

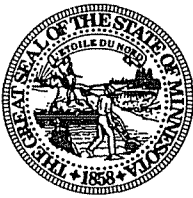
Psychopathic Personality Commitment Law

February 1994

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JAMES R. NOBLES, LEGISLATIVE AUDITOR

February 25, 1994

Members

Legislative Audit Commission

In June 1993, the Legislative Audit Commission directed the Program Evaluation Division to conduct a study of state sponsored programs for sex offenders. This report, the first of two we are publishing on this topic, focuses on the implementation of the psychopathic personality commitment law. Enacted in 1939, the law was used relatively infrequently until 1991.

We found that use of the law has risen sharply since 1991, primarily to confine high-risk sex offenders indefinitely in a state security hospital after they have served their prison sentences. We found problems in the current application of the law, resulting in part from its use after a prison stay. Further, if commitments continue at the present rate, state institutions housing psychopathic personality commitments will be filled to capacity within a few years, even though the Legislature has authorized the construction of a new facility at Moose Lake. We also found that confinement in mental health facilities is at least twice as expensive as in state prisons. We offer several options for legislative consideration, including improving or replacing the current commitment law, and allowing for indefinite confinement of sex offenders in prison.

We received the full cooperation of the Department of Corrections and the Department of Human Services. This report was researched and written by Marlys McPherson, with assistance from Mark Baloga, David Chein, and Nancy Van Maren. Dean Swenson served as a part-time intern on the project.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jim Nobles".

Jim Nobles
Legislative Auditor

A handwritten signature in black ink, appearing to read "Roger Brooks".

Roger Brooks
Deputy Legislative Auditor

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Psychopathic Personality Commitment Law

EXECUTIVE SUMMARY

In 1939, Minnesota enacted a "psychopathic personality" (PP) law that provides for indefinite civil commitment of dangerous sex offenders to the Department of Human Services for treatment. The law has been used infrequently over the past several decades. However, since 1991, county attorneys and the Attorney General's Office have increasingly used the law to commit high-risk sex offenders to the Minnesota Security Hospital at St. Peter upon their release from prison. To accommodate the increase in psychopathic personality commitments, the 1993 Legislature authorized construction of a new \$20.05 million treatment facility at Moose Lake. In addition, the Legislature has appropriated \$8.5 million to improve security and expand capacity for psychopathic personalities at the Minnesota Security Hospital.

**The
psychopathic
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1939.**

Also, the constitutionality of the psychopathic personality law has been challenged recently in court. In January 1994, the Minnesota Supreme Court issued an opinion in the first of several Appeals Court cases it has accepted for review. In a 4 to 3 decision, the Court upheld the constitutionality of the psychopathic personality statute, stating that the public's right to be protected from people with an "uncontrollable impulse to sexually assault" outweighs individuals' liberty interests.¹

In this study we ask:

- How many sex offenders have been committed as psychopathic personalities? Why has the number of cases increased over the past few years? Are current trends likely to continue?
- What standards and procedures are followed in the current psychopathic personality commitment process?
- How much does treatment cost in mental health facilities and how does this compare to treating sex offenders in other settings?
- How have other states responded to public concern about sex offenders who pose high risks to commit additional offenses?

¹ *In re Blodgett*, 490 N.W.2d 638 (Minn. App. 1992), affirmed. ____ N.W.2d ____ (Minn. 1994).

- Are changes needed to improve the commitment process? What alternative policies could the Legislature consider to deal with high-risk sex offenders?

To answer these questions, we interviewed staff from the Department of Corrections, Department of Human Services, and Attorney General's Office, assistant county attorneys and judges who handle civil commitment cases, and other knowledgeable persons. We also visited the sex offender treatment program at the Minnesota Security Hospital, collected and analyzed data on costs and number of commitments, and reviewed court cases and sentencing data. Finally, we conducted a literature review and contacted other states to learn about how they deal with high-risk sex offenders.

BACKGROUND

Laws that used civil procedures to commit sex offenders to treatment programs instead of sending them to prison were popular when Minnesota enacted its psychopathic personality statute in 1939. These laws offered community protection while stressing treatment and rehabilitation of offenders. Under Minnesota's law, a person who is emotionally unstable, impulsive, lacks good judgment, or fails to appreciate the consequences of actions, and who therefore is sexually irresponsible and dangerous to others, may be committed indefinitely to a treatment facility.² The definition of a psychopathic personality has remained unchanged since 1939.

The Minnesota Supreme Court recently upheld the constitutionality of the law.

Since the mid-1970s, most states have repealed their sexual psychopath laws because of skepticism about treatment effectiveness, an inability to predict dangerousness or diagnose sexual psychopathologies according to accepted medical standards, and public opinion that increasingly prefers punishment for sex offenders over treatment.³ Also, these laws raise serious legal questions, illustrated in the Minnesota Supreme Court's January 1994 decision. The dissenting opinion contended that the law violates the Constitution because it deprives an individual of liberty without a criminal conviction or a medically defined mental illness. The majority opinion held that the state has a "compelling interest" in protecting the public from dangerous persons and confining them for purposes of treatment.⁴

2 Minn. Stat. §526.09. A 1939 Minnesota Supreme Court case (*State ex rel. Pearson v. Probate Court*, 205 Minn. 545, 287 N.W.297, 302) narrowed the definition to persons who "by habitual course of misconduct in sexual matters, evidence an utter lack of power to control their sexual impulses," and as a result are likely to inflict injury.

3 Carol Veneziano and Louis Veneziano, "An Analysis of Legal Trends in the Disposition of Sex Crimes: Implications for Theory, Research, and Policy," *The Journal of Psychiatry and Laws* (Summer 1987), 205-225.

4 *In re Blodgett*, 490 N.W.2d 638 (Minn. App. 1992), affirmed. ____ N.W.2d ____ (Minn. 1994).

CURRENT USE OF THE PSYCHOPATHIC PERSONALITY LAW

Commitment decisions are made in district courts, based on petitions brought by county attorneys. 1992 legislation directed the Attorney General's Office to represent counties at their request in PP commitment cases (outside of Hennepin and Ramsey Counties).⁵ While the Departments of Corrections and Human Services are also involved, no single agency routinely monitors all PP commitment cases. Based on data we collected, we found that:

- A total of 71 individuals committed under the psychopathic personality law were in state facilities on September 30, 1993, with commitment decisions pending in another 23 cases.

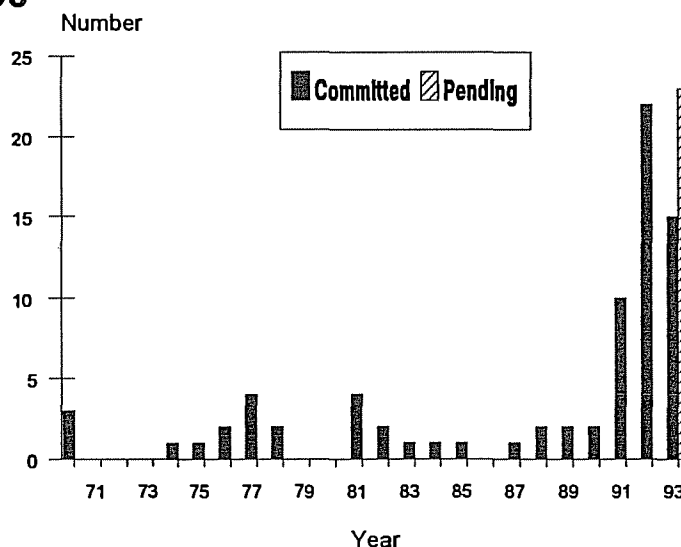
We also found that:

- Since 1991, the number of psychopathic personality commitments has increased sharply, largely because the Department of Corrections now routinely screens soon-to-be-released sex offenders and notifies county attorneys if the department thinks PP commitment may be appropriate.

Beginning in 1991, psychopathic personality commitments have increased sharply.

As illustrated in the figure, the number of psychopathic personality commitments per year was low during the 1970s and 1980s, but increased rapidly beginning in 1991. Sixty-five percent of all finalized commitments (46 of 71) occurred between January 1, 1991 and September 30, 1993.

Psychopathic Personality Commitment Cases, 1970-93



Sources: OLA analysis of data from the Departments of Corrections and Human Services, various district courts, and county attorneys.

⁵ *Minn. Laws* (1992), Ch. 571.

In 1991, the Department of Corrections began screening sex offenders for psychopathic personality referral.

In response to public outcry against several violent crimes committed by offenders who had recently been released from prison, the Department of Corrections modified its supervised release policies in July 1991. As part of its revised release policies, the department began systematically screening sex offenders for possible psychopathic personality commitment and referring these cases to county attorneys. The department took this action because, under sentencing guidelines, the state cannot hold prisoners beyond their scheduled release date, even though they may pose a high risk to reoffend. The Department of Corrections also believed that judges were not identifying potential psychopathic personality commitment cases at initial sentencing as directed by the 1989 Legislature. Also, the department thinks that sentencing judges should have been using the PP statute more consistently prior to 1989 and views its screening and referral system as a "fail-safe mechanism" designed to catch referrals missed by the courts at sentencing.

The Department of Corrections and Attorney General's Office supported changes enacted by the Legislature in 1992 that mandated the department's screening and referral process and authorized the Attorney General's Office to act on behalf of county attorneys, upon request, without charging its usual fees. Currently, the psychopathic personality law is the only means available to hold a sex offender for an indeterminate length of time.

We also found that:

- **The psychopathic personality law is being used today mainly to confine individuals who have just completed a prison sentence.**

Approximately 90 percent of those committed under the psychopathic personality statute since January 1991 had just completed a prison sentence (averaging 6.8 years) and were scheduled to be released when commitment proceedings were initiated. Over 80 percent of recent commitment cases involved individuals sentenced before 1989.

We were unable to determine the extent to which district court judges identify individuals appropriate for PP commitments at the time of criminal sentencing--referred to as a "dual commitment"--as directed by 1989 legislation, since this provision is not monitored. However, we found that:

- **Only two of the 48 final commitments that have occurred since August 1989, when the dual sentencing statute took effect, have been dual commitments.**

We also found that:

- **The majority of those committed since 1990 are recidivist sex offenders, most of whom have been offered treatment previously and either refused to participate or failed to complete it.**

On average, individuals recently committed under the psychopathic personality law have three prior convictions, multiple victims, and a history of prior treatment

The psychopathic personality law is currently the only legal way to confine high-risk sex offenders indefinitely.

failures. According to treatment professionals, many of them do not suffer from a medically diagnosable mental illness that is likely to respond to therapy (based on standardized criteria currently in use).

ADEQUACY OF PSYCHOPATHIC PERSONALITY COMMITMENT PROCEDURES

Psychopathic personality commitments are required to follow the procedures specified in *Minn. Stat. §253B*, the "civil commitment act," which also applies to mentally ill, mentally ill and dangerous, mentally retarded, and chemically dependent commitments. However, only mentally ill and dangerous and psychopathic personality commitments are for an indefinite time period.

**The
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designed to
commit people
following a
prison sentence.**

We found that:

- Current psychopathic personality commitment procedures were not designed to be used for offenders who have just served a prison sentence.

When the psychopathic personality statute was enacted in 1939 and later revised in 1969 to make its procedures the same as for civil commitment of mentally ill and dangerous persons, it was used mainly by judges at the time of sentencing. Its main purpose was to divert sex offenders for fairly brief periods of time (usually less than one year) into treatment instead of sending them to prison. Civil commitment procedures were not designed to accommodate systematic referrals from the Department of Corrections of serious, repeat sex offenders scheduled for release from prison. Now that the law is used to confine more dangerous offenders after they have been in prison, an "indefinite" commitment could become lifetime confinement. Also, since most of the individuals petitioned for PP commitment are in prison, the behaviors for which they are committed usually happened before they entered prison and much of the evidence presented at recent commitment hearings comes from inmates' prison files.

Civil commitment procedures are different from criminal procedures. As in criminal cases, individuals considered for civil commitment are entitled to counsel, but, unlike criminal cases, there is no jury trial. Also, the level of proof required ("clear and convincing evidence") is lower than in criminal cases ("beyond a reasonable doubt"). Furthermore, judges may not admit certain types of evidence in criminal cases (e.g., hearsay evidence) that they might in psychopathic personality commitment cases.

We also found that:

- **Pre-petition screening, which is required under the civil commitment act, is not required by statute in psychopathic personality commitment cases and usually is not done.**

The Department of Corrections' referral process lacks uniform standards.

Pre-petition screening is a process that includes a team, such as social workers, psychologists, psychiatrists, and other mental health or medical professionals, who interview the proposed patient and others, review the evidence, and recommend in writing to the county attorney whether a petition for commitment is appropriate. Although it is required for all other civil commitments, according to the Attorney General's Office, pre-petition screening is not required by statute in psychopathic personality commitments. Among the prosecutors we contacted, only the Ramsey County Attorney's Office routinely does pre-petition screening.

In addition, we found that:

- **The Department of Corrections' psychopathic personality screening and referral process varies by correctional facility and relies on information about offenders that varies in quantity and quality.**

The Department of Corrections' screening and referral process is not part of the formal commitment process, although the department has been legally required to screen and make referrals since 1992. Two-thirds of all PP commitment cases initiated since January 1991 originated with a Department of Corrections referral. The department's referral process is newly developed, and the department continues to refine its procedures. However, at the time of our study, we found that the five "civil commitment coordinators" at adult correctional facilities used different procedures, relied on somewhat different information, and weighed various factors differently. The Department of Corrections has developed a "sex offender screening tool," which is supposed to measure future risk to reoffend, but the civil commitment coordinators use and interpret it differently. The accuracy of the sex offender screening tool has not been established, although the department is in the process of refining it and testing its validity. Finally, information in inmates' medical and treatment files, which constitutes much of the evidence presented at commitment hearings, varies by individual and institution.

The Legislature has authorized over \$28.5 million to expand capacity for psychopathic personalities.

PREDICTING FUTURE PSYCHOPATHIC PERSONALITY COMMITMENTS

The 1993 Legislature approved construction of a new \$20.05 million, 100-bed treatment facility exclusively for psychopathic personality commitments. The new facility is scheduled to open in Moose Lake in July 1995. The Legislature has also appropriated \$8.5 million to increase security and expand capacity at the Minnesota Security Hospital at St. Peter by 50 beds. The Security Hospital will house psychopathic personalities until the new facility opens and may be used as a back-up when the Moose Lake facility is full. We think that:

- **It is likely that, absent any policy changes, between 27 and 36 additional psychopathic personality commitments will occur over the next two years.**

We found that approximately 7 percent of the sex offenders released from prison since 1991 were committed as psychopathic personalities. The Department of Corrections estimates that 449 sex offenders will be released between July 1993 and June 1995. Since most of these offenders were not sentenced under new laws, it is reasonable to expect that between 6 and 8 percent will be referred and committed. Our projections are slightly lower than the Department of Human Services', but both projections suggest that the Moose Lake facility is likely to be near capacity when it opens (assuming all current PPs at the Minnesota Security Hospital are transferred there). Minnesota Security Hospital staff estimate that most psychopathic personalities will remain in custody at least eight to ten years, with some remaining for life.

The use of the psychopathic personality statute may decline in the future because the Legislature has enacted longer sentences for sex offenses, a "patterned sex offender" statute that directs the courts to double the sentence for sex offenders who represent a danger, and mandatory 30-year and life sentences for "three-time losers." We found that:

- **Since 1989, sentences received by sex offenders have lengthened considerably, and the number of offenders sentenced under the "patterned sex offender" statute has increased each year since it took effect.**

It is much more costly to keep sex offenders in mental health facilities than in prison.

For example, the average prison sentence for individuals convicted of criminal sexual conduct in the first degree that involves force or coercion with sexual penetration increased from 6.5 years in 1986 to 10.6 years in 1992. In 1990, the first full year the "patterned sex offender" law was in effect, five individuals were sentenced under it. This number increased to 11 in 1991 and to 19 in 1992.

We also found that:

- **It costs nearly twice as much to keep people committed as psychopathic personalities at the Minnesota Security Hospital as in a maximum security prison, and it will cost even more to keep them at the Moose Lake facility.**

Department of Human Services staff estimate that operating costs at the new Moose Lake facility will be \$10,310,000 in fiscal year 1996 when the facility opens. For purposes of comparison, we standardized costs for fiscal year 1995.⁶ We estimate that in fiscal year 1995, it will cost approximately \$41,700 per year to keep a sex offender at the Oak Park Heights correctional facility, the state's most secure prison, which also operates a sex offender treatment program. This com-

⁶ The 1994-95 Biennial Budget is the source of cost data for MCF-Oak Park Heights; Minnesota Security Hospital staff provided per diem costs for its psychopathic personality unit as of October 1993. We adjusted these data by 3 percent for inflation.

pared to approximately \$79,000 in fiscal year 1995 at Minnesota Security Hospital and \$101,100 at Moose Lake (if it were open). These cost differences are largely accounted for by differences in staff-to-patient/inmate ratios and different licensing and accreditation standards.

