fails to include it in the barrier crimes statutes. For example, in 2009, Virginia created the new offense of abduction for purposes of forced labor, but failed to include this crime in any of the barrier crimes statutes.[22] Currently, the felonies of abduction for purposes of forced labor,[23] violation of a protective order,[24] and violation of a family abuse protective order,[25] are not included in any of the barrier crimes statutes, and extortion[26] is not included in Va. Code § 63.2-1719, though it is included in the other three statutes.

Conclusion

The Crime Commission discussed the advisability of modifying Virginia's barrier crimes law, as it pertains to foster care, generally, and kinship care in particular. After deliberations, the Crime Commission voted to recommend that Virginia modify the barrier crimes statute, as it pertains to kinship care placement, to allow for individual

waivers on a case-by-case basis, but only for the crimes of felony drug possession and misdemeanor arson offenses. Ten years must have passed from the time of the conviction. Prior convictions for felony drug distribution or possession with the intent to distribute should continue to be an absolute bar to serving as a kinship care provider. The Crime Commission declined to endorse the concept of rewriting Virginia's barrier crimes statutes so that all the criminal offenses are listed individually. The Crime Commission did vote to recommend that the crimes of abduction for purposes of forced labor, felony violation of a protective order, and felony violation of a family abuse protective order all be included in the various barrier crimes statutes.

During the 2012 Regular Session of the Virginia General Assembly, Senator Janet Howell introduced Senate Bill 299, which modified the kinship care barrier crimes statutes in the manner recommended by the Crime Commission.[27] After passing both the Senate and the House of Delegates, this bill was signed into law by the Governor on April 4, 2012.[28] Also during the 2012 Regular Session, Delegate Robert Bell introduced House Bill 971, which added the crimes of abduction for purposes of forced labor, felony violation of a protective order, and felony violation of a family abuse protective order to the four barrier crimes statutes, and the crime of extortion to the barrier crime statute of Va. Code § 63.2-1719.[29] After passing both the House of Delegates and the Senate, this bill was signed into law by the Governor on March 23, 2012.[30]

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[1] Kinship care is foster care that is provided by a relative of the child.
[2] Va. Comm'n. on Youth, Barriers to Kinship Care in Virginia, RD17, 21 (2011).
[3] VA. CODE ANN. §§ 37.2-314, 37.2-408.1, 63.2-1719, 63.2-1726 (West 2011).
[4] Va. Comm'n. on Youth, Barriers to Kinship Care in Virginia, RD17, 21 (2011).
[5] VA. CODE ANN. § 63.2-901.1(E) (West 2011).
[6] Id. The misdemeanor conviction for assault and battery must not have involved "abuse, neglect, moral turpitude, or a minor," and ten years must have elapsed following the conviction.
[7] VA. CODE ANN. § 63.2-901.1(F)–(G) (West 2011).
[8] VA. CODE ANN. § 63.2-1721 (West 2011).
[9] VA. CODE ANN. § 63.2-900.1(B) (West 2011).
[10] Va. Comm'n. on Youth, Barriers to Kinship Care in Virginia, RD17, 16 (2011).
[11] Id. at 11.
[12] Id. at 14. *See also* 42 U.S.C. § 671(a)(19) (2011).
[13] 42 U.S.C. § 671(a)(10) (2011).
[14] 42 U.S.C. § 671(a) (2011).
[15] 42 U.S.C. § 671(a)(10) (2011).
[16] Id.
[17] 42 U.S.C. § 671(a)(20)(A) (2011).
[18] VA. CODE ANN. §§ 37.2-314, 37.2-408.1, 63.2-1719, 63.2-1726 (West 2011).
[19] VA. CODE ANN. §§ 37.2-314, 37.2-408.1, 63.2-1719, 63.2-1726 (West 2011).
[20] For example, it is not clear if making a bomb threat in violation of Va. Code § 18.2-83, which is a Class 5 felony, would qualify, under a plain reading of the statute, as a barrier crime. While this serious crime is located in Article 1 of Chapter 5 of Title 18.2, it is not arson, and is arguably not an arson crime. Currently, state agencies interpret violations of Va. Code § 18.2-83 to be akin to arson, for purposes of applying the relevant barrier crime statutes.
[21] S.B. 1243, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).
[22] 2009 Va. Acts ch. 662.
[23] VA. CODE ANN. § 18.2-47(B) (West 2011).

[24] VA. CODE ANN. § 18.2-60.4 (West 2011).
[25] VA. CODE ANN. § 16.1-253.2 (West 2011).
[26] VA. CODE ANN. § 18.2-59 (West 2011).
[27] S.B. 299, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).
[28] 2012 Va. Acts ch. 568.
[29] H.B. 971, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).
[30] 2012 Va. Acts ch. 383.

Cyberbullying

Executive Summary

Delegate Robert Bell requested by letter that the Crime Commission review cyberbullying by impersonation. There has been a growing concern over the past few years, with the increased use of social media by minors, that cyberbullying is much easier to accomplish than traditional bullying. The cases of Lori Drew and Tyler Clementi highlight the potential harm to individuals in extreme instances of cyberbullying.

The use of technology has made it much easier for teenagers to harass and intimidate others. Teenagers now have increased access to cell phones and the Internet, and many of them use social media websites, such as Facebook, Myspace, and blogs. The increased use of the Internet and other electronic technologies by teens has assisted in the transition from traditional bullying to a newer form typically coined as cyberbullying, electronic bullying, or Internet harassment.

Cyberbullying has been loosely defined as behavior transmitted through phones or computers by persons who send hostile or aggressive messages intended to harm or upset others. This behavior can be accomplished through the use of cell phones, websites, and chat rooms. One of the more disconcerting issues about cyberbullying is that it can be done with a level of anonymity, which may embolden more people to engage in bullying behavior, thinking there are no consequences for their actions. Cyberbullying victimization rates vary, but have been estimated to affect a third of youths in some studies.

Currently, states can use either harassment or stalking statutes to punish cyberbullying, since the prohibited conduct in these statutes is broad enough to cover cyberbullying. In Virginia, the computer harassment and stalking statutes only cover conduct that involves either vulgar or threatening language. At least four states have passed specific cyberbullying statutes, which generally focus on protecting children from acts of cyberbullying. At least 23 states require schools to have policies that penalize cyberbullying by students. This is advantageous, because the U.S. Supreme Court gives schools wide latitude to curtail student speech. However, this standard may need to be revisited since some student speech may be created in homes, and not on school property or at school functions.

As a result of this study, no formal recommendations were made by the Crime Commission.

Background

Bullying has long been a matter of concern in schools and has captured the attention of much academic research.[1] While the Internet can be a necessary tool for searching for information and developing social networks, it can also be misused to carry out undesirable behavior. Specifically, the increased use of the Internet and other electronic technologies by adolescents has assisted in the transition from traditional bullying to a newer form, typically coined as cyberbullying, electronic bullying or Internet harassment. As a result, there has been a significant concern about cyberbullying in recent years.

Another reason that cyberbullying has received so much national attention is due to the very extreme cases that have been covered by the media. The most infamous is the "Myspace Mom," Lori Drew,[2] who posed as a 16 year old boy on Myspace and conducted a fake romance with a 13 year old girl.[3] Four weeks into the "fake romance," Ms. Drew broke off the relationship.[4] The girl was very distraught over the faked romance and committed suicide as a result.[5] Ms. Drew could not be prosecuted in Missouri, where she and the young girl lived, because there was no federal crime for cyberbullying, but she was instead prosecuted under federal anti-hacking statutes in California.[6] She was later acquitted on all charges.[7] Another significant cyberbullying case involved Tyler Clementi, a college student at Rutgers.[8] Mr. Clementi was secretly filmed by his roommate engaging in sexual acts with another man in his dorm room.[9] The video was streamed live on the internet by his roommate.[10] Three days after the incident, Mr. Clementi committed suicide.[11] While these two incidents represent extreme cases of cyberbullying, the concept of cyberbullying is relatively new and, thus, academic literature on the subject only began to emerge in the last ten years, as discussed below.

The definition of cyberbullying does vary in the literature. However, most acts of cyberbullying can be incorporated into the following general definition: "…any behavior performed through electronic or digital media by individuals or groups that repeatedly communicates hostile or aggressive messages intended to inflict harm or discomfort on others."[12] Cyberbullying can be carried out in a number of ways including harassing or incriminating messages, photos or videos via email, instant messaging, social networking sites (e.g., Facebook, Myspace), blogs, websites, chat rooms, or cellular phone text messaging.[13]

While traditional bullying and cyberbullying have many similarities, there are some important differences to consider. First, unlike traditional bullying, which is a face-to-face confrontation, cyberbullying can extend beyond the school grounds, occurring at any given time via electronic messaging.[14] Additionally, the victim may or may not know who their cyberbully is. There is a sense of anonymity online that may embolden individuals to engage in cyberbullying rather than traditional bullying since they feel they will unlikely be caught or do not see the reaction of the victim to realize the negative impact of such behavior.[15] Some research has suggested that such anonymity may increase the frequency and power of cyberbullying.[16]

Research has estimated that the number of youth engaging in cyberbullying varies between 4%-15%.[17] However, the prevalence of cyberbullying victimization is much

higher, with research estimating anywhere from 19% to 42% of youth cyberbullied at least once.[18] The consequences of cyberbullying are very similar to those reported from traditional bullying, such as lower self-esteem, decreased academic performance, increased stress levels, embarrassment, insecurity, and depression, social, and anxiety disorders.[19]

The Role of Social Media

The advent and growth of technology has changed the nature and extent of bullying in recent years. The number of teenagers using such technologies is considerable. For instance, recent surveys estimate that at least 75% of teens (12-17) own a cellular phone,[20] and well over 90% of all teens are connected to the Internet in some way.[21] Social media is yet another recent mechanism that makes it much easier to communicate with a large number of people in a very short period of time, making it very simple to spread rumors and communicate false statements about people.

Facebook, the most popular of all social media sites, has more than 800 million users worldwide, with roughly 200 million users in the U.S.[22] Twitter has more than 200 million active accounts, and is growing rapidly.[23] Myspace has approximately 60 million users worldwide.[24] There are also many "blog" platforms such "Blogger," "Word Press," or "Tumblr." that make it very easy to create a blog, allowing the blog owner to post practically any message they desire, and reach anyone who subscribes to or reads the blog. It has been estimated that 73% of teens use social networking sites.[25] Another way teens and young adults harass and intimidate each other is by setting up fake profiles, on sites like Facebook, to impersonate another.

At the Crime Commission's November 16, meeting, Facebook representatives made a presentation about their efforts to address cyberbullying and curb impersonation. Ms. Brooke Oberwetter of Facebook explained that Facebook is based on the concept of a "real name culture," which means that on Facebook, you have to be your real self instead of using pseudonyms. She explained that this creates an environment where people are accountable for their actions, and deters imposters and fake names.

Ms. Oberwetter also detailed the many reporting tools available on Facebook for users to report abuse, such as acts of harassment and bullying. Users can notify Facebook when they see posts, photos, or speech that they believe may violate Facebook's policies. There are also social reporting tools that allow users to communicate with other users regarding the content of their posts or photos that may be offensive, embarrassing or make them feel uncomfortable. If a teenager feels like they are being bullied or harassed, they can easily and discreetly notify a parent, teacher, or a mutual friend who can help them resolve the situation.

Ms. Oberwetter provided information on Facebook's policies regarding impersonation and reported that it is a violation of their policy to set up a fake profile. Additionally, they have tools in place to detect against fake accounts, which were recently updated and implemented. Users can now notify Facebook immediately when they believe that someone is impersonating them or another person. Facebook has a security team that

operates worldwide, 24 hours a day, seven days a week, to review reports and take action when necessary. Facebook also has special tools for accounts set up by teenagers, such as limiting the amount of information that is shared on the Internet. Finally, Ms. Oberwetter explained that Facebook has been involved in multiple safety campaigns and anti-bullying initiatives. They recently partnered with Time Warner to educate the general public about cyberbullying.

Legal Analysis

Generally, cyberbullying can by addressed by existing law, since some states' harassment laws and stalking laws are broad enough to penalize most conduct that is considered cyberbullying. Additionally, there have been a few states that have created specific laws to penalize cyberbullying. Many states have also focused on this issue by requiring schools to develop policies and procedures to address acts of cyberbullying.

HARASSMENT STATUTES

At least 31 states have harassment laws that are generally broad enough to cover most facets of cyberbullying.[26] For example, Alabama's law provides punishment for acts targeted at individuals for electronic communications done in a "manner likely to harass or cause alarm."[27] Likewise, in Kentucky, using a computer "with intent to intimidate, harass, annoy, or alarm another person" subjects a person to punishment under its harassment statute.[28]

In Virginia, there is no general harassment statute. There is, however, a specific statute that targets computer harassment.[29] The statute covers the following behavior:

> If any person, with the intent to coerce, intimidate, or harass any person, shall use a computer or computer network to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act, he shall be guilty of a Class 1 misdemeanor.[30]

While this statute could punish some acts of cyberbullying, it would be limited to those acts that are accompanied by "obscene, vulgar, profane, lewd, lascivious, or indecent language."[31]

STALKING STATUTES

Since the 1990s, all states, and the federal government, have enacted stalking laws.[32] Stalking laws, like harassment laws, can be used to prosecute actions considered to be cyberbullying, since the focus of the statutes is to punish individuals who set out on a specific course of action to harass, annoy, or intimidate a specific person. For example:

- Florida - "any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking."[33]

- Maine - "the actor intentionally or knowingly engages in a course of conduct directed at or concerning a specific person that would cause a reasonable person…to suffer serious inconvenience or emotional distress."[34]

- Mississippi - "Electronically mail or electronically communicate to another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct, or criminal conduct of the person electronically mailed or of any member of the person's family or household with the intent to threaten, terrify or harass."[35]

- Rhode Island - "knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or bothers the person, and which serves no legitimate purpose. The course of conduct must be of a kind that would cause a reasonable person to suffer substantial emotional distress, or be in fear of bodily injury."[36]

Virginia also has a stalking law, Virginia Code § 18.2-60.3. It is similar to most stalking laws and penalizes an individual:

> who on more than one occasion engages in conduct directed at another person with the intent to place, or when he knows or reasonably should know that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury.[37]

One important distinction with Virginia's stalking law, in terms of dealing with cyberbullying, is that only extreme cases of cyberbullying would be covered under this statute. Specifically, it would only cover acts of cyberbullying that involve threats of injury, death, or sexual assault.

CYBERBULLYING STATUTES

As of the end of 2011, there are four states that have enacted specific cyberbullying statutes: Louisiana, North Carolina, Texas and Utah. In 2010, Louisiana passed a cyberbullying statute that punished "the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen."[38]

Like Louisiana, North Carolina focused its cyberbullying statute on protecting minors. It covers the following acts:

- building a fake "profile or website" to:
  - either pose as a minor in a electronic message; or,
  - encourage others to post the "private or personal" information of the minor on the Internet.

- with the intent to intimidate or torment a minor, "post a real or doctored image of a minor."

- "plant any statement, whether true or false, tending to provoke or that actually provokes any third party to stalk or harass a minor." [emphasis added][39]

In September 2011, Texas began penalizing acts of cyberbullying accomplished through impersonation. Specifically, it is a crime when a person, without consent, uses another's name with the intent to harm, defraud, intimidate, or threaten any person; or sets up a website on the Internet, or on a social networking site sends emails, instant or text messages, with the intent to harm or defraud someone.[40] Unlike Louisiana and North Carolina, the statute applies to all persons.

Finally, Utah's cyberbullying statute penalizes electronic communications sent "with intent to annoy, alarm, intimidate, offend, abuse, threaten, harass, frighten, or disrupt the electronic communications of another."[41] The statute applies to all persons; however, in subsequent offenses against minors, the penalty is increased from a misdemeanor to a third degree felony.[42]

School Cyberbullying Policies

Schools and school systems have been addressing bullying for many years, and often have official policies that discourage, educate, and punish, regarding bullying.[43] Recently, states have been addressing cyberbullying by requiring schools to have policies in place to educate students about cyberbullying and policies that prescribe discipline for students committing acts of cyberbullying.[44] According to the National Conference of State Legislatures, there are at least 23 states that have statewide, either in code or regulation, requirements for schools and school systems to develop polices regarding cyberbullying.[45] Virginia has a statutory requirement that is similar to what most other states prescribe for schools. In 2009, language was added to Va. Code § 22.1-279.6 requiring the Board of Education to adopt guidelines that include provisions addressing cyberbullying.[46] Specifically, the Virginia Code requires the Board of Education to adopt and establish a model policy for local school boards to follow regarding: "bullying, the use of electronic means for purposes of bullying, harassment, and intimidation, and dissemination of such policies to students, their parents, and school personnel."[47] Under this statutory scheme, school boards must adopt codes of student conduct commensurate with the guidelines of the Board of Education. In response to the requirement in Va. Code § 22.1-279.6, the Board of Education updated its guidelines in 2009 to include provisions addressing cyberbullying.[48]

The critical advantage to school cyberbullying policies is that the U.S. Supreme Court has given schools significant latitude to restrict speech that otherwise would be protected by the First Amendment.[49] In the landmark case of Tinker v. Des Moines Independent School District, the Court created a basic rule that schools may restrict student speech that causes "material and substantial disruption" of school activities.[50] This rule has been refined and altered over the years to include: restricting vulgar and lewd speech, inconsistent with the schools values;[51] exercising editorial control of school sponsored activities, as long as it is related to teaching purposes;[52] and extending

the right of schools to restrict speech at school sponsored or authorized activities, to include speech outside or off school property.[53]

One commenter has noted that the Court's complicated set of rules may need to be revisited, since students are using the Internet in large numbers and it is problematic to punish student speech that may be generated at home.[54] Two recent U.S. Circuit Court cases illustrate the tension between Tinker and its progeny, and student use of the Internet. Recently, the Fourth Circuit Court of Appeals upheld the disciplining of a student for creating a Myspace chat group that targeted a specific student with false and derogatory statements from the host and other posters.[55] The court ruled that the punishment was justified because "the speech interfered with the work and discipline of the school."[56] However, a recent case in the Third Circuit limited the reach of a school's policy in a case where a student created a fake Myspace profile of his principal.[57] The court held that there was no evidence of substantial disruption in the school, so the Tinker standard did not apply.[58] Additionally, while the court conceded that parts of the fake profile were vulgar, they reasoned that the activity occurred outside of school, and it was not proper for the school to restrict the student's speech.[59]

Conclusion

The main concern with cyberbullying is the ease with which it can be accomplished through the use of the Internet and social media sites. Access to the Internet is easier than ever with the prevalence of cell phones, smart phones, tablets, gaming consoles and computers. The majority of teenagers who have access to the Internet go online frequently and use social media sites like Facebook. However, the proactive steps taken by Facebook and other networking sites may help reduce cyberbullying.

Most states can prosecute acts of cyberbullying with existing harassment or stalking statutes. In Virginia, however, only extreme cases of cyberbullying may be prosecuted with the state's computer harassment or stalking statutes. To date, only four states have created specific cyberbullying statutes. Twenty-three states, including Virginia, require schools to have policies against cyberbullying. Due to the great deference the U.S. Supreme Court gives schools to restrict student speech, this appears to be an effective policy option.

As a result of this study, no formal recommendations were made by the Crime Commission.

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[26] ALA CODE § 13A-11-8 (West 2011); ALASKA STAT. § 11.61.120 (2010); ARIZ. REV. STAT. § 13-2921 (2011); ARK. CODE ANN. § 5-71-209 (2010); COLO. REV. STAT. § 18-9-111 (2011); CONN. GEN. STAT. § 53a-183, 53a-182b (2011); DEL. CODE ANN. tit. 11, § 1311 (2011); HAW. REV. STAT. ANN. § 711-1106 (2011); 720 ILL. COMP. STAT. 135/1-2 (2011); IND. CODE § 35-45-2-2 (2011); IOWA CODE § 708.7 (2011); KY. REV. STAT. ANN. § 525.080 (West 2010); ME. REV. STAT. ANN. tit. 17-A, § 506-A (2011); MD. CODE ANN., CRIM. LAW § 3-803 (2011); MASS. GEN. LAWS Ch. 265, § 43A (2011); MINN. STAT. § 609.749 (2011); Mo. Rev. Stat. § 565.090 (2011); NEV. REV. STAT. § 200.571 (2010); N.H. REV. STAT. ANN. § 644:4 (2011); N.J. STAT. ANN. § 2C:33-4 (2011); N.M. STAT. ANN. § 30-3A-2 (2010); N.Y. PENAL LAW § 240.30 (2011); N.D. CENT. CODE § 12.1-17-07 (2011); OHIO REV. CODE ANN. § 2917.21 (2011); OKLA. STAT. tit. 21, § 1172 (2011); OR. REV. STAT. § 166.065 (2011); 18 PA. CONS. STAT. ANN. § 2709 (2011); TENN. CODE ANN. § 39-17-308 (2011); TEX. PENAL CODE ANN. § 42.07 (2011); W. VA. CODE § 61-3C-14a (2011); WIS. STAT. ANN. § 947.013 (2011).
[27] ALA. CODE § 13A-11-8 (West 2011).
[28] KY. REV. STAT. ANN. § 525.080 (West 2010).
[29] VA. CODE ANN. § 18.2-152.7:1 (2011).
[30] Id.
[31] Additionally, Va. Code § 18.2-60(A)(2) would cover electronic threats to persons on school property, which is punished as a Class 6 felony.
[32] Naomi Harlin Goodno, Cyberstalking, *A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 128 (2007).
[33] FLA. STAT. ANN. § 784.048 (West 2011).
[34] ME. REV. STAT. tit. 17-A, § 210-A (2011).
[35] MISS. CODE. ANN. § 97-45-15 (West 2011).
[36] R.I. GEN. LAWS ANN. § 11-52-4.2 (West 2011).
[37] VA. CODE ANN. § 18.2-60.3 (2011).
[38] LA. REV. STAT. ANN. § 14:40.7 (2011). The penalty for a violation of this section is not more than a $500 fine or six months in jail.
[39] N.C. GEN. STAT. ANN. § 14-458.1 (West 2011). Violations of this statute are punishable as a Class 1 misdemeanor.
[40] TEX. PENAL CODE ANN. § 33.07 (West 2011).
[41] UTAH CODE ANN. § 76-9-201 (West 2011).
[42] Id.
[43] Powell, s*upra*, at note 1.
[44] Id.

[45] National Conference of State Legislatures, State Cyberstalking, Cyberharassment, and Cyberbullying Laws, (2011) *available at* http://www.ncsl.org/default.aspx?tabid=13495.
[46] 2009 Va. Acts ch. 431.
[47] VA. CODE ANN. § 22.1-279.6 (2011).
[48] Virginia Board of Education, *Student Conduct Guidelines*, (2009), http://www.doe.virginia.gov/boe/guidance/safety/student_conduct.pdf.
DOE is required by HJR 625 to study the nature and effectiveness of school divisions' anti-bullying policies. The report is due before the start of the 2012 General Assembly Session. Part of the study entails collecting information on every school divisions' policies on bullying and determining the general effectiveness of the policies
[49] *See generally* Allison E. Hayes, *From Armbands to Douchebags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 255 (2010).
[50] Tinker v. Des Moines Independent School District, 393 U.S. 503 (1968).
[51] Bethel School District v. Frasier, 478 U.S. 675 (1986).
[52] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
[53] Morse v. Frederick, 551 U.S. 393 (2007).
[54] Hayes, s*upra* at note 49.
[55] Kowalski v. Berkeley County Sch., 652 F.3d 565 (4th Cir. 2011).
[56] Id.
[57] Layshock ex rel. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011).
[58] Id.
[59] Id.