**Only
Minnesota and
Washington
actively use
civil
commitment
for high-risk
sex offenders.**

SEX OFFENDER COMMITMENT AND TREATMENT IN OTHER STATES

We contacted staff from prosecuting attorneys' offices and mental health and corrections departments in 18 states and the District of Columbia, which includes all jurisdictions with special civil commitment laws for sex offenders. There is considerable variation in how states deal with repeat sex offenders, including whether and where treatment for sex offenders is provided. However:

- **Minnesota and Washington are the only states we could identify that actively use their civil commitment statutes to confine sex offenders in treatment facilities after they have served their prison sentences.**

We found only seven jurisdictions that retain special commitment statutes for sex offenders: Colorado, District of Columbia, Illinois, Minnesota, Tennessee, Virginia, and Washington. Staff in all jurisdictions except Minnesota and Washington told us these laws are rarely used because they were designed to divert sex offenders into treatment in lieu of prison. Washington enacted a "sexually violent predator" law in 1990 that is specifically designed to commit sex offenders indefinitely after they have served their prison sentence. Like Minnesota, Washington has sentencing guidelines that specify a prison sentence based on the severity of the crime and the offender's prior criminal record.

However, Minnesota's psychopathic personality law differs from Washington's violent sexual predator law in several respects. Washington's statute is more narrowly defined than Minnesota's and uses contemporary language. It also provides due process protections that are similar to those found in criminal procedures, and treatment is provided in mental health facilities located within correctional facilities. Fewer individuals have been committed under Washington's new law than under Minnesota's law.

**But
Minnesota's
law differs
from
Washington's
law.**

OPTIONS AND RECOMMENDATIONS

The Minnesota Supreme Court's January 1994 opinion *In re Blodgett*, upholding the constitutionality of the psychopathic personality statute, may be appealed to the U.S. Supreme Court. But for now, the uncertainty surrounding the constitutionality of the law has been resolved.

However, there are still reasons why the Legislature may want to consider changes in the way the state deals with high-risk sex offenders. In contrast to the way the

**The current
psychopathic
personality
commitment
process could
be improved.**

statute was used initially, the psychopathic personality law is being used today primarily to commit offenders after they have served their prison sentences. The civil commitment process was not designed to accommodate significant referrals from the Department of Corrections. We also found that using the psychopathic personality statute to confine dangerous sex offenders in mental health facilities is more expensive than confinement in prison.

Since the focus of our study was the existing PP commitment process and how it works, our specific recommendations are aimed at improving that process. However, for legislators who want to consider other approaches, we propose two alternatives to retaining the current law. In total, we present three options:

Option 1: Continue to rely--with procedural improvements--on the current psychopathic personality statute.

If the Legislature decides to rely on the existing psychopathic personality statute, we recommend that:

- The Conference of Chief Judges should study the appropriateness of the procedures currently applied to psychopathic personality commitments and recommend changes to the 1995 Legislature.

We think the Conference of Chief Judges should seek input from individuals and agencies actively involved in the PP commitment process. The specific issues that we think should be addressed include: whether pre-petition screening should be required in psychopathic personality commitments; whether changes in evidentiary standards applied to PP commitment cases may be needed; whether district court judges are identifying individuals for possible PP commitment at initial criminal sentencing and if not, why; and any additional procedural changes that may be needed.

In order to improve monitoring of psychopathic personality commitment cases and projections of future facility needs, we recommend that:

- The Legislature should consider directing either the Supreme Court, Sentencing Guidelines Commission, Department of Corrections, or Department of Human Services to monitor and compile data on psychopathic personality commitments and related sentencing practices and to report to the Legislature on a regular basis.

In addition, we recommend that:

- The Department of Corrections should continue to make improvements in its psychopathic personality screening and referral process, including refining and testing its "sex offender screening tool," and should establish uniform policies on what information, including that divulged during treatment, should be added to inmate files.

- **The Legislature may want to consider directing the Department of Corrections to establish these policies under the procedures provided for in the Administrative Procedure Act.**

Alternatively, the Legislature could replace the commitment law.

The Department of Corrections has been granted a broad exemption from the Administrative Procedure Act for most of its policies and rules. However, procedures like its screening and referral of potential psychopathic personality commitments have high public impact and may need broader public notice and input.

Option 2: Replace the psychopathic personality statute with a law that is more consistent with contemporary psychiatric knowledge and the way the statute is being used to confine persons indefinitely after they have served their prison sentences.

Even though the Minnesota Supreme Court upheld the constitutionality of the psychopathic personality statute, the Court's close decision and the dissenting opinion suggest there may be future problems with the existing law. Also, the statute remains the subject of court scrutiny. Hence, the Legislature may want to consider changing the law in more fundamental ways to make it more consistent with contemporary psychiatric and psychological theory, to provide for more due process protections, or to provide for treatment in less costly facilities. Washington's violent sexual predator law is a useful guide since it was designed to be used for offenders scheduled for release from prison.

Option 3: Revise existing sentencing statutes to remove sex offenses from Sentencing Guidelines and permit indeterminate prison sentences for high-risk sex offenders.

For future sex offenses, the Legislature could consider adopting indeterminate sentencing.

Finally, the current need for a civil commitment law to confine sex offenders scheduled for release from prison results from the inability of Sentencing Guidelines to achieve, simultaneously, the goals of equal punishment and public protection from high-risk sex offenders at a reasonable cost. Hence, another option the Legislature may want to consider is removing this class of offenses from the guidelines. Under this option, judges could sentence sex offenders to a mandatory minimum sentence within a high maximum sentence range. Once the minimum sentence has been served, a release panel would review the records of sex offenders to determine whether they remain a danger and require continued confinement within the prisons. Sex offender treatment would continue to be available in prison. However, since this would be prospective legislation, it would not apply to sex offenders currently in prison, who were sentenced under existing statutes.

Psychopathic Personality Commitment Law

Minnesota's psychopathic personality law was enacted 55 years ago.

Over the past few years, the Attorney General's Office and county attorneys have increasingly used the "psychopathic personality" (PP) statute, enacted in 1939, to civilly commit sex offenders to the Minnesota Security Hospital at St. Peter upon their release from prison.¹ To accommodate the current and projected increase in psychopathic personality commitments, the 1993 Legislature authorized construction of a new \$20.05 million treatment facility at Moose Lake.² In addition, the Legislature has appropriated \$8.5 million to improve security and expand capacity at the Minnesota Security Hospital for psychopathic personalities and other dangerous patients.

Some legislators have asked why the number of PP commitments has suddenly increased and whether current trends are likely to continue. Others have questioned whether it is cost-effective to provide expensive treatment for individuals who, in the opinion of most treatment professionals, are least likely to benefit from it. Still others support the continued use of the psychopathic personality commitment law because it provides a legal way to protect the public from sex offenders who are at high risk to reoffend and who otherwise would be released into the community.

Minnesota's psychopathic personality law was initially challenged in 1939, and the Minnesota Supreme Court upheld its constitutionality, a decision subsequently affirmed by the U.S. Supreme Court.³ However, with its increased use in recent years, the PP statute has been challenged again. Lower court decisions in over 30 recent PP commitment cases have been appealed to the Minnesota Court of Appeals alleging that the law is unconstitutional because it arbitrarily deprives people of their liberty and it fails to provide adequate due process protections. The Appeals Court has consistently upheld the constitutionality of the law. The Minnesota Supreme Court has accepted a number of cases for review and issued an opinion in the Blodgett case in January 1994, upholding the constitutionality of the psychopathic personality statute in a 4 to 3 decision.⁴ Since the Blodgett decision, the Supreme Court has affirmed eight other psychopathic personality commitments, but still is reviewing three cases.

1 Minn. Stat. §§526.09-.115.

2 Minn. Laws (1993), Ch. 373.

3 *State ex rel. Pearson v. Probate Court*, 205 Minn. 545, 287 N.W. 297, 302 (1939), affirmed 309 U.S. 270, 60 Supreme Court 523 (1940).

4 *In re Blodgett*, 490 N.W.2d 638 (Minn. App. 1992), affirmed, ____ N.W.2d ____ (Minn. 1994).

In June 1993, the Legislative Audit Commission asked for a study of sex offender treatment programs and services in the state, as well as a review of the national literature on treatment effectiveness. Due to the immediacy of the psychopathic personality issue, we are issuing this interim report on the PP commitment law, and we will issue a more complete report on sex offender treatment later this Spring.

In this study we ask:

- **How many sex offenders have been committed as psychopathic personalities? Why has the number of cases increased over the past few years? Are current trends likely to continue?**
- **What standards and procedures are followed in the current psychopathic personality commitment process?**
- **How much does treatment cost in mental health facilities and how does this compare to treating sex offenders in other settings?**
- **How have other states responded to public concern about sex offenders who pose high risks to commit additional offenses?**
- **Are changes needed to improve the current PP commitment process? What alternative policies could the Legislature consider to deal with high-risk sex offenders?**

To answer these questions, we interviewed staff from the Department of Corrections, Department of Human Services, and Attorney General's Office, assistant county attorneys and judges who handle civil commitment cases, and others knowledgeable about the PP commitment process. We also visited the sex offender treatment program at the Minnesota Security Hospital, collected and analyzed data on costs and number of commitment cases, and reviewed court cases and sentencing data. Finally, we conducted a literature review and contacted other states to learn about how they deal with high-risk sex offenders.

Briefly, we show that when it was enacted in 1939, the psychopathic personality law was used primarily to divert sex offenders into treatment instead of sending them to prison. Today, we find that the law is being increasingly used to commit sex offenders at high risk to reoffend to mental health facilities after they have served their prison sentences. Commitments have increased primarily because the Department of Corrections now routinely screens all sex offenders scheduled to be released from prison and refers cases to county attorneys to consider commitment proceedings. We found some inadequacies in the process that the Department of Corrections uses to make PP referrals and confusion over when and how formal commitment decisions should be made. We also found that commitment to facilities operated by the Department of Human Services costs more than twice as much as confining people in correctional facilities primarily because of higher staff-to-patient ratios. We make recommendations that would improve the current psychopathic personality commitment process and we suggest additional options the Legislature might consider.

BACKGROUND

In this section, we describe the historical evolution of statutes like Minnesota's psychopathic personality law. We also summarize recent events and policy changes that help explain why Minnesota's PP law is being used more often today and outline the issues posed by increased reliance on this statute.

History of "Sexual Psychopath" Laws

Singling out "abnormal" offenders for special treatment within the mental health and criminal justice systems has a long history in this country, dating back to the early 1900s.⁵ Laws that committed sex offenders to treatment programs—generally referred to as "sexual psychopath" or "mentally disordered sex offender" laws—were enacted in a majority of states between 1940 and 1970. Michigan enacted the first such statute in 1937, and Illinois (1937) and Minnesota (1939) followed with similar laws. By 1970, a total of 29 states and the District of Columbia had sexual psychopath statutes.⁶

Sexual
psychopath
laws usually
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treatment in
lieu of
imprisonment.

Typically, states defined a "sexual psychopath" or "psychopathic personality" as someone who commits sex crimes as a result of a mental disorder or impairment and, consequently, who is dangerous to society. Most state laws provided for civil rather than criminal confinement, and hence were covered by civil procedures. Most were intended to divert offenders into treatment as an alternative to imprisonment. These laws offered community protection while stressing treatment and rehabilitation of offenders. They were based on assumptions that some sex offenders suffered from a mental disorder that could be diagnosed and treated by mental health professionals, and that treatment was likely to be successful.⁷

Since their inception, sexual psychopath laws have been legally challenged on a number of constitutional grounds, including arbitrary deprivation of liberty, right against self-incrimination, right to a jury trial, right to treatment, violation of equal protection, and violation of the Eighth Amendment's cruel and unusual punishment clause. The U.S. Supreme Court ruling in *Minnesota ex rel. Pearson v. Probate Court* initially established the constitutionality of such laws, and subsequent U.S. Supreme Court opinions have upheld them. The legal rationale rests on the civil—as distinct from criminal—nature of the proceedings, the state's police power to protect its citizens, and its power to provide for citizens unable to care for themselves (*parens patriae*).⁸ However, there have been numerous cases in which the U.S. and state supreme courts have ruled that many due process protec-

5 Carol Veneziano and Louis Veneziano, "An Analysis of Legal Trends in the Disposition of Sex Crimes: Implications for Theory, Research, and Policy," *The Journal of Psychiatry and Laws* (Summer 1987), 205-225.

6 *Ibid.*, 206.

7 *Ibid.*, 207; see also William D. Erickson, M.D., *The Psychopathic Personality Statute, Need for Change* (St. Paul: Department of Human Services, 1991).

8 Mark A. Small, "The Legal Context of Mentally Disordered Sex Offender (MDSO) Treatment Programs," *Criminal Justice and Behavior*, Vol. 19, No. 2 (June 1992), 128-9.

Most states have repealed their sexual psychopath laws.

tions found in criminal trials must apply to sexual psychopath proceedings because of the potential deprivation of liberty.⁹

Since the mid-1970s, most states have repealed their sexual psychopath laws.¹⁰ The reasons include skepticism about treatment effectiveness (especially for dangerous, repeat sex offenders), an inability to predict dangerousness or diagnose sexual psychopathologies according to accepted medical standards, and public opinion that increasingly prefers punishment for sex offenders rather than treatment.¹¹ It has also been noted that repeal of a state's sexual psychopath statute seems to follow legal challenges to it, possibly due to the costs and legal complexities involved.¹²

Policy Changes Affecting Minnesota's Psychopathic Personality Law

In Minnesota, people may be committed to a treatment facility against their will, using civil procedures, if they fall into any of six categories: mentally ill, mentally ill and dangerous to the public, mentally retarded, chemically dependent, psychopathic personality, or health threat to others.¹³ The procedures contained in the state's 1982 Civil Commitment Act, outlined briefly in Figure 1, apply to all commitments except for persons found to be a health threat (covered in *Minn. Stat.* §144.1472). At the present time, everyone committed under the psychopathic personality statute is sent to the Minnesota Security Hospital at St. Peter. Individuals committed as psychopathic personalities who are also criminally sentenced serve their prison sentence before being transferred to the Minnesota Security Hospital.¹⁴

Figure 2 summarizes the history of Minnesota's psychopathic personality law, and Figure 3 presents the legal definition of a "psychopathic personality," which must be established in court for commitment to occur. The Minnesota Supreme Court's opinion in the 1939 Pearson case, which has applied to subsequent cases, further refined the definition. In a 1993 case, the Appeals Court reversed a commitment decision and held that physical harm or intent to harm was required for commit-

⁹ For example, Alabama's sexual psychopath statute was ruled unconstitutional because it did not provide full due process rights when commitment could lead to a sentence longer than the original offense. For a review of state and federal cases, see Veneziano and Veneziano, "An Analysis of Legal Trends," 208-216, and Small, "The Legal Context of Mentally Disordered Sex Offender Treatment Programs," 129-132.

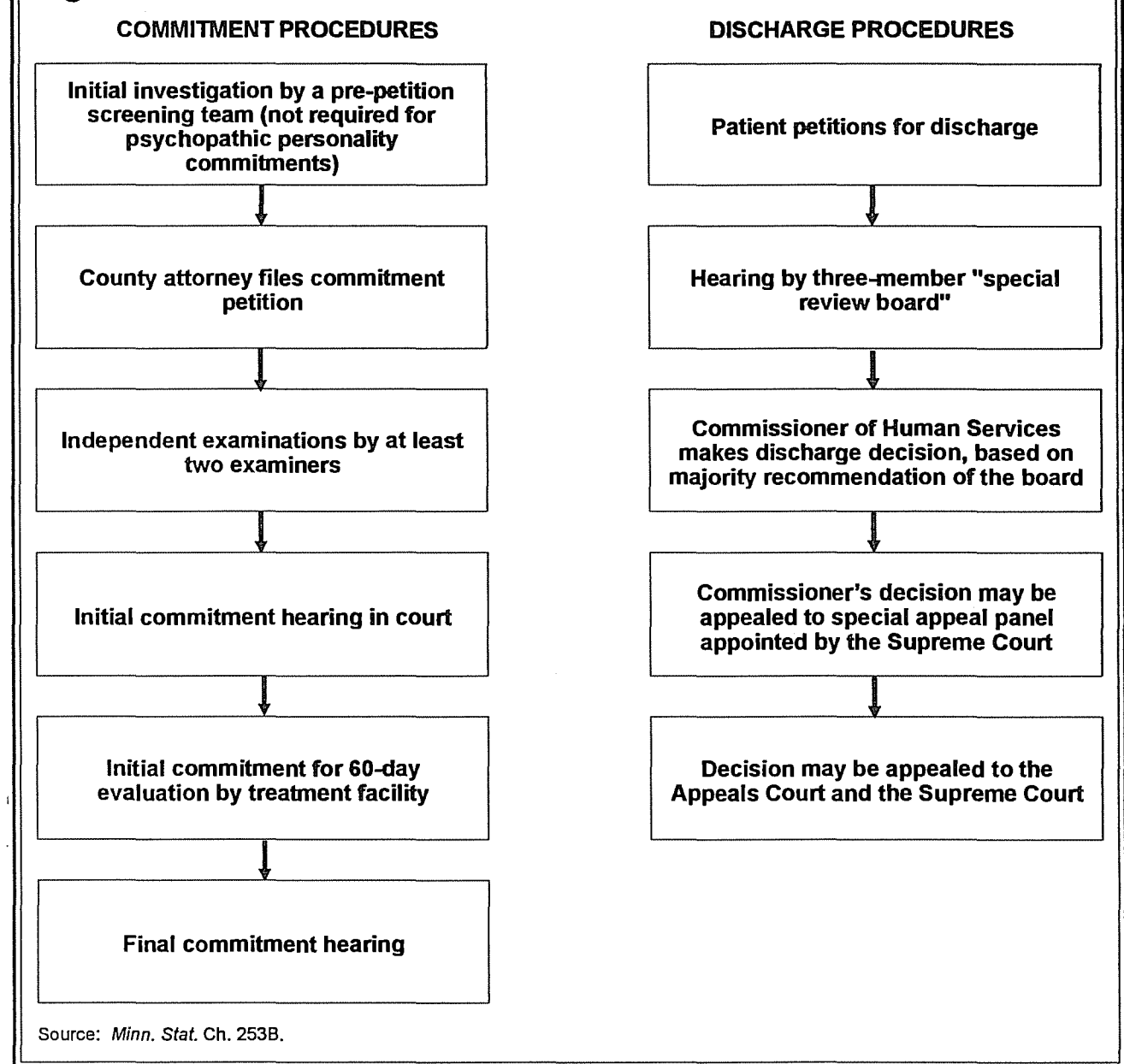
¹⁰ As we discuss later, we were able to identify only six states (Colorado, Illinois, Minnesota, Tennessee, Virginia, and Washington) and the District of Columbia that still have statutes singling out "psychopathic" or "dangerous" sex offenders for commitment to treatment facilities.

¹¹ Small, "The Legal Context of Mentally Disordered Sex Offender Treatment Programs," 128-129.

¹² Veneziano and Veneziano, "An Analysis of Legal Trends," 216.

¹³ The first four categories are defined in *Minn. Stat.* §253B.02 of the Civil Commitment Act. Psychopathic personalities are defined in *Minn. Stat.* §526.09, and persons representing a health threat to others are defined in *Minn. Stat.* §144.4172.

¹⁴ *Minn. Stat.* §526.10.

Figure 1: The Civil Commitment Process

ment.¹⁵ As Figure 2 suggests, aside from modifying psychopathic personality commitment proceedings to make them consistent with procedures for committing mentally ill and dangerous persons, the PP statute remained unchanged until 1989.

As Figure 2 also indicates:

- Since 1989, the Legislature has made several changes to the PP law that have increased the likelihood that sex offenders will be committed

¹⁵ *In re Rodriguez*, 506 N.W.2d 660 (Minn. App. 1993).

Figure 2: History of Minnesota's Psychopathic Personality Law

- 1939 Legislature enacts psychopathic personality statute, which provides for civil commitment of persons found to be sexually irresponsible and dangerous to others [*Minn. Laws* (1939), Ch. 369].
- 1939 Minnesota Supreme Court upholds constitutionality of the psychopathic personality statute (*State ex rel. Pearson v. Probate Court*, 205 Minn. 545, 287 N.W. 297).
- 1940 U.S. Supreme Court affirms the Minnesota Supreme Court's decision in the Pearson case (309 U.S. 270, 60 S. Ct. 523).
- 1969 Legislature applies civil commitment procedures for persons found to be mentally ill and dangerous to psychopathic personalities [*Minn. Laws* (1969), Ch. 431].
- 1982 Legislature revises existing civil commitment procedures into Chapter 253B, the Civil Commitment Act, which specifies patients' rights, judicial commitment procedures, conditions of confinement, and discharge procedures [*Minn. Laws* (1982), Ch. 581].
- 1988 Department of Human Services' task force considers repeal or revision of the psychopathic personality statute, but deadlocks over the issue and fails to make specific recommendations [Minnesota Department of Human Services, *Report to the Commissioner: Commitment Act Task Force* (St. Paul, February 1988)].
- 1989 Attorney General's task force examines the issue of sexual violence. Among its recommendations, the task force suggests longer prison sentences, greater use of the psychopathic personality commitment statute (where appropriate), and the enactment of indeterminate criminal sentences for dangerous convicted sex offenders [Attorney General's Task Force on the Prevention of Sexual Violence Against Women, *Final Report* (St. Paul, February 15, 1989)].
- 1989 Legislature provides that courts should identify persons who may be psychopathic personalities at initial sentencing, with commitment to the Minnesota Security Hospital to occur upon completion of the criminal sentence. Legislature also allows Department of Human Services to transfer PP patients with a remaining criminal sentence who refuse to cooperate with treatment to the Department of Corrections. It also increases penalties for sex offenses and enacts "patterned sex offender" statute that provides for a doubling of presumptive prison sentences for dangerous sex offenders. [*Minn. Laws* (1989), Ch. 290].
- 1991 Department of Corrections reexamines its release procedures and recommends review of all soon-to-be-released high-risk offenders for possible psychopathic personality commitment or increased community supervision [Frank W. Wood, *Risk Assessment and Release Procedures for Violent Offenders/Sexual Psychopaths, Final Report* (Department of Corrections, August 15, 1991)].
- 1992 Legislature provides that the Supreme Court may establish a panel of district judges to hear psychopathic personality cases, requires the Commissioner of Corrections to review all high-risk sex offenders and refer them to county attorneys for commitment proceedings, and directs the Attorney General's Office to act on behalf of county attorneys, upon request and at no charge, at psychopathic personality commitment cases. Legislature also revises "subsequent offense" statute for sex offenders that provides for mandatory 30-year and life sentences for repeat sex offenders meeting certain criteria. [*Minn. Laws* (1992), Ch. 571].
- 1994 In a 4 to 3 decision, the Minnesota Supreme Court upholds the constitutionality of the psychopathic personality statute [*In re Blodgett*, 490 N.W.2d 638 (Minn. App. 1992), affirmed, ___ N.W.2d ___ (Minn. 1994)].

Figure 3: Legal Definition of a "Psychopathic Personality"

Statutory Definition (*Minn. Stat. §526.09*):

- A person exhibiting any or all of the following:
 - emotional instability,
 - impulsiveness of behavior,
 - lack of customary standards of good judgment, or
 - a failure to appreciate the consequences of personal acts,
- Which renders the person irresponsible for personal conduct with respect to sexual matters and thereby dangerous to other persons.

As Further Defined through Case Law:

- A person who, "by habitual course of misconduct in sexual matters, evidences an utter lack of power to control his sexual impulses," and as a result, "who is likely to inflict injury on the objects of his uncontrolled desire" [*State ex rel. Pearson v. Probate Court*, 205 Minn. 545, 287 N.W.297, 302 (1939)].
- Commitment as a psychopathic personality requires evidence of physical harm or intent to harm the victim [*In re Rodriguez*, 506 N.W.2d 660 (Minn. App. 1993)].

to the Minnesota Security Hospital after they have served their prison sentence.

Under Minnesota's current sentencing policy, the psychopathic personality law is the only legal way to hold a sex offender indefinitely.

These statutory changes were supported by the Attorney General's Office and the Department of Corrections, which were responding to a public outcry against several violent crimes committed by offenders who had recently been released from prison.¹⁶ In response to several rape/murders that occurred in 1987 and 1988, an Attorney General's Task Force on the Prevention of Sexual Violence Against Women noted that the psychopathic personality statute was the only means available to hold a sex offender for an indeterminate length of time. Since 1980, when Sentencing Guidelines took effect, criminal offenders receive a sentence that is based solely on the severity of the crime (with all crimes ranked from one to ten) and their previous criminal history (a score based on number of prior convictions).¹⁷ Once offenders have served their prescribed guidelines sentence, they are eligible for release and the Commissioner of Corrections has no authority to hold them beyond their scheduled release date.

¹⁶ For a complete discussion, see Cheryl Heilman and Kathy Meade Hebert, "Civil Commitment of Sexual Predators: Minnesota's Psychopathic Personality Statute," *The Hennepin Lawyer* (September-October 1993), 4-7 ff.

¹⁷ The statute provides for certain conditions under which judges may depart from the guidelines. Also, offenders may earn up to one-third off their sentence for good behavior in prison, with the remainder of the sentence served under the supervision of probation agents in the community.

Among its recommendations, the Attorney General's task force suggested that the Legislature should permit an indeterminate term of prison confinement for dangerous sex offenders and suggested that the psychopathic personality statute might be used to confine violent sex offenders who meet the statute's definition.¹⁸

The 1989 Legislature responded by directing the courts to consider the appropriateness of a psychopathic personality commitment at the time of initial sentencing, generally referred to as "dual commitment." The Legislature also allowed the transfer of a person committed as a PP who also has a current correctional sentence, and who is unwilling to cooperate with treatment, from the Minnesota Security Hospital to the Department of Corrections. Simultaneously, the Legislature took action to lengthen the time sex offenders remain under correctional supervision, and permitted the Commissioner of Corrections to order treatment as a condition of release.¹⁹ However, these provisions did not apply to sex offenders who committed their crimes before August 1989 and were sentenced under prior statutes.

The Legislature has taken steps to increase the likelihood that sex offenders will be committed as psychopathic personalities.

In 1990 and again in 1991, two more women were raped and murdered by recently released sex offenders. The latter incident, which occurred while the offender was supposed to have been at a halfway house, prompted the Commissioner of Corrections to reevaluate the Department of Corrections' release procedures and to implement a process to evaluate all high-risk sex offenders for possible psychopathic personality commitment prior to their scheduled release.²⁰

In 1992, the Legislature enacted the Department of Corrections' new PP commitment screening procedures into law. In addition, it authorized the Attorney General's Office to assume responsibility, at the request of the county, for PP commitment cases outside of Hennepin and Ramsey Counties without charging its usual fees. The Legislature also authorized the Supreme Court to establish a state-wide panel of district judges to preside over psychopathic personality commitment proceedings, which the court has not yet done. Finally, the Legislature modified the "subsequent offense" law, which mandates 30-year and life sentences for repeat sex offenders who meet certain criteria.²¹

Issues Presented by Minnesota's Psychopathic Personality Law

The Blodgett case, which was argued before the Supreme Court in March 1993, illustrates the issues raised by the psychopathic personality statute. The Attorney General's Office argued on behalf of the state that civil commitment of high-risk sex offenders is justified on the basis of the state's right to protect the public from dangerous persons and its interest in confining them for purposes of treatment.

¹⁸ Attorney General's Task Force on the Prevention of Sexual Violence Against Women, *Final Report* (St. Paul, February 1989), 20-23.

¹⁹ *Minn. Laws* (1989), Ch. 290.

²⁰ Frank W. Wood, *Risk Assessment and Release Procedures for Violent Offenders/Sexual Psychopaths, Final Report* (St. Paul: Department of Corrections, 1991).

²¹ *Minn. Laws* (1992), Ch. 571.

The Minnesota Supreme Court recently upheld the constitutionality of the psychopathic personality law.

Further, the Attorney General argued that, although it may be extremely difficult to treat sex offenders, treatment may benefit some individuals and may reduce their likelihood of reoffending. The Minnesota Security Hospital recently instituted a new comprehensive, four-phase treatment program specially designed to meet individual patient's needs, which will be offered to all individuals committed as psychopathic personalities. Finally, the Attorney General argued that since psychopathic personality proceedings are civil--and distinct from any criminal proceedings involving the individual--the claim of being tried twice for the same offense is not valid.²²

Blodgett's constitutional challenge was supported by a friend-of-the-court's brief by the Minnesota Civil Liberties Union (MCLU). The MCLU and Blodgett's attorneys argued that the psychopathic personality statute violates the Constitution because it deprives an individual of liberty without a criminal conviction or a medically defined mental illness. Also, they claimed that the statute is vague and does not reflect current psychiatric theory since neither "psychopathic personality" nor "sexual psychopath" are medically recognized terms. Further, they argued that the statute is unconstitutional because it claims to be a civil commitment statute but is being used to achieve criminal justice purposes (preventive detention) and permits the equivalent of incarceration for acts for which the person has already been punished.²³

The Minnesota Psychiatric Society and staff at the Minnesota Security Hospital have also expressed opposition to the law because most psychopathic personalities do not have a diagnosable mental illness and are considered by most treatment professionals to be unamenable to treatment. Furthermore, until steps were taken to segregate individuals committed as psychopathic personalities from other patients at the security hospital, staff were concerned that they might pose a danger to others. Finally, discharge criteria are so stringent that it is unlikely that many of these individuals will ever be released.²⁴

The Minnesota Supreme Court's majority opinion and minority dissent in the Blodgett case acknowledge these opposing arguments. In upholding the constitutionality of the psychopathic personality statute, the court decided that, given the violent history of persons committed as psychopathic personalities and the high likelihood of them committing additional sexual assaults, protection of the public outweighed individuals' liberty interests.²⁵

22 *In re Phillip Jay Blodgett*, 490 N.W.2d 638 (Minn. App. 1992), Appellant's and Respondent's Briefs and Addendums to the State of Minnesota in Supreme Court (1993).

23 *Ibid.*

24 See Minnesota Psychiatric Society, *Problems with the Current Psychopathic Personality Statute* (February 1992); Minnesota Department of Human Services, *Report to the Commissioner: Commitment Act Task Force* (St. Paul, February 1988); and Erickson, *The Psychopathic Personality Statute, Need for Change*.

25 *In re Blodgett*, 490 N.W.2d 638 (Minn. App. 1992), affirmed, ____ N.W.2d ____ (Minn. 1994).

CURRENT USE OF THE PSYCHOPATHIC PERSONALITY LAW

In this section, we present information on the number of psychopathic personality commitments and how use of the PP statute has changed over time.

Changes in the Number of Psychopathic Personality Commitments

We found that:

- **Current data collection efforts and monitoring of psychopathic personality cases are inadequate.**

Current monitoring of the number of psychopathic personality commitment cases is inadequate.

We found it difficult to obtain accurate data on the number of pending and finalized psychopathic personality cases. There is no central data source or agency that routinely monitors these cases. The Department of Corrections has instituted a procedure whereby each correctional facility reports quarterly on the sex offenders it has referred for possible PP commitment to its Sex Offender Services Unit. These data are used mainly to monitor referrals among the various correctional facilities and are not regularly compiled or summarized. Furthermore, we found the files on psychopathic personality cases maintained by the Sex Offender Services Unit to be incomplete and to contain little information. For example, most of the files did not contain copies of the referral letters sent to county attorneys nor documentation of case outcomes. The Sex Offender Services Unit forwards its quarterly reports to the Department of Human Services for planning purposes. However, we found a number of discrepancies between the Department of Corrections' and Department of Human Services' records regarding psychopathic personality commitment cases.

Also, as we discuss later, the Department of Corrections does not always receive up-to-date information on PP commitment case outcomes from county attorneys. Data on pending cases are especially incomplete because county attorneys may initiate commitment proceedings on their own, which may not be reported to the Department of Corrections. District courts and county attorney offices keep their own records, which are not easily accessible, and there are no public records if county attorneys decide not to pursue a case. Finally, no agency routinely monitors "dual commitment" decisions, whereby the sentencing court identifies individuals who may be appropriate for psychopathic personality commitment at the time of criminal sentencing. We were unable to obtain accurate data on the extent to which this occurs. The data we present in this report are based on information that we were able to gather and verify from a variety of sources, including the Departments of Corrections and Human Services, Attorney General's Office, district courts in Hennepin and Ramsey Counties, and county attorney offices in Anoka, Carver, Dakota, Hennepin, Olmsted, Ramsey, and Washington Counties. There-

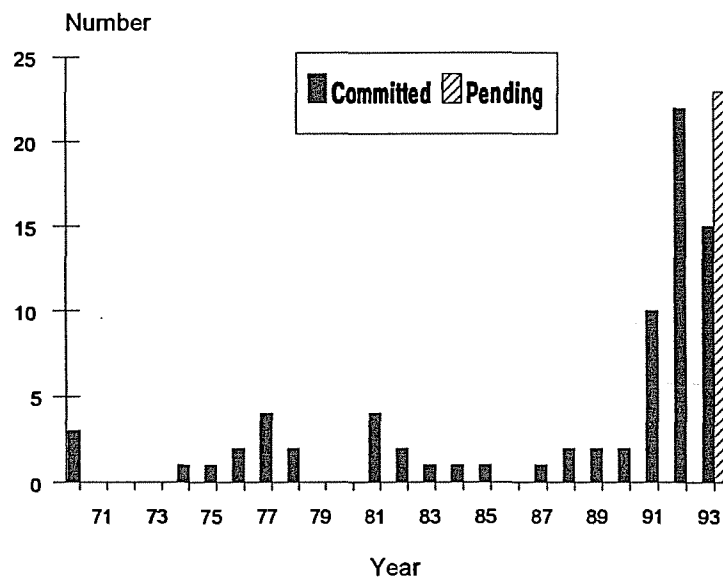
fore, the number of cases under consideration but not finalized ("pending") may be understated.