Death and Rape Investigations by Campus Police

Executive Summary

During the 2011 Regular Session of the Virginia General Assembly, Delegate Paula Miller introduced House Bill 2490 (HB 2490) which proposed to amend Va. Code § 23-234, relating to death and rape investigations by campus police departments. The bill was referred by the House Militia, Police and Public Safety Committee to the Crime Commission for review.

Crime Commission staff utilized several methodologies to assess the issue, including examining other states with similar statutes, reviewing national and state-level research, collecting data relating to campus crime and sexual assaults, and creating an informal work group. Staff also disseminated comprehensive surveys to campus police departments and their respective administrations.

The purview of HB 2490 was limited to investigations of medically unattended deaths and alleged rapes at Virginia's 33 campus police departments. If passed, the bill would impact at least 43 local law enforcement agencies that surround campus police department jurisdictions. Currently, there are only two other states that have similar statutes to HB 2490: Tennessee and South Carolina.

A review of existing literature and data revealed a number of different factors contributing to campus crime rates -- namely the proportion of students living on campus. Further, research reveals that the vast majority of reported campus crime is against property, specifically larceny and vandalism. When examining information relating to sexual assaults, research and data consistently indicate that sexual assaults are a highly underreported crime on campuses and in the general community. Additionally, very few cases result in a successful conviction. This pattern holds true across Virginia campuses and communities. The development of Sexual Assault Response Teams (SART) has been one response to such patterns. It should be noted that there are three potential avenues for rape investigations occurring at colleges and universities with campus police departments: criminal investigations, judicial investigations and/or Title IX investigations. Each investigation is mutually exclusive, and more than one type of investigation can occur simultaneously.

An informal work group with various representatives was created to discuss the bill topic and to assist in developing a comprehensive survey for campus police departments and their respective administrations. The campus police department survey focused on a number of key issues related to criminal investigations, including jurisdiction, joint investigation, concurrent jurisdiction and mutual aid agreements. The survey also examined campus police department personnel, accreditation and training. Findings underscore that campus police officers must meet the same requirements for

basic training and in-service training as all law enforcement officers in Virginia. Finally, specific attention was placed on campus death and rape investigations and whether the department had a written policy for such investigations and to what extent campus police departments notified or requested assistance from local law enforcement or the Virginia State Police.

The survey, disseminated to the administrations of higher education institutions with campus police departments, focused on the different avenues provided for student conduct that could be considered criminal in a court of law. Specific attention was placed on judicial boards and the types of members serving, burden of proof levels, rights of the accused and victim, as well as the number and types of referrals heard by such boards. The vast majority of referrals were for alcohol and drug violations. The survey also addressed Title IX investigations and the implications of the U.S. Department of Education's "Dear Colleague Letter" pertaining to investigations by colleges and universities relating to "acts of sexual violence." The letter is still being interpreted and implemented by college and university administrators. There is a divergence of opinion on what the letter requires. Finally, the survey asked a number of questions dealing with threat assessment teams. All public institutions indicated that they had implemented a team, as required by the Code of Virginia.

The Crime Commission reviewed study findings at its November 16, 2011, meeting and directed staff to draft legislation for several key issues. As a result of the study effort, the Crime Commission endorsed the following recommendations at its December 6, 2011, meeting:

Recommendation 1: Amend Va. Code § 15.2-1627.4 to require campus police departments to be specifically listed for inclusion in local or regional Sexual Assault Response Teams (SART).

Recommendation 2: Amend Va. Code § 23-234 to require campus police departments and local law enforcement agencies or the Virginia State Police to have mutual aid agreements for cooperation in providing assistance with death and alleged rapes occurring on college or university property.

Recommendation 3: Amend Va. Code § 63.2-1509 to require college and university employees to be included in the list of individuals who are required to report instances of suspected child abuse.

Background

OVERVIEW OF HB 2490

House Bill 2490 was introduced by Delegate Paula Miller during the 2011 Regular Session of the Virginia General Assembly.[1] It was referred to the House Militia, Police and Public Safety Committee and subsequently referred to the Crime Commission for review. The bill proposed to amend Va. Code § 23-234, relating to investigations by campus police departments. The bill in its final version was the same as introduced,

with no amendments or modifications made in Committee. Specifically, HB 2490 required that the:

> *…chief law enforcement officer of a public or private institution of higher education, or his designee, shall immediately notify the local law enforcement agency of the locality in which the institution of higher education is located of (i) the death of any person on the property of the institution when such person is medically unattended and (ii) any report alleging that a rape has occurred on the property of the institution. Upon notification, the local law enforcement agency shall assume responsibility for leading the investigation. The campus police department and all other employees of the institution of higher education shall cooperate with the local law enforcement agency conducting the investigation and shall provide any assistance requested by the local law enforcement agency.*

The bill, if passed, would have impacted at least 43 local law enforcement agencies that surround campus police department jurisdictions, including 23 city/county police departments, 14 sheriff's offices and 6 town police departments.

Colleges and universities either have a campus police department or a security department. The focus of HB 2490 was only upon institutions with campus police departments. Campus security departments already rely on local law enforcement or the Virginia State Police (VSP) to conduct any death, rape or other criminal investigation. There are 33 campus police departments in the Commonwealth. All 15 public four-year and above, as well as 9 private four-year and above and 9 public two-year institutions have campus police departments. Unlike campus security departments, campus police departments handle all calls for service on their respective campus jurisdictions and employ sworn, Virginia Department of Criminal Justice Services (DCJS) certified law enforcement officers who undergo the same training as all sworn law enforcement officers in the Commonwealth. Campus security departments rely upon special conservators of the peace, proprietary officers or contracted security officers.

OTHER STATES

Currently, there are only two other states that have similar existing statutes as proposed by HB 2490: Tennessee and South Carolina. Each is described in detail below.

Tennessee

Tennessee Code § 49-7-129 ("Robert 'Robbie' Nottingham Campus Crime Scene Investigation Act of 2004") requires that:

> ...the chief security officer or chief law enforcement officer of the institution shall immediately notify, unless otherwise prohibited by federal law, the local law enforcement agency with territorial jurisdiction over the institution, if the medically unattended death of a person occurs on the property of the institution, or if the officer is in receipt of a report from the victim alleging that any degree of rape has occurred on the property of the institution.[2]

The statute also requires that, upon notification, it shall be the duty of each law enforcement agency to participate in a joint investigation of the death or alleged rape reported. In the case of a medically unattended death, the local law enforcement agency shall lead the investigation, whereas in the case of an alleged rape, the campus law enforcement agency shall lead the investigation. The statute indicates that officers and all other employees of the institution shall cooperate in every respect with the investigation conducted by the local law enforcement agency.

There are also two additional provisions that require "any official of a public or private institution of higher education receiving a report from a victim of rape occurring on the property or in the vicinity of the institution shall refer the victim to a sexual assault program or other service on campus or in the community." These programs must then report back to campus police the number of requests for assistance received from victims who were raped on or in the vicinity of a public or private institution of higher education during the preceding calendar year by January 31. A knowing violation of this section is a Class C misdemeanor.[3]

In sum, the key difference between the provisions of HB 2490 and Tennessee's statute is that Tennessee calls for a joint investigation rather than completely turning the investigation over to local law enforcement.

South Carolina

South Carolina Code § 59-154-10, also known as the "Jessica Horton Act," is similar to Tennessee's statute:

> The chief of the campus police of an institution of higher learning, or his designee, immediately shall notify the State Law Enforcement Division if there is a death resulting from an incident occurring on the property of the institution or if the officer or another official of the institution is in receipt of a report alleging that an act of criminal sexual conduct has occurred on the property of the institution.[4]

However, there are key differences. First, the campus police notify the State Law Enforcement Division rather than local law enforcement. Second, instead of requiring notification for "medically unattended deaths," South Carolina's statute expands the inclusion to "any death resulting from an incident occurring on the property of the institution." Finally, the scope is also expanded from "rape" to any "act of criminal sexual conduct."

Like Tennessee, the State Law Enforcement Division, upon notification, participates in a joint investigation of the death or alleged act of criminal sexual conduct, with the State Law Enforcement Division taking the lead in death investigations and the campus police taking the lead in investigating acts of criminal sexual conduct. This statute also calls for the cooperation of campus police and other employees of the institution of higher learning with any investigation conducted by the State Law Enforcement Division.

ACADEMIC LITERATURE

Nature of Campus Crime

When examining the academic literature, there are several factors consistently identified as contributing to the campus crime rate. First, one of the most consistent factors impacting campus crime rates has been the number of students living on campus.[5] This concept makes intuitive sense in that students living on campus and their property are exposed to potential victimization 24 hours a day, as opposed to those who commute to campus for only a few hours per week or who take on-line courses only.[6]

Second, the overall wealth of the institution and student body has been found to increase campus crime rates, specifically property crime rates, in that more expensive targets are more attractive to potential offenders.[7] Third, the overall demographic characteristics of the student body can lead to an increase in campus crime rates. For instance, some research has found a positive correlation between the percentage of male students enrolled and campus crime rates.[8]

Fourth, the impact of substance abuse on campus crime is cited widely in the literature.[9] Somewhat related, research has shown that certain types of organizations can affect campus crime rates. Specifically, research has consistently found that institutions with a higher number of national social "Greek" fraternities and sororities on campus tend to have higher levels of alcohol consumption and crime on campus.[10]

Research has also examined the campus crime phenomenon in terms of institution location or comparison to surrounding communities. Consistently, this body of literature reveals lower overall rates of campus crime compared to rates in the general community.[11] In general, crimes are not only less common, but also less violent. Numerous studies have indicated that violent crime rates are substantially lower than the communities that surround them and the nation as a whole.[12] Furthermore, studies find that property offenses, specifically larcenies, comprise the overwhelming majority of campus crime.[13] This is a finding supported by both official and victimization data.

The "mix" of crimes appears to vary by campus location as well. Some researchers have found that as campuses become more urban or have a closer proximity to surrounding areas with high unemployment rates, the proportion of crime rates tends to be higher.[14] There appears to be mixed evidence as to whether there is a community "spill-over" effect onto the campuses affecting crime.[15] However, what does appear to be agreed upon is that the vast majority of crime committed on campus is perpetrated by its own students.[16]

Nature of Sexual Assaults

Other researchers have focused on specific campus crimes. There is a plethora of research highlighting the fact that students, specifically women, are exposed to higher risks of sexual victimization on campuses.[17] Research and data consistently indicate that sexual assault is a highly underreported crime both in the general community and on campuses.[18] There are various reasons why such crimes go unreported, including:

- Shame, guilt, or embarrassment;
- Fear of not being believed;
- Concerns about confidentiality;
- Unwillingness to recount details multiple times;
- Fear of retaliation; and,
- Fear or distrust of the overall criminal justice system.[19]

When examining the nature of rapes on campus, research has repeatedly found that the vast majority are acquaintance rapes,[20] and that many involve alcohol or drug consumption by the assailant, victim or both.[21] Research and data also consistently indicate that only a very low percentage of sexual assault cases result in convictions, whether the crime occurred in the general community or on a campus.[22] Virginia is no exception.

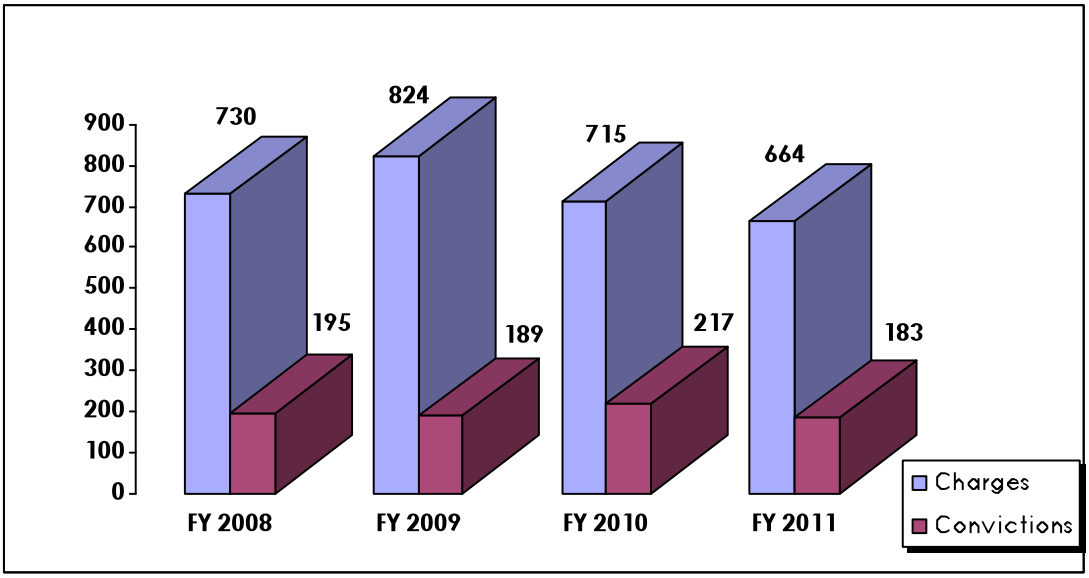
Virginia Data

Staff requested the total number of charges and convictions in Virginia between Fiscal Year (FY) 08 through FY11 for:

- Rape (Va. Code § 18.2-61 (A)(i) and (ii));
- Forcible sodomy (Va. Code § 18.2-67.1 (A)(2)), and;
- Forcible object penetration (Va. Code § 18.2-67.2 (A)(2)).

As seen in Figure 1 below, there is approximately a 25% conviction rate when examining the aggregate number of charges and convictions for these particular statutes.

Figure 1: Total Number of Aggregate Charges and Convictions for Rape, Forcible Sodomy, and Object Penetration in Virginia, FY08-FY11



Source: Virginia Criminal Sentencing Commission, Supreme Court's Circuit Court Case Management System.

Note: Includes offenses under Va. Code §§ 18.2-61 A (i) and (ii), 18.2-67.1 (A)(2), and 18.2-67.2 (A)(2);
Figures are based on concluded cases. Cases still pending in Circuit Court are not included in the figures above. Fairfax, Alexandria and Prince William County were not participating in the Supreme Court's Circuit Court Case Management System during FY07-FY10. During FY11, Prince William rejoined the Supreme Court's system and Virginia Beach left the system.

When examining the total number of charges and convictions for each individual statute as seen below in Figure 2, the data continues to show significant case attrition with only approximately 20%-30% resulting in a conviction.

Figure 2: Breakdown of Total Number of Charges and Convictions for Rape, Forcible Sodomy, and Object Penetration in Virginia, FY08-FY11

	Total Charges			
TYPE OF OFFENSE	**FY08**	**FY09**	**FY10**	**FY11**
Rape- §§ 18.2-61(A)(i) and (ii)	352	428	305	338
Forcible Sodomy- § 18.2-67.1(A)(2)	216	250	230	181
Object Penetration- § 18.2-67.2(A)(2)	162	146	180	145
	Total Convictions			
TYPE OF OFFENSE	**FY08**	**FY09**	**FY10**	**FY11**
Rape- §§ 18.2-61(A)(i) and (ii)	84	86	81	93
Forcible Sodomy- § 18.2-67.1(A)(2)	60	66	76	49
Object Penetration- § 18.2-67.2(A)(2)	51	37	60	41

Source: Virginia Criminal Sentencing Commission, Supreme Court's Circuit Court Case Management System. Figures are based on concluded cases. Cases still pending in Circuit Court are not included in the figures above. Fairfax, Alexandria and Prince William County were not participating in the Supreme Court's Circuit Court Case Management System during FY07-FY10. During FY11, Prince William rejoined the Supreme Court's system and Virginia Beach left the system.

Sexual Assault Response Teams

One response to concerns over low conviction rates for sexual assault cases has been the development of Sexual Assault Response Teams (SART). Many states, including Virginia, have created these teams, which provide a multidisciplinary response to criminal sexual assaults. Use of such a multidisciplinary response in conducting medical forensic examinations can help provide victims access to immediate care, help reduce trauma, encourage use of community resources, enhance public safety by aiding in the investigation, arrest and prosecution of offenders, and increase public awareness of such coordinated responses to perhaps encourage more reporting of sexual assaults.[23]

In 2009, Virginia implemented Va. Code § 15.2-1627.4, which requires each Commonwealth's Attorney to coordinate the establishment of a multidisciplinary response to criminal sexual assault and hold a meeting, at least annually, to discuss implementation of DCJS protocols and policies for sexual assault response teams and to establish and review guidelines for the community's response--to include the collection, preservation and secure storage of evidence from Physical Evidence Recovery Kit (PERK) examinations.[24] Per Va. Code § 15.2-1627.4, the following individuals or their designees shall be invited to participate in the annual meeting:

- Commonwealth's Attorney;
- Sheriff;
- Director of the local sexual assault crisis center, if any;
- Chief of each police department in the jurisdiction, if any;
- Forensic nurse examiner or other health care provider who performs PERK examinations in the jurisdiction, if any; and,
- Director of the victim/witness program in the jurisdiction, if any.

As will be discussed later, the language of the statute is not clear whether campus police departments and their respective chiefs are required to be included. In other words, unlike other areas of the Virginia Code, this section does not specifically list campus police departments (chiefs) for inclusion.

Reported Campus Crime Data

In order to understand the impact of the proposed bill, relevant campus crime data was considered. There are a number of data sources available to examine *reported* campus crime, such as Clery Act data, Virginia Incident Based Reporting (IBR) data and campus crime logs. It should be underscored that the data from these three sources should not be strictly compared to one another, for a number of reasons, including definitional differences, the manner in how incidents/offenses are counted, and differences in state versus federal reporting requirements.

CLERY ACT DATA

Each institution of higher education in the United States that is eligible for Title IV funding must produce and distribute an annual report containing crime statistics and statements of security policy.[25] Clery Act statistics are compiled annually by the U.S. Department of Education and can serve as a means to inform potential college students and their parents of criminal offenses reported on college campuses. Such institutions must disclose the following reported crimes:

- Murder;
- Forcible and non-forcible sex offenses;
- Robbery;
- Aggravated assault;
- Burglary;
- Motor vehicle theft;
- Arson; and,
- Negligent manslaughter.

The reported crimes are categorized by the hierarchy rule, which counts only the most serious offense in an incident. Institutions must also report the total number of arrests and referrals for liquor, drug, and weapon law violations. All crimes are categorized based on where the offense took place, including on campus, in residence halls (subset of on-campus figures), non-campus and public property.

There are several limitations of Clery Act statistics that need to be mentioned. Perhaps most significant is that the Clery Act does not require all crimes to be reported. For example, some of the most commonly reported crimes, such as larceny/theft, vandalism, threats, and harassment are not mandated to be reported.

Another key difference between Clery Act data and the other data mentioned in this report is the Clery Act data includes offenses reported to *any* campus security authority, such as campus police and security officers, deans of students, directors of athletics, coordinators of Greek affairs, campus health centers, campus counseling centers, victim advocacy centers or campus rape crisis centers.[26] This is an important distinction, as this may impact the total number of reported sexual assaults included. As such, Clery Act figures will typically be higher than figures reported by other law enforcement agency data and are not directly comparable. Similar to Uniform Crime Reporting (UCR) data, National Incident Based Reporting System (NIBRS) data and campus crime logs, Clery Act statistics only represent alleged criminal offenses and do not necessarily reflect prosecutions or convictions for crime.

Despite such limitations, the Clery Act statistics can be valuable to evaluate with other sources of data. They are the only source of data readily available for all Title IV institutions with either campus police or campus security departments. For purposes of this study, Clery Act statistics were gathered from Calendar Year (CY) 06 through CY10 for all Virginia campus police departments. The CY10 Clery Act findings, the most recent available, are provided below.

CY10 Clery Act Findings

According to the CY10 Clery Act statistics, there were a total of 815 offenses reported at institutions with campus police departments in Virginia. Figure 3 illustrates the breakdown of these reported offenses. However, due to the exclusion of crimes such as larceny and vandalism, these percentages do not capture the true overall nature or volume of campus crime.

Figure 3: 2010 Clery Act Crimes for Virginia's Campus Police Departments

Rank	Type of Offense	Number of Offenses (N=815)	Percent of Offenses
1	Burglary	539	66%
2	Forcible Sex Offenses	83*	10%
3	Motor Vehicle Theft	65	8%
4	Aggravated Assault	56	7%
5	Robbery	51	6%
6	Arson	21	3%

Source: U.S. Department of Education, Clery Act statistics, CY10. N=33 campus police departments.

*Note: Figures account for all on-campus, non-campus and public property offenses reported to campus authorities. * 71 of the 83 reported forcible sex offenses occurred on-campus.*

VIRGINIA IBR DATA

Virginia IBR data is compiled annually by the VSP. Unlike Clery Act data and the old UCR program, NIBRS/IBR data expands the scope of crimes required for reporting into Group A and Group B offenses.[27] Group A offenses include more serious crimes against

persons, property and society, whereas Group B offenses include less serious offenses. The data captures the total number of offenses reported and arrests for all Group A offenses; however, the data only captures the number of arrests and not the number of offenses for Group B offenses. Recall that Clery Act data will include crimes that are reported to authorities other than law enforcement and that the data includes crimes occurring on adjacent public property, which is investigated by another law enforcement agency. This is not the case with IBR data. In order for data to be captured, the offense/incident must be reported directly to a law enforcement agency. Furthermore, the figures reported by each agency, in general, will reflect the number of offenses/incidents occurring within its jurisdiction and not any surrounding jurisdictions.

It should be noted that only 24 of the 33 Virginia campus police departments' IBR statistics were published for the 2010 calendar year. This exclusion could be due to a number of reasons, which are not necessarily unique to campus police departments, as some other law enforcement agencies' figures are not included either. The primary reason that a law enforcement agency's figures are not included in the publication is that they may not currently have the technological capability to participate in the program, as the records management system required to participate is very costly. One reason that *is* unique to why not all campus police department figures are included is because the provisions under Va. Code § 52-28 "shall not apply to any police agency not paid entirely from public funds." This would explain why some of the campus police departments at private institutions are not listed.

Given the discussion above, in general, IBR figures will be lower than Clery Act statistics since IBR data does not reflect all 33 campus police departments, and because IBR data only records crimes reported directly to law enforcement.

Virginia IBR Findings

There were 485,901 Group A offenses reported across the Commonwealth in CY10 with 1% (6,459 of 485,901) of such offenses being reported by campus police departments. Over two-thirds of reported offenses were for larceny or vandalism, as illustrated in Figure 4 below. This listing provides a far more accurate portrayal of reported campus crime.

Figure 4: Top 5 Group A Offenses Reported at VA Campus Police Departments, CY10

Ranking	Type of Offense	Total Offenses	Percent of Offenses
1	Larceny	3,015	47%
2	Vandalism	1,367	21%
3	Drug/narcotic offenses	655	10%
4	Simple assault/intimidation	566	9%
5	Burglary	340	5%

Source: Virginia State Police, Crime in Virginia (2010); n=24 campus police departments; 6,459 offenses.

Staff examined the total number of murder/non-negligent manslaughters reported statewide versus the total reported by campus police departments. As seen in Figure 5

below, such offenses are relatively rare on campuses with police departments over the past five fiscal years.

Figure 5: Total Murder/Non-Negligent Manslaughters Reported Statewide and by Virginia Campus Police Departments, CY06-CY10

CY	Statewide Murder Offenses	Campus Murder Offenses
2006	398	0
2007	411	3*
2008	369	1
2009	349	1
2010	369	0

Source: Virginia State Police, Crime in Virginia (2006-2010).

n= 22 campus police departments for CY06-CY08; n=23 for CY09; n=24 for CY10.

**30 of the 32 murders occurring at Virginia Tech in 2007 were captured by the Virginia State Police IBR figures in Montgomery County.*

Staff also examined the total number of forcible sex offenses reported statewide versus the total reported by campus police departments over the past five fiscal years. One should keep in mind that these figures only represent reported incidences of forcible sex offenses (forcible rape, sodomy, object penetration and fondling) with many incidents likely not being reported to law enforcement. Additionally, one may note that the total number of forcible sex offenses reported in 2010 was 31 as seen below in Figure 6, which is much lower than the 71 on-campus sexual assaults captured by 2010 Clery Act data illustrated in Figure 3. This is due to a number of potential reasons, namely the fact that not all 33 campus police departments are captured by IBR data and because Clery Act data *includes* sexual assaults reported to other campus authorities besides law enforcement, including health, counseling and rape crisis centers. This is one clear example of why Clery Act data and IBR data cannot be directly compared.

Figure 6: Total Forcible Sex Offenses Reported Statewide and by Virginia Campus Police Departments, CY06-CY10

CY	Statewide Forcible Sex Offenses*	Campus Forcible Sex Offenses
2006	5,475	50
2007	5,317	33
2008	5,259	46
2009	4,779	42
2010	4,981	31

Source: Virginia State Police, Crime in Virginia (2006-2010).

n= 22 campus police departments for CY06-CY08; n=23 for CY09; n=24 for CY10.

**Figure represents total number of victims involved in all offenses reported.*

Finally, staff looked at statewide and campus-specific arrest data. Of the 485,901 Group A offenses reported in Virginia during 2010, there were 142,524 arrests.[28] Of the 6,459 Group A offenses reported by campus police departments, there were 580 arrests.

While this may seem like a low number of arrests, recall that the vast majority of reported campus crime involves larceny or vandalism, which have historically low clearance rates. Campus police made an additional 2,750 Group B arrests in CY10.

Figure 7 below illustrates a more specific breakdown of the total number of forcible sex offenses reported statewide and by campus police departments in CY10. While attempting to determine any type of "clearance rate" is discouraged with IBR, it is readily apparent that relatively few arrests are made. These low arrest rates could be due to a number of reasons. For instance, while offenses may be reported to police, law enforcement may not be given enough information to move forward with an arrest when the perpetrator cannot be identified or when the victim does not wish to press charges. Further, law enforcement is required to have probable cause to make an arrest, which can sometimes be difficult to achieve given the fact patterns of some sexual assault cases.

Figure 7: Total Number of IBR Forcible Sex Offenses and Arrests, Total Statewide vs. Virginia Campus Police Departments, CY10

Type of Incident	Total Statewide Offenses	Total Statewide Arrests	Total Campus PD Offenses	Total Campus PD Arrests
Forcible Rape	1,518	377	16	0
Forcible Sodomy	506	177	15	0
Forcible Object Penetration	301	105		0
Forcible Fondling	2,362	775		3
TOTAL	**4,687***	**1,434**	**31**	**3**

Source: Virginia State Police, Crime in Virginia (2010). n= 24 campus police departments.
Note: When comparing offenses and arrests, one cannot determine a precise clearance rate as 1 arrest can "clear" multiple offenses/incidents. Also, specific breakdown for reported "other forcible sex offenses" was not readily available for campus police departments.
** 4,687 offenses involving 4,981 victims.*

CAMPUS CRIME LOGS

Campus crime logs are required by both federal and state laws. Under federal law pursuant to C.F.R., Title 34, § 668.46, every institution with a campus police or security department must maintain a crime log. The log entries must contain the nature of the crime, the data and time the crime was reported, the general location and disposition, if known. Va. Code § 23-232.2 has additional requirements, such as a general description of injuries suffered or property damaged or stolen, as well as the name and address of any individual arrested as a result of felonies committed against persons or property or misdemeanors involving assault, battery, or moral turpitude reported to the campus police.

Staff requested crime logs from all 33 campus police departments, with 79% (26 of 33) submitting logs for analysis. Unlike Virginia IBR data, campus crime logs capture both Group A and Group B offenses reported. There were nearly 10,000 log entries submitted for analysis. Staff extracted only the Group A and Group B reported offenses for analysis. As such, entries for incidents such as fire alarms, building checks or parking tickets were not included. This exclusion reduced the total number of crime log entries to 8,669 for CY10.

Campus Crime Log Findings

As seen below in Figure 8, even when capturing all Group B offenses in addition to Group A offenses, larceny and vandalism are still the two most reported offenses on campus, followed by a myriad of alcohol-related offenses.

Figure 8: Top 15 Group A and Group B Offenses Reported in Virginia Campus Police Department Crime Logs, CY10

Ranking	Type of Offense	Total Log Entries	Percent of Total Log Entries
1	Larceny	2,803	32.3%
2	Vandalism	1,436	16.6%
3	Liquor Law Violations	1,310	15.1%
4	Drunkenness	774	8.9%
5	Drug/Narcotic Offenses	545	6.3%
6	Assaults	529	6.1%
7	Burglary	286	3.3%
8	Trespassing	264	3.0%
9	DUI	178	2.1%
10	Disorderly Conduct	146	1.7%
11	Fraud	126	1.5%
12	Weapon Law Violations	63	less than 1%
13	Robbery	57	less than 1%
14	Forcible Sexual Assaults	45	less than 1%
15	Counterfeit	26	less than 1%
*	All Other	81	less than 1%

Source: CY10 Virginia campus police department crime logs; N= 8,669 log entries; n= 26 campus police departments.

OTHER DATA

Since the purview of the bill encompassed any medically unattended death, staff requested the total number of suicides and accidental deaths occurring on campuses across the Commonwealth from the Virginia Department of Health (VDH). It should be underscored that the figures illustrated in Figure 9 represent all campuses in Virginia rather than only the 33 institutions with campus police departments. Further, the figures for CY10-CY11 are still preliminary.

Figure 9: Va. Department of Health- Total Virginia Suicides and Accidental Deaths Statewide and on Virginia Campuses

Type of Death	CY07	CY08	CY09	CY10*	CY11*†
Total Va. Suicides	906	949	974	1,002	480
Total Campus Suicides	**4**	**2**	**1**	**1**	**1**
Total Va. Accidental Deaths	2,404	2,297	2,175	2,245	901
Total Campus Accidental Deaths	**0**	**2**	**1**	**0**	**1**

Source: Virginia Department of Health, Office of Chief Medical Examiner.

**Numbers are preliminary and subject to change; † Cases reported and/or finalized by June 30, 2011.*

Note: Figures represent reports from all campuses in the Commonwealth.

To achieve a greater specificity in the types of other death investigations handled by campus police departments, staff asked campus police to self-report the total number of suicides, and accidental, natural and undetermined deaths occurring on their campus or as a result of an incident occurring on their campus over the past five calendar years. For each type of death classification, staff asked that the figures be broken into whether the individual was a student, faculty/staff member or other individual (visitor, passerby, etc.). In addition to any homicide investigations, these types of non-homicide deaths would also likely fall under the purview of HB 2490.

Figure 10: Total Number of Self-Reported Deaths on Campus, CY07-CY11

Type of Death	CY07	CY08	CY09	CY10	CY11*
Suicides	4 students 1 other	1 student 1 faculty/staff 1 other	1 student	5 students	1 student
Accidental Deaths	1 student 1 other	2 students	1 other	1 student	0
Natural Deaths	2 faculty/staff	2 students 2 other	3 students 1 faculty/staff 2 other	1 student 2 faculty/staff 4 other	1 student 1 faculty/staff 2 other
Undetermined Deaths	0	0	0	0	1 other
TOTAL	**9**	**9**	**8**	**13**	**5**

Source: Virginia State Crime Commission, Campus Police Department Survey, 2011.

*N=33 campus police departments; *Figures include all deaths up to and including September 1, 2011.*

Campus Police Department Survey Findings

HB 2490 INFORMAL WORK GROUP

In order for Crime Commission staff to obtain a full understanding of the issues surrounding HB 2490, staff requested assistance from key stakeholders to discuss HB 2490 and to assist in the development of comprehensive surveys for both campus police departments and their respective administrations. Specifically, staff invited representatives from the following agencies and organizations to participate:

- Campus police departments;
- Campus women's center directors;
- College/university administrators;
- Commonwealth's Attorneys Offices;
- Council for Independent Colleges in Virginia;
- Local law enforcement;
- Judicial/student conduct directors;
- Sexual assault and suicide prevention specialists;
- Virginia Association of Chiefs of Police;
- Virginia Department of Criminal Justice Services;
- Virginia Department of Health; and,
- Virginia Sheriff's Association.

CAMPUS POLICE DEPARTMENT SURVEY

Staff disseminated surveys to all Virginia campus police departments.[29] All (33 of 33) campus police departments responded to the survey for a 100% response rate. The survey addressed a number of key issues that will be discussed below.

Campus Police Department Investigations

A key element in any criminal investigation is jurisdiction. The powers, duties and jurisdiction of campus police officers is defined by Va. Code § 23-234. Specifically, a campus police officer may exercise the powers and duties conferred by law:

> …(i) upon any property owned or controlled by the relevant public or private institution of higher education, or, upon request, any property owned or controlled by another public or private institution of higher education and upon the streets, sidewalks, and highways, immediately adjacent thereto, (ii) pursuant to a mutual aid agreement provided for in § 15.2-1727 between the governing board of a public or private institution and such other institution of higher education, public or private, in the Commonwealth or adjacent political subdivisions, (iii) in close pursuit of a person as provided in § 19.2-77, and (iv) upon approval by the appropriate circuit court of a petition by the local governing body for concurrent jurisdiction in designated areas with the police officers of the county, city, or town in which the institution, its satellite campuses, or other properties are located. The local governing body may petition the circuit court pursuant only to a request by the local law enforcement agency for concurrent jurisdiction.[30]

Joint Investigations

Joint investigations involve two or more agencies in an investigation, with one of the agencies taking the lead. Between FY08-FY11, 85% (28 of 33) of campus police departments reported being involved with other law enforcement agencies in a joint investigation. In some cases, the campus police department took the lead and in other cases, the other law enforcement agency took the lead.

The vast majority of joint investigations are undertaken with local law enforcement or the VSP; however, campus police also reported conducting such investigations with federal agencies (FBI, DEA, ICE, U.S. Secret Service and U.S. Postal Service), other college/university police departments, regional drug task forces or crash investigation teams, as well as the Virginia ABC and the Virginia Game and Inland Fisheries Department.

The survey did reveal that some of these joint investigations involved a death or rape that occurred on campus property between FY08-FY11. Specifically, 29% (8 of 28) indicated that a joint investigation involving a death occurred on their campus and 43% (12 of 28) indicated that a joint investigation involving an alleged rape occurred on their campus between the stated fiscal years.

Concurrent Jurisdiction

Concurrent jurisdiction is a legal agreement filed in circuit court by local governing bodies pursuant to Va. Code § 23-234. With this agreement, the jurisdiction of the campus police department is extended, which allows the campus police to respond to situations near the campus with the same authority as if in their campus jurisdiction. As such, concurrent jurisdiction agreements essentially create a primary and a secondary jurisdiction for campus police departments.

To be clear, the city or county where a campus is located has the inherent right to conduct investigations anywhere within their jurisdiction, and that includes the college campus, similar to how the VSP have jurisdiction anywhere in the Commonwealth. Another element to underscore is that in order for concurrent jurisdiction to occur, the local governing body may only petition the circuit court pursuant upon a request by the local law enforcement agency.

Thirty percent (10 of 33) of campus police departments reported having concurrent jurisdiction with at least one of their surrounding localities. Six additional departments reported that they were working towards a concurrent jurisdiction agreement.

Mutual Aid Agreements

Mutual aid agreements involve a reciprocal agreement for cooperation in providing police services in specific circumstances, such as emergencies, special events or assistance with investigations, equipment or technology. Such agreements can be made between two agencies or many. Agreements can also be written or verbal. When mutual aid is invoked, any investigation stemming from an incident typically is headed by the agency that requested the mutual aid.

Most campus police departments, 88% (29 of 33), have a mutual aid agreement with another jurisdiction. Six additional agencies are working towards a mutual aid agreement with another law enforcement agency.

Campus Police Department Personnel

The survey also examined campus police personnel. When looking at the level of experience of campus police chiefs, all have a significant amount of prior law enforcement experience. The average amount of prior experience was 20 years. Such previous experience was gained mostly at local police departments, sheriff's offices with primary law enforcement responsibilities and other campus police departments. In addition, 61% (20 of 33) of campus police chiefs have served an additional three or more years in their current position. Twenty-four percent (10 of 33) have served more than 10 years in their current position as campus police chief.

Most campus police chiefs, 91% (30 of 33), report directly to a vice-president level administrator for either finance, administration or business. Only 9% (3 of 33) of campus police chiefs report directly to a student affairs/services administrator.

According to survey findings, there were a total of 740 sworn campus police officers employed as of September 1, 2011. Of the 740 sworn campus police officers, there were 688 full-time sworn officers and 52 part-time sworn officers. There was an average of 21 full-time sworn officers per agency and the range of sworn officers was anywhere from 0 to 80 full-time and 0 to 8 part-time officers. The length of time officers have been employed with campus police departments varied:

- 27% (194 of 730) serving less than 3 years;
- 21% (155 of 730) 3-5 years;
- 20% (149 of 730) 6-10 years;
- 13% (94 of 730) 11-15 years;
- 9% (65 of 730) 16-20 years; and,
- 10% (73 of 730) over 20 years.[31]

Over half of campus police officers, 56% (414 of 740), have previously worked for a local, state, or federal law enforcement agency.

Accreditation

Campus law enforcement agencies can be accredited by three different entities, including the Virginia Law Enforcement Standards Commission (VLEPSC), the Commission on Accreditation for Law Enforcement Agencies (CALEA), and the International Association of Campus Law Enforcement Administrators (IACLEA). Accreditation can be beneficial in that it provides a uniform set of written directives based on national best practices. Accreditation can also limit an agency's liability and risk exposure. It should be noted that accreditation can be very costly, and even though many law enforcement agencies are not typically accredited, many will base their policies on such accredited standards and best practices.

As of November 2011, 12% (4 of 33) of campus police department were state-accredited through VLEPSC, including the College of William and Mary, James Madison

University, Radford University, and Virginia Commonwealth University. When examining Virginia city and county police departments and sheriff's offices with primary law enforcement, 55% (74 of 134) were similarly accredited.

Another 12% (4 of 33) of campus police departments were nationally accredited through CALEA as of November 2011, including George Mason University, University of Richmond, University of Virginia, and Virginia Tech. When examining Virginia city and county police departments, sheriff's offices with primary law enforcement and the Virginia State Police, 16% (21 of 134) were similarly accredited.

Finally, campus police departments can also be accredited through IACLEA, which is technically a "subset" of CALEA since it utilizes its standards with permission. As of November 2011, 6% (2 of 33) of campus police departments were accredited through IACLEA, including the University of Richmond and Virginia Tech.

Training

Campus police officers undergo the same basic training as all sworn law enforcement officers in the Commonwealth of Virginia. They also have the same requirements for in-service training, which includes annual firearms certification[32] and 40 hours of in-service training every two years. The 40 in-service training hours include four hours of legal training, two hours of cultural diversity training and 34 hours of career development training.

The courses an officer takes for career development training varies from officer to officer. Currently, there is no way to readily identify all of the specific courses each law enforcement officer attended for their 40 hours of in-service training. Since the courses taken vary from officer to officer, it would require obtaining specific information on over 18,000 individual officers across the Commonwealth.[33] Therefore, staff was unable to readily compare in-service training received by campus law enforcement officers to in-service training received by local law enforcement officers.

Staff was able to determine that training is made available by many providers, such as:

- Virginia Department of Criminal Justice Services (DCJS);
- Virginia Department of Forensic Sciences (DFS);
- Local/state/federal law enforcement;
- Virginia Center for Policing Innovation (VCPI);
- Private entities; and,
- Non-profit entities.

One area of training that staff focused upon was the training made available by DFS. Specifically, staff requested the list of agencies whose officers attended courses offered by DFS between FY07-FY11. The DFS offers the Virginia Forensic Science Academy, which is an intensive nine-week school that teaches officers all aspects of evidence collection, preservation and packaging. The academy is offered approximately two times per year. Over the past five fiscal years, 87 local law enforcement agencies sent officers and four campus police departments sent officers. For graduates of the academy, an annual three-day re-training seminar is offered.

The DFS also provides other forensic/crime scene investigation courses to law enforcement, such as:

- Basic Crime Scene Investigation;
- Bloodstain Pattern Analysis (Basic and Advanced);
- Crime Scene Photography courses;
- Crime Scene Sketching courses;
- Drug Evidence Seminar;
- Fingerprint Examiners and Processing Seminars;
- Fire Investigations;
- Hit and Run Investigations; and,
- Homicide Scene Seminar.

Over the past five fiscal years, 174 local law enforcement agencies and eight campus police departments sent officers to attend such courses.

Campus Death Investigations

The survey asked whether campus police departments had a written policy for death investigations and whether they notify, request assistance or ever completely turn over an investigation to local law enforcement or the VSP. Seventy-three percent (24 of 33) of campus police departments had a written policy for death investigations. As seen in Figure 11 below, all campus police departments indicated that they would request assistance from local law enforcement given certain circumstances. Typically, requests for assistance would occur when additional resources or expertise was needed or when the incident involved other parties who lived off of campus.

Figure 11: Death Investigation Notification and Request for Assistance by Virginia Campus Police to Local Law Enforcement and the Virginia State Police

Local Law Enforcement	YES	ONLY IN SOME CIRCUMSTANCES	NO
Notify when death occurs on campus (N=33)	61%	30%	9%
Request Assistance (N=33)	45%	55%	0%
Completely turn over investigation (n=32)	31%	16%	53%
Virginia State Police	**YES**	**ONLY IN SOME CIRCUMSTANCES**	**NO**
Notify when death occurs on campus (N=33)	33%	30%	36%
Request Assistance (N=33)	27%	42%	30%
Completely turn over investigation (N=33)	15%	24%	61%

Source: Virginia State Crime Commission, Campus Police Department Survey, 2011.

Campus Rape Investigations

For purposes of this study, rape was defined as rape, forcible sodomy or object penetration. Victims of alleged rape at colleges and universities with campus police

departments have various reporting options, including moving forward with a criminal investigation (violation of law) or an internal judicial/student conduct investigation (violation of university code of conduct). Also, colleges and universities conduct Title IX investigations (violation of civil rights). Each avenue will be discussed in further detail below.

A. Criminal Investigations

It should be noted that a criminal investigation of an alleged rape is not automatic. It is contingent upon the offense being reported to the campus police department. Nearly all campus police departments, 90% (30 of 33) have a written policy for rape investigations as required by Va. Code § 9.1-1301. The three departments lacking a policy indicated that their policy was to hand the investigation over to a local law enforcement agency to investigate.

Figure 12: Rape Investigation Notification and Request for Assistance by Virginia Campus Police to Local Law Enforcement and the Virginia State Police

Local Law Enforcement	YES	ONLY IN SOME CIRCUMSTANCES	NO
Notify when rape occurs on campus (n=32)	34%	53%	13%
Request Assistance (n=32)	28%	63%	9%
Completely turn over investigation (n=31)	16%	29%	55%
Virginia State Police	**YES**	**ONLY IN SOME CIRCUMSTANCES**	**NO**
Notify when rape occurs on campus (n=31)	16%	19%	65%
Request Assistance (n=31)	6%	35%	58%
Completely turn over investigation (n=31)	3%	23%	74%

Source: Virginia State Crime Commission, Campus Police Department Survey, 2011.

B. Judicial Investigations

Surveys were sent to the administrations of all 33 institutions which have campus police departments to determine the different avenues that campuses utilize to handle matters that could be considered criminal in a court of law.[34] The surveys were typically completed by the deans of students or directors of judicial affairs/student conduct. There was an 88% (29 of 33) response rate to the survey request.

Each of the 29 responding institutions reported having a judicial/student conduct mechanism for handling student misconduct that could be considered criminal in a court of law. Most judicial boards involve students with a combination of faculty, staff and administrators serving, as illustrated in Figure 13 below.

Figure 13: Types of Members Serving on Judicial Boards

Type of Member	Total Number of Institutions	Percent of Institutions
Students	22 of 29	76%

Faculty	18 of 29	62%
Staff	14 of 29	48%
Administration	19 of 29	66%
Other	12 of 29	28%

Source: Virginia State Crime Commission, Judicial/Student Conduct Mechanism Survey, 2011.

The survey also examined the burden of proof level for judicial hearings. All but one institution reported their burden of proof level. Most institutions, 61% (17 of 28), reported that their burden of proof level was *preponderance of the evidence.*

Figure 14: Judicial Board Hearing Burden of Proof Levels

Burden of Proof Level	Total Number of Institutions	Percent of Institutions*
Preponderance of evidence	17 of 28	61%
Reasonable evidence/sufficient information	5 of 28	18%
Clear and convincing evidence	4 of 28	14%
Beyond a reasonable doubt	1 of 28	4%
Other**	1 of 28	4%

Source: Virginia State Crime Commission, Judicial/Student Conduct Mechanism Survey, 2011.

** Figures may not total to 100% due to rounding.*

***Clear and convincing evidence except for sexual misconduct cases, where the burden is preponderance of the evidence.*

The survey also revealed that both the accused and the victim/accuser have similar rights, as illustrated in Figure 15 below.

Figure 15: Rights of Accused and Victim at Judicial Hearings

Accused/ Victim Permitted to:	Accused	Victim
Speak at hearing?	97%	86%
Cross-examine witnesses at hearing?	76%	66%
Be present for entire hearing?	93%	83%
Submit *written* testimony/evidence?	100%	100%
Read all written reports?	86%	76%
Receive all written reports prior to hearing?	59%	55%
Have character witnesses testify?	48%	38%
Have fact witnesses testify?	86%	90%
Have advisor/advocate *present* at hearing?	83%	83%
Have advisor/advocate *speak* at hearing?	21%	28%
Have legal counsel *present* at hearing?	66%	66%
Have legal counsel *speak* at hearing?	7%	10%
Have legal counsel question witnesses?	3%	7%
Have parents/guardians present at hearing?	55%	55%

Source: Virginia State Crime Commission, Judicial Board/Student Conduct Mechanism Survey, 2011; N=29.