According to staff at the Minnesota Security Hospital, a total of 221 individuals were committed under the psychopathic personality statute from 1939 through 1969. During the 1940s and 1950s, the statute was used frequently, but its use declined during the 1960s.²⁶ Figure 4 shows that the average number of commitments was fairly low during the 1970s and 1980s. Between 1970 and 1979, only 13 people were committed as psychopathic personalities, with 14 committed during the 1980s, and two committed in 1990.

But as Figure 4 also illustrates, psychopathic personality commitments increased sharply, beginning in 1991 when the number increased to 10. In 1992, there were 22 commitments. As of September 30, 1993, a total of 15 commitments had been finalized in 1993, with an additional 23 known cases pending a decision (either in a county attorney's office or district court).

Psychopathic personality commitments have increased sharply since 1991.

Figure 4: Psychopathic Personality Commitment Cases, 1970-93



Sources: Office of the Legislative Auditor analysis of data from Departments of Corrections and Human Services, various district courts, and county attorneys.

We also found that:

- A total of 71 individuals whose psychopathic personality commitments have been finalized were in state facilities on September 30, 1993; and
- Sixty-five percent of finalized psychopathic personality commitments (46 out of 71) occurred between January 1, 1991 and September 30, 1993.

²⁶ Erickson, *The Psychopathic Personality Statute, Need for Change*, 4, 20-21.

Table 1 shows the total number of people committed as psychopathic personalities as of September 30, 1993 by where they were residing. Most of those committed were residing at the Minnesota Security Hospital, although six older patients had been provisionally discharged to a state-operated nursing home. In addition, seven individuals whose commitments have been finalized will remain in state correctional facilities until their prison sentences expire, at which time they will be transferred to the Minnesota Security Hospital or the Minnesota Psychopathic Personality Treatment Center at Moose Lake, which is scheduled to open in 1995. Another five individuals whose cases were pending on September 30, 1993 were at the Minnesota Security Hospital undergoing a 60-day evaluation, which is a mandatory part of the commitment process.

Table 1: Psychopathic Personality Commitment Cases by Residence, September 30, 1993

Where Person Was Residing on 9/30/93	Commitments Final ^a		Cases Pending ^b		Total	
	Number	Percent	Number	Percent	Number	Percent
Minnesota Security Hospital	58	82%	5	22%	63	67%
Nursing home	6	8	0	0	6	6
State correctional facility ^c	7	10	17	74	24	26
In community on supervised release	0	0	1	5	1	1
Total	71	100%	23	100%	94	100%

Source: Program Evaluation Division analysis of information gathered from Department of Corrections' files, the Department of Human Services, and various courts and county attorneys.

^aDoes not include commitments initiated as psychopathic personalities but finalized as mentally ill, mentally ill and dangerous, mentally retarded, or chemically dependent (N = 5).

^bThe number of cases pending may be understated. These figures are based on cases that have been referred to county attorneys by the Department of Corrections for possible psychopathic personality commitment proceedings.

^cThese seven individuals will be transferred to the Minnesota Security Hospital or the new Moose Lake facility for psychopathic personalities on their scheduled prison release date.

We also found that:

- The majority of psychopathic personality commitments originated in Hennepin and Ramsey Counties (the Fourth and Second Judicial Districts, respectively).

As shown in Table 2, 59 percent of the final commitments and pending cases were from these two counties, with nearly 70 percent of the total cases originating in the Twin Cities metropolitan area (seven counties). These proportions are similar to data on reported rapes: 68 percent of all rapes reported in 1991 occurred in Hennepin and Ramsey Counties, and 76 percent occurred in the Twin Cities metropolitan area.²⁷

²⁷ Based on 1991 Minnesota Crime Information data from the Department of Public Safety.

Table 2: Psychopathic Personality Commitment Cases by Judicial District

Judicial District	Commitments Final ^a		Cases Pending ^b		Total	
	Number	Percent	Number	Percent	Number	Percent
First	5	7%	1	4%	6	7%
Second	15	22	5	23	20	22
Third	2	3	2	9	4	4
Fourth	25	37	8	35	33	37
Fifth	2	3	2	9	4	4
Sixth	3	4	0	0	3	3
Seventh	3	4	0	0	3	3
Eighth	2	3	1	4	3	3
Ninth	4	6	2	9	6	7
Tenth	6	9	2	9	8	9
Total	67	100%	23	100%	90	100%

Source: Program Evaluation Division analysis of data gathered from the Departments of Corrections and Human Services and various courts and county attorneys.

^aIncludes all current PP commitments, except for four individuals residing in nursing homes whose county of commitment is unknown. Does not include commitments initiated as PP, but finalized as mentally ill, mentally ill and dangerous, mentally retarded, or chemically dependent.

^bThe number of cases pending may be understated. These figures are based on cases that have been referred to county attorneys by the Department of Corrections for possible psychopathic personality commitment proceedings.

Most recent psychopathic personality cases have been referred by the Department of Corrections.

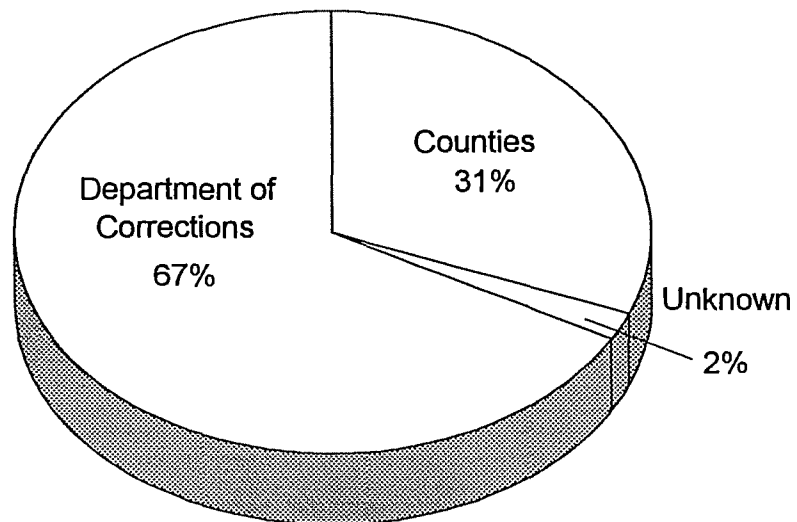
Among the policy changes since 1991 that were aimed at facilitating use of the psychopathic personality commitment law, the most significant factor appears to be the 1991 change in Department of Corrections policy to screen sex offenders for possible PP referral. As shown in Figure 5:

- Two-thirds of recent psychopathic personality commitment cases were initiated through a Department of Corrections referral.

County attorneys must decide whether to pursue the cases referred by the department, and ultimately judges decide whether there is sufficient evidence to warrant commitment under the statute. (The commitment process is described in the following section of the report.)

However, before the Department of Corrections began systematically screening and making psychopathic personality referrals, significantly fewer PP commitment cases were considered by county attorneys and the courts. According to Attorney General's Office staff, since their office became involved in PP commitment proceedings (mid-1992), they have been asked to handle 18 cases by county attorneys. Almost all of these cases originated with a Department of Corrections referral. County attorney staff told us that they used to initiate virtually all psychopathic personality commitments, but the majority of cases since 1991 have been brought to their attention by the Department of Corrections. County attorneys also learn about potential commitments from probation agents, social serv-

Figure 5: Initiator of Psychopathic Personality Commitment Cases, 1991-93 (N = 103)



Sources: Department of Corrections, Attorney General's Office, and various county attorneys.

ice agencies, judges, victims, or acquaintances or relatives of the offender, but only sporadically. Meanwhile, the recently instituted Department of Corrections' screening and referral process systematically applies to all sex offenders scheduled to be released.

According to Department of Corrections officials, the department began systematically screening all sex offenders scheduled for release in part because the department thinks that judges were not identifying potential psychopathic personality commitment cases at initial sentencing, as directed by the 1989 Legislature.²⁸ Also, department officials think that sentencing judges should have been using the psychopathic personality statute more consistently prior to 1989. The department views its screening and referral system as a "fail-safe mechanism" designed to catch any referrals missed by the courts at sentencing. As noted above, we were unable to determine the extent to which district court judges are following the "dual commitment" statute enacted in 1989.

We found that:

- Approximately 7 percent of the sex offenders released from prison over the past two and one-half years were subsequently committed as psychopathic personalities.

According to data obtained from the Department of Corrections, a total of 623 sex offenders were released from state prisons between January 1991 and July 1993. As indicated above, during a similar time period a total of 46 individuals were

²⁸ Minn Stat. §609.1351.

committed as psychopathic personalities, which represents 7.4 percent of the number released.

We also found that:

- Most initiated psychopathic personality cases were decided in favor of commitment.

As shown in Table 3, 64 percent of recent psychopathic personality cases resulted in a final commitment order. However, in 8 of the 51 commitments, a psychopathic personality petition was filed along with a petition to commit the person as mentally ill, or mentally ill and dangerous, or mentally retarded, or chemically dependent. In three of these eight cases, the individual was committed both as a psychopathic personality and on another petition. In five cases, however, the psychopathic personality petition was dropped or denied and the individual was committed on the other petition.

In approximately half of the known cases that did not result in commitment, the county attorney declined to pursue the case. It should be noted, however, that county attorneys may consider additional cases on their own and decide not to pursue them. There is no easy way to determine how often this occurs. Of the 12

Table 3: Outcome of Psychopathic Personality Cases, 1991-93

In over 60 percent of recent cases, a judge decided to commit the person.

<u>Commitment Outcome^a</u>	<u>Number</u>	<u>Percent of Cases Decided</u>
COMMITTED		
Committed as a psychopathic personality (PP)	43	54%
Committed as both a PP and mentally ill (MI), mentally ill and dangerous (MI & D), mentally retarded (MR), or chemically dependent (CD)	3	4
PP commitment initiated, but finally committed as MI, MI & D, MR, or CD	5	6
Subtotal	51	64%
NOT COMMITTED		
County attorney declined to pursue commitment ^b	14	17%
District court denied or "stayed" commitment	12	15
Appeals court overturned district court commitment	2	3
Person deported	1	1
Subtotal	29	36%
TOTAL	<u>80</u>	<u>100.0%</u>

Source: Program Evaluation Division analysis of data gathered from the Departments of Corrections and Human Services and various courts and county attorneys.

^aIncludes cases finalized between January 1, 1991 and September 30, 1993.

^bThe number of these cases may be understated, as county attorneys may initiate commitment proceedings on their own and there are no public records if county attorneys do not pursue a case. These figures are based on cases referred by the Department of Corrections.

cases where the court denied commitment, 5 were originated by the county and 7 were referred by the Department of Corrections.

Finally, in 2 of the more than 30 recent cases where the lower court's commitment decision was appealed, the Appeals Court reversed the decisions. The first case involved a man who was HIV positive and refused to take appropriate sexual precautions. His commitment was reversed on the grounds that a health threat commitment applied, not a PP commitment.²⁹ The second case involved the commitment of a chronic exhibitionist, which was reversed on the grounds that the PP statute requires physical harm or a threat of physical harm to the victim.³⁰

Changes in the Type of Individuals Committed

Staff at the Minnesota Security Hospital have analyzed the backgrounds of psychopathic personality commitments. Their analysis shows that:

- The behaviors and offense histories of individuals currently being committed as psychopathic personalities are more serious than those of prior commitments.

When the law was first enacted, people were committed for minor offenses for brief periods of time.

During the 1940s and 1950s, commitments were typically for nonviolent behaviors, such as window peeping, indecent exposure, and consenting adult homosexual activity. Three-quarters of the commitments during this period were first-time offenders. Typically, a person was committed for a relatively short time (usually less than one year) instead of being sent to prison.³¹

During the late 1950s and 1960s, more violent offenders were committed. However, commitment tended to occur before criminal prosecution and sentencing, with the person returned to court for trial or sentencing after a brief period of observation at the Minnesota Security Hospital. Since the 1970s, more of the individuals committed as psychopathic personalities have been repeat sex offenders who exhibited violent behavior.³²

We also found that:

- The majority of those committed since 1990 are repeat sex offenders.

According to data provided by staff at the Minnesota Security Hospital, individuals committed as psychopathic personalities since 1990 have an average of three prior convictions and multiple victims. Some have been clinically diagnosed as pedophiles (sexually attracted to children) or sexual sadists (deriving sexual pleasure from causing suffering). For some, their criminal histories include other crimes in addition to sexual assault.

²⁹ *In re Stilinovich*, 479 N.W.2d 731 (Minn. App. 1992).

³⁰ *In re Rodriguez*, 506 N.W.2d 660 (Minn. App. 1993).

³¹ Erickson, *The Psychopathic Personality Statute, Need for Change*, 19-20. In some instances, the committing courts indicated that they believed commitment was more humane than prison.

³² *Ibid.*

We also found that:

- Almost all persons recently committed under the PP statute have just completed a prison sentence and were scheduled to be released when commitment proceedings were initiated.

Now, the law is being used to commit repeat sex offenders scheduled for release from prison.

Of the 80 psychopathic personality cases decided between January 1991 and September 30, 1993 (including those where commitment did not occur), approximately 90 percent involved individuals who were in prison with their release date approaching when PP commitment proceedings were initiated. On average, individuals who were committed since January 1991 had served 6.8 years in prison.³³

While the courts found that these individuals met the statutory definition of a psychopathic personality, which is a legal standard based on specific identified behaviors, there is disagreement over whether these individuals are mentally ill and whether they are treatable. Treatment professionals use standardized criteria in making clinical diagnoses. The most current criteria for mental disorders are listed in the third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.³⁴ While some sexual disorders are medically diagnosable and treatable, many sexual disorders fall into the categories of "anti-social personality" or "other personality disorders." These types of disorders are less likely to respond to medications and other therapeutic approaches with demonstrated effectiveness. As shown earlier, since January 1991, a mental illness, chemically dependent, or mentally retarded commitment was simultaneously sought in 8 of the 51 psychopathic personality cases that resulted in commitment.

We also examined the court's findings in 39 recent PP commitment cases to determine the extent to which psychopathic personality commitments had prior treatment experience. We found that:

- Nearly all recent PP commitments had been offered treatment previously and most either refused to participate or failed to complete it.

In over 90 percent of the cases we examined, those committed had a fairly lengthy treatment history. In most instances, they had either refused treatment or entered treatment but failed to complete it, with some having done so multiple times. Typical reasons for failing treatment included absconding, being disruptive, being asked to leave by treatment staff, and failing to complete treatment goals. A few individuals had completed other treatment programs. However, three commitments involved individuals who apparently had never been accepted into a treatment program because of their borderline intelligence or violent behavior. Two cases involved individuals who claimed they were denied treatment in

³³ Data on length of prison sentence served were available for 37 individuals. Prison sentences served ranged from 5.7 months to 30 years. These numbers exclude committed individuals who remain in prison.

³⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Third Edition Rev. (Washington, D.C., 1989).

Most of those committed as psychopathic personalities are considered to be unamenable to treatment.

prison, one because he was being considered for PP commitment referral and the second because the length of the prison treatment program was longer than his remaining sentence.³⁵

The generally poor prior treatment record and history of violent behavior of individuals recently committed as psychopathic personalities are among the reasons treatment professionals at the Minnesota Security Hospital consider many of these individuals to be treatment-resistant. Also, security hospital staff have expressed concern about housing psychopathic personalities with mentally ill patients. Since July 1992, psychopathic personalities have been housed in a separate unit at the Minnesota Security Hospital. The desirability of segregating these populations was part of the rationale for building a separate facility to house psychopathic personality commitments, which the Legislature approved in 1993.³⁶

ADEQUACY OF PSYCHOPATHIC PERSONALITY COMMITMENT PROCEDURES

In this section, we discuss the formal civil commitment process specified in *Minn. Stat.* §253B that applies to mentally ill and dangerous persons and psychopathic personalities.³⁷ Because of its importance in the process, we also assess the adequacy of the Department of Corrections' procedures to screen offenders and refer potential PP commitments to county attorneys for further handling.

Judges decide commitment cases based on petitions brought by county attorneys.

Formal Civil Commitment Procedures

Figure 6 describes the formal commitment and discharge procedures and patient's rights that apply to psychopathic personality commitments. Civil commitment petitions are filed by county attorneys and heard by district court judges. Prior to the consolidation of county courts into a statewide system, these cases were heard by county probate courts. In Hennepin County, a judge in the mental health division of the Fourth Judicial District hears all psychopathic commitment cases. In Ramsey County, these cases are heard by a court referee or "commissioner" who serves the "probate court," which is now part of the Second Judicial District Court. In the remaining eight judicial districts, psychopathic personality cases may be heard by any district court judge.

³⁵ Unpublished opinions of the Minnesota Appeals Court, case numbers C9-91-1031 and C6-92-1790.

³⁶ *Minn. Laws* (1993), Ch. 373.

³⁷ A similar commitment process also applies to persons found to be mentally ill, mentally retarded, or chemically dependent, but the duration of confinement is different for these three groups, which are reviewed periodically to determine if continued confinement is justified. In contrast, "indefinite" confinement is specified for mentally ill and dangerous persons and psychopathic personalities. See *Minn. Stat.* §253B.13 and §253B.18.

Figure 6: Major Provisions of Minnesota's Civil Commitment Process**Commitment Procedures**

- Pre-petition screening by a team appointed by "designated agency," which includes a personal interview with the patient and others, investigation into the alleged conduct, access to medical records (considered private data on individuals), and a written report to the county attorney. Pre-petition screening is not required in psychopathic personality commitments, per *Minn. Stat.* §526.10.
- Petition for commitment filed in court by the county attorney, based on a presentation of the facts.
- Independent examinations by a court-appointed examiner and a second examiner of the proposed patient's choosing, appointed by the court and paid for by the county.
- Initial court hearing, within specified time limits. Hearing includes notice, patient's right to attend and testify, witness testimony and cross-examination, and admission of relevant evidence. Standard of proof: "clear and convincing evidence."
- Initial commitment for 60 days to a treatment facility, which reports back to the committing court on diagnosis, need for care, and treatment plan.
- Second court commitment hearing, with final commitment order transferring custody of the patient to the treatment facility for an "indeterminate period of time."

Discharge Procedures

- Hearing held for transfers and discharge petitions by three-member "special review board" trained in the field of mental illness, with recommendation to the Commissioner of Human Services.
- Commissioner of Human Services makes final decision upon finding by a majority of the review board that the patient is "capable of making adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision."
- Commissioner's decision may be appealed to a special appeal panel consisting of three judges appointed by the Supreme Court.

Patient's Rights

- Freedom from restraints and right to correspond, have visitors, and make phone calls.
- Prior consent to medical, surgical, or otherwise intrusive treatment.
- Right to receive proper care and treatment, according to "contemporary professional standards."
- Access to personal medical records.
- Right to counsel at any proceeding covered by Ch. 253B, the Civil Commitment Act.
- Right to appeal commitment and discharge decisions to the Appeals Court.

Sources: *Minn. Stat.* §253B and *Minn. Stat.* §§526.09-.115.

Because these cases rely on specialized expertise, the Conference of Chief Judges recently recommended that all psychopathic personality cases may be heard in Hennepin County (Fourth Judicial District) because it has a special mental health division. However, changing the venue of PP cases remains at the discretion of the district court where the petition is filed.

As Figure 6 illustrates, there are multiple steps in the formal commitment process that include independent examinations by at least two experts trained in mental health, psychology, or psychiatry and two formal court hearings with written evidence and witness testimony. In addition to the court-appointed examiners, others may testify as well, including correctional staff, treatment professionals, former victims, and others who know the person. Psychopathic personality commitment hearings sometimes last as long as three to five days.

Between the preliminary and final commitment hearings, the individual undergoes a 60-day assessment at the Minnesota Security Hospital that includes psychiatric and psychological evaluations and assessments by social work, recreational therapy, chemical dependency, vocational rehabilitation, and education staff. The results of this evaluation are submitted to the court.

However, we found that:

- **Pre-petition screening, which is required under the civil commitment act, is not required by statute in psychopathic personality commitment cases and usually is not done.**

Pre-petition screening is usually not done in psychopathic personality cases.

Several judges and county attorney staff we spoke with, including those who handle the majority of PP commitments, told us that pre-petition screening is routinely done with "mentally ill and dangerous" commitment cases. It is required under *Minn. Stat.* §253B.07, which specifies the procedures that should be followed in pre-petition screening. Typically, a pre-petition screening team consists of social work, mental health, and medical professionals who interview the proposed patient and others, review all of the evidence, and prepare a written report with a recommendation to the county attorney.

But according to the Attorney General's Office, pre-petition screening is not required in psychopathic personality commitment cases. Civil commitment procedures for the mentally ill and dangerous apply to psychopathic personality commitments except as otherwise provided in the PP statute, which states that county attorneys may initiate a PP commitment petition based on evidence of "good cause."³⁸ Among the county attorney's offices we contacted, only Ramsey County screens its psychopathic personality cases using the same team that screens mentally ill and dangerous commitment cases. The Attorney General's Office, which currently handles many of the PP cases in non-metropolitan counties, does not use a pre-petition screening team, although it usually orders its own psychological evaluation. Similarly, there is no pre-petition screening in Hennepin County where a substantial proportion of cases are handled. In counties without

³⁸ *Minn. Stat.* §526.10. In two unpublished cases, the appellate courts have held that pre-petition screening is not necessary in psychopathic personality commitment cases.

Committing people following a prison sentence raises problems.

pre-petition screening, county attorney staff or Attorney General's Office staff must do their own investigation of the evidence provided by the Department of Corrections and other sources in deciding whether to pursue a commitment petition. Several attorneys and judges we spoke with think that pre-petition screening may be desirable in PP commitment cases even though it is not required.

We found that:

- Current psychopathic personality commitment procedures were not designed to be used for offenders who have just served a prison sentence.

As discussed earlier, when the psychopathic personality statute was enacted in 1939 and later revised in 1969 to make its procedures consistent with civil commitment of mentally ill and dangerous persons, it was used by judges at the time of sentencing. Further, it was used primarily to divert sex offenders for fairly brief periods of time into treatment instead of sending them to prison.³⁹

Civil commitment procedures were not designed to accommodate systematic referrals from the Department of Corrections of serious, repeat sex offenders who have just spent an average of seven years in prison. Initiating a psychopathic personality commitment when an offender is scheduled for release after serving a prison sentence raises several problems. First, most of the evidence pertaining to individuals' sexual conduct pertains to behaviors that the individuals engaged in before they were sent to prison. The longer individuals have been in prison, the more difficult it may be to predict how they would act if they were released. This is why judges who hear these cases told us that behavior in prison is an important consideration in the commitment decision because it is an indicator of current behavior. A second problem is that for individuals who have served years in prison, much of the evidence presented at the commitment hearings comes from inmates' prison files, which elevates the Department of Corrections' prison files to a legal status for which they may not have been intended. Finally, because more serious repeat sex offenders are being referred for possible commitment, longer confinement will probably result.

The behaviors for which people are committed usually occurred before they were sent to prison.

Although it is not a formal part of the commitment process, the systematic screening and referral done by the Department of Corrections has become an important initial step in most psychopathic personality commitment cases because it sets the commitment process in motion. This is especially so since pre-petition screening is not routinely done.

Once a petition for commitment has been filed, the individuals formally considered for civil commitment are entitled to counsel and a separate examination by an examiner of their own choosing, with the costs paid by the county. However, due process procedures in civil commitment cases are different from criminal cases. Under Minnesota law, there is no right to a jury trial and the burden of proof in civil commitments--"clear and convincing evidence"--is lower than the "proof beyond a reasonable doubt" standard in criminal cases. Furthermore, judges may

³⁹ Erickson, *The Psychopathic Personality Statute, Need for Change*.

decide that certain kinds of evidence (e.g., hearsay evidence) may be admissible in psychopathic personality commitment cases but not in criminal cases. As one judge explained, the main difference between a criminal case and a psychopathic personality commitment case is that in the former, most of the evidence comes from witness testimony, while in the latter, most of the evidence consists of papers and files that pertain to the individual's life history (especially sexual history).

The 1992 Legislature clarified the "dual" psychopathic personality commitment statute to require that when the sentencing court finds that PP commitment may be appropriate, it shall forward its preliminary determination to the county attorney.⁴⁰ This legislation also amended the psychopathic personality statute to provide that when a PP commitment follows a prison commitment, the person shall first serve the sentence in a facility designated by the Commissioner of Corrections.⁴¹ These statutory changes clarify that a psychopathic personality commitment may be more appropriately considered at the time of sentencing. We were unable to determine the extent to which the courts have followed this statute since 1989 because its use is not regularly monitored by the Supreme Court or the Sentencing Guidelines Commission. However, we found that:

- Over 80 percent of PP commitments since 1991 have involved individuals who were sentenced before the 1989 statute took effect.

We also found that:

- Only two of the 48 final commitments that have occurred since August 1989, when the dual sentencing statute took effect, have been "dual" commitments.

Very few recent commitments have been "dual" commitments.

Given the average length of prison sentences for sex offenders, there may be additional people in prison who have been identified by the courts as potential PP commitments and county attorneys may be waiting until their prison sentences expire to pursue civil commitment petitions. The "dual" commitment law, *Minn. Stat.* §609.1351, does not specify whether the county attorney should act on the judge's determination and file a PP petition at the time of sentencing, shortly thereafter, or when individuals are scheduled for release from prison. Also, there is ambiguity between this statute and the psychopathic personality law, which identifies the county attorney as the appropriate judicial agent to initiate a PP commitment proceeding. According to judges we spoke with, identifying an individual as a possible psychopathic personality interferes with the criminal court judge's role since civil commitment is a separate proceeding and it is the county attorney's responsibility to determine whether a PP petition is warranted.

We also found that:

- The commitment process is not always completed before the inmate's scheduled release date.

⁴⁰ *Minn. Stat.* §609.1351, as modified by *Minn. Laws* (1992), Ch. 571.

⁴¹ *Minn. Stat.* §526.10, as modified by *Minn. Laws* (1992), Ch. 571.

Commitment decisions are not always timely.

When the commitment process has not been completed before an offender's scheduled release date, the Department of Corrections, county attorney, or Department of Human Services must obtain a temporary court order to detain the person in prison, at the Minnesota Security Hospital, or at another hospital until the final commitment decision is made. We were unable to determine how often this happens, but we identified a number of cases where inmates (including some who were not committed) were detained beyond their scheduled release date so that the process could be completed.

There are several reasons why the commitment process is not always completed in a timely manner. The commitment process can take as long as six to nine months to complete, including two months for the mandatory evaluation at the Minnesota Security Hospital. There are timelines specified in the civil commitment act covering when the formal procedures must occur. Accordingly, the Commissioner of Corrections must make a PP referral to the county attorney no later than six months before an inmate is scheduled to be released.⁴² Although Department of Corrections' policy suggests that a review should be initiated a year before the inmate's scheduled release date, this is not always done.⁴³ In addition, the Department of Corrections does not always hear back from county attorneys as to whether they intend to pursue the commitment. Some county attorneys told us they must prioritize PP commitment cases because their offices are not sufficiently staffed to handle the sudden increase in Department of Corrections' referrals. Also, once the formal procedures are initiated, either party may request a continuance.

Patients have a right to refuse treatment.

Individuals who are committed are entitled to patients' rights as spelled out in statute and Department of Human Services' rules. Among these rights, patients have a right to treatment, but they also have a right to refuse treatment. The new treatment program at the Minnesota Security Hospital, which was designed for sexual offenders including those committed as psychopathic personalities, began operating in October 1993. It is based on individualized diagnoses and treatment plans. Some patients may be given anti-androgen medications to help reduce sexual arousal, but as with all aspects of treatment, drug therapy is voluntary. The formal treatment includes four phases and is designed to last a minimum of three years. Individuals must successfully complete each phase before progressing to the next. According to security hospital staff, several of the individuals committed as psychopathic personalities have refused to participate, and the participation of others is limited by security concerns. There are incentives to participate in treatment for those who still have a portion of their criminal sentence remaining since they may be transferred to the custody of the Commissioner of Corrections if they are unwilling to follow treatment recommendations, show a lack of progress, or pose a danger to staff or other patients.⁴⁴

⁴² *Minn. Stat.* §244.05.

⁴³ Department of Corrections, Institutional Services Division Policy Memo, "Civil Commitment Referral Policy-Referral of Certain Offenders for Commitment as Psychopathic Personalities," March 12, 1993.

⁴⁴ *Minn. Stat.* §526.10. Individuals committed following a prison term are committed on their scheduled release dates, which may be earlier than their sentence end dates if they earned good time in prison.

Patients have a right to appeal commitment and discharge decisions to the Appeals Court.

Once committed, individuals remain at the Minnesota Security Hospital until the Commissioner of Human Services releases them, based on the majority recommendation of a three-person review board (none of whom may be an employee of the Department of Human Services). The commissioner's decision may be appealed to a special appeal panel of three judges appointed by the Supreme Court. The standard applied by the board and the commissioner for final discharge is that the patient is "no longer dangerous to the public," no longer needs inpatient treatment, and is capable of making an acceptable adjustment to open society. Other procedural requirements and criteria apply to patients' requests for transfer or provisional discharge, under which the patient may be released but remains under the commitment order. Patients may petition for provisional or final discharge and the special review board is statutorily required to meet at least every six months to hear all petitions. The board has been meeting on a more frequent basis--generally every week--due to the large number of petitions submitted. According to Minnesota Security Hospital staff, two patients with psychopathic personalities have been discharged during the past three years (one of the two was provisionally discharged to a state-operated nursing home).

Department of Corrections Psychopathic Personality Referral Process

As discussed previously, the Department of Corrections began systematically screening all offenders scheduled to be released in July 1991 to identify "public risk monitoring" cases.⁴⁵ There are seven Minnesota correctional facilities (MCFs) from which offenders may be released, five of which have a designated "civil commitment coordinator" who reviews sex offenders for possible PP referral.⁴⁶ Each correctional facility is responsible for screening its own offenders prior to their release using seven criteria. An inmate who meets any of the seven public risk monitoring criteria is considered a high public risk and is subject to additional community supervision upon release.⁴⁷

All sex offenders identified as public risk monitoring cases are subsequently screened for referral to the appropriate county attorney for possible psychopathic personality commitment proceedings. In addition, any Department of Corrections staff member can request that an inmate be reviewed for possible PP referral. Over 70 percent of the department's referrals come from the Lino Lakes and

⁴⁵ Prior to July 1991, the department used "supervised release guidelines" to determine the level of community supervision an offender would receive upon release. For a description of the new policy, see Wood, *Risk Assessment and Release Procedures for Violent Offenders/Sexual Psychopaths*, 17-20, and Memorandum from the Department of Corrections, "Public Risk Monitoring Guidelines," March 10, 1992.

⁴⁶ The five correctional facilities are MCF-Faribault, MCF-Lino Lakes, MCF-Oak Park Heights, MCF-St. Cloud, and MCF-Stillwater.

⁴⁷ The criteria include: whether the conviction offense involved actual or attempted victim injury; prior convictions for assaultive behavior; institutional assessments of mental health problems; whether the inmate is a recidivist sex offender; whether the current offense involved the use of a weapon and the inmate has a prior offense with a weapon or the inmate has a history of assaultive behavior; and whether the inmate is considered a potential public risk by correctional (institutional or field) staff.

Stillwater facilities because of the way in which the various correctional facilities are used.⁴⁸

Five correctional facilities have designated "civil commitment coordinators" who make the final PP referral decision. To promote objectivity, the commitment coordinator may not be a person involved in treating sex offenders. In addition, the department has established a Civil Commitment Coordinating Committee, which includes the commitment coordinators from each facility, the director of the department's Sex Offender Services Unit, and one additional department member. This committee has met two or three times since January 1993. It is responsible for recommending changes to PP civil commitment policies and helping to track department referrals.