Nearly all institutions, 97% (28 of 29), indicated that they had some form of an appeal process. Appeals were typically heard by appeals committees/boards/councils, college

or university presidents, deans or vice presidents of student affairs or boards of trustees or visitors. There was often more than one level of appeal as well.

Most institutions, 79% (23 of 29), indicated that their hearings proceed regardless of any potential or existing criminal or civil litigation for the same incident. Most also indicated that the hearings, findings, and sanctions are not open to the public. Specifically, 86% (25 of 29) indicated hearings as not being open to public and 79% (23 of 29) indicated findings and sanctions are not open to the public. Some institutions indicated that the accused may request an open hearing only in certain cases and others mentioned that findings and sanctions are reported but only in the aggregate. However, by federal law both the accused and victim/accuser of violent crimes are notified of the specific outcomes of the case.

In addition to judicial boards, 55% (16 of 29) of institutions indicated that they had additional mechanisms for handling matters that could be considered criminal in a court of law, such as:

- Administrative hearings (n=5);
- Formal resolution by Dean or Dean's staff (n=5);
- Informal resolution (n=3);
- Mediation (n=3);
- Panhellenic councils (n=3);
- Psychological evaluation panels (n=2); and/or,
- Sexual assault boards (n=2).

In order to uncover the types of cases heard by judicial boards, staff requested all violations occurring between January 1, 2010, and December 31, 2010, that could be considered criminal in a court of law, in accordance with Family Educational Rights and Privacy Act (FERPA) guidelines (34 CFR Part 99.3). As such, the requested information only included the date of the incident and hearing, the charge, disposition, sanction and the offenders' age, class and gender. There was an 82% (27 of 33) response rate for the submission of such records. There was a total of 6,264 valid judicial referral records within the stated timeframe.

From the results, one can see that 84% of referrals were for alcohol or drug violations, as seen in Figure 16. There were no referrals related to deaths; however, there were 13 referrals for rape or sexual assault. Overall, 83% (5,208 of 6,264) of those referred were found responsible, as illustrated in Figure 17.

Figure 16: Type and Total Number of Judicial Referrals, CY10

Ranking	ype of Offense	Number of Referrals	Percent of Referrals
1	Alcohol violations	4,372	70%

2	Drug violations	868	14%
3	Assaults	357	6%
4	Disorderly conduct	212	3%
5	Larceny	209	3%
6	Vandalism	154	2%
7	Weapon law violations	23	less than 1%
8	Trespassing	17	less than 1%
9	Burglary	14	less than 1%
10	Rape/sexual assault	13	less than 1%
11	Forgery	11	less than 1%
12	Obstruction of justice	6	less than 1%
13	Fraud	3	less than 1%
13	Gambling	3	less than 1%
14	Robbery	1	less than 1%
14	Pornography	1	less than 1%
TOTAL		**6,264**	**100%**

Source: Virginia State Crime Commission, Judicial Records Analysis, CY10, n=27 institutions.

Figure 17: Type of Hearing Outcome for Judicial Referrals, CY10

Type of Outcome	Number of Referrals	Percent of Referrals
Responsible	5,206	83%
Not Responsible	894	14%
Other (student withdrew, dismissed, etc.)	164	3%

Source: Virginia State Crime Commission, Judicial Records Analysis, CY10, n=27 institutions.

C. Title IX Investigations

The final avenue for the investigation of sexual assaults at colleges and universities is an investigation under Title IX of the federal law. Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.

In April 2011, the U.S. Department of Education, Office for Civil Rights, issued what is now referred to as the "Dear Colleague Letter" (DCL). The purpose of the letter was to inform institutions of their responsibilities under Title IX to protect students from sexual harassment, which includes acts of sexual violence. The DCL defines sexual violence as physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual may also be unable to give consent due to an intellectual or other disability. Consequently, rape, sexual assault, sexual battery, and sexual coercion are all considered acts of sexual harassment covered under Title IX.

The DCL requires institutions to investigate complaints of sexual violence through a grievance process or its judicial council. Such claims must be investigated regardless of, or in addition to, any criminal investigation. The burden of proof in such cases must be based on a *preponderance of the evidence* standard. Furthermore, institutions may have an obligation to respond to student conduct that initially occurs off of campus property. Unlike criminal and judicial investigations, Title IX investigations can move forward without the victim's consent.

The individual in charge of such investigations is a Title IX Coordinator. Most institutions, 79% (23 of 29), indicated that they currently have a Title IX coordinator. One additional institution is in the process of identifying their coordinator. The survey sought to determine how complaints involving Title IX "acts of sexual violence" were handled:

- 61% (14 of 23) handle such complaints through their existing judicial/student conduct mechanism;
- 30% (7 of 23) have an entirely separate mechanism for such complaints; and,
- 9% (2 of 23) indicate that students may use either or both; or, that such complaints are handled through their existing judicial board but with more tailored rules and/or with a different burden of proof.

Since the DCL was just released in April 2011, there are still significant differences in opinion on what the DCL and relevant law actually require.

Threat Assessment Teams

In summer 2011, the Governor's Advisory Board on Domestic Violence Prevention and Response met on several occasions, with the Crime Commission's Executive Director participating on the Enhancing Campus Safety subcommittee. As part of these efforts, Crime Commission staff was asked to examine how many institutions had threat assessment teams, since the issue fell within the purview of the current bill.

Threat assessment teams were established in 2008 under Va. Code § 23-9.2:10, which requires:

> Each public college/university shall have in place policies and procedures for the prevention of violence on campus, including assessment and intervention with individuals whose behavior poses a threat to the safety of the campus community…The board of visitors or other governing body shall determine a committee structure on campus of individuals charged with education and prevention of violence on campus, including representatives from: Student Affairs, Law Enforcement, Human Resources, Counseling Services, Residence Life, and Other Constituencies as needed.

Based on survey results, 88% (29 of 33) of institutions currently have a threat assessment team. Specifically, all 15 public four-year and above and all nine public two-year institutions with campus police departments indicated that they have a threat assessment teams and were therefore compliant with the law. Although not required under Virginia law, 56% (5 of 9) of private four-year and above institutions with

campus police departments indicated they have a threat assessment team. One additional private institution indicated that they were in the process of creating one.

Based on data from 25 institutions with threat assessment teams, there were approximately 659 "persons of concern" and 584 threat assessment cases opened during the 2010-2011 academic year. The number of cases ranged from 0 to over 250 and the median number was 10 "persons of concern" per institution and six threat assessment cases per institution.

Summary and Conclusion

The purview of HB 2490 is limited to Virginia's 33 campus police departments. The provisions of the bill would only apply to investigations of medically unattended deaths and alleged rapes. If passed, the bill would impact at least 43 local law enforcement agencies that surround campus police department jurisdictions. Only two other states have enacted somewhat similar statutes.

Research and data consistently indicate that campus crime consists primarily of property offenses, specifically larceny. Furthermore, the evidence shows that sexual assault is a highly underreported crime and is difficult to prosecute, regardless of whether the assault occurs on a campus or in the general community.

Campus police officers must meet the same requirements for basic training and in-service training as all law enforcement officers in Virginia. There are three potential avenues for rape investigations occurring at colleges and universities with campus police departments: criminal investigations, judicial investigations and/or Title IX investigations. Each investigation is mutually exclusive. In regard to Title IX investigations, the DCL is still being interpreted and implemented by college and university administrators. There is a divergence of opinion on what the letter requires.

As a result of the study effort, the Crime Commission endorsed the following recommendations at its December 6, 2011 meeting:

Recommendation 1: Amend Va. Code § 15.2-1627.4 to require campus police departments to be specifically listed for inclusion in local or regional Sexual Assault Response Teams (SART).

Senator Janet Howell introduced Senate Bill 301 during the 2012 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was passed by the Virginia Senate and Virginia House of Delegates as introduced, and signed by the Governor.[35]

Delegate Robert Bell introduced House Bill 969 during the 2012 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was passed by the Virginia House of Delegates and the Virginia Senate as introduced, and signed by the Governor.[36]

Recommendation 2: Amend Va. Code § 23-234 to require campus police departments and local law enforcement agencies or the Virginia State Police to have mutual aid agreements for cooperation in providing assistance with death and alleged rapes occurring on college or university property.

Senator Janet Howell introduced Senate Bill 302 during the 2012 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was passed by the Virginia Senate and the Virginia House of Delegates with an agreed substitute, and signed by the Governor.[37]

Delegate Robert Bell introduced House Bill 965 during the 2012 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was passed by the Virginia House of Delegates and the Virginia Senate with an agreed substitute, and signed by the Governor.[38]

Recommendation 3: Amend Va. Code § 63.2-1509 to require college and university employees to be included in the list of individuals who are required to report instances of suspected child abuse.

Senator Janet Howell introduced Senate Bill 303 during the 2012 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. Senate Bill 303 was incorporated into Senator Richard Stuart's Senate Bill 239, which passed by the Virginia Senate with a substitute and the Virginia House of Delegates with a committee amendment. Afterwards, the Governor's recommendation was received by, agreed upon, and adopted by both the Virginia Senate and the Virginia House of Delegates. The bill was then signed by the Governor.[39]

Delegate Robert Bell introduced House Bill 970 during the 2012 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was passed by the Virginia House of Delegates as introduced and the Virginia Senate with committee amendments agreed to by the House of Delegates, and signed by the Governor.[40]

Acknowledgements

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HB 2490 Informal Work Group Members

U.S. Department of Education

Virginia's Campus Law Enforcement Agencies

Virginia's College and University Administrators

Virginia Association of Campus Law Enforcement Administrators

Virginia Criminal Sentencing Commission

Virginia Department of Criminal Justice Services

Virginia Department of Forensic Science

Virginia Department of Health

Virginia State Council of Higher Education

Virginia State Police

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[1] H.B. 2490 Va. General Assemb., Reg. Sess. (2011).
[2] TENN. CODE ANN. § § 49-7-129 (West 2011).
[3] This is the least serious misdemeanor under Tennessee law, carrying no more than 30 days in jail, and a fine of no more than $50.00; TENN. CODE ANN. § 40-35-111 (West 2011).
[4] S.C. CODE ANN. § 59-154-10 (West 2011).
[5] Bromley, M.L., Community college crime: An exploratory review. *Journal of Security Administration,* 22(2), 11-21 (1999); Fox, J., & Hellman, D., Correlates of campus crime. *Journal of Criminal Justice,* 13(5), 429-444 (1985); Henson, V.A., & Stone, W.E., Campus crime: A victimization study. *Journal of Criminal Justice,* 27(4), 295-307 (1999); McPheters, L., Econometric analysis of factors influencing crime on the campus. *Journal of Criminal Justice,* 6, 47-52 (1978); Moriarty, L.J., & Pelfrey, W.V., Exploring explanations for campus crime: Examining internal and external factors. *Journal of Contemporary Criminal Justice,* 12(1), 108-118 (1996); Sloan, J., Campus crime and campus communities: An analysis of crimes known to campus police and security. *Journal of Security Administration,* 15(2), 31-47 (1992); Sloan, J., The correlates of campus crime: An analysis of reported crimes on college and university campuses. *Journal of Criminal Justice,* 22(1), 31-47 (1994); Volkwein, J., Szelest, B., & Lizotte, A., The relationship of campus crime to campus and student characteristics. *Research in Higher Education,* 36(6), 647-670 (1995).
[6] Lewis, L., & Farris, E., National Center for Educational Statistics, Campus Crime and Security at Postsecondary Education Institutions, NCES 97-402. Washington, D.C.: Government Printing Office (1997).
[7] Fernandez, A., & Lizotte, A., An analysis of the relationship between campus crime and community crime: Reciprocal effects. In B. Fisher and J. Sloan (eds.), *Campus crime: Legal, social and policy perspectives,* pp. 79-102. Springfield, IL: Charles C. Thomas (1995); Fox, *supra* note 5; Sloan, 1992 and 1994, *supra* note 5; Volkwein, *supra* note 5.
[8] Fox, *supra* note 5.
[9] *See*, for example, CASA, *Wasting the best and the brightest: Substance abuse at America's colleges and universities.* Columbia University: National Center on Addiction and Substance Abuse (2007); Hingson, R.W., Heeren, T., Azkocs, R.C., Kopstein, A., & Wechsler, H., Magnitude of alcohol-related mortality and morbidity among U.S. college students ages 18-24. *Journal of Studies on Alcohol,*63, 136-144 (2002); Marcus, R.F., & Swett, B., Multiple-precursor scenarios: Predicting and reducing campus violence. *Journal of Interpersonal Violence,* 18(5), 553-571 (2003); Siegel, D.G., & Raymond, C.H., An ecological approach to violent crime on campus. *Journal of Security Administration,* 15(2), 19-29 (1992); Sloan, 1994, *supra* note 5.
[10] *See*, for example, CASA, *supra* note 9; Caudill, B.D., Crosse, S.B., Campbell, B., Howard, J., Luckey, B., & Blane, H.T., High-risk drinking among college fraternity members: A national perspective. *Journal of American College Health,* 55(3), 141-155 (2006); Chaloupka, F.J., & Wechsler, H., Binge drinking in college: The impact of price, availability, and alcohol control policies. *Contemporary*

Economic Policy, 14, 112-124 (1996); Sloan, 1992, *supra* note 5; Wechsler, H., Kuo, M., Lee, H., & Dowdall, G.W., Environmental correlates of underage alcohol use and related problems of college students. *American Journal of Preventive Medicine,* 19(1), 24-29 (2000).

[11] Bromley, M.L., Campus and community crime rate comparison: A statewide study. *Journal of Security Administration,* 15(2), 49-64 (1992); Bromley, M.L., Comparing campus and city crime rates: A descriptive study. *American Journal of Police,*14(1), 131-148 (1995); Bromley, 1999, *supra* note 5; Fox, *supra* note 5; U.S. Department of Education, *The incidence of crime on the campuses of U.S. postsecondary education institutions: A report to Congress.* Washington, D.C.: Office of Post Secondary Education, Policy, Planning and Innovation (2001); Volkwein, *supra* note 5.

[12] Bromley, *supra* note 11; Reaves, B.A., & Goldberg, A.L., *Campus law enforcement agencies.* Bureau of Justice Statistics, NCJ-161137. Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (1996); Sloan, 1992 and 1994, *supra* note 5; Volkwein, *supra* note 5.

[13] Brantingham, P.J., & Brantingham, P.L., Surveying campus crime: What can be done to reduce crime and fear. *Security Journal*, 5(3), 160-171 (1994); Henson, *supra* note 5; Lewis, *supra* note 6; Siegel, *supra* note 9.

[14] Fox, *supra* note 5; McPheters, *supra* note 5.

[15] Fernandez, *supra* note 7; Volkwein, *supra* note 5.

[16] Siegel, *supra* note 10; Sloan, *supra* note 5.

[17] *See*, for example, Fisher, B., Cullen, F., & Turner, M., *The sexual victimization of college women: Findings from two national-level studies.* Washington, D.C.: National Institute of Justice and Bureau of Justice Statistics (2000); Fisher, B.S., Daigle, L.E., Cullen, F.T., & Turner, M.G., Reporting sexual victimization to the police and others: Results from a national-level study of college women. *Criminal Justice and Behavior,* 30(1), 6-38 (2003); Karjane, H.M., Fisher, B.S., & Cullen, F.T., *Executive summary: Campus sexual assault: How America's institutions of higher education respond. Final report.* NIJ Grant # 1999-WA-VX-0008. Newton, MA: Education Development Center, Inc. (2002); Koss, M., Gldycz, C., & Wisniewski, N., The scope of rape: Incidences and prevalence of sexual aggression and victimization in a national sample of higher education students. *Journal of Consulting and Clinical Psychology,* 55(2), 162-170 (1987).

[18] *See*, for example, Fisher et al., 2003, *supra* note 17; National Crime Victimization Survey (NCVS) data.

[19] *See*, for example, Sable, M.R., Danis, F., Mauzy, D.L., & Gallagher, S.K., Barriers to reporting sexual assault for women and men. *Journal of American College Health,* 55(3), 157-162 (2006); NCVS data, *supra* note 18.

[20] Fisher et al., 2000, *supra* note 17.

[21] *See*, for example, Abbey. Alcohol-related sexual assault: A common problem among college students*. Journal of Studies on Alcohol,* 14, 118-128 (2002); Mohler-Kuo, M., Dowdall, G.W., Koss, M.P., & Wechsler, H., Correlates of rape while intoxicated in a national sample of college women. *Journal of Studies on Alcohol,* 65, 37-45 (2004).

[22] *See*, for example, Campbell, R., Patterson, D., Bybee, D., Dworkin, E.R., Predicting sexual assault prosecution outcomes*. Criminal Justice and Behavior,* 36(7), 712-727 (2009); Campbell, R*.,* The psychological impact of rape victims' experiences with the legal, medical and mental health systems*. American Psychologist,* 68, 702-717 (2008).

[23] See, for example, U.S. Department of Justice, A national protocol for sexual assault medical forensic examinations: Adults/adolescents (NCJ 206554). Washington, DC: Office on Violence Against Women (2004); Virginia Department of Criminal Justice Services, Sexual assault response teams (SART): A model protocol for Virginia. (2011).

[24] A key change in 2008 to Virginia law, under Va. Code § 19.2-165.1(B), was the requirement that PERK examinations be paid for by the Commonwealth regardless of whether or not the victim chooses to participate in the criminal justice system.

[25] As required under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act") and the Code of Federal Regulations (CFR, Title 34).
[26] U.S. Department of Education (2011). *The handbook for campus safety and security reporting.* Available at http://www.ed.gov/admins/lead/safety/campus.html.
[27] Group A offenses include: murder, non-negligent murder, kidnapping/abduction, forcible rapes, other forcible sex offenses, robbery, aggravated assault, simple assault/intimidation, arson, extortion/blackmail, burglary, larceny, motor vehicle theft, counterfeiting/forgery, fraud, embezzlement, stolen property, destruction/damage/vandalism, drug/narcotic offenses, non-forcible sex offenses, pornography, gambling, prostitution, bribery, and weapons law violations. Group B offenses include: bad checks, curfew/loitering/vagrancy, disorderly conduct, D.U.I., drunkenness, non-forcible family offenses, liquor law violations, peeping tom, runaway, trespass of real property, conspiracy, and all other offenses except traffic. Only arrests are maintained for Group B offenses.
[28] One must be cautioned that from these figures, a precise clearance rate cannot be determined as one arrest can "clear" multiple offenses/incidents under the NIBRS schema.
[29] A copy of the VSCC Campus Police Department Survey is available upon request.
[30] VA. CODE ANN. § 23-234 (2011).
[31] Data on length of service was only available for 730 of the 740 officers.
[32] Annual training also includes review of policies, procedures and use of force.
[33] Such information should be available from individual law enforcement agencies and/or academies; Total number of officers, retrieved from VSP's, *Crime in Virginia,* 2010.
[34] A copy of the VSCC Judicial/Student Conduct Mechanism Survey is available upon request.
[35] 2012 Va. Acts ch. 373.
[36] 2012 Va. Acts ch. 625.
[37] 2012 Va. Acts ch. 282.
[38] 2012 Va. Acts ch. 450.
[39] 2012 Va. Acts ch. 815.
[40] 2012 Va. Acts ch. 698.

Disclosure of Juvenile Records

Executive Summary

During 2011, the Commission on Youth (COY) reviewed juvenile reentry. As part of this study, COY determined that some juvenile adjudications of delinquency were being obtained by potential employers, insurers, and the military. The COY sent a letter to the Crime Commission, requesting a review of juvenile records to determine if these records were being improperly disclosed, possibly through the Virginia Department of Motor Vehicles (DMV).

Crime Commission staff reviewed the statutory framework in Virginia that allows for specific agencies to obtain and disclose juvenile adjudications. The Virginia State Police (VSP), juvenile and domestic relations (JDR) district courts, DMV, and the Department of Juvenile Justice (DJJ) are permitted, by the Code of Virginia, to disclose juvenile adjudications to specified agencies or entities. In particular, the DMV is authorized, based on abstracts of court records, to include certain specific adjudications on a juvenile's driving record.

While most complaints about a juvenile's record being improperly disclosed appear to have dubious merit, Crime Commission staff became aware of a specific instance where a juvenile had an adjudication for petit larceny, improperly included on his DMV driving record, without statutory authorization for such disclosure. After reviewing a random selection of driving records from DMV, Crime Commission staff discovered that there were additional driving records that included adjudications for petit larceny, without any apparent statutory authority for such disclosures. Crime Commission staff met independently with representatives from the Supreme Court of Virginia, as well as DMV; it was determined that a data entry error had resulted in unauthorized adjudications being included in abstracts to DMV. The data entry error is being addressed by the Supreme Court of Virginia through training. The Supreme Court of Virginia and DMV are working on identifying and correcting the improper disclosures locality by locality throughout the state.

Background

The COY sent a letter to the Crime Commission requesting a study of the unauthorized disclosure of juvenile criminal records. Specifically, the request was to review the protection and purging of records after a juvenile's adjudication of delinquency. The COY's review of juvenile reentry, which included reviewing the disclosure of juvenile records, made a determination that juvenile adjudications of delinquency, otherwise kept confidential, were apparently being obtained by potential employers, insurers, and the military. Also, COY suggested that DMV might be responsible for the unauthorized disclosure of juvenile delinquency records.[1]

Disclosures Allowed Under the Virginia Code

The general rule with juvenile adjudications is that these records must be kept confidential.[2] There are, however, several exceptions located throughout the Virginia Code which permit the disclosure of juvenile adjudications, in very specific circumstances. In particular, there are exceptions for VSP, courts, DJJ, and DMV to share information on juvenile adjudications.

VIRGINIA STATE POLICE

The VSP, under Virginia Code § 19.2-389.1, is permitted to share juvenile criminal records in the following, limited circumstances: [3]

- information required for firearms purchases and permits (§§ 18.2-308.2 and 308.2:2);
- aid in the preparation of pretrial, post trial, and pre-sentence reports;
- community-based probation services agencies;
- fingerprint comparisons using AFIS;
- Commonwealth's Attorneys and law enforcement for legitimate criminal justice activities;
- Va. Department of Forensic Science to determine if it can maintain a juvenile's DNA sample;
- Va. Office of the Attorney General for "criminal justice" activities;
- Va. Criminal Sentencing Commission, for research purposes;
- "threat assessment" teams;
- public institutions of higher learning; and,
- law enforcement employment screening.