**The
Department of
Corrections
thinks it
screens nearly
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offenders for
possible
psychopathic
personality
referral.**

The Department of Corrections is in the process of developing a sex offender tracking system which should provide summary data in the future. Although the department does not know precisely how many sex offenders have been screened, department staff think that nearly all sex offenders are screened for possible PP referral because the screening criteria are very inclusive. According to correctional facility staff, almost all sex offenders are identified as a high public risk--and, therefore, are also screened for possible PP referral--since one public risk monitoring criterion is whether the person is a repeat sex offender or has a "substantial potential" to reoffend. Another criterion is whether the inmate is considered a potential risk by correctional staff, based on institutional behavior, an exhibited lack of control in the community, or behavior that placed the victim in danger.⁴⁹ Each facility keeps its own files on psychopathic personality screening and referrals, which were not summarized at the time of our study. However, according to information provided by staff at MCF-Stillwater--one of the facilities that makes many of the PP referrals--185 sex offenders scheduled to be released during 1992 were identified as "public risk monitoring" cases. All 185 were screened for possible PP referral, and of those, 29 (16 percent) were referred to county attorneys for possible psychopathic personality commitment proceedings.

When the Department of Corrections instituted its screening and referral process, it was undertaking a new activity with which it had little experience. Subsequently, the department has refined its process of screening and referring sex offenders and continues to do so. The observations we make here are based on the way the process worked at the time of our study. We interviewed the civil commitment coordinators in September and October 1993 about the process they used then to assess sex offenders for possible PP referral. We found that:

- **The psychopathic personality referral process varies by correctional facility.**

⁴⁸ Each correctional facility houses inmates of different ages and security risks. For example, fewer inmates are referred for PP commitment from the St. Cloud and Faribault facilities because they house younger and older inmates, respectively. Similarly, Oak Park Heights is a maximum security facility, and most inmates are transferred to Stillwater or Lino Lakes before release.

⁴⁹ Memorandum from the Department of Corrections, "Public Risk Monitoring Guidelines," March 10, 1992.

**Each
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Figure 7 summarizes what we learned from the civil commitment coordinators. As indicated, each commitment coordinator uses different procedures, relies on somewhat different information, and weighs the various factors somewhat differently. For example, to some commitment coordinators, disruptive behavior in prison weighs in favor of a PP referral. Others expect this behavior from prisoners and think it fails to differentiate or predict future non-prison behavior. Furthermore, many sex offenders are well-behaved in prison. The commitment coordinators told us that they ultimately rely on their professional judgments, after weighing all the evidence, in making decisions. All but one of the commitment coordinators are licensed psychologists. The other coordinator is a social worker who has a psychologist evaluate potential referrals before making a decision.

County attorney staff and judges told us that evidence pertaining to whether the person continues to pose a high risk to reoffend is an important element in the commitment decision. Nationally, there are few instruments to measure a sex offender's reoffense risk.⁵⁰ The Department of Corrections has developed its own instrument, called a "sex offender screening tool" (SOST). A SOST is filled out by caseworkers on all sex offenders who have been identified as public risk monitoring cases as the first step in the PP commitment referral process. However, the commitment coordinators who review the forms evaluate them differently. Each coordinator applies a different cut-off score (ranging from 25 to 40) to determine whether the person is a potential referral. All coordinators told us that the SOST score is just one factor they consider in making a decision.

The correctional staff who developed the sex offender screening tool continue to modify and refine it. They have also attempted to validate the instrument by scoring it "blind" on previously released sex offenders whose recidivism rates are known.⁵¹ The most recent version was put into effect in January 1994, and its accuracy as a predictive tool will be assessed in Spring 1994.

The Department of Corrections' plans for improving its screening and referral process include assessing sex offenders when they enter the correctional system using the sex offender screening tool. The department intends to use its assessment process to ensure that sex offenders receive appropriate treatment while they are in the prison system. Those individuals identified as potential PP commitments at the time of prison entrance will be carefully monitored and assessed again before they are scheduled for release. The department started doing initial assessments of entering sex offenders in late 1993.

As Figure 7 also suggests:

- **Many of the factors considered by the department in making PP referrals depend on information about an offender that varies in quantity and quality.**

⁵⁰ Robert J. McGrath, "Assessing Sex Offender Risk," *Perspectives* (Summer 1992), 6.

⁵¹ James D. Kaul, Stephen J. Huot, and Maude Dornfeld, "The Prediction of Risk of Recidivism for Incarcerated Sex Offenders," paper presented at 12th Annual Conference of the Association for the Treatment of Sexual Abusers, Boston, Massachusetts, November 10-13, 1993.

Figure 7: Assessment of Department of Corrections (DOC) Psychopathic Personality Referral Process

Parts of the Referral Process

- 1) Use of "sex offender screening tool"
- 2) Use of MMPI or other standardized psychological tests
- 3) Personal interview with the offender
- 4) Interviews with caseworkers, treatment professionals, and others familiar with inmate
- 5) Review of inmate's files
- 6) Contents of inmate's files
- 7) Information sent to county attorneys

DOC Procedures

Filled out on all offenders, but each commitment coordinator uses different cut-off scores in making referrals.

Inconsistently used; may or may not be done prior to making commitment referral.

Varies by institution and inmate; some coordinators interview all potential referrals, others prefer not to do so.

Varies by institution and by individual inmate.

Considered an important part of process in all institutions.

Information placed in inmate files varies by institution and individual, especially information obtained during treatment.

Varies by institution; some coordinators send a letter only, others send the results of their psychological evaluation as well.

Factors Considered

- 1) Inmate's treatment history
- 2) Inmate's institutional record
- 3) Number of prior offenses and prior victims
- 4) Inmate's juvenile history
- 5) Inmate's personal demeanor during interview

How Factors are Considered

All commitment coordinators view this as important; successful completion of treatment is viewed positively, prior treatment failures are viewed negatively.

Disagreement among commitment coordinators over the relative importance of this factor.

Disagreement among commitment coordinators over the number of offenses/victims meriting psychopathic personality referral and whether only criminal convictions or all known victims should be counted.

Commitment coordinators agree this is important; however, knowledge of inmate's juvenile history varies by institution and individual.

Those commitment coordinators who interview all potential psychopathic personality referrals believe this is important.

Many items on the sex offender screening tool—total number of victims, age of victims, length of sex offending history, and alcohol and drug usage—rely on information that may be unknown, with much of it dependent on what offenders may have told their probation officer, prison caseworker, or treatment counselor. Even information about the conviction offense, prior convictions, and juvenile records depends on the quality of information contained in police reports, presentence investigations, and other official documents.

We found that:

- Although the department has a policy regarding inmate records and files, it does not specify what information may be placed in them.

The Department of Corrections is exempt from the Administrative Procedures Act for its policies covering institutional management and treatment of inmates.⁵² The department operates under a 1987 policy that covers inmate records, which complies with the Government Data Practices Act as it pertains to the Department of Corrections.⁵³ The department keeps base files on all inmates, which are maintained by the correctional facility where the inmate is housed. In addition, inmates have separate medical and program files where treatment information may be placed, which are considered confidential.

The commitment coordinators and other mental health professionals who work with inmates differ in what information they put in inmates' files. Some place all psychological, medical, and program information in the base files, while others leave out certain information, such as that confided during treatment. In addition, caseworkers and other correctional staff may place information about prison behavior or inmate belongings (e.g., pornographic magazines) in the base files at their discretion.

This issue is important because at civil commitment proceedings, inmates' institutional files represent an important part of the evidence considered by county attorneys and judges in making decisions. This is especially the case for commitment proceedings initiated after an offender has spent time in prison. The court's principal findings of fact rely on the professional judgments of examining psychologists and any information about the offender's behavior, both past and recent, which substantiates whether the offender is dangerous and acts impulsively. Hence, anything known about the offender becomes relevant to the commitment decision.

A copy of the inmate's base file is forwarded to the county attorney and, subsequently, to the court if the county attorney petitions for commitment. County attorneys may also obtain a court subpoena to gain access to the inmate's medical files. Some judges and county attorney staff told us that the information they receive from the Department of Corrections varies in quantity and quality by correctional facility and individual inmate.

Inmates' prison files may be used as evidence at commitment hearings.

⁵² Minn. Stat. §14.03, subd. 3.

⁵³ Department of Corrections, *Policies Pertaining to Institution Services*, 3-183.0 (Records), July 1987. See also Minn. Stat. §§13.85-.87 and Minn. Stat. §241.06.

The most problematic issue concerns what information may be placed in the inmate's medical and program (treatment) files, and whether this information also becomes part of the evidence considered at the commitment hearing. The "Catch 22" of sex offender treatment, especially in prison, is that participation is viewed positively, as an indicator that the inmate desires to change. During treatment, offenders are encouraged to discuss their sexual history, problems, and victims. Alternatively, inmates who fail to admit to sexual behaviors may be considered uncooperative, which is viewed negatively by correctional staff who make PP referrals. But in the absence of a departmental policy covering what happens to this kind of information, anything an inmate divulges during treatment or while in prison may be included in the files by a caseworker or treatment professional and could be presented as evidence against that inmate at a PP commitment hearing. According to one judge, some files contained copies of workbooks and diaries that the inmate completed as part of treatment assignments.

PREDICTING FUTURE PSYCHOPATHIC PERSONALITY COMMITMENTS

In this section, we assess predictions of the need for more psychopathic personality beds and examine the costs associated with keeping PPs in alternative institutional settings. We also present information about changes in court sentencing practices, which also may affect the number of future psychopathic personality commitments.

Estimating Future Costs

The Legislature has authorized over \$28.5 million to expand capacity for psychopathic personality commitments.

The 1993 Legislature approved construction of a \$20.05 million, 100-bed treatment facility exclusively for psychopathic personality commitments at Moose Lake, to be operated by the Department of Human Services.⁵⁴ It will be built adjacent to the former Moose Lake Regional Treatment Center, which is being converted to a medium security prison operated by the Department of Corrections. The new Moose Lake treatment facility is scheduled to open in July 1995. It will be partially staffed with former employees from the old regional treatment center and will develop its own treatment program in conjunction with the Minnesota Security Hospital's PP treatment program that just began operating. However, an administrative rule is being written that will cover both facilities. The Minnesota Security Hospital also received \$8.5 million in state funds to expand its capacity for psychopathic personality commitments by 50 beds and provide for adequate security and programming. It will continue to house PPs until the Moose Lake facility opens.

We asked Department of Human Services staff how they made their projections for the number of new beds needed for psychopathic personalities. We found that:

⁵⁴ *Minn. Laws* (1993), Ch. 373. Of the total projected cost, \$7.25 million was appropriated in 1993.

A new facility for psychopathic personalities, costing over \$100,000 per person annually to operate, will open in 1995.

- **The Department of Human Services had very little reliable information upon which to base projections of future psychopathic personality commitments.**

The department simply used the number of commitments to the Minnesota Security Hospital during the previous year—an average of two per month—and projected that number forward (i.e., 48 additional beds needed in the next two years). According to staff projections, if commitments continue at their current rate, the Moose Lake treatment facility will be near capacity by the time it opens in July 1995 since psychopathic personalities at the Minnesota Security Hospital will be transferred to Moose Lake. Because of the uncertainty of how many new commitments will occur before July 1995, the department's contingency plan calls for the Minnesota Security Hospital to house any PP commitments in excess of the 100-bed capacity at Moose Lake. Otherwise, the Minnesota Security Hospital's new beds will be used for mentally ill and dangerous patients.

We made our own projections based on Department of Corrections' data on the proportion of previously released sex offenders who were committed as psychopathic personalities. Based on our projections, we think that:

- **It is likely that between 27 and 36 new psychopathic personality commitments will occur over the next two years, absent any policy changes to limit PP commitments.**

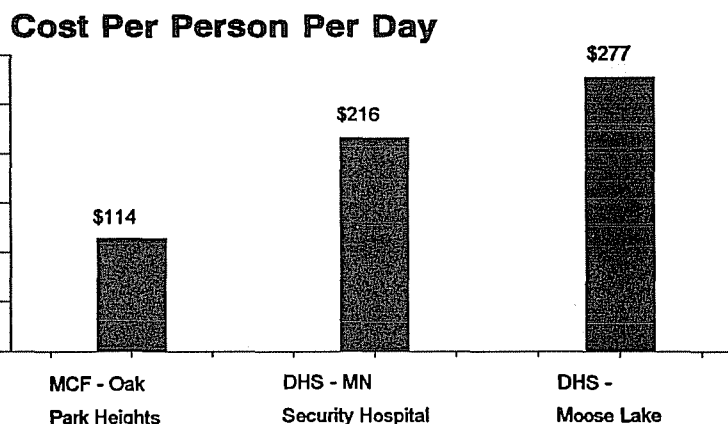
Information presented previously showed that during the period January 1991 through September 1993, a total of 46 sex offenders were committed as psychopathic personalities, which represents 7.4 percent of sex offenders released from prison during a similar time period. The Department of Corrections estimates that 449 sex offenders will be released between July 1993 and June 1995. Since most of these offenders were not sentenced under newer sentencing laws, it is reasonable to expect that between 6 and 8 percent will be referred and committed, assuming no changes in policies or screening procedures. These projections are slightly lower than those made by the Department of Human Services, but they do suggest that the Moose Lake facility is likely to be near capacity when it opens (assuming all current PPs at the Minnesota Security Hospital are transferred there).

Department of Human Services staff estimate that operating costs for the new Moose Lake facility will be \$10,310,000 in fiscal year 1996, the first year the facility will be open. In order to compare costs for a similar time period, we converted that estimate into a fiscal year 1995 per diem by deflating it by 3 percent, and inflating fiscal year 1994 costs by 3 percent for the psychopathic personality unit at the Minnesota Security Hospital.⁵⁵ We compared this to estimated per diem costs for MCF-Oak Park Heights, the state's most secure prison, which also operates a sex offender treatment program. The results are shown in Figure 8. We estimate that:

⁵⁵ Minnesota Security Hospital staff estimated a cost of \$210 per day for the psychopathic personality unit, as of October 1993 when the new treatment program began operating. This per diem cost is slightly lower than the average for the whole St. Peter Regional Treatment Center, of which the Minnesota Security Hospital is a part.

- It costs nearly twice as much to keep people committed as psychopathic personalities at the Minnesota Security Hospital as in a maximum security prison, and it will cost even more to keep them at the Minnesota Psychopathic Personality Treatment Center in Moose Lake.

Figure 8: Estimated Costs of Alternative Psychopathic Personality Commitment Settings, FY 1995



Sources: Department of Human Services and 1994-95 State Biennial Budget.

It is much more costly to confine people in DHS facilities than in prisons.

As Figure 8 shows, projected fiscal year 1995 per diem costs at MCF-Oak Park Heights are \$114 per day (\$41,682 per year), compared to \$216 (\$79,004) at Minnesota Security Hospital and \$277 (\$101,078) at Moose Lake (if it were open). These cost differences are largely accounted for by differences in staff-to-patient/inmate ratios. For example, the planned Moose Lake facility is projected to have a staff of 175 to care for 100 patients. Meanwhile, MCF-Oak Park Heights has 302 staff to manage an average daily inmate population of 375.⁵⁶ In addition, present Department of Human Services facilities must meet state licensing, federal certification, and accreditation standards that are different from those that apply to the Department of Corrections.

Any predictions of future costs to house and treat psychopathic personalities are based on assumptions about how many additional people will be committed and how many current commitments may be released. However, given the stringent criteria for discharging PP patients from DHS treatment facilities, Minnesota Security Hospital staff estimate that PPs already committed are likely to spend a minimum of eight to ten years there, with some possibly remaining for life. Assuming a conservative 3 percent inflation rate per year, the comparative costs of housing 100 psychopathic personalities for the next ten years are: \$47.8 million at MCF-

⁵⁶ Minnesota 1994-95 Biennial Budget.

Oak Park Heights, \$90.6 million at Minnesota Security Hospital, and \$114.8 million at the planned Moose Lake psychopathic personality treatment facility. The average age of current psychopathic personality commitments is 40 years, and they could remain in confinement until they die (an average of 38 additional years).⁵⁷

Other Factors Affecting Future Psychopathic Personality Commitments

The use of the psychopathic personality statute may decline in the future as policies recently enacted by the Legislature to deal with dangerous sex offenders take effect. As described previously, these include longer guidelines-based sentences for sex offenses, a patterned sex offender statute that directs the courts to double the presumptive guidelines sentence for sex offenders who represent a danger to society, and mandatory 30-year and life sentences for repeat sex offenders who meet certain criteria.⁵⁸

We examined how the courts have modified sentencing practices for sex offenders. We found that:

- The sentences that sex offenders currently receive are considerably longer than those received prior to the 1989 legislative changes.

As Figure 9 illustrates, the average length of pronounced prison sentences for various sex offenses has increased significantly since the Legislature toughened penalties for sex crimes in 1989. For example, individuals convicted of criminal sexual conduct (CSC) in the second or third degrees for offenses involving force or coercion—ranked by Sentencing Guidelines as "level 7" offenses—received an average pronounced prison sentence in 1986 of 4.1 years. In 1992, the average prison term for the same offenses had increased to 6.8 years.⁵⁹

Similarly, the average prison sentence for individuals convicted of criminal sexual conduct in the first degree that involves force or coercion with sexual penetration (a "level 8" offense) increased from 6.5 years in 1986 to 10.6 years in 1992. Offenders convicted of CSC in the first degree involving a child victim (also a "level 8" offense) received an average sentence of 4.7 years in 1986, and the average sentence more than doubled to 10.4 years in 1992.

We also found that:

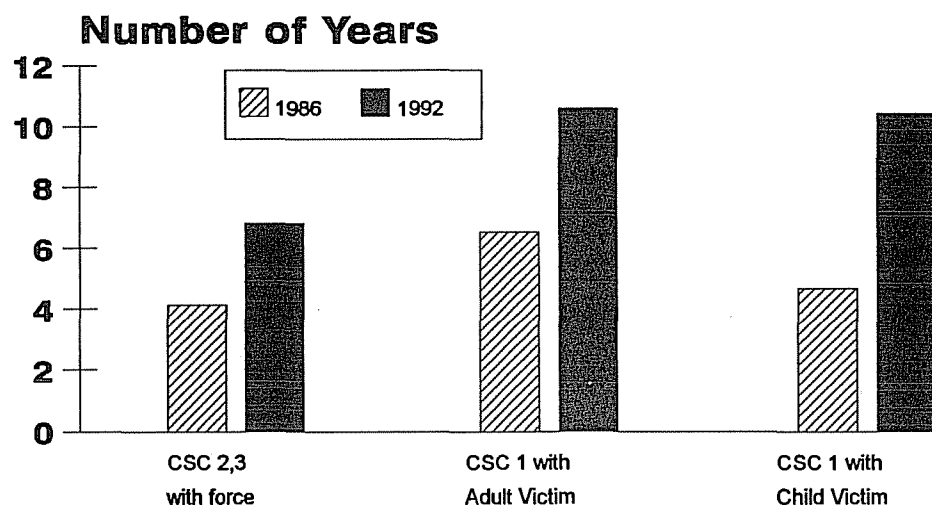
⁵⁷ 1990 data from Minnesota Planning on life expectancy of a 40-year old male.

⁵⁸ For a definition of the specific criteria that apply, see *Minn. Stat.* §609.346.

⁵⁹ Some parts of criminal sexual conduct in the second and third degrees are ranked at "level 7," while the remainder are ranked at "levels 5" or "6." For a ranking of all crimes and complete definitions of the criminal sexual conduct statutes, see Minnesota Sentencing Guidelines and *Minn. Stat.* §§609.341-.3451.

Growth in psychopathic personality commitments may slow in the future due to longer prison sentences.

Figure 9: Average Prison Sentences for Sex Offenders, 1986 and 1992



Source: Sentencing Guidelines Commission.

- While few sex offenders have been sentenced under the "patterned sex offender" statute, the number has increased each year since the statute was enacted.

Persons convicted of criminal sexual conduct in the first, second, third, or fourth degrees or other specified predatory crimes after August 1, 1989 are subject to sentencing under the patterned sex offender statute if the court finds them to be a danger to public safety.⁶⁰ In 1990, the first full year the statute was in effect, five individuals were sentenced to twice the guidelines-based prison sentence through reference to the "patterned sex offender" statute. This number increased to 11 in 1991 and to 19 in 1992. In addition, between 1988 and 1992, judges have departed from the guidelines and given longer sentences to an average of four sex offenders per year as "recidivist" or "patterned sex offenders."⁶¹

In 1989, the Legislature enacted a mandatory 37-year sentence for sex offenders who are convicted of their third felony sex offense. This statute was modified in 1992 to provide for mandatory 30-year and life sentences for sex offenders with two prior felony-level sex convictions (or who meet other conditions) and who are subsequently convicted of criminal sexual conduct in the first or second degree involving force or coercion. In 1992, four sex offenders were sentenced to 37 years and another four were sentenced to 25 years.⁶²

⁶⁰ Minn. Stat. §609.1352.

⁶¹ Minnesota Sentencing Guidelines Commission data.

⁶² *Ibid.*

But all sex offenders sentenced under the guidelines will eventually be released.

It is difficult to predict how much these changes may help to slow the growth in psychopathic personality commitments. To the extent that sex offenders sentenced under statutes in effect since 1989 remain in prison longer, the number of sex offenders released each year should decrease (unless offset by significant growth in the number of new sex offenders sent to prison). Consequently, the rate of growth in PP commitments may be expected to slow after those sentenced under older statutes have been released. However, regardless of whether they remain in prison longer, under guidelines-based sentencing, nearly all sex offenders will eventually be released. Hence, it is likely that the PP statute will continue to be used to confine the most dangerous offenders in mental hospitals upon their release from prison.

SEX OFFENDER COMMITMENT AND TREATMENT POLICIES IN OTHER STATES

A recent article identified 12 states and the District of Columbia with sexual psychopath or sexual predator statutes that permit civil confinement of sex offenders: Colorado, Connecticut, the District of Columbia, Illinois, Massachusetts, Minnesota, Nebraska, New Jersey, Oregon, Tennessee, Utah, Virginia, and Washington.⁶³ An earlier article found that only Massachusetts used its sexual psychopath law on a regular basis.⁶⁴ We conducted telephone interviews with attorney general, county attorney, mental health, and/or correctional staff from these jurisdictions, as well as with staff in other states with recent court cases pertaining to this issue. The results of these interviews are presented in Figure 10. As this figure suggests:

- There is considerable variation in how states deal with repeat sex offenders, although most provide treatment for some of them.

There are a number of states whose statutes provide sex offender treatment during incarceration or permit certain offenders to enter treatment voluntarily as an alternative to incarceration. In most instances, these provisions are included in criminal sentencing statutes. A few states, however, provide little or no treatment and deal with sex offenders exclusively by sentencing them to prison. Also, a number of states have general "mentally ill" commitment statutes, under which any offenders (not only sex offenders) who are determined to have a mental illness may be confined to treatment. Some of these statutes are used exclusively as an alternative to incarceration, while others may apply either pre-conviction or post-prison.

63 Gary Gleb, "Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings," *UCLA Law Review*, Vol. 39 No. 1 (October 1991), 215.

64 Weiner (1985), cited in Small, "The Legal Context of Mentally Disordered Sex Offender Treatment Programs," 131.

Figure 10: Comparison of States' Use of Civil and Criminal Commitments for Sex Offenders

<u>State</u>	<u>Civil/Criminal Commitment Statute</u>	<u>Title of Statute</u>	<u>Treatment Availability</u>	<u>Number Treated</u>
California	Civil commitment of sex offenders repealed in 1981; current law enacted in 1982 but not used since 1988 for sex offenders.		Limited treatment for sex offenders provided by Department of Mental Health sometime during last two years of incarceration (joint custody with Department of Corrections). Provided for under criminal codes.	35-40 per year
Colorado	Portions of civil commitment statute declared unconstitutional in 1967 for lack of procedural safeguards; criminal commitment statute enacted in 1968.	"Sex Offenders Act of 1968"	Indeterminate commitment of sex offenders to treatment in lieu of imprisonment; most sex offenders sentenced under straight sentencing statutes.	"Use has decreased in recent years," 36 currently held
Connecticut	General civil commitment statute for mentally ill and dangerous, not specific to sex offenders; revised in 1990 to provide same protections as in criminal cases.		Treatment provided in mental health facility.	"Occasionally used post-prison" (not only sex offenders)
District of Columbia	Civil commitment of dangerous sex offenders (excluding rapists) since 1948.	"Sexual Psychopath"	Indefinite commitment to mental hospital in lieu of incarceration.	"Rarely used; 2-3 currently committed"
Florida	Civil commitment statute repealed in 1991.	N/A	None.	N/A
Illinois	Civil commitment statute enacted 1938; amended in 1955.	"Sexually Dangerous Persons Act"	Indefinite commitment to Department of Corrections with treatment in lieu of prison.	"Rarely used, if at all"
Louisiana	Criminal statute: mandatory life sentence for aggravated rape.	N/A	N/A	N/A
Massachusetts	Civil commitment of "sexually dangerous persons" repealed in 1990.	N/A	Currently, joint custody between Departments of Mental Health and Corrections; pending legislation would transfer custody to Corrections.	220 at present time
Michigan	Civil commitment statute declared unconstitutional in 1971; current criminal statute enacted afterward.	"Sexually Delinquent Person"	Indeterminate prison sentence; used to enhance existing criminal statutes.	"Very seldom used"
MINNESOTA	Civil commitment of dangerous sex offenders statute since 1939.	"Psychopathic Personality"	Treatment provided by Department of Human Services. Sex offender treatment also provided in correctional facilities.	71 held under PP statute (9/30/93)
Nebraska	Repealed civil commitment statute in 1992; replaced it with criminal statute.	"Convicted Sex Offender Statute" (1992)	Voluntary commitment to treatment provided by Department of Public Institutions during incarceration for length of sentence or less.	13 at present (new program)
New Jersey	Criminal statute; civil commitment considered in 1993.	"Sex Offender Act"	Treatment provided by Department of Corrections during incarceration as an alternative to prison for length of sentence or less.	195/year (about 30% of all sex offenders)

Figure 10: Comparison of States' Use of Civil and Criminal Commitments for Sex Offenders, continued

<u>State</u>	<u>Civil/Criminal Commitment Statute</u>	<u>Title of Statute</u>	<u>Treatment Availability</u>	<u>Number Treated</u>
Oregon	No civil statute, but provisions for offenders to voluntarily enter treatment as an alternative to prison since 1977.	"Sexually Dangerous Person"	Voluntary treatment provided jointly by Departments of Mental Health and Corrections for up to two years during criminal sentence.	170 per year
Tennessee	Civil commitment of mentally ill sex offenders, enacted in 1957 (part of general civil commitment statute).		Treatment for sex offenders judged amenable provided by Department of Corrections; treatment in lieu of prison provided jointly by DOC and Departments of Human Services and Health and Mental Retardation.	Civil commitment of mentally ill sex offenders rarely used
Utah	General "mentally ill" civil commitment statute; criminal verdict of "guilty but mentally ill" also available.		Treatment available; no longer than length of criminal sentence, in lieu of incarceration.	"Very rarely used"
Vermont	Repealed civil commitment statute; life sentence with parole after 4th conviction (applies to all violent felonies), with changes under consideration to permit greater discretion.	"Repeat Offender Statute"	Voluntary treatment provided as an alternative to or during incarceration through the Vermont Treatment Program for Sexual Aggressives.	192 per year
Virginia	General civil commitment statute for mentally ill. Criminal statutes provide for diversion to treatment for persons with "sexual abnormality."		Treatment available for sex offenders in prison.	"Sexual abnormality provision not used at all; 450 treatment beds in prisons.
Washington	Two civil commitment statutes; 1959 statute revised in 1984 to limit its application to pre-July 1984 offenses.	"Sexual Psychopath" (1959) "Sexually Violent Predator" (1990)	Indefinite commitment to mental health treatment program within a correctional facility (1990 law).	Nine of 14 committed, (7/90-2/92); one case subsequently reversed
Wisconsin	Civil commitment statute repealed in 1980; reconsidered in 1993.		Treatment available during incarceration provided by Department of Corrections.	600 per year

Sources: Phone interviews and analysis of state statutes; *The 1990 Community Protection Act: Two Years Later* (Washington State Institute for Public Policy, 1992); D. Richard Laws, Editor, *Relapse Prevention With Sex Offenders* (New York: Guilford Press, 1989), Chapter 24.

We also found that:

- **Minnesota and Washington are the only states we could identify that actively use their special civil commitment statutes to confine sex offenders in treatment facilities after they have served their prison sentences.**

Massachusetts repealed its sexual psychopath law in 1990 in response to public opinion that it was too expensive to keep sex offenders in mental institutions.

Washington and Minnesota are the only states to actively use civil commitment procedures for high-risk sex offenders.

Massachusetts is in the process of finalizing legislation to transfer those previously committed under the law to the authority of its Department of Corrections. Staff from prosecuting attorneys' offices or mental health or corrections departments in states that retain commitment statutes for sex offenders—Colorado, Illinois, Tennessee, Virginia, and the District of Columbia—told us that these laws are rarely used because they were designed to divert sex offenders into treatment in lieu of prison. However, staff from several states told us that civil commitment statutes similar to Washington's "sexually violent predator" law, described below, are under consideration in their states.

Washington has had a sexual psychopath law since 1959, but in 1984 it was revised to limit its application to offenses committed before July 1984. In response to several heinous crimes committed by repeat offenders, Washington enacted a "sexually violent predator" law as part of its 1990 Community Protection Act.⁶⁵ Like Minnesota, Washington has sentencing guidelines that specify a prison sentence based on the severity of the crime and the offender's prior criminal record. Once individuals have served their prescribed sentences, they are automatically released. The sexually violent predator law provides for indefinite commitment of sex offenders after they have served their prison sentence. The constitutionality of this law has been challenged and, in a 6 to 3 decision, the Washington Supreme Court recently upheld its constitutionality.⁶⁶

However, Minnesota's psychopathic personality law differs from Washington's violent sexual predator law in several respects. First, Washington's statute is more narrowly defined than Minnesota's and it uses contemporary language. It requires the state to prove that the person "suffers from a mental abnormality or personality disorder" and is "likely to engage in predatory acts of sexual violence." However, the court is permitted latitude in making its determination.⁶⁷ Second, there are more due process protections provided under Washington's statute, including the right to a jury trial with a unanimous verdict required to commit, a higher burden of proof (beyond a reasonable doubt), and release decisions made by the court with a right to a jury trial. Also, fewer individuals have been committed under Washington's statute compared to Minnesota's law. Between 1990 when Washington's law took effect and February 1992, 14 commitment proceedings were initiated and 9 offenders were committed.⁶⁸ Subsequently, the Washington Supreme Court's 1993 decision overturned one of these commitments and remanded a second for consideration of a less restrictive placement. Finally, under Washington's statute, treatment is provided in mental health facilities located within correctional institutions.⁶⁹

⁶⁵ Gary Nelson, *Washington State's 1990 Community Protection Act* (Olympia: Washington State Institute for Public Policy, 1993).

⁶⁶ *In re Young and Cunningham*, 857 P.2d 989 (Wash. 1993).

⁶⁷ *Ibid.* The Washington Supreme Court equated "mental disorder" with "mental illness" and said that testimony by psychiatric and psychological clinicians who are able to identify sexual pathologies is sufficient. Regarding proof of dangerousness, the court said evidence of "recent overt acts" is required if the person is in the community but not if the person is incarcerated prior to commitment proceedings.

⁶⁸ Washington State Institute for Public Policy, *The 1990 Community Protection Act: Two Years Later* (Olympia, 1992), 15.

⁶⁹ *Ibid.* See also *In re Young and Cunningham*, 857 P.2d 989 (Wash. 1993).

In some states, treatment is provided jointly by corrections and mental health departments.

As indicated in Figure 10, there are several states in which treatment for sex offenders is provided jointly by state departments of corrections and mental health. Historically, sex offender treatment programs operated solely within single institutions, either prisons or maximum security state hospitals. Nearly all early sex offender treatment programs were based on a medical model in which treatment attempts to "cure" the patient, in the sense of using medications or other therapeutic interventions to eliminate deviant sexual desires. Current thinking among many professionals who treat sex offenders is that cure may not be possible since they are not suffering from a disease. Many contemporary sex offender treatment programs incorporate tenets of a "relapse prevention" model in which offenders are instructed in how to deal with risky situations, control their deviant desires, and reduce the likelihood of their reoffending. Relapse prevention relies on gradual stages of readjustment into the community and long-term community monitoring and supervision. The relapse prevention model combines principles and skills traditionally associated with both mental health and correctional fields. In recognition of this, treatment programs in a number of states have provided for joint supervision and treatment of sex offenders by both departments.⁷⁰

OPTIONS AND RECOMMENDATIONS

The Minnesota Supreme Court's January 1994 opinion *In re Blodgett*, upholding the constitutionality of the psychopathic personality statute, may be appealed to the U.S. Supreme Court. But for now, the uncertainty surrounding the constitutionality of the law has been resolved.

However, there are still reasons why the Legislature may want to consider changes in the way the state deals with high-risk sex offenders. In contrast to how the psychopathic personality statute was initially used, the law is being used today primarily to commit offenders after they have served their prison sentence. The civil commitment process was not designed to accommodate significant psychopathic personality referrals from the Department of Corrections. We found problems in the way the psychopathic personality commitment process is being administered. Some of these problems are the result of PP commitment being used primarily after long prison stays, when the process was designed for persons whose deviant behaviors had occurred recently. We also found inadequate coordination among the various state and local agencies that are part of the commitment process. As a result, commitment decisions are not always timely and it is difficult for the state to plan for future facility needs. We also found that using the psychopathic personality statute to confine dangerous sex offenders in mental health facilities is more expensive than confinement in prison.