VIRGINIA JUDICIAL SYSTEM

Under Va. Code § 16.1-305, the courts are permitted to share juvenile court records with specifically enumerated individuals or agencies. The general rule is that these records are to remain confidential, only to be shared with individuals or entities that are specifically listed.[4] All courts are required to maintain juvenile files separately from adult files and only allow the following individuals or agencies to review or inspect the files: [5]

- judges, probation officers, and professional staff assigned to JDR courts;
- public or private agencies that have custody of the child or are furnishing treatment or evaluation;
- Commonwealth's Attorneys or attorneys for the juvenile;
- persons, agencies, or institutions, under court order, with legitimate interests;
- aid in the preparation of pretrial, post trial, and presentence reports;
- community-based probation services agencies;
- background for Parole Board;
- Va. Office of the Attorney General for "criminal justice" activities;
- Va. DMV for abstracts pursuant to Va. Code § 46.2-383; and,

- Va. Workers Compensation Board, to determine compensation for a victim of a crime.

Juvenile and domestic relations district courts are required by statute to expunge delinquency records.[6] The courts are directed to purge these records once a year, for all juveniles who have reached 19 years of age, provided there has been five years since the adjudication of delinquency.[7] If the record is one that DMV can include on a juvenile's driving record pursuant to Va. Code § 46.2-383, the record will be expunged at age 29.[8] However, if the juvenile was "found guilty of a delinquent act which would be a felony if committed by an adult," the record is retained.[9]

DEPARTMENT OF JUVENILE JUSTICE

The Department of Juvenile Justice must keep the records of juveniles in their custody, under supervision of court service units, or before a court, confidential.[10] The Department of Juvenile Justice may open the records to the following: [11]

- judge, prosecuting attorney, probation officers and professional staff, assigned to a juvenile's case;
- agencies treating or providing services to a juvenile;
- parents, legal guardians, or those standing in *loco parentis* to the juvenile;
- person reaching majority;
- any person, by order of the court, having a legitimate interest in the juvenile, case, or work of the court;
- any person, agency, or institution, having a legitimate interest in the treatment of the juvenile;
- Commonwealth's Attorney, pretrial services, probation services for pretrial and post trial activities;
- person, agencies, institutions outside DJJ doing research for them;
- law enforcement for criminal street gang information purposes;
- Va. Office of the Attorney General for "criminal justice" activities; and,
- Commonwealth's Attorneys' Services Council and any attorney for the Commonwealth, for use in identifying criminal street gang members.

VIRGINIA DEPARTMENT OF MOTOR VEHICLES

The Department of Motor Vehicles is statutorily permitted to obtain juvenile adjudication records in order to effectuate the suspension of a juvenile's license. Specifically, under Va. Code § 16.1-305(D), DMV receives abstracts of juvenile adjudications from Virginia courts. Under Va. Code § 46.2-383, DMV is permitted to obtain abstracts of the convictions and adjudications for the following offenses:

- any traffic violation, including local ordinances;
- motor vehicle theft;
- operating a water craft while intoxicated;
- manslaughter or any other felony in the commission of which a motor vehicle was used;
- driving while intoxicated;
- failure to pay fines, costs, forfeiture, restitution or penalty, or any installment, related to traffic cases;

- forfeiture of bail or collateral, related to charges;
- court ordered driver's education or alcohol treatment/rehabilitation program; and,
- forfeiture of license for driving while intoxicated.

According to DMV, the authority to include conviction information on DMV driving records, including those of juveniles, is derived from Va. Code § 46.2-383. Because the statute refers to "persons," which includes juveniles, and is referenced in Va. Code §16.1-305(D), DMV is permitted to include this information, even if it pertains to juveniles, in a driving record. It should be noted that the offenses and other related information listed in the statute are limited to driving offenses, DUI's, and other motor vehicle-related crimes.

There are also two statutes where judges may revoke or suspend a juvenile's license. Judges, under Va. Code § 16.1-278.9, shall deny or suspend the driver's license of a juvenile for the following offenses:

- DUI or refusal;
- marijuana or controlled substances, possession or distribution;
- unlawful purchase, possession or consumption of alcohol;
- public intoxication;
- possession of a handgun or "street sweeper;"
- threats to bomb or damage a building; and,
- truancy.

While judges are required to take action on the license, there is no explicit authority for DMV to include this conviction information on the juvenile's driving record. Additionally, under Va. Code § 16.1-278.8(A)(9), a judge may order the suspension of a license for juveniles found delinquent of any offense. Again, there is no explicit authority in this statute for DMV to include the adjudication on the driving record, nor is there a cross reference in Va. Code § 46.2-383. There is also a general grant of authority for DMV to suspend or revoke licenses for failure or refusal to pay fines or court costs for criminal convictions under Va. Code § 46.2-395, but there is no explicit authority in this statute either, to include information about juvenile convictions on the DMV driving record.

Conviction records may be destroyed by DMV after three years, five years for forfeitures related to speeding or reckless driving. Convictions stay on driving records for various lengths of time, depending upon the person or entity that has requested the record: 5 years for insurance companies; 7 years for employers; 11 years for personal use; and, 12 years for law enforcement.

Review of Unauthorized Disclosures

There have been many anecdotal stories about juveniles who are denied employment, college admission, entry into the military, and even insurance coverage, presumably

because of an unauthorized disclosure of their delinquency records. The difficulty with these stories is, generally, the allegations lack specific details about how the crime was handled (whether through a delinquency proceeding, or tried as an adult and found guilty); and there is limited information regarding names or identifying information to verify the story. Some of the crimes committed by the juveniles in these anecdotes are serious and likely were not handled in a delinquency proceeding. In order to determine if there was any possibility that the agencies tasked with the responsibility of safe-guarding juvenile records breached any of the requirements for confidentiality, Crime Commission staff met independently with representatives from the following agencies concerning the records: VSP, DJJ, DMV, and the Supreme Court of Virginia. A common theme from each discussion was that each agency felt that they were often accused of inappropriately distributing records. All of the agencies stressed that they take great care protecting these records, as required by law. Some specific measures taken by these agencies include:

- The Virginia State Police maintains an entirely separate database for juvenile criminal records.

- The Supreme Court of Virginia does not provide online, public access to the JDR case management system.

- DMV's agreement with insurers does not permit them to sell any information obtained from driving records.

- DJJ limits access to juvenile delinquency/criminal records to one specific individual, who may only access the records in a closed room.

When staff presented this information to Crime Commission members at the September 2011, meeting, there was no solid proof that any agency had improperly disclosed juvenile criminal or delinquency records. Based on a review of applicable Virginia Code sections and discussions with agencies, Crime Commission staff developed conclusions concerning the perception of improper disclosure of juvenile records:

- There appeared to be no systemic problem or "gap" in the Va. Code, that would allow illegal disclosures;

- There is a perception by the general public that juvenile records are completely confidential;

- The public does not always distinguish between a conviction and a delinquency adjudication;

- Juveniles and parents may be unaware of the availability of public felony delinquency records. This information can be obtained by employers or schools and is open for inspection by the public at the courthouse;

- The sharing of information on social media or the Internet could permit employers to discover information concerning criminal records or pending criminal cases;

- Sometimes juvenile criminal information is available through traditional media sources, (i.e. news stories);

- Community reputation could be responsible for local employers' hiring decisions;

- If a person requests their own DMV record for employment or school, it is possible they could request a more detailed transcript, and provide more information than required;

- There was a suggestion that data mining, through search engines such as Westlaw or LexisNexis, could be responsible for the electronic disclosure of records allowed by law; and,

- Many Virginia college and university admissions applications ask whether the applicant has ever been adjudicated delinquent.

While all of the conclusions reached remain valid, Crime Commission staff received, after the September 2011 meeting, a letter from an attorney whose client had an adjudication for petit larceny[12] that was included on an official DMV driving record. A copy of the juvenile's DMV record was reviewed by Crime Commission staff and clearly indicated what appeared to be an improper disclosure of his record. The authorization for including the adjudication on the record was stated as "Va. Code § 46.2-390.1." It is not clear how Va. Code § 46.2-390.1 provides the authority for including the juvenile adjudication for petit larceny on the driving record. (Under this statute, a juvenile's license may be revoked for violating drug offenses, which has nothing to do with petit larceny). Based on this instance of an improper disclosure, Crime Commission staff reviewed a random sample of juvenile driving records from DMV. After the review, it was determined that several records contained adjudications for petit larceny.

Crime Commission staff made an effort to determine why the petit larceny convictions were appearing on DMV records, when there is no statutory authority for DMV to include these adjudications. After discussions with representatives of the Supreme Court of Virginia and DMV, the problem was identified as a specific data entry error that was prone to occur with a new computer program that is being used, among other things, to transmit the abstracts of criminal proceedings from the JDR courts to DMV in accordance with Va. Code § 46.2-383. In some cases, petit larceny adjudications were included in the abstract, with DMV then adding the adjudication to the driving record, in reliance on the court providing the information accurately and lawfully. The Supreme Court of Virginia and DMV are currently working on identifying each record that contains an improper disclosure and correcting the driving record. Additionally, the Supreme Court of Virginia is training court clerks on the new system, to avoid the inclusion of unauthorized delinquencies in the court abstracts to DMV.

Conclusion

While the general rule in Virginia is to maintain the confidentiality of juvenile adjudications, the Code of Virginia grants very specific exceptions to a limited number of agencies, for official use. The agencies permitted to disclose juvenile records take the responsibility of maintaining the confidentiality of the records very seriously. While there is no weakness or "hole" in the statutory exceptions to the confidentiality of juvenile records that employers, insurers or other unauthorized entities may use to obtain juvenile records, Crime Commission staff did uncover a data entry error that led to the unauthorized inclusion of juvenile adjudications on DMV driving records. This data entry error has been brought to the attention of the Supreme Court of Virginia, and both the courts and DMV are now working to correct the erroneous inclusion of certain adjudications on driving records.

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[1] R.D. 179, STUDY OF JUVENILE OFFENDER REENTRY IN THE COMMONWEALTH, Virginia Commission on Youth, *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/4d54200d7e28716385256ec1004f3130/2aa3342132c11b2f85257903005a63f6?OpenDocument.

[2] VA. CODE ANN § 16.1-305 (2011).

[3] VA. CODE ANN § 19.2-389.1 (2011).

[4] However, if "a juvenile 14 years of age or older at the time of the offense is adjudicated delinquent on the basis of an act which would be a felony if committed by an adult," the records are open, unless otherwise ordered by the judge.

[5] VA. CODE ANN. § 16.1-305 (2011).

[6] VA. CODE ANN. § 16.1-306 (2011).

[7] Id.

[8] Id.

[9] Id.

[10] VA. CODE ANN. § 16.2-300 (2011).

[11] Id. Additionally, under Va. Code § 16.1-309.1, a judge may share information on a juvenile in the "consideration of public interest." Essentially, this information may be shared in situations where the juvenile has been adjudicated of a serious offense and is a fugitive.

[12] VA. CODE ANN. § 18.2-96 (2011).

Domestic Abuser Registry

Executive Summary

During the 2011 Regular Session of the Virginia General Assembly, Delegate Daniel Marshall introduced House Bill 1932 (HB 1932), which sought to create a domestic abuser registry in Virginia. The bill would require any adult convicted of a violation of a protective order or assault and battery against a family or household member to register for 15 years. The bill was referred by the House Courts of Justice Committee to the Crime Commission for review.

Crime Commission staff utilized several methodologies to assess the issue, including collecting relevant literature, obtaining data related to domestic abuse convictions in Virginia, and examining other states' statutes and registries. Data obtained by staff revealed a combined total of 48,822 domestic abuse convictions in circuit courts, general district courts, and juvenile and domestic relations (JDR) district courts between Fiscal Years (FY) 07 and FY11. Of those convictions, 97% were for misdemeanor domestic abuse offenses and 3% were for felony domestic abuse offenses.

There was very little literature available concerning domestic abuser registries, as there are no state run domestic abuser registries. However, there is the National Domestic Violence Registry which serves as the first national domestic violence database available to the public.

As a result of this study effort, no formal recommendations were made by the Crime Commission.

Background

House Bill 1932 was introduced by Delegate Daniel Marshall during the 2011 Regular Session of the Virginia General Assembly.[1] As introduced, the bill would have established a domestic abuser registry and required any adult who has been convicted of a violation of Va. Code §§ 16.1-253.2 (violation of a family abuse protective order), 18.2-57.2 (assault and battery against a family or household member), or 18.2-60.4 (violation of a protective order) to register for 15 years. The bill proposed that anyone failing to register or re-register would be charged with a Class 6 felony. It is important to note that a person originally convicted of a misdemeanor domestic abuse crime could then be found guilty of a felony if they failed to register or re-register properly.

There are 12 crimes that penalize domestic abuse in the Virginia Code:

- violation of a family abuse protective order;[2]

- violation of a family abuse protective order (violence), second offense within five years;[3]
- violation of a family abuse protective order (violence), third offense within five years;[4]
- assault with serious injury to person with family abuse protective order;[5]
- enter home of someone with protective order;[6]
- simple assault against a family member;[7]
- simple assault against a family member, third or subsequent conviction within 20 years;[8]
- violation of protective order;[9]
- violation of protective order (violence), second offense within five years;[10]
- violation of protective order (violence), third offense within five years;[11]
- assault with serious injury to person in violation of protective order; [12] and,
- entering the home of person in violation of a protective order.[13]

The fiscal implications of HB 1932 would have affected the Virginia Department of Corrections (DOC), the Virginia State Police (VSP), and the local and regional jails. According to the Virginia Criminal Sentencing Commission (VCSC), the proposed legislation would impact state correctional beds by 114 beds by FY17, requiring $3,085,510 to be appropriated to DOC in FY12. The proposed legislation would also impact local jail beds by 116 beds by FY17. In addition, the VSP estimates that about $986,000 would be needed to design and develop a new registry and website and an additional $126,411 would be needed each year to support a position to maintain the website. The cost to local law enforcement agencies was not known.[14]

The 2011 General Assembly extensively revised Va. Code § 18.2-60.4, relating to protective orders. As adopted, the legislation renamed "protective orders for stalking" as "protective orders" and expanded the number of persons who are eligible to obtain a protective order, by expanding the types of conduct that permit the issuance of a protective order. Previously, only stalking, sexual battery, aggravated sexual battery, or a criminal offense resulting in serious bodily injury permitted the issuance of a protective order; after 2011, any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury, could qualify for a protective order. Protective orders are now available based on such conduct, regardless of the relationship of the parties involved. The 2011 legislation made the protective order statutes under Title 19.2 and the family abuse protective orders under Title 16.1 of the Code of Virginia more consistent. For example, a family abuse protective order may now include a condition prohibiting the abusing person from committing a criminal offense that results in injury to person or property. The 2011 legislation also made the penalties for violating a protective order consistent with the penalties for violating a family abuse protective order. Prior to 2011, no changes had been made to Va. Code § 18.2-60.4 since 2003.[15]

Virginia Code § 16.1-253.2, relating to family abuse protective orders, has not been modified by the General Assembly since 2007. The 2007 legislation created a mandatory minimum term of confinement of 60 days for any person convicted of a second violation of a protective order when the offense was committed within five years of a conviction for a prior offense and when either the current incident or prior offense

was based on an act or threat of violence. It also increased the penalty for a third or subsequent violation of a protective order, committed within 20 years of the first conviction, if either the instant or any of the prior offenses was based on an act or threat of violence, from a Class 1 misdemeanor to a Class 6 felony with a mandatory minimum term of confinement of six months.[16]

Literature Review

Literature shows that domestic violence is not as simple as one partner physically harming another. Domestic violence can consist of a complex range of controlling behaviors including physical, emotional, sexual and economic maltreatment, isolation, blaming, intimidation, and threats.[17]

There is both support and opposition over the prospect of domestic violence registries. Supporters believe that the most important aspect of a registry would be to raise awareness of domestic violence.[18] Additionally, a registry could serve as a resource for both victims and potential victims. Supporters of domestic violence registries believe that they could reduce victimization by allowing individuals to look up a potential partner to ensure that he or she has not been placed on a registry for a domestic abuse crime.[19] On the other hand, opponents of the registry argue that it may provide a false sense of security if a partner's name is not found,[20] especially if an individual has committed acts of domestic abuse in the past, but was never convicted in a court of law. Additionally, individuals who simply have a restraining order against them could eventually be included in the category of domestic abusers and be required to register, possibly creating further stigmatization for a certain group of people never convicted of a crime. Other negative consequences to creating and placing offenders on a domestic abuser registry could include potential violations of the abuser's privacy, possible disclosure of the victim's identity, and the difficulty of trying to find a job once placed on the abuser registry.

Other Registries

The National Domestic Violence Registry, a non-profit organization, is the first national database for domestic violence convictions available to the public. It allows the public to search for an offender by name or by state. The National Domestic Violence Registry provides the conviction records of offenders who have been found guilty of domestic violence and domestic violence-related offenses, such as physical battering, stalking, criminal confinement, intimidation, strangulation, and domestic violence-based sex offenses.[21] They provide this data free of charge to the general public. There is no fiscal impact to any state. The registry also has the highest level of victim and offender privacy allowable under the law and mirrors the sex offender registry with a few exceptions.

Crime Commission staff conducted a national review of domestic abuser registries and found that there are no state-run public registries. However, some states, including

Connecticut, Georgia, Hawaii, Kansas, Kentucky, Mississippi, Nevada, and Texas have introduced legislation over the past several years that would have created a domestic abuser registry. To date, none of this legislation has passed. While it is not a state run registry, the Kansas Bureau of Investigation has created an online offender registry search form that allows individuals to search for a particular offender after providing some specific information. Staff found that some states have developed databases that are similar to a registry, but are only available to members of the law enforcement community, not the public.

There is one local ordinance that allows for a domestic abuser registry. In 2009, Suffolk County, New York, passed an ordinance requiring the county to establish a public domestic violence offender registry, operating in a manner similar to a sex offender registry. Currently, this registry has yet to be completed.[22]

Conviction Data

Crime Commission staff requested data from the VCSC to obtain a better understanding of domestic abuse convictions across the Commonwealth. Specifically, conviction data was requested for the total number of convictions in circuit courts, general district courts and JDR courts for domestic abuse offenses under §§ 16.1-253.2, 18.2-60.4, and 18.2-57.2. The following figures are based on concluded cases that resulted in a conviction.

There were a combined total of 48,822 domestic abuse convictions in circuit, general district and JDR courts between FY07 and FY11. Of those convictions, 42,975 occurred in JDR courts, 5,527 occurred in circuit courts, and 320 occurred in general district courts.[23] Of those 48,822 convictions, 97% (47,327 of 48,822) were for misdemeanor domestic abuse offenses:

- 39,199 were for simple assaults against a family member under § 18.2-57.2(A);
- 7,842 were for misdemeanor violations of protective orders under § 16.1-253.2; and,
- 286 were for misdemeanor violations of protective orders under § 18.2-60.4.

The remaining 3% (1,495 of 48,822) of convictions were for felony domestic abuse offenses:

- 1,354 were for assaults against a family member, third or subsequent offense, under § 18.2-57.2(B);
- 141 were for felony violations of protective orders under § 16.1-253.2; and,
- 0 convictions for felony violations of protective orders under § 18.2-60.4.

Conclusion

If Virginia were to create a domestic abuser registry, it would be the first, state run registry of its kind. While some people believe a domestic abuser registry could be used as a tool for predicting future behavior of certain offenders, or for tracking and treating abusers, others believe that a registry would simply be another tool of limited utility that could end up stigmatizing a group of individuals, sometimes unfairly. The Crime Commission took no action regarding this issue.

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[1] H.B. 1932, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).
[2] VA. CODE ANN. § 16.1-253.2.
[3] Id.
[4] Id.
[5] Id.
[6] Id.
[7] VA. CODE ANN. § 18.2-57.2.
[8] Id.
[9] VA. CODE ANN. § 18.2-60.4.
[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] Fiscal impact statement for House Bill 1932 (2011), http://lis.virginia.gov/cgi-bin/legp604.exe?111+oth+HB1932IMP.
[15] VA. CODE ANN. § 18.2-60.4.
[16] VA. CODE ANN. § 16.1-253.2.
[17] Catherine Simmons and Peter Lehmann, *Exploring the Link Between Pet Abuse and Controlling Behaviors in Violent Relationships*, 22(9) J. of Interpers. Viol. 1211-1222 (2007).
[18] Office of Legislative Research, Conn. Gen. Assemb., Domestic Violence Registries, 2011-R-0196 (2011), *available at* http://www.cga.ct.gov/2011/rpt/2011-R-0196.htm.
[19] Id.
[20] Id.
[21] Information taken from the National Domestic Violence Registry *available at* www.domesticviolencedatabase.org.
[22] As of September 20, 2011.
[23] JDR and general district courts all participate in their respective court case management systems. Fairfax, Alexandria, and Prince William were not participating in the Supreme Court's Circuit Court Case Management System during FY07-FY10. During FY11, Prince William joined the Supreme Court's system and Virginia Beach left the Supreme Court's system. Localities not participating in the system in a particular year are not included in that year's figures.

Inherent Authority of Courts to Defer and Dismiss

Executive Summary

During the 2011 Regular Session of the Virginia General Assembly, Delegate Todd Gilbert introduced House Bill 2513 (HB 2513), which would have statutorily prohibited trial courts from taking criminal cases under advisement, with a later dismissal of the charges upon completion of terms and conditions, unless otherwise statutorily authorized to do so. A letter was sent from the Senate Courts of Justice Committee, asking the Crime Commission to review the subject matter of the bill.

House Bill 2513 was introduced as a response to the Virginia Supreme Court case of Hernandez v. Commonwealth, 281 Va. 222 (2011). In Hernandez, the Supreme Court held that trial courts have the inherent authority to defer issuing a final order in a criminal case for a period of time; during this time, they may place the defendant on whatever terms of bond are deemed appropriate. While this raises the possibility that trial courts could then use this power as a creative means to place a defendant on a probationary period, and later acquit him, the Hernandez decision does not specifically affirm that trial courts may do so. A later opinion by the Virginia Court of Appeals, Taylor v. Commonwealth, 58 Va. App. 435 (2011), specifically states that trial courts do not have the inherent authority to do this.

To that extent, HB 2513 would merely be a codification of Virginia's current case law on this issue. However, the engrossed portion of the bill added a sentence, prohibiting trial courts from deferring findings of guilt for more than 60 days. Based upon a reading of the applicable cases, it is unclear whether a statutorily imposed time-frame would be upheld by the Virginia Supreme Court. While the Court is clear that trial courts have an inherent authority to decide cases, and with that authority comes the authority to defer making a decision—though not for an unlimited period of time—the Court has not indicated to what extent this authority may be modified or curtailed by the legislature.

The Crime Commission reviewed the relevant case law in Virginia, and considered the subject matter of HB 2513. After deliberating, the Commission declined to endorse the legislation, and made no recommendations on this issue.

Background

During the 2011 Regular Session of the Virginia General Assembly, Delegate Todd Gilbert introduced HB 2513, which would have statutorily prohibited trial courts from taking criminal cases under advisement, with a later dismissal of the charges upon completion of terms and conditions, unless otherwise statutorily authorized to do so.[1]

The bill was referred to the Senate Courts of Justice Committee, where it was passed by indefinitely; a letter was sent to the Crime Commission asking for a review of the subject matter of the bill. The proposed statute, as passed by the House of Delegates, was as follows:

§ 19.2-298.02. Deferred disposition in a criminal case.

> *No court shall have the authority, upon a plea of guilty or nolo contendere or after a plea of not guilty, when the facts found by the court would justify a finding of guilt, to defer proceedings or to defer entry of a final order of guilt or to dismiss the case upon completion of terms and conditions except as provided by statute. In no case shall the court defer entry of a final order of guilt for more than 60 days following conclusion of all of the evidence.*

House Bill 2513 was introduced in response to the case of Hernandez v. Commonwealth.[2] In that case, the Supreme Court of Virginia appeared to hold that trial courts have an inherent authority to take criminal cases under advisement, place the defendant on terms of bond that resemble probation, and at a later date, dismiss the charges. The wording of the opinion implies that because this authority is inherent, a trial court may take this action, even in the absence of a statute that specifically authorizes such a disposition.[3] The Court noted that "the act of rendering judgment is with the inherent power of the [trial] court," and therefore, "it was within the inherent authority of the court to 'take the matter under advisement' or 'continue the case for disposition' at a later date."[4] The Court also stated that "while such a case [is] pending, the [trial] court has statutory authority to continue bail requirements."[5]

However, the Supreme Court also observed that "once a court has entered a judgment of conviction of a crime, the question of the penalty to be imposed is entirely within the province of the legislature, and the court has no inherent authority to depart from the range of punishment legislatively prescribed."

Analysis

While the Hernandez case seems to give the impression that trial courts can make use of their inherent authority to favor certain well-deserving defendants, by placing them on conditions similar to that of probation, and later dismiss the criminal charges if the defendant satisfies all of the conditions, it is significant to note that the Supreme Court did not explicitly say so. Instead, the Court noted, "we [leave] open the question whether a court may defer judgment and continue a case with a *promise* of a particular disposition at a later date. That question…is not before us here."[6]

The Hernandez opinion repeatedly cites the earlier case of Moreau v. Fuller.[7] The Moreau case similarly stands for the proposition that upon hearing the evidence in a criminal case, it is "within the inherent authority of the court to 'take the matter under advisement' or 'continue the case for disposition' at a later date."[8] However, the Supreme Court acknowledged in Moreau that the doctrine of the separation of powers

means that "the judiciary…may not assume a power of clemency or pardon which is a unique function of executive power."[9]

These two observations by the Virginia Supreme Court seem to indicate that the inherent authority articulated in the Hernandez case does not extend to trial judges making creative use of bail conditions and continuances, so as to place the defendant on a type of "probation," which has the possibility of ending in an acquittal. A recently published opinion by the Virginia Court of Appeals directly states this. In the case of Taylor v. Commonwealth, the Court of Appeals held that it is a fallacy "that the power to enforce begets inherently a discretion to permanently refuse to do so."[10] On the contrary:

> [A] Virginia court cannot refuse to convict a guilty defendant merely because it questions the category of offense assigned by the legislature, considers the range of statutory punishment too harsh, or believes certain guilty offenders undeserving of a criminal conviction.[11]

Although a petition for appeal was filed to the Virginia Supreme Court in the Taylor case, it was denied; as a published opinion, the Court of Appeals holding in Taylor v. Commonwealth is now the law in the Commonwealth and is binding on all trial courts. Reading the Hernandez and Taylor cases in conjunction, the current state of the law in Virginia seems to be that trial judges have the inherent authority to defer issuing a final judgment in a criminal case, and during this time period, they can place the defendant on whatever conditions of bond are deemed appropriate. However, the trial court cannot take a case under advisement in perpetuity, or absolutely refuse to render a judgment. Even more significantly, the trial court cannot use its inherent authority as a mechanism to provide leniency or acquit a defendant who is guilty of a crime.[12]

If this is the current state of the law, HB 2513 would merely represent a codification of the principle that trial judges in criminal cases may not make use of "deferred dispositions" to help defendants gain an acquittal, unless the legislature has specifically authorized such a possibility for the criminal charge that is the before the court. The last sentence of the engrossed version of HB 2513, which places a time limit of 60 days on how long a trial judge may defer entering a final order of guilt, might be held to be an impermissible breach of the separation of powers, though. If courts have an inherent authority to defer a matter, per Hernandez, it remains unclear, based upon a reading of the relevant cases, to what extent the legislature can modify or restrict such authority.

Conclusion

The Crime Commission reviewed the cases of Hernandez v. Commonwealth and Taylor v. Commonwealth, and considered the subject matter of HB 2513. After deliberations, the Crime Commission took no position on either HB 2513 or the issue of deferred dispositions.

[1] H.B. 2513, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).
[2] Hernandez v. Commonwealth, 281 Va. 222 (2011).
[3] *See, e.g.,* VA. CODE ANN. §§ 18.2-251, 18.2-57.3 (West 2011).
[4] Id. at 225.
[5] Id. at 225.
[6] Id. at 225.
[7] Moreau v. Fuller, 276 Va. 127 (2008).
[8] Id. at 137.
[9] Id. at 136.
[10] Taylor v. Commonwealth, 58 Va. App. 435, 439 (2011).
[11] Id. at 442.
[12] *Accord,* Epps v. Commonwealth, 59 Va. App. 71 (2011).

Medical Fraud Control Unit Investigators

Executive Summary

During the 2011 Session of the General Assembly, House Bill 2454 (HB 2454) was introduced by Delegate Manoli Loupassi. This bill sought to classify Medicaid Fraud Control Unit (MFCU) investigators as law-enforcement officers – sworn to enforce the laws of the Commonwealth through the investigation of health care fraud and patient neglect/abuse. This bill was referred to the Crime Commission by letter from the House Courts of Justice Committee for study.

As a condition of receiving Medicaid funds, Virginia was required to establish a MFCU. Currently, the Virginia Attorney General's office has a MFCU, which is also authorized by Virginia Code § 32.1-320. In general, the MFCU investigates billing for unperformed services, billing for unnecessary services, embezzlement, kickbacks, inflating bills, and double billing.

At the July 25, 2011, Crime Commission meeting, representatives from the Office of the Attorney General provided a detailed presentation on this issue. According to the Attorney General's Office, if these investigators were considered law enforcement officers, they would be allowed to serve legal documents, execute search and arrest warrants, seize evidence of crimes, be armed and carry badges. Certification for these investigators would be managed by the Department of Criminal Justice Services.

There are four "core" purposes behind making MFCU investigators law enforcement officers, according to the Attorney General's Office:

1. Protecting state investigators - since investigators are required to take investigations into increasingly violent areas and are coming into contact with more violent criminals, including individuals involved with organized crime.

2. Saving money – as a law enforcement agency, the MFCU will have access to federal funding, by participating with the Organized Crime Drug Enforcement Task Force or the FDA Office of Criminal Investigations Task Force.

3. Enhancing investigative tools - by permitting prosecution of false statements to law enforcement officers, under both Virginia and federal law.

4. Streamlining cases - often outside law enforcement officers are brought in to serve subpoenas, execute search warrants, and participate in interrogations. This causes delay and duplicative efforts, and is a drain on state and local law enforcement agencies.

The Crime Commission members unanimously endorsed legislation that would authorize the Attorney General to designate MFCU investigators as sworn law enforcement officers, so they would be better able to handle medical fraud investigations.

During the 2012 Regular Session of the Virginia General Assembly, Delegate Manoli Loupassi introduced House Bill 988, which permits the Attorney General to designate MFCU investigators as sworn law enforcement officers.[1] This bill passed the House Courts of Justice Committee, but was left in the House Appropriations Committee.

[1] H.B. 988, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).

Protective Orders

Executive Summary

After the Virginia legislature made extensive changes to Virginia's protective order statutes in 2011, a number of legal issues gradually became evident. First, the language of Va. Code § 16.1-253.2 is ambiguous—is any violation of a family abuse protective order a Class 1 misdemeanor, or only those violations that involve trespass, family abuse, or a prohibited contact between the parties? Second, the language of the emergency family abuse protective order statute refers to prohibiting contacts between the respondent and family and household members of the respondent, instead of between the respondent and family and household members of the petitioner. Third, there is no clear venue statute for protective orders issued pursuant to Va. Code §§ 19.2-152.8, 19.2-152.9, or 19.2-152.10. Last, while it makes sense that any protective order case that involves a juvenile should be heard in a juvenile and domestic relations (JDR) district court, the relevant jurisdiction statute, Va. Code § 16.1-241, only refers to family abuse protective orders, not all protective orders.

The Crime Commission recommended making only those violations of a family abuse protective order that are criminal acts, in and of themselves, a Class 1 misdemeanor. All other violations should be handled by petitioning the relevant court for a show cause hearing. The Crime Commission also recommended that the language of the emergency family abuse protective order statute be modified, so that respondents are prohibited from contacting members of the petitioner's family, not members of their own family. It was also the recommendation of the Crime Commission that a clear venue statute be enacted for protective orders, and that clear jurisdiction be given to juvenile and domestic relations district courts to handle all protective order cases involving juveniles.

Background

In 2010, the Crime Commission reviewed seven bills dealing with protective orders that were referred from the House Courts of Justice Committee.[1] In addition, the Crime Commission studied a number of other issues connected with protective orders in Virginia, particularly the advisability of expanding the scope of such orders, and making them available to more people. Ultimately, the Crime Commission's recommendations to expand the scope and availability of protective orders were accepted by the Virginia General Assembly, and resulted in legislation being signed into law on March 24, 2011.[2]

During the course of the 2010 study, a few peripheral issues were identified with Virginia's existing statutes. As they dealt with minor ambiguities, they were not addressed in the legislation that was enacted. After enactment, it was realized that the following issues involving protective orders should be clarified:

- Does any violation of a family abuse protective order constitute a Class 1 misdemeanor, or only those that involve acts of trespass, family abuse, or prohibited contacts?

- Should the language of the family abuse emergency protective order statute mirror the other protective order statutes, in that contact is prohibited between the respondent and the petitioner's family, rather than the respondent and the respondent's family?

- What is the venue for protective orders issued under the provisions of Title 19.2 of the Virginia Code?

- Do JDR courts have jurisdiction in all cases involving protective orders where a juvenile is either the victim or the respondent?

Analysis

PENALTY FOR VIOLATING A FAMILY ABUSE PROTECTIVE ORDER

Virginia Code § 16.1-253.2 provides the penalty for violating a family abuse protective order:

> In addition to any other penalty provided by law, any person who violates any provision of a protective order issued pursuant to §§ 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-278.14, 16.1-279.1 or subsection B of § 20-103, which prohibits such person from going or remaining upon land, buildings or premises or from further acts of family abuse, or which prohibits contacts between the respondent and the respondent's family or household member as the court deems appropriate is guilty of a Class 1 misdemeanor.

However, this language contains an ambiguity. Does the Class 1 misdemeanor apply to anyone who violates "any provision" which prohibits a person from going or remaining upon land, buildings or premises, or further acts of family abuse, etc.? Or, does the Class 1 misdemeanor apply to anyone who violates "a protective order" which prohibits a person from going or remaining upon land, buildings or premises or from further acts of family abuse, etc.? If it is the latter meaning, then any violation of a family abuse protective order is a Class 1 misdemeanor, as every family abuse protective order will contain a provision prohibiting further acts of family abuse. If it is the former meaning, then a violation involving an act of family abuse, trespass, or contact is a Class 1 misdemeanor, but a violation that involves something else, such as failing to attend a counseling session, is not.[3]

Because of the ambiguity in this section, resulting from the awkward placement of the lengthy dependant clause, "which prohibits such person from going…or household member as the court deems appropriate," it has resulted in different interpretations in various parts of the state. Informal conversations with prosecutors and law enforcement in varying jurisdictions revealed that some interpret this statute to mean any violation of a protective order is a Class 1 misdemeanor, and thus subjects the offender to immediate arrest. Others interpret this to mean that serious violations, i.e., acts of family abuse, trespass, or contact, will be grounds for an immediate arrest by law enforcement. Other violations, such as failing to pay a utility bill as ordered, cannot be handled by law enforcement, but must be handled by the aggrieved party filing a petition with the court.

The legislative history of this statute reveals that in its original version, the dependant clause in question applied to the word "provision," and not to the words "a protective order." As enacted in 1987, the statute read:

> In addition to any other penalty provided by law, any person who violates any provision of a protective order issued pursuant to §§ 16.1-253, 16.1-253.1, 16.1-279 or § 16.1-279.1, which prohibits such person from going or remaining upon land, buildings or premises, shall be guilty of trespass…[4]

Because the original statute resulted in a trespass conviction, it is clear that the dependant clause did not modify the words "protective order." (It would be nonsensical to argue that a person who assaults another, in violation of one of the terms of a protective order, would be found guilty of trespass). However, as Va. Code § 16.1-253.2 was expanded and modified over the years, with additional terms added to the dependant clause, it created ambiguity as to what was being described by that clause.

As one of the goals of all legislative statutes is to provide clear guidance to the citizenry, this statute should be modified to remove the confusion created by the awkward placement of the dependant clause. Whether the legislature decides to make all violations of a family abuse protective order a Class 1 misdemeanor, or only those violations that involve trespass, family abuse, and contact between the parties, there should be a consistent interpretation and application of this statute throughout the Commonwealth.

MODIFYING VA. CODE § 16.1-253.4(B)

Currently, the family abuse emergency protective order statute, Va. Code § 16.2-253.4(B), reads in part, "the judge or magistrate shall issue an ex parte emergency protective order… 2. Prohibiting such contacts by the respondent with family or household members of the respondent as the judge or magistrate deems necessary…" This wording seems unusual, in that the judge would be able to order the respondent to have no further contacts with members of the respondent's own family.

By contrast, the family abuse preliminary protective order statute, Va. Code § 16.2-253.2(A), allows a judge to prohibit contacts between the respondent and the petitioner or family or household members of the petitioner as the court deems necessary…" This language is also used in the final family abuse protective order statute, Va. Code § 16.1-

279.1(A)(2), which reads, "Prohibiting such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary…"

While the family and household members of the respondent and the petitioner in a family abuse protective order case will almost always be the same individuals, so that the wording of Va. Code § 16.1-253.4(B) likely has no practical effect in its application, it still might be advisable to modify the statute for the sake of consistency. Amending the statute to prohibit contacts between the respondent and the petitioner's family or household members would make the statute parallel to the other two family abuse protective order statutes.

VENUE FOR PROTECTIVE ORDERS

Prior to the legislative changes made in 2011, a protective order could only be issued pursuant to Va. Code §§ 19.2-152.8, 19.2-152.9, or 19.2-152.10, if a criminal arrest warrant had also been issued. Therefore, in almost every case, the same court that had jurisdiction over the pending criminal charge was the court that would hold hearings on and perhaps issue a protective order. Questions of venue never arose.

With the 2011 legislative changes, though, it is now possible for a victim to seek a protective order, even if no criminal charges have been filed. This raises, for the first time, questions about the appropriate venue for protective order petitions. In the absence of any other statutory directives, the permissible venue provisions found in Title 8.01 would seem to apply.[5] These venue provisions might not be the most sensitive to the needs of a victim in cases involving a petition for a protective order. For example, if a victim who resides in Virginia Beach encounters a former boyfriend, currently residing in Roanoke, and is threatened in Roanoke, should the victim be forced to travel to Roanoke to file her petition?[6] By contrast, the venue statute created for family abuse protective orders allows the victim the option to file a petition in the jurisdiction where he or she has her principal residence.[7]

It may be advisable to create a special venue statute applicable only to protective order provisions, which would allow a victim the ability to file a petition for a protective order in the jurisdiction where he or she lives.

JURISDICTION IN PROTECTIVE ORDER CASES INVOLVING JUVENILES

Juvenile and domestic relations district courts have jurisdiction over all cases involving family abuse protective orders.[8] However, it is not clear if juvenile and domestic relations district courts also have jurisdiction over cases involving protective orders issued under Va. Code §§ 19.2-152.8, 19.2-152.9, or 19.2-152.10 where a juvenile is either the victim or the respondent in the case. Amending Va. Code § 16.1-241 to make clear that all protective order cases involving juveniles should be heard in a juvenile and domestic relations district court could clear up uncertainty on this point.

Conclusion

The Crime Commission unanimously voted to recommend modifying Va. Code § 16.1-253.2, in order to make clear that the only violations of a family abuse protective order that constitute a Class 1 misdemeanor are those that involve a criminal offense, such as trespass or an act of family abuse, or a contact between the parties. All other violations of a family abuse protective order should be handled by petitioning the court for a show cause hearing. The Crime Commission also unanimously voted to recommend that the language of Va. Code § 16.1-253.4 be made consistent with the other family abuse protective order statutes; in emergency family abuse protective orders, the respondent may be ordered to have no contacts with the petitioner, or the petitioner's family or household members. As for protective orders issued pursuant to the provisions of Va. Code §§ 19.2-152.8, 19.2-152.9, and 19.2-152.10, the Crime Commission unanimously voted to recommend that a special venue statute be adopted. The victim in such cases should be entitled to file a petition in the jurisdiction where he or she resides, instead of being forced to file a petition in a court that might be very inconvenient, in terms of distance. Finally, the Crime Commission unanimously recommended that the jurisdiction statute for JDR district courts be amended, to make clear that these courts are the proper forum for all cases where a juvenile is either the victim or the respondent of a protective order.

During the 2012 Regular Session of the Virginia General Assembly, Senator Janet Howell introduced Senate Bill 300, which incorporated all of the Crime Commission's recommendations for the protective order statutes.[9] After passing both the Senate and the House of Delegates, this bill was signed into law by the Governor on April 5, 2012.[10]

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[1] S.B. 208, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 453, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 164, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 656, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 1156, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 216, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 285, 2010 Gen. Assemb., Reg. Sess. (Va. 2010).

[2] 2011 Va. Acts chs. 445, 480.

[3] Failing to obey the terms of a protective order would still have consequences, even if the violation were not a Class 1 misdemeanor. The respondent who willfully disobeyed the terms of the order could be "show caused," and would be subject to a contempt of court proceeding that could lead to a period of incarceration. VA. CODE ANN. § 16.1-279.1(D) (2011).

[4] VA. CODE ANN. § 16.1-253.2 (1987).

[5] *See* VA. CODE ANN. §§ 8.01-262 (2011).

[6] Under the permissible venue statute, the location where the plaintiff resides is not the preferred venue, and is to be used only if the defendant's residence is unknown and there is no other preferred venue for the cause of action. VA. CODE ANN. § 8.01-262(10) (2011).

[7] VA. CODE ANN. § 16.1-243(A)(3) (2011).

[8] VA. CODE ANN. § 16.1-241(M) (2011).

[9] S.B. 300, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).

[10] 2012 Va. Acts ch. 637.

Reckless Driving

Executive Summary

During the 2011 Regular Session of the Virginia General Assembly, Delegate Bill Janis introduced House Bill 1993 (HB 1993) and Delegate Bill Carrico introduced House Bill 2322 (HB 2322), both of which dealt with traffic crimes. House Bill 1993 sought to make failure to obey a traffic light a Class 1 misdemeanor and HB 2322 sought to raise the speed limit, from 80 mph to 90 mph, as the point at which speeding changes from being a traffic infraction to the crime of reckless driving.

In Virginia, reckless driving is considered a criminal violation, as opposed to a traffic infraction. There are two "general" reckless driving statutes that punish driving done in a reckless manner or without consideration of "life, limb, and property." There are also 13 *per se*, or strict, reckless driving offenses in Virginia. The states surrounding Virginia, namely Kentucky, Maryland, North Carolina, Tennessee, and West Virginia, all treat reckless driving as a traffic infraction. A review of the surrounding states' reckless driving statutes revealed that Virginia's statutory reckless driving scheme is the most punitive.

As a result of this study effort, no formal recommendations were made by the Crime Commission.

Background

House Bill 1993 was introduced by Delegate Bill Janis during the 2011 Regular Session of the Virginia General Assembly.[1] As introduced, the bill would have increased the penalties for the failure to yield or stop, in violation of Va. Code § 46.2-821, or failure to obey a traffic signal at a controlled intersection, in violation of Va. Code § 46.2-833, from a fined offense, to reckless driving, if the violation of either of these statutes caused an accident causing serious bodily injury or death. A substitute was passed by the Virginia House of Delegates, which made a violation of Va. Code § 46.2-833 reckless driving, penalized as a Class 1 misdemeanor. Additionally, HB 2322, introduced by Delegate Bill Carrico during the 2011 Regular Session of the Virginia General Assembly, would have raised reckless driving speeding, in Va. Code § 46.2-862(ii), from in excess of 80 mph to in excess of 90 mph.[2]

Reckless driving is considered a criminal offense rather than a traffic offense. The statutory scheme in the Commonwealth that addresses the punishment of reckless driving has 13 very specific offenses and two "general" offenses. The 13 specific offenses are what could be called *per se* offenses, meaning that if there is evidence a driver committed one of the prohibited acts, he may be found guilty of reckless driving and punished consistent with a Class 1 misdemeanor. The 13 specific offenses include:

- Overtaking or passing an emergency vehicle that is operating its lights or siren;[3]
- Operating a vehicle "not properly under control" or with "inadequate or improper adjusted" brakes;[4]
- Passing or overtaking a vehicle on a curve or approaching a grade or crest;[5]
- Driving a vehicle that is loaded in such a way as to obstruct the driver's view or prevent proper control of the vehicle;[6]
- Passing two vehicles abreast, going the same direction;[7]
- Driving two abreast in a single lane, in the same direction;[8]
- Overtaking or passing at a railroad crossing;[9]
- Failure to stop for a school bus;[10]
- Failure to give an adequate or timely signal when turning, slowing down, or stopping;[11]
- Driving too fast for conditions;[12]
- Exceeding the speed limit by 20 mph or more, or in excess of 80 mph;[13]
- Failing to stop at an entrance to a highway from a side road; and,[14]
- Racing two or more cars, on highways, roads, or parking lots open to the public.[15]

In addition to the specific reckless driving offenses, there are two "general" offenses that penalize reckless driving conduct as a Class 1 misdemeanor. Virginia Code § 46.2-852, known as "Reckless Driving: General Rule," defines the offenses as, "irrespective of the maximum speeds permitted by law, any person who drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person shall be guilty of reckless driving."