Since the focus of our study was the existing psychopathic personality commitment process and how it works, our specific recommendations relate to the current procedures. However, for legislators who want to consider other approaches, we

⁷⁰ D. Richard Laws, Editor, *Relapse Prevention with Sex Offenders* (New York: The Guilford Press, 1989), Chapter 25.

We propose options for dealing with high-risk sex offenders.

outline two alternatives to keeping the current statute. Thus, we present the following three options:

1. Continue to rely--with procedural improvements--on the current psychopathic personality statute as the primary method of indefinitely detaining high-risk sex offenders.
2. Replace the psychopathic personality statute with a law that is more consistent with contemporary psychiatric knowledge and the way the law is being used to confine persons indefinitely after they have served their prison sentences.
3. Revise existing sentencing statutes to remove sex offenses from Sentencing Guidelines and permit indeterminate prison sentences for high-risk sex offenders.

Option 1: Rely on the existing psychopathic personality statute.

The Minnesota Supreme Court's decision in the Blodgett case means that the Legislature need not change the existing psychopathic personality statute at the present time. It is possible that as longer prison terms for repeat violent offenders, which the Legislature enacted in 1989 and 1992, fully take effect, the growth in psychopathic personality commitments will slow. Those already committed are being offered comprehensive treatment. However, if the Legislature decides to retain the psychopathic personality statute in its current form, we recommend consideration of the following steps to improve commitment procedures.

We recommend that:

- The Conference of Chief Judges should study the appropriateness of the procedures currently applied to psychopathic personality commitments and recommend changes to the 1995 Legislature.

The current psychopathic personality commitment law could be improved.

Several of the problems we identify in this report are properly within the purview of the state's judicial system. Therefore, we think that the Conference of Chief Judges should seek input from individuals and agencies actively involved in the psychopathic personality commitment process. The specific issues that we think should be addressed include: whether pre-petition screening should be required in psychopathic personality commitments; whether changes in admissibility of evidence standards used in psychopathic personality commitment cases may be needed; whether district court judges are identifying individuals appropriate for PP commitment at initial criminal sentencing, and if not, why not; and any additional procedural changes that may be needed.

We also recommend that:

- The agencies currently involved in the psychopathic personality commitment process--the Department of Corrections, Attorney General's Office, county attorneys, and district courts--should take

steps to ensure that the psychopathic personality commitment process is completed before an offender is due for release from prison.

The PP commitment process can take up to six to nine months to complete. To allow sufficient time for investigation, case preparation, and the court's formal commitment process to occur, the Department of Corrections needs to ensure that its referrals are made according to department policy. In addition, there needs to be better coordination and more frequent communication between county attorneys, the Attorney General's Office (when involved in commitment cases), and the Department of Corrections.

We also recommend that:

- **The Legislature should consider directing either the Supreme Court, Sentencing Guidelines Commission, the Department of Corrections, or the Department of Human Services to monitor and compile data on psychopathic personality commitments and related sentencing practices and to report to the Legislature on a regular basis.**

If the Legislature received accurate information on a regular basis, we think it could plan better for future facility needs or consider alternative policies. There are numerous state, local, judicial, and executive-branch agencies involved in the psychopathic personality commitment process, and each maintains its own records pertaining to commitment cases. At present, no agency routinely compiles summary data on all PP commitment cases. We think there needs to be better coordination among these agencies, at least with respect to monitoring the number of commitment cases and other trends, such as judicial use of the "dual" commitment provision and changing sentencing practices, that may affect future facility needs. Because both the Supreme Court and Sentencing Guidelines Commission have staff trained in analysis and both already summarize court sentencing data, either may be an appropriate agency to handle this responsibility. Alternatively, either the Department of Corrections or Human Services could perform this function, with improved data gathering and analysis, since both already maintain some files on PP commitment cases.

In addition, we recommend that:

- **The Department of Corrections should improve its screening and referral process and continue to refine and test its "sex offender screening tool."**

We found variation in the department's PP screening and referral process because it permits referral decisions to be made by each releasing institution without uniform criteria or standards. These decisions do require discretion and professional expertise and may ultimately rely on professional judgment. However, to ensure greater objectivity and more intense scrutiny of individual cases, we think that the department should consider establishing a centralized panel to screen those sex offenders who are being considered for PP referral. Alternatively, it may want to establish a set of procedures and criteria to be applied by the commitment

The Department of Corrections should improve its psychopathic personality screening/referral process.

coordinators at each releasing facility. At a minimum, we think the department should have clear standards and criteria with respect to how the sex offender screening tool is applied, use of standardized psychological tests, the use of a personal interview, and the information provided in the initial referral to county attorneys. In addition, the department's PP screening and referral procedures should be communicated to the inmate population so that sex offenders who want treatment receive it before they are screened for psychopathic personality commitment.

With respect to the Department of Corrections' "sex offender screening tool," it is unreasonable to expect that any instrument purporting to predict future dangerousness or risk will have perfect validity. In refining and testing the tool, an important consideration is how many "false positives" (individuals identified as high-risk cases who do not commit additional offenses) should be permitted in order to ensure a high rate of accurate predictions. Despite the inherent limitations of such predictive instruments, we think the department should continue to refine it and test its reliability and validity and make the results of its tests widely available so that policy makers and others, including those who make PP commitment decisions, are aware of the strengths and limitations of the tool.

We also recommend that:

- **The Department of Corrections should establish uniform policies on what information, including information divulged during treatment, should be added to inmate files.**

As the PP statute is currently applied, it relies heavily on the opinions of technical experts (primarily psychologists, psychiatrists, and other mental health professionals). These professionals, as well as county attorneys and judges who make commitment decisions, rely on information about offenders' past behavior contained in inmates' files maintained by the Department of Corrections. Since commitment decisions may hinge on what a caseworker or prison treatment professional places in an inmate's files, there needs to be a policy covering what kind of information is routinely kept.

In addition, the department needs to formally recognize the contradictions posed by treating sexual offenders within a correctional setting. It needs to develop clear policies that balance concern for public safety with individuals' rights in a therapeutic treatment setting. At a minimum, we think the department needs to develop standards and criteria covering how different types of information divulged during treatment, or required as part of treatment, will be handled by treatment and other correctional staff. Furthermore, inmates should be made aware of these policies and how they affect them.

Therefore, we recommend that:

- **The Legislature should consider directing the department to establish its referral and information management policies under the procedures established in the Administrative Procedure Act (APA).**

**The Legislature
could replace
the
psychopathic
personality
commitment
law.**

The Department of Corrections has been granted a broad exemption from the Administrative Procedure Act for all of its rules pertaining to placement and supervision of inmates, internal management of correctional institutions, and inmate conditions (including rules for their employment, conduct, and discipline inside and outside the facility).⁷¹ Department of Corrections policies that directly affect the psychopathic personality commitment process have potentially high public impact, and we think it may be worthwhile to consider whether they should be adopted in compliance with the public notification and participation requirements in the APA.

Option 2: Replace or revise the PP statute with a more contemporary commitment law for sex offenders.

Even though the Minnesota Supreme Court has upheld the constitutionality of the psychopathic personality statute, the Court's close decision and the dissenting opinion suggest there may be future problems with the existing law. The decision in the Blodgett case may be appealed to the U.S. Supreme Court, and the Minnesota Supreme Court still has three additional psychopathic personality cases under review. In addition, two Minnesota psychopathic personality cases are pending in federal court. So while the legality of the PP statute has been settled for the time being, it remains the subject of court scrutiny.

As we show in this report, Minnesota's PP law, which was enacted 55 years ago, employs language, theory, and methods considered invalid today by many psychiatric and psychological professionals. Our findings show that the statute is currently used to confine high-risk sex offenders, most of whom have previously failed other treatment programs. Furthermore, they are being treated in mental health facilities that cost more than twice as much to operate as correctional facilities. Seventy-one people are currently under commitment and the number is likely to increase to over 100 in the next two years.

Should the Legislature want to change the PP law in more fundamental ways, it could consider replacing the existing law with one that is more consistent with contemporary psychiatric and psychological theory, that provides for more due process protections, or that provides for treatment in less costly facilities.

The Legislature may want to consider following the lead of Washington, which recently enacted a new statute to accomplish the goal of indefinitely confining high-risk sex offenders. Washington's "sexually violent predator" law was enacted explicitly to respond to sex offenders scheduled to be released from prison. It contains a more precise, contemporary definition of whom the law applies to and provides for similar due process protections that apply to criminal cases, including a right to a jury trial and a higher burden of proof. Hence, it meets many of the objections of opponents of Minnesota's psychopathic personality statute.

Besides the due process protections provided for in Washington's statute, there are additional procedural reforms the Legislature may wish to consider. As suggested in the 1994 Blodgett opinion, the psychopathic personality statute could be revised

⁷¹ *Minn. Stat.* §14.03, subd. 3, and *Minn. Stat.* §609.105.

to shift the burden of proof to the state to show "by clear and convincing evidence" that commitment should continue or the statute could be revised to incorporate the narrowed definition contained in the 1939 Pearson case.⁷²

In addition, the Legislature may want to consider confining high-risk sex offenders in facilities that cost less to operate than Department of Human Services' treatment facilities. We found that a number of states provide for treatment of sex offenders in facilities that are jointly operated by departments of corrections and mental health or human services, including treatment provided under civil commitment. A common arrangement is for the department of corrections to operate the facility and the department of mental health/human services to develop and provide the treatment. This is similar to the way treatment is provided for under Washington's civil commitment statute for violent sex offenders, and a number of other states have cooperative arrangements like this. We do not know how much less this option would cost compared to confining psychopathic personalities at the Minnesota Security Hospital or the planned Moose Lake facility. But we expect that the costs would be somewhere between correctional facilities and DHS-run facilities because the latter must meet more comprehensive treatment and staffing standards. Under civil commitment procedures, treatment must be offered, and it is important that the treatment which is provided meets the specific needs of the patients. However, based on the experience of other states, there is no apparent reason why treatment must be provided within a mental health facility operated by the Department of Human Services.

For future cases, the Legislature could permit indeterminate sentences for sex offenders.

Option 3: Revise sentencing statutes to permit indeterminate prison sentences for high-risk sex offenders.

The current need for a civil commitment law to confine sex offenders scheduled for release from prison results from the inability of Sentencing Guidelines to achieve, simultaneously, the goals of equal punishment and public protection from high-risk sex offenders at a reasonable cost. Guidelines-based justice depends on giving offenders who have committed similar crimes and with similar criminal histories (as scored by points based on number of prior convictions) the same punishment. The perceived likelihood that the offender will commit another crime is not a factor that is explicitly considered under the guidelines except through the criminal history "score." The Legislature has responded to this problem by increasing maximum sentences for sex offenders, enacting a patterned sex offender statute that doubles the presumptive prison sentence for dangerous sex offenders, and enacting mandatory 30-year and life sentences for "three-time losers."

However, while longer prison sentences may slow the growth in psychopathic personality commitments, nearly everyone sentenced under a determinate sentence will eventually be eligible for release. Also, judges may be reluctant to sentence offenders to mandatory 30-year or life sentences, except in the most egregious cases. These sentences preclude the possibility that the individual may change and are unlikely to be applied to all violent sex offenders who may pose a risk at the time of their scheduled prison release date. Hence, another option for the Leg-

⁷² *In re Blodgett*, 490 N.W. 2d 638 (Minn. App. 1992), affirmed, ____ N.W.2d ____ (Minn. 1994).

islature to consider is removing sex offenses from the guidelines and permitting a return to indeterminate sentencing for this class of criminal.

Under this option, judges could sentence sex offenders to a mandatory minimum sentence to be served within a high or indeterminate maximum sentence range. The criminal histories of offenders would not be scored, as they are under guidelines, but could be used by judges in determining the minimum sentence that the offender must serve. Once the minimum sentence has been served, a release panel would review the records of all sex offenders periodically to determine whether they remain a danger to society and should remain in confinement within the prisons. Sex offender treatment would continue to be available to them there.

This option acknowledges that the primary purpose of the psychopathic personality commitment statute, as currently applied, is to protect the public from dangerous offenders. In the long run, it may be more cost-effective to incarcerate high-risk sex offenders who are least likely to benefit from treatment in prison rather than to place them indefinitely in higher cost mental health facilities. However, if these changes were enacted, they would not apply to individuals currently in prison who have already been sentenced under existing statutes.

We might add that this option does not necessarily imply giving up on the possibility that treatment for sex offenders may be effective, especially with increased research on sex offenders and more sophisticated evaluation of alternative treatments. This option is compatible with a redirection of treatment funds toward first-time sex offenders and those who are more likely to benefit from it. Our forthcoming report on *Sex Offender Treatment and Services* will say more about the extent to which an adequate continuum of treatment services currently exists in Minnesota.



State of Minnesota
Department of Human Services

Human Services Building
444 Lafayette Road N
St. Paul, Minnesota 55155

February 22, 1994

Mr. James R. Nobles
Legislative Auditor
Centennial Office Building
658 Cedar Street
Saint Paul, Minnesota 55155

Dear Mr. Nobles:

Thank you for the opportunity to review the Legislative Auditor's draft report on Minnesota's "psychopathic personality commitment law." In general, the report provides a complete description of the spectrum of issues relating to offenders deemed to be psychopathic personalities.

Minnesota, like other states, is grappling with the difficult task of assuring the public's right to protection from dangerous, high-risk sex offenders. Your report assists in this effort by providing a factual framework for the Legislature and others striving to come to grips with the pertinent issues.

I look forward to working with you and the Legislature as these important issues are discussed.

Sincerely,

A handwritten signature in cursive script that reads "Maria R. Gomez".

MARIA R. GOMEZ
Commissioner

February 22, 1994

James R. Nobles, Legislative Auditor
Office of the Legislative Auditor
Centennial Building
St. Paul, Minnesota 55155

Dear Mr. Nobles:

Thank you for the opportunity to review the final draft of your report on the psychopathic personality commitment law. We were very pleased to see that some of our recommendations and suggestions were incorporated into your final report. We were all impressed with the very thoughtful discussion and receptivity of you and your staff to our perspective.

First and foremost, we support your finding that the Minnesota Department of Corrections developed and the legislature later mandated a process to systematically review and refer high-risk, dangerous sex offenders for commitment as psychopathic personalities. The department developed this process in the interest of public safety as a fail-safe mechanism to identify cases that were not committed by the courts as psychopathic personalities at the time of initial criminal sentencing. As documented in your report, this process has very successfully identified appropriate cases for referral to county attorneys for commitment as psychopathic personalities when offenders are nearing the end of their terms of imprisonment. Two-thirds of recent psychopathic personality commitment cases were initiated through a department referral.

Also, the Department of Corrections fully agrees with your recommendation relating to the statute which requires identification of individuals by the court for possible commitment as psychopathic personalities at the time of initial criminal sentencing. We support your recommendation that the Conference of Chief Judges study this issue to determine whether courts are identifying potential psychopathic personality commitments at initial criminal sentencing as prescribed by law and, if not, what is the rationale for that position.

In response to your review of the department's procedures used in the referral process, it should be emphasized that the referral process is newly developed, has been enhanced since your office's field work was completed, and continues to be improved. Since the development of this process is being accomplished in a totally new arena, it has always been our position that the process will continue to be refined, tested and enhanced over time.

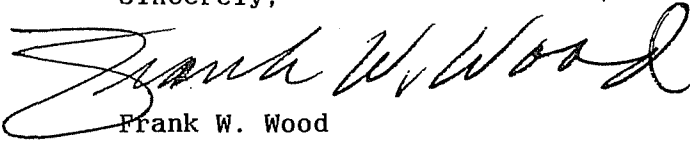
The department has written policy in place setting forth procedures for the referral process. These overall procedures are used consistently throughout the department.

James R. Nobles
February 22, 1994
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The department's Civil Commitment Review Committee and Sex Offender Resource Committee have been assigned by the Deputy Commissioner, Institutions Division, to carefully review the report recommendations regarding the referral process. They have been directed to address recommendations that have not already been addressed. Necessary changes in policy and/or procedure will be developed and implemented by the department no later than April 1, 1994.

In closing, we especially want to thank Ms. Marlys McPherson for her hard work on this very thoughtful and balanced report. The report provides an excellent foundation of information for the legislature, the criminal justice system, and the civil court to begin thoughtful discussion and deliberation on how to improve the state's response to high-risk, repeat sex offenders.

Sincerely,

A handwritten signature in cursive script, reading "Frank W. Wood". The signature is written in dark ink and is positioned above the printed name and title.

Frank W. Wood
Commissioner

FWW:sb