This statute has been addressed by the courts in considering the limits and parameters of violating the statute. However, the court cases tend to define what is not punished under the statute, rather than conduct covered by the statute. The Supreme Court of Virginia has defined the term "reckless" in terms of this statute to mean "a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb, or property."[16] The Court also held that speed, by itself, is not sufficient to find guilt under the statute; there must be speed and conduct that endangers life, limb, or property.[17] The Power's Court also held that "the mere happening of an accident does not give rise to an inference of reckless driving."[18] Basically, where the evidence leaves "speculation and conjecture," the Court will refuse to find a driver guilty under the statute.[19] In a similar vein, the Virginia Court of Appeals has held that intoxication, by itself, is not enough to sustain a conviction under the statute.[20] The Court of Appeals held that, in addition to evidence of intoxication, there must also be evidence that the driver operated the car recklessly in order to sustain a conviction under Va. Code § 46.2-852.[21]

While most cases point out what conduct will not suffice for a conviction under the statute, there are some decisions that provide a better understanding of prohibited "reckless" conduct. The Virginia Court of Appeals held that evidence which suggested that a driver who crashed his motor vehicle, knew he was sleepy and that there was a known defect with his car, was sufficient to infer reckless driving under the statute.[22] Additionally, the Virginia Court of Appeals held that a driver, with local knowledge of a

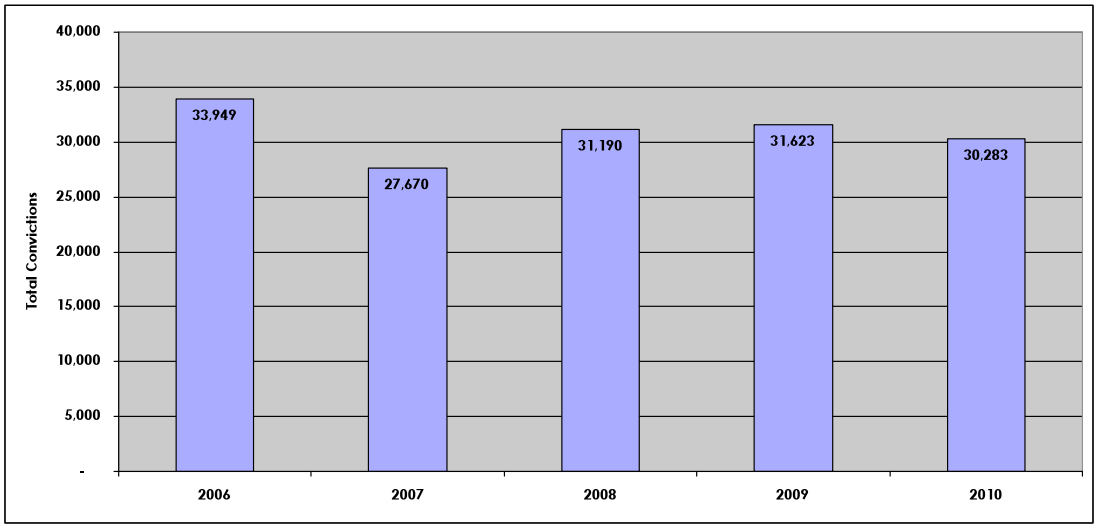
short merge lane, who sped up, making it difficult for another driver to merge in front of him, was guilty of reckless driving, even when the other driver had the duty to yield.[23]

Conviction Data

Staff requested data from various agencies to obtain a better understanding of reckless driving convictions across the Commonwealth. Specifically, conviction data was requested for failure to obey a traffic signal in violation of Va. Code § 46.2-833, because HB 1993 would move that offense from a traffic violation to a Class 1 misdemeanor. Additionally, conviction data was sought for reckless driving speeding violations of Va. Code § 46.2-862.

As illustrated in Figure 1 below, there is an average of approximately 30,943 convictions per year for failure to obey traffic lights in violation of Va. Code § 46.2-833.

Figure 1: Total Number of Convictions for § 46.2-833, CY06-CY10



Source: Virginia Department of Motor Vehicles.

As seen in Figure 2 below, there was an average of 538,900 charges and 479,900 convictions per year for speeding infractions in general district courts, over the past 6 fiscal years.

Figure 2: Total Speeding Infraction Charges and Convictions, FY06-FY11

Speeding Infraction Charges and Convictions	FY06	FY07	FY08	FY09	FY10	FY11
Total Charges in General District Court	435,047	514,457	599,857	550,430	594,139	540,021
Total Convictions in General District Court	392,056	469,348	540,184	485,790	521,509	470,505

Source: Virginia Criminal Sentencing Commission, General District Court data, FY06-FY11.

Finally, as illustrated in Figure 3 below, there was an average of 117,300 charges and 69, 500 convictions per year for exceeding the speed limit/reckless driving (Va. Code § 46.2-862 (i and ii)) in general district courts, over the past 6 fiscal years.

Figure 3: Total Speed Limit/Reckless Driving Charges and Convictions, FY06-FY11

§ 46.2-862, Charges and Convictions	FY06	FY07	FY08	FY09	FY10	FY11
Total Charges in General District Court	112,965	130,726	129,776	108,606	111,864	109,943
Total Convictions in General District Court	72,552	85,513	73,755	62,491	62,557	60,471

Source: Virginia Criminal Sentencing Commission, General District Court data, FY06-FY11

Surrounding State Review

Staff reviewed how states surrounding Virginia punish reckless driving, including:

Kentucky: Has a general reckless driving statute, similar to Va. Code § 46.2-852.[24] Failure to yield or stop is a traffic violation, just as it is in Virginia.[25] There is no automatic reckless driving offense for a specified speed or speeding over a posted limit.[26]

Maryland: Has a general reckless driving statute similar to Virginia's, but no specific reckless offenses.[27] A violation is subject to a $1,000 fine. Failure to stop or yield is penalized as a traffic offense with a fine and speeding is penalized with a fine or as a point violation.[28]

North Carolina: The general reckless driving statute prohibits driving performed "carelessly and heedlessly in willful or wanton disregard of the rights or safety of others."[29] Failure to yield or to stop is penalized with a fine, and if doing so causes an

injury or death, it is a mandatory $500 fine.[30] Exceeding the speed limit by 15 mph, or in excess of 80 mph, is an automatic suspension of license.[31]

Tennessee: The reckless driving statute is very similar to Va. Code § 46.2-852; however riding a motorcycle on one wheel or driving through a flood warning sign is considered to be reckless driving as well.[32] Failure to yield or stop is punished with a fine, but if injury or death occurs, there is a mandatory fine of $250 or $500, respectively.[33] Speeding is punished by a fine or point violation, unless it is considered to be reckless driving.[34]

West Virginia: Reckless driving is very similar to § Va. Code 46.2-852; however, the penalties can include minimum jail time and a fine up to $500.[35] Failure to yield or stop is a fined offense, up to $1,000.[36] Speeding is generally a fined offense; however, if there are three or more convictions within a given time frame, the fines go up or there is the possibility of up to six months jail time.[37]

Overall, based on a review of Virginia's reckless driving statutory scheme, it appears Virginia has a much stricter system than its bordering states. Additionally, in Virginia, a far wider array of conduct is considered to constitute reckless driving.

Conclusion

In Virginia, reckless driving is considered a crime and not treated as a traffic infraction. In addition to a "general" reckless driving statute, there are 13 specific reckless driving crimes. When compared to the states surrounding Virginia, the statutory scheme in Virginia is significantly broader and penalizes reckless conduct as a crime, instead of a traffic violation.

The Crime Commission took no action to increase the penalty for failure to yield from a traffic violation to a Class 1 misdemeanor nor to increase the reckless driving speeding from 80 mph to 90 mph.

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[1] H.B. 1993, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).
[2] H.B. 2322, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).
[3] VA. CODE ANN. § 46.2-829 (2011).
[4] VA. CODE ANN. § 46.2-853 (2011).
[5] VA. CODE ANN. § 46.2-854 (2011).
[6] VA. CODE ANN. § 46.2-855 (2011).
[7] VA. CODE ANN. § 46.2-856 (2011).
[8] VA. CODE ANN. § 46.2-857 (2011).
[9] VA. CODE ANN. § 46.2-858 (2011).
[10] VA. CODE ANN. § 46.2-859 (2011).
[11] VA. CODE ANN. § 46.2-860 (2011).
[12] VA. CODE ANN. § 46.2-861 (2011).
[13] VA. CODE ANN. § 46.2-862 (2011).

[14] VA. CODE ANN. § 46.2-863 (2011).
[15] VA. CODE ANN. § 46.2-865 (2011).
[16] Powers v. Commonwealth, 211 Va. 386, 177 S.E.2d 628 (1970).
[17] Id.
[18] Id.
[19] Id.
[20] Hall v. Commonwealth, 25 Va. App. 352, 488 S.E.2nd 651 (1997).
[21] Id.
[22] Kennedy v. Commonwealth, 1 Va. App. 469, 399 S.E.2nd 905 (1997).
[23] Robinson v. Commonwealth, 48 Va. App. 623, 633 S.E.2nd 737 (2006).
[24] KY. REV. STAT. ANN. § 189.290 (West 2011). Requires the "operator of any vehicle upon a highway shall operate the vehicle in a careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway."
[25] KY. REV. STAT. ANN. § 189.993 (West 2011).
[26] KY. REV. STAT. ANN. § 532.020(4) (West 2011).
[27] MD. CODE ANN., TRANSP. § 21-901.1 (West 2011). The statute defines reckless driving as "wanton or willful disregard for the safety of persons or property; or in a manner that indicates a wanton or willful disregard for the safety of persons or property."
[28] MD. CODE ANN., TRANSP. § 21–801.1 (West 2011).
[29] N.C. GEN. STAT. ANN. § 20-140 (West 2011).
[30] N.C. GEN. STAT. ANN. § 20-160.1 (West 2011).
[31] N.C. Gen. Stat. Ann. § 20-16.1 (West 2011).
[32] TENN. CODE ANN. § 55-10-205 (West 2011).
[33] TENN. CODE ANN. § 55-8-197 (West 2011).
[34] TENN. CODE ANN. § 55-8-152 (West 2011).
[35] W. VA. CODE ANN. § 17C-5-3 (West 2011).
[36] W. VA. CODE ANN. § 17C-9-6 (West 2011).
[37] W. VA. CODE ANN. § 17C-6-1 (West 2011).

Reporting of Missing Children

Executive Summary

After Casey Anthony was acquitted of murdering her child, there was public concern that existing laws did not address parents or guardians failing to report missing children. An online movement, which included the "change.org" website and a Facebook page, called for federal and state governments to enact "Caylee's Law," a new law that would penalize parents and guardians for failing to report a missing child, deceased child, or a child in danger.

Provisions under Virginia law already punish the hiding or concealing of a dead body as a Class 6 felony. Likewise, parents or guardians who fail to provide the necessary care for their child may be punished with a Class 4 felony. And finally, failure to report a death to the Virginia medical examiner's office carries the penalty of a Class 1 misdemeanor. Currently, there is no law that punishes parents or guardians for failing to report their child as missing.

As of the end of 2011, there were as many as 20 states considering adopting versions of "Caylee's Law," with pre-filed bills in Florida, Kentucky, Ohio, and Tennessee. Each state that considers a version of "Caylee's Law" will have to consider the proper time limit before a parent must report a missing child, the age of the child missing, at what age a child would no longer fall within the requirements of mandatory reporting, and which agencies would receive the report. Another important concern about enacting "Caylee's Law" is the possibility that parents will feel compelled to report a child missing, to avoid prosecution, which could lead to over-reporting, straining already limited law enforcement resources.

As a result of this study, no formal recommendations were made by the Crime Commission.

Background

Since the acquittal of Casey Anthony in a Florida state court for the death of her daughter, Caylee, there has been widespread public interest, notably on www.change.org and Facebook, to enact a federal or state law to penalize parents who fail to report a missing child within 24 hours of his or her disappearance.[1] Specifically, the public's concern focused on the fact that Ms. Anthony allegedly could not be prosecuted for failing to report her daughter's disappearance to law enforcement under Florida law.[2] The petition requests the President of the United States, representatives of the U.S. Congress, and legislators from the 50 states to adopt the following statute:

Make it a felony for a parent, caretaker or guardian that does not notify law enforcement with knowledge of a missing, deceased, [child] or child in a life threatening situation in a timely manner.[3]

Virginia Law

In Virginia, there are three relevant statutes that address the core requirements of the change.org petition: Va. Code §§ 18.2-323.02, 18.2-371.1(A), and 32.1-283.

- Va. Code § 18.2-323.02 prohibits the concealment of a dead body, specifically: Any person who transports, secretes, conceals or alters a dead body, as defined in § 32.1-249, with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or the manner or cause of death is guilty of a Class 6 felony.

- Va. Code § 18.2-371.1(A) penalizes parents, guardians, or persons responsible for care of a child for willful acts or omissions "or refusal to provide any necessary care for the child's health [and thereby] causes or permits serious injury to the life or health of such child." A violation of this section is a Class 4 felony.

- Va. Code § 32.1-283 requires notification to the medical examiner of deaths by "trauma, injury, violence, poisoning, accident, suicide or homicide, or suddenly when in apparent good health, or when unattended by a physician." Failing to comply with this section is a Class 1 misdemeanor.

Additionally, the Virginia State Police (VSP) are required by statute to maintain the Missing Children Information Clearinghouse.[4] Based on the requirement in Va. Code §15.2-1718, the VSP must enter reports of missing children in the clearinghouse.[5] In general, the VSP have three relevant categories in which missing children cases can be classified:

1. Endangered Child: missing under circumstances indicating his/her physical safety is in danger.

2. Involuntary Child: missing under circumstances indicating the disappearance was not voluntary.

3. Juveniles: Child under 18 years of age who is missing but not considered endangered or involuntary. This category should not include children under 12 years of age.

On July 21, 2011, there were a total of 383 open cases of missing children.[6] Of the 383 open cases: 6 cases were categorized as endangered; 11 cases were involuntary; and, 366 cases were juvenile.

Other State Review

Perhaps due to the publicity of the change.org petition, to date, up to 20 states are considering legislation.[7] Overall, the current pre-filed legislation varies in a few of the states in some respects:

- Time requirements of reporting: 12hrs,[8] 24 hrs,[9] or 48 hrs;[10]
- Extent of reporting requirements: missing,[11] death,[12] or location of corpse;[13]
- Age of the child: 12 years old or younger,[14] 16 or younger,[15] under age 18;[16] and,
- Penalties: misdemeanor,[17] or felony.[18]

Policy Considerations

With the consideration of a "Caylee's Law," state legislatures will have to carefully consider some of the following issues:

- Timeframe of reporting – The time frames of 12, 24, or 48 hours which have been proposed as the cutoff time for when the crime would be committed, could be problematic for parents (guardians) if is not clearly specified how it would be applied. For example, would the time period commence from the time the parents know the child is missing or from when the parents know the child is dead? Careful drafting could prevent any problems with these potential situations.

- Definition of "life threatening situation" or "imminent danger"- First, the term "life threatening situation" needs to be clearly defined, or parents who have allowed their children permission to do certain activities that result in death could be later prosecuted for not alerting law enforcement, because the activity could be deemed a "life threatening situation." This portion of the proposed statute has the potential to be used to second guess parental decisions. Second, the term could be construed in an over- inclusive manner, resulting in the prosecution of well meaning parents who were more concerned with rescuing or aiding their child, than with reporting the situation to law enforcement.

- Reporting authority - Missing reports go to law enforcement or 911 call centers, but deaths are often reported to EMT/hospitals, medical examiners, or funeral homes. Any requirement to report a death should involve clearly defined authorities.

- Misuse in custody situations - As with any law affecting the welfare of child, such a law has the potential to be abused in custody situations. Consideration should be made to honest mistakes with parental custody and visitation situations, and other problems associated with the exchange of custodial duties or physical custody.

- Overuse of reporting - And finally, there are concerns that parents will feel forced to report a potentially missing child to avoid prosecution, and that law enforcement resources could be stretched thin by numerous reports. There is anecdotal evidence this situation has occurred in other states with over-frequent use of Amber Alert systems. If the police become inundated with reports, there is the possibility of law enforcement developing an attitude that missing children are simply a routine procedure, to be handled in the course of other everyday activities.

Conclusion

Under Virginia Code, the failure to report a death and hiding a dead body are already penalized. However, there is no current law that punishes parents or guardians for failing to report a missing child. The Crime Commission considered legislation that would penalize a parent, guardian, legal custodian, or person standing in loco parentis who fails to report a missing child, age 9 or under, to law enforcement within 24 hours. After deliberation, no formal recommendations were made by the Crime Commission.

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[1] http://www.change.org/petitions/create-caylees-law.
[2] Id.
[3] Id.
[4] VA. CODE ANN. §§ 52-31 – 52-34 (West 2011).
[5] VA. CODE ANN. §15.2-1718 (West 2011). Specifically the VSP are required, "Upon receipt of a missing child report by any police or sheriff's department, the department shall immediately, but in all cases within two hours of receiving the report, enter identifying and descriptive data about the child into the Virginia Criminal Information Network and the National Crime Information Center Systems, forward the report to the Missing Children Information Clearinghouse within the Department of State Police, notify all other law-enforcement agencies in the area, and initiate an investigation of the case."
[6] According to the VSP, these figures represent a snapshot of missing children on July 21, 2011, rather than a cumulative total since cases open and close each day. At this time, data cannot be obtained for total missing children per year.
[7] Joshua Wolfson, *Wyoming Legislators Grant More Time to Study Caylee's Law*, Casper Star-Tribune (August 31, 2011), *available at* http://billingsgazette.com/news/state-and-regional/wyoming/article_23fb1eeb-5407-5013-8f9e-d368f66c21fc.html
[8] H.B. 1993, 2011 Gen. Assemb., Reg. Sess. (KY 2012).
[9] H.B., 129th Gen. Assemb., Reg. Sess. (OH 2011-2012).
[10] H.B. 14, 2012 Florida Leg., General Session (FL 2012).
[11] H.B. 1993, 2011 Gen. Assemb., Reg. Sess. (KY 2012); H.B., 129th Gen. Assemb., Reg. Sess. (OH 2011-2012); H.B. 14, 2012 Florida Leg., General Session (FL 2012).
[12] H.B., 129th Gen. Assemb., Reg. Sess. (OH 2011-2012) and H.B. 14, 2012 Florida Leg., General Session (FL 2012).
[13] H.B., 129th Gen. Assemb., Reg. Sess. (OH 2011-2012).
[14] H.B. 1993, 2011 Gen. Assemb., Reg. Sess. (KY 2012).
[15] H.B., 129th Gen. Assemb., Reg. Sess. (OH 2011-2012).
[16] S.B. 2124, Gen. Assemb., Reg. Sess. (TN 2011).
[17] S.B. 2124, Gen. Assemb., Reg. Sess. (TN 2011).

[18] H.B. 14, 2012 Florida Leg., General Session (FL 2012); H.B., 129th Gen. Assemb., Reg. Sess. (OH 2011-2012); H.B. 1993, 2011 Gen. Assemb., Reg. Sess. (KY 2012).

Sex Offender Registry

Executive Summary

During the 2011 Regular Session of the Virginia General Assembly, Senate Joint Resolution 348 was enacted, which directed the Crime Commission to study and report on sex offender registry requirements. The resolution specifically directed the Crime Commission to focus on the requirements imposed by the federal government and the extent to which Virginia is currently in compliance with those requirements. The resolution also directed the Crime Commission to determine whether registration and notification laws are effective methods of reducing sexual victimizations.

Sex offender registry laws are a relatively new development in the field of public safety. To date, there have been only a few peer reviewed academic studies that have examined the effectiveness of registries in reducing sex crimes. Those that have been published have not reached a definitive conclusion on this issue. The different laws and registry schemes used in other states prevents generalizing the results of these studies to Virginia. While criminologists, sociologists, and other researchers will continue to study the effects of sex offender registries in the coming years, at this point, any attempt to derive a final conclusion from the available studies would be premature.

In 2006, Congress passed the Sex Offender Registration and Notification Act, or SORNA, requiring states to maintain sex offender registries and providing detailed requirements on how those registries must be maintained and updated, as well as which criminal convictions must result in registration, and for what lengths of time. SORNA categorizes all sex offenders into three "Tiers," depending upon the seriousness of the crime for which the offender was convicted. States are free to develop their own systems of categorization, provided that all offenders are on the states' registries for as long as they would be under the federal scheme. SORNA requires juvenile sex offenders, 14 years of age or older, who have been convicted of violent sex offenses to be registered. This requirement applies even if the juvenile was tried as a juvenile and did not receive an adult conviction.

Virginia categorizes all sex offenders into two "Tiers": registered sex offenders, and offenders who have been convicted of a "sexually violent offense." Under Virginia law, juveniles who have been adjudicated delinquent of a sex offense may be required to register, if the prosecutor requests this, and the trial judge makes a specific determination that the circumstances of the offense require the juvenile to be registered. Registration of juveniles is not automatic, however. As of July 17, 2011, there were a total of 18,287 offenders in total on Virginia's sex offender registry; 3,308 were convicted of a registerable sex offense, and 14,979 were convicted of a "sexually violent offense."

States which fail to substantially comply with the requirements of SORNA are subject to a ten percent reduction in the amount of Byrne funding they receive. While the amount

of Byrne funding Virginia has received has varied considerably over the years, in Fiscal Year 2010, Virginia received approximately $5,934,000, meaning that Virginia could lose approximately $600,000 if it is determined that Virginia's statutes do not substantially comply with SORNA. It was preliminarily determined that Virginia's laws do not meet the requirements of SORNA, due to the fact that juvenile offenders who have committed violent sex crimes are not automatically required to be registered. This determination by the federal government was reviewed pursuant to a formal request by Virginia. On December 6, 2011, the federal government formally re-affirmed its determination that Virginia is not in compliance with SORNA due to this issue.

As Virginia law already allows for the registration of juvenile offenders in cases where it is determined that the facts of the crime are particularly serious, the Crime Commission recommended that Virginia not amend its sex offender registry laws to require mandatory registration for juveniles. Doing so would interfere with the discretion of judges to limit registration of juveniles to those cases where it would be most appropriate.

For the complete report on the Sex Offender Registry study,
please see Senate Document 8 (2012) at:
http://leg2.state.va.us/DLS/h&sdocs.nsf/5c7ff392dd0ce64d85256ec400674ecb/1342e660f75433a285257989005c9167?OpenDocument

Soliciting a Minor to Enter a Vehicle

Executive Summary

During the 2011 Regular Session of the Virginia General Assembly, Delegate Robert Bell introduced House Bill 2396, which proposed to create a new criminal statute, making it a crime for an adult to entice a minor into a motor vehicle. A letter was sent from the Senate Courts of Justice Committee, asking the Crime Commission to review the subject matter of the bill.

In most cases, when an adult with an unlawful intent solicits a child to accompany him in a motor vehicle, he will be subject to a successful prosecution, either for the crime of indecent liberties, or the crime of attempted abduction. However, there are some cases where such a prosecution could be very difficult—the adult has not made any overt sexual suggestions to the child, and the offer of the ride, while extremely suspicious under the circumstances, might not be sufficient to prove beyond a reasonable doubt that the offer was, in reality, an attempted abduction. In such cases, having a strict liability crime for this type of behavior would be very helpful to prosecutors; the mere offer of the ride, without any further evidence, would be sufficient for a criminal conviction.

Currently, six states make it a strict liability crime for an adult to offer a ride to a minor. In these states, it is either an affirmative defense, or not made illegal by the statute, for an adult to offer a ride to a minor under circumstances where it appears the safety or well-being of the minor are at risk.

The Crime Commission considered the advisability of creating a similar, strict liability crime in Virginia. After deliberating, the Commission declined to endorse such legislation.

Background

During the 2011 Regular Session of the Virginia General Assembly, Delegate Robert Bell introduced House Bill 2396 (HB 2396), which proposed to create a new criminal statute, making it a crime for an adult to entice a minor into a motor vehicle.[1] The bill was referred to the Senate Courts of Justice Committee, where it was passed by indefinitely; a letter was sent to the Crime Commission asking for a review of the subject matter of the bill. The proposed statute, as passed by the House of Delegates, was as follows:

§ 18.2-47.1. Unlawful solicitation of a child by an adult; penalty.

> *Any adult who, by an offer of something of value or by misrepresentation of his identity, allures, persuades, invites or entices a minor [who is three or more years younger than the adult] to enter a motor vehicle is guilty of a Class 1 misdemeanor.*
>
> *There shall exist a rebuttable presumption that any of the following persons who allure, persuade, invite or entice a minor to enter a motor vehicle are not in violation of this section: a law-enforcement officer in the performance of his duties, the minor's family or household member as defined in § 16.1-228, a guardian of the minor, or any person who has permission, granted by an adult family or household member of the minor or the guardian of the minor, to transport the minor.*

The intent of the statute is to make it a crime for predatory adults to invite or lure minors into motor vehicles, under circumstances where no additional crime, or criminal intent, can be shown. An example of the type of behavior this statute is designed to prohibit would be a strange adult inviting a young child into his car to receive some candy, or to take a trip to a distant amusement park.[2]

In Virginia, it is already a crime, indecent liberties, for an adult to "entice, allure, persuade, or invite any…child [under the age of 15] to enter any vehicle, room, house, or other place, for any [sexual purpose]…."[3] The proposed new statute would therefore be applicable in situations where a sexual intent on the part of the adult could not be directly proven or inferred. The enactment of a statute that does not have an intent requirement, though, creates the possibility that innocent conduct, or the actions of a good Samaritan trying to help a lost child seen by the side of a road, could result in a criminal prosecution.

Analysis

REVIEW OF OTHER STATES' STATUTES

A review of other states' statutes found that most states have enacted legislation similar to the existing crime of indecent liberties in Virginia. These statutes make it a crime for an adult to invite or lure a child into a motor vehicle, with the intent of committing a sexual act or other crime. A small number of states, though, have created statutes that are similar to HB 2396—they create a crime that focuses on the act of invitation, by itself, without any additional elements of sexual or criminal intent. These statutes can be classified into three categories: a criminal intent can be inferred from the fact that an invitation for a ride was given; the invitation for a ride is a crime, in and of itself; and, the offer of a ride is made the equivalent of attempted abduction.

A. Statutes where a criminal intent can be inferred

Two states, Illinois and Florida, had statutes where the offer of a ride allowed an inference to be made that the offer was for an unlawful purpose. In both states, though,

a state appellate court ruled that this statutory presumption was unconstitutional. The Illinois and Florida statutes are enforceable, but without the statutory inference. Illinois' statute reads:

> A person commits the offense of child abduction when he or she…intentionally lures or attempts to lure a child under the age of 16 into a motor vehicle…without the consent of the child's parent or lawful custodian for other than a lawful purpose. [T]he luring or attempted luring…without the consent of the child's parent or lawful custodian is prima facie evidence of other than a lawful purpose.[4]

The Illinois Supreme Court held that the prima facie presumption in this statute is facially unconstitutional, though the presumption was severable, and thus, the statute could still be used to prosecute those who lure children into motor vehicles for an unlawful purpose.[5] The Illinois legislature has not modified the statute since the ruling; thus it continues to contain the unconstitutional provision.

Florida's statute had a similar prima facie presumption that lack of parental consent equated to an unlawful purpose whenever a sex offender lured a child, under the age of 12, into a dwelling or car. When the Florida Supreme Court ruled that this prima facie presumption was unconstitutional,[6] the Florida legislature subsequently modified the statute. It currently reads:

> A person 18 years of age or older who intentionally lures or entices, or attempts to lure or entice, a child under the age of 12 into a structure, dwelling, or conveyance for other than a lawful purpose commits a misdemeanor of the first degree…[7]

Essentially, as a result of court rulings, the two states that had statutes with prima facie inferences that offering a ride to a minor was for an unlawful purpose, absent parental permission, were forced to abandon this approach to criminalizing predatory behavior. Illinois and Florida now have statutes that, at least in application, require a showing that the defendant acted with a bad intent in mind, which is what Virginia currently does with its indecent liberties statute.

B. Statutes where the invitation for a ride is a strict liability crime

Three states were identified that make it a strict liability crime for an adult to offer a juvenile a ride in a motor vehicle: Pennsylvania, Nebraska, and Washington. In all three states, the crime is committed when the invitation is made, and no additional motive or intent on the part of the adult must be proven for a conviction. One other state, Ohio, was identified as having had such a statute; however, the statute was declared unconstitutional, and has since been amended to require that a bad intent on the part of the defendant be shown.

Pennsylvania's statute makes it a crime, in and of itself, to lure a minor into a motor vehicle or offer a minor a ride. No additional motive or intent must be proven:

> Unless the circumstances reasonably indicate that the child is in need of assistance, a person who lures or attempts to lure a child into a motor vehicle or structure without the consent of the child's parent or guardian commits a misdemeanor….It shall be an affirmative defense…that the person lured or attempted to lure the child…for a lawful purpose.[8]

The Pennsylvania Superior Court has upheld this statute and affirmed that no ill intent on the part of the adult is required for a conviction.[9]

Nebraska has a statute that is similar, though with an affirmative defense component that is defined in more detail:

> (1)(a) No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure or attempt to solicit, coax entice, or lure any child under the age of fourteen years to enter into any vehicle, whether or not the person knows the age of the child.
>
> (2) It is an affirmative defense to a charge under this section that:
>
> (a) The person had the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity;
>
> (b)(i) The person is a law enforcement officer, emergency services provider…firefighter…the operator of a bookmobile or other such vehicle operated by the state or a political subdivision and used for informing, educating, organizing, or transporting children, is a paid employee of, or a volunteer for, a nonprofit or religious organization which provides activities for children, or is an employee or agent of or a volunteer acting under the direction of any board of education and (ii) the person listed in subdivision (2)(b)(i) of this section was, at the time the person undertook the activity, acting within the scope of his or her lawful duties in that capacity; or
>
> (c) The person undertook the activity in response to a bona fide emergency situation or the person undertook the activity in response to a reasonable belief that it was necessary to preserve the health, safety, or welfare of the child.[10]

There have not been any appellate court rulings, to date, regarding this statute.

Washington state has a luring statute that is similar to Pennsylvania's:

> A person commits the crime of luring if the person:

> (1)(a) Order, lure, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle;
>
> (b) Does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and
>
> (c) Is unknown to the child or developmentally disabled person.
>
> (2) It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor or the person with the developmental disability.[11]

The Washington Court of Appeals has upheld this statute and specifically ruled that having a bad or sexual intent is not an element of the crime.[12]

Ohio had a luring statute that, until 2007, did not require any specific intent on the part of the defendant:

> No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age to accompany the person in any manner, including entering into any vehicle or onto any vessel, whether or not the offender knows the age of the child, if both of the following apply:
>
> (1) The actor does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity.
>
> (2) The actor is not a law enforcement officer, medic, firefighter, or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of, any board of education, or the actor is any of such persons, but, at the time the actor undertakes the activity, the actor is not acting within the scope of the actor's lawful duties in that capacity.
>
> (B) It is an affirmative defense to a charge under division (A) of this section that the actor undertook the activity in response to a bona fide emergency situation or that the actor undertook the activity in a reasonable belief that it was necessary to preserve the health, safety, or welfare of the child.[13]

After the statute was modified in 2007 to include a section adding a "sexual motivation" to the crime,[14] one of Ohio's Courts of Appeals held that the previous version of the statute, without the "sexual motivation" section, was unconstitutional.[15] The Court

focused upon the fact that the statute criminalized, not just inviting a minor into a car, but inviting a minor to accompany an adult "in any manner." This, combined with the fact that there was no sexual intent required for the crime to be committed, resulted in a statute that was unconstitutionally overbroad. The Court held that:

> [T]he statute very well might criminalize a senior citizen asking a neighborhood boy to help her across the street, or to rake leaves in her back yard for money….The potential applications of [this statute] to entirely innocent solicitations are endless….As a result, we conclude that [this version of the statute] is substantially overbroad and unconstitutional on its face.[16]

The Court indicated in dicta, though, that the recent addition of a "sexual motivation" element to the statute might "help eliminate the overbreadth problem we have found herein."[17]

In summary, of the four states that have attempted to create a strict liability crime of inviting or luring a minor to accept a ride in a motor vehicle, two have had their statutes upheld, one has not had any appellate rulings on its statute, and one had its statute struck down for being overbroad, partly due to its including "an invitation to accompany in any manner," in the prohibited conduct.[18]

C. Statutes where the offer of a ride is deemed to be attempted abduction

While the focus of the review of the other states' statutes was to identify any states that had created a strict liability crime, similar to that proposed by HB 2396, a number of states were found where the act of attempting to lure child is deemed to be either abduction or attempted abduction. For example, in the Illinois statute, discussed above, the crime of "intentionally [luring]…a child under the age of 16 into a motor vehicle" is defined as a crime of "child abduction."[19] Michigan's child abduction statute is defined in even broader terms:

> A person shall not maliciously, forcibly, or fraudulently lead, take, carry away, decoy, or entice away, any child under the age of 14 years, with the intent to detain or conceal the child from the child's parent or legal guardian….A person who violates this section is guilty of a felony, punishable by imprisonment for life or any term of years.[20]

While there is no element of inviting the minor into a motor vehicle in this statute, it is made a crime, generally, to fraudulently entice a child away, with the intent to conceal the child from his parents.

Under a number of scenarios, this statute might not prove sufficient to sustain a conviction against a stranger who invites a young child to come with him for a ride. For instance, the requirement of concealment, or the requirement of showing actual fraud or malice, might prove difficult. While general abduction statutes demonstrate a slightly different approach to criminalizing the predatory behavior of adults, especially strangers, who invite young children to accompany them in automobiles, their focus does not quite accomplish the goal of HB 2396.

Conclusion

Under most circumstances, an adult who attempts to solicit a child to accompany him in a motor vehicle, with a bad intent, will be subject to a successful prosecution, either for the crime of indecent liberties, or attempted abduction. However, there are a few scenarios where such a prosecution could be very difficult—no specific intent of an illegal or sexual nature can be shown, and the general circumstances of the interaction between the adult and the child, while suspicious, are capable of an innocent, though unlikely, explanation. For these situations, it could be helpful for law enforcement and prosecutors to have a more general criminal statute available to them, one which criminalizes, in a strict liability way, an adult who invites a young child to accompany him in an automobile. However, such a statute must also contain an exception to cover "good Samaritan" offers of assistance to unaccompanied children who appear to be lost or in need of transportation, and exceptions for those adults who, in the regular course of their duties, might reasonably be expected to offer a child a ride. Examples of such occupations would include law enforcement, emergency service providers, school bus drivers, and others who provide services to young children on a regular basis.

After deliberation, the Crime Commission declined to endorse the creation of a strict liability crime in Virginia that would penalize adults who offer automobile rides to children, without any additional showing of bad intent.

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[1] H.B. 2396, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).
[2] Each of these scenarios was reported as having occurred in Virginia in 2010. In both cases, there were no additional statements or actions made by the adult; no criminal prosecutions were initiated.
[3] VA. CODE ANN § 18.2-370 (2011).
[4] 720 Ill. Comp. Stat. Ann. 5/10-5(b)(10) (West 2010).
[5] People v. Woodrum, 860 N.E.2d 259 (Ill. 2006).
[6] State v. Brake, 796 S.2d 522 (Fla. 2001).
[7] FL. STAT. ANN. § 787.025(2)(a) (West 2011). If the defendant previously has been convicted of a sex offense, which was where the prior prima facie presumption came into play, then the crime is a felony, not a misdemeanor. FL. STAT. ANN. § 787.025(2)(b), (c) (West 2011).
[8] 18 PA. CONS. STAT. ANN. § 2910 (West 2010).
[9] Commonwealth v. Figueroa, 648 A.2d 555 (Pa. Super. 1994).
[10] NEB. REV. STAT. ANN. § 28-311(a)(1), (b) (West 2011). Section a(2), omitted from the citation, was added to the statute in 2011, and criminalizes inviting a minor into a location with the intent to seclude the minor from his parents or the general public.
[11] WASH. REV. CODE ANN. § 9A.40.090 (West 2011).
[12] State v. Crowl, 119 Wash. App. 1033, 2003 WL 22794534 (Div. 2 2003).
[13] OHIO REV. CODE ANN. § 2905.05 (West 2006).
[14] *See* OHIO REV. CODE ANN. § 2905.05 (West 2011). The statute has not been modified since the last amendments made in 2007.
[15] State v. Chapple, 888 N.E.2d 1121 (Ohio 2008).
[16] Id. at 1125-1126.
[17] Id. at 1126.

[18] Earlier versions of the Ohio statute, which were limited to invitations to enter into a motor vehicle, had been upheld by other Ohio Courts of Appeals. State v. Long, 550 N.E.2d 522 (Ohio 1989); State v. Kroner, 551 N.E.2d 212 (Ohio 1988).
[19] 720 ILL. COMP. STAT. ANN. 5/10-5(b)(10) (West 2010).
[20] MICH. COMP. LAWS ANN. § 750.350 (West 2011).

Unrestorably Incompetent Defendants

Executive Summary

During the 2011 Regular Session of the Virginia General Assembly, Delegate Robert Bell introduced House Joint Resolution 626 (HJR626), which directed the Crime Commission to study the disposition of unrestorably incompetent defendants, and assess whether the available disposition options are adequate to deal with all defendants who are found to be unrestorably incompetent regardless of the underlying reason for the incompetency. While House Joint Resolution 626 (HJR 626) was left in the House Rules Committee, the patron of the resolution directly requested the Crime Commission to study its general subject matter.

In Virginia, when a criminal defendant is found incompetent to stand trial, the court issues an order directing that the defendant receive treatment, with the goal of restoring him to competency. In the event the treatment provider reports to the court that the defendant has not been restored to competency, and is not likely to be restorable to competency in the foreseeable future, and the court agrees with this determination, the defendant is then usually subject to a civil commitment petition. In those rare instances where, in the separate civil proceeding, the defendant is found to not meet the standard for involuntary civil commitment, he must be released back into the general public. If the defendant is still suffering from a mental disorder, it creates the possibility that he could commit a new crime, be found incompetent to stand trial on the new criminal charges, and the process would repeat itself.

The Crime Commission considered the possibility of creating a new standard for involuntary civil commitment for respondents recently found incompetent to stand trial in a criminal case. However, creating two sets of standards for civil commitment cases could be problematic. Instead, the Crime Commission recommended that the involuntary commitment statute be modified, to emphasize to judges and special justices that if a respondent has recently been found incompetent to stand trial, that fact may be considered, provided it is properly admitted into evidence.

Background

During the 2011 Regular Session of the Virginia General Assembly, Delegate Robert Bell introduced HJR 626, which directed the Crime Commission to study the disposition of unrestorably incompetent defendants, and assess whether the available disposition options are adequate to deal with all defendants who are found to be unrestorably incompetent regardless of the underlying reason for the incompetency.[1] While HJR 626 was left in the House Rules Committee, the patron of the resolution directly requested

the Crime Commission to study its general subject matter: what options are available when a criminal defendant is found to be unrestorably incompetent to stand trial, and is later found in a civil commitment hearing to not meet the standard for involuntary commitment? Are the available statutory dispositions, created by the legislature, adequate to deal with those defendants who might repeatedly commit crimes, repeatedly be found incompetent to stand trial, and then, in a civil proceeding, be found to not meet the standard for involuntary commitment?

Analysis

In Virginia, when a criminal defendant is found to be incompetent to stand trial, the court issues an order that the defendant receive treatment to restore him to competency.[2] Such treatment may be provided on an outpatient basis, or, if the court specifically finds that the defendant needs inpatient hospital treatment, he may be ordered to receive treatment at a hospital designated by the Commissioner of the Department of Behavioral Health and Developmental Services.[3] The treatment provider must send a report to the court within six months, stating whether the defendant has been returned to competency, or has not been restored to competency, but is restorable to competency in the foreseeable future, or is incompetent and is likely to remain so for the foreseeable future.[4] If the court finds that the defendant is incompetent, but is restorable to competency in the foreseeable future, it may order that the defendant continue to receive treatment in six month intervals.[5]

If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, i.e., is unrestorably incompetent, then there are four dispositional options available:[6]

- the defendant can be released;
- the defendant can be committed pursuant to the regular involuntary civil commitment process as outlined in Va. Code § 37.2-814 et seq.;
- if the defendant has mental retardation, he can be certified as eligible for placement in a training center, pursuant to the certification process outlined in Va. Code § 37.2-806 et seq.; or,
- if the defendant is charged with having committed a sexually violent offense, he must be reviewed for possible commitment as a sexually violent predator, as provided for in Va. Code § 37.2-900 et seq.

Normally, if the defendant does not have mental retardation and is not charged with a sexually violent offense, the second option will be followed, and the defendant will be the subject of a petition to have him civilly committed. The standard for a person to be involuntarily civilly committed is provided in Va. Code § 37.2-817(C). The judge or special justice must find by clear and convincing evidence that:

> (a) the person has a mental illness and there is a substantial likelihood that, as a result of mental illness, the person will, in the near future, (1) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (2) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, and (b) all available less restrictive treatment alternatives to involuntary inpatient treatment, pursuant to subsection D, that would offer an opportunity for the improvement of the person's condition have been investigated and determined to be inappropriate…

This standard was created in 2008 as part of the revisions that were made to Virginia's mental health statutes, and was designed to make it easier for respondents to be involuntarily civilly committed.[7] The former standard, prior to 2008, required a showing that the respondent "presents an imminent danger to himself or others."[8]

Even with this easier standard, though, it is possible for a respondent, who begins the involuntary civil commitment process as a result of being found unrestorably incompetent to stand trial on a criminal charge, then to be found by a judge or special justice to not meet the standard required for civil commitment. In that event, the respondent would have to be released, either completely free or on the condition of receiving out-patient treatment.[9] This, in turn, could lead to a scenario where the respondent then commits another crime, is evaluated for competency, is found by the criminal court to be unrestorably incompetent, and the process repeats itself.

This presents an important public policy question for Virginia's legislature--do Virginia's statutes provide enough protection to the public? Currently, the statute that governs the possible dispositions for defendants found unrestorably incompetent directly cites the general involuntary commitment statutes.[10] Should the civil commitment standard that is used for those respondents who have recently been found unrestorably incompetent be the same as for respondents in general, i.e., those respondents who have not been recently charged with a crime?

The United States Supreme Court has held that due process and equal protection concerns apply to state civil commitment proceedings involving defendants who have been found incompetent to stand trial.[11] A state may not create a process whereby an incompetent defendant is automatically civilly committed, and is then denied the opportunity to have a meaningful review of his condition after institutionalization, while at the same time, other committed individuals have a much easier chance of eventually being released.[12] However, the Supreme Court has not mandated that the civil commitment process applicable to criminal defendants must be identical to the general involuntary commitment process.[13] While most state statutes are like Virginia's, in that the statute that governs unrestorably incompetent defendants directly references the statute or statutes governing general involuntary commitments,[14] or uses the same standard and essentially the same language as found in the general statute,[15] some states do have a slightly different process for those respondents who were initially referred for possible commitment after being found incompetent to stand trial for a criminal charge.[16]

Therefore, as long as Virginia's procedures satisfied the basic elements of due process, it would probably be constitutional for the legislature to create a slightly different standard for the involuntary commitment of unrestorably incompetent defendants, than the standard used for all other respondents. Three possible new standards, suggested by current language in the Code of Virginia, would be:

- A standard similar to that used for the commitment of sexually violent predators—because of his mental illness, the respondent finds it difficult to control his violent or predatory behavior;[17]

- A standard similar to that used for determining if a mental patient should be released after having been involuntarily committed—will the respondent engage in behavior that is detrimental to the public welfare or injurious to himself;[18] or,

- A standard that slightly modifies the existing language of Va. Code § 37.2-817(C)—will the respondent cause physical harm to himself or others, rather than the higher standard of "serious physical harm."

Conclusion

The Crime Commission discussed the possibility of creating a slightly different standard for the involuntary commitment of respondents who were recently found to be unrestorably incompetent to stand trial for a criminal charge. The Crime Commission decided that a different standard should not be created for this group of respondents. Instead, the existing statute, Va. Code § 37.2-817(C), could have language inserted that would emphasize to the judge or special justice that the fact that the respondent had recently been found to be unrestorably incompetent to stand trial, or had recently been charged with a crime, could be considered in making his ruling. Already, Virginia's statute allows the judge or special justice to consider "any past actions of the person," "any examiner's certification," and "any other relevant evidence that may have been admitted."[19] Therefore, adding language that would include the phrase "including the fact that the person has recently been found to be unrestorably incompetent to stand trial for a criminal charge," would not be a substantive change in the law. Rather, it would simply provide an emphasis to the judge or special justice that this fact should not be forgotten or deemphasized in determining whether or not the respondent might, in the near future, cause serious physical harm to himself or others.

The Crime Commission unanimously voted to recommend that this language be added to Virginia's involuntary commitment statute.

During the 2012 Regular Session of the Virginia General Assembly, Delegate Robert Bell introduced House Bill 972, which added the Crime Commission's recommended language to the involuntary commitment statute.[20] After passing both the House of Delegates and the Senate, this bill was signed into law by the Governor on March 30, 2012.[21]

[1] H.J. Res. 626, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).
[2] VA. CODE ANN § 19.2-169.2(A) (2011).
[3] Id.
[4] VA. CODE ANN §§ 19.2-169.2(B), 19.2-169.3(A)-(B) (2011).
[5] VA. CODE ANN § 19.2-169.3(B) (2011).
[6] VA. CODE ANN § 19.2-169.3(A) (2011).
[7] 2008 Va. Acts chs. 779, 780, 782, 793, 850, 870.
[8] VA. CODE ANN § 37.2-817(B) (2007).
[9] VA. CODE ANN § 37.2-817(D) (2011).
[10] As discussed *supra*, Va. Code § 19.2-169.3 directly references Va. Code § 37.2-814 et seq. as a process to be followed when a defendant is determined to be unrestorably incompetent to stand trial.
[11] Jackson v. Indiana, 406 U.S. 715 (1972).
[12] Id.
[13] Jones v. United States, 463 U.S. 354 (1983). *See also*, United States v. Sahhar, 917 F.2d 1197 (9th Cir. 1990).
[14] *See, e.g.*, N.C. GEN. STAT. § 15A-1002(b1) (2011), KY. REV. STAT. ANN. § 504.080(7) (West 2011); TENN. CODE ANN. § 33-7-301(b)(1)(B) (West 2011).
[15] *See, e.g.,* MD. CODE ANN., CRIM. PROC. § 3-106 (West 2011).
[16] *See, e.g.,* W. VA. CODE § 27-6A-3 (2011).
[17] *Cf.* VA. CODE ANN § 37.2-900 (2011).
[18] VA. CODE ANN §§ 37.2-837, 37.2-838 (2011). This is not an evidentiary standard used in legal hearings, but is the standard of evaluation that the director of a hospital is to use when determining whether or not a mental patient can be discharged.
[19] VA. CODE ANN § 37.2-817(C) (2011).
[20] H.B. 972, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).
[21] 2012 Va. Acts ch. 451.