

Issue: VA Criminal Justice Reform

Criminal Justice Reform

The administration of criminal justice may be seen as having three purposes: keeping society free of those who commit criminal acts, making offenders pay for their decisions to flout the rules of civilized society, and finally, rehabilitating them, so they can become productive members of society.

Unfortunately, the balancing of these three purposes has gotten out of kilter both in Virginia and in the rest of the country. Prisoners are not being adequately rehabilitated and they are often staying in prison long after they pose any threat to society.

Starting in the 1990s, Virginia has overemphasized the punitive aspects of justice without a concomitant effort towards rehabilitation. In 1994, the Virginia legislature approved a set of comprehensive reforms designed to make punishment assured, consistent, and long-lasting. The result in Virginia and across the country has been a ballooning prison population, which has grown even as crime rates have dropped. In Virginia, between 2010 and 2015, crime rates dropped 19.5 percent, more than the national average of 14.6 percent.¹ But the rate of incarceration per 100,000 people dropped just two percent in the same period.

Republicans have shown little inclination to help former inmates who have served their sentences and completed post-release obligations take up productive lives. This is particularly true of the Republicans on the House of Delegates' Courts of Justice Committee. Repeatedly, measures to help reintegrate inmates into Virginia's communities die there, usually without a vote. Examples of these numerous failed initiatives include providing mental health services for inmates and expunging the records of juveniles convicted of larceny when the amount stolen is worth less than \$750.

Here is a look at some of the issues surrounding criminal justice in the United States and in Virginia—with a focus on those that the Republican-led House of Delegates has done little to tackle.

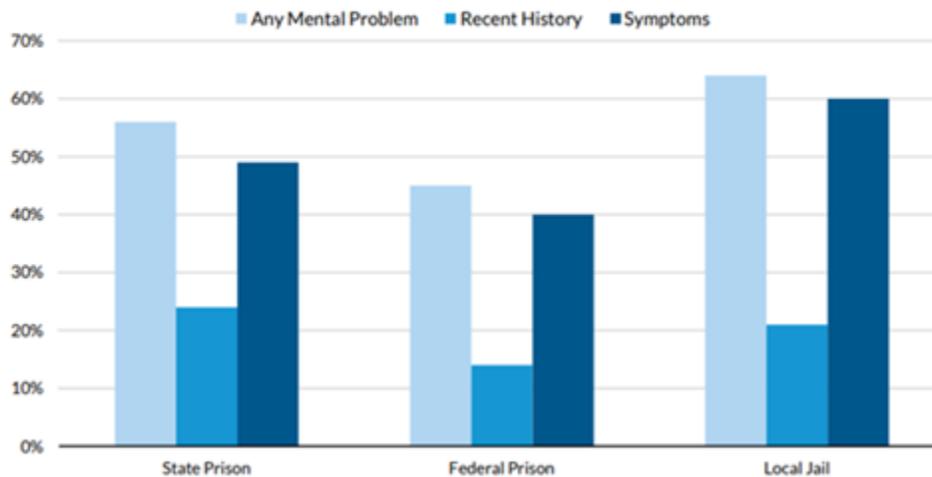
Over-Reliance on Incarceration

The U.S. imprisons more people by far than any other country. Including prison and local jail populations, the rate is about 700 people incarcerated per 100,000 population. Russia, by comparison, imprisons 450 per 100,000 people. The rates in western democracies are much lower: 150 for Australia, 100 for France, 78 for Germany, and 50 for Sweden.

Many factors account for the enormous numbers of prisoners in U.S. prisons and jails, but key among them are the two-decade-old trend for mandatory minimum sentences and the end of authorities' willingness to grant parole. In Virginia, parole was abolished in 1991. Also, there has been extensive criminalization of non-violent drug crimes.

Prisons are also being used to warehouse people with mental health problems.² According to the Bureau of Justice Statistics, individuals with mental health needs make up an estimated 56 percent of state prisoners and 64 percent of jail inmates.³

FIGURE 1
Percentage of Inmates with Mental Health Problems



In the 2017 legislative session, a bill was proposed [SB 940] to require that the staff of a local or regional correctional facility screen persons admitted to the facility for mental illness, and get them appropriate treatment within 72 hours. This bill was unanimously approved by the state Senate and by the House’s Courts of Justice Committee, but died in the House appropriations committee.

Mandatory Minimum Sentencing Laws and Very Long Sentences

The number of mandatory minimum sentencing laws nationally has doubled in the past few decades, robbing judges of discretion when sentencing. From 1988 to 2012, the average amount of time served more than doubled for all categories of crime.⁴ For drug offenses, the average amount of time spent in prison tripled from 1986 to 2004, according to The Sentencing Project.⁵ Virginia has more than followed suit.

When judges have no discretion in sentencing and cannot consider specific circumstances, clearly inappropriate sentences result. The Washington Post cited the example of a Virginia felon who had possession of a musket from the Civil War era. Since felons are not allowed to possess firearms, this man would have been sent back to prison under current Virginia mandatory sentencing laws. However, as he was sentenced before the strict sentencing laws of 1999 were put into effect, he was fined but not sent back to jail.⁶

First-time offenders have also received long sentences for relatively minor drug crimes. Virginia is no exception to draconian sentences as shown by the experience of Kemba Smith. Her boyfriend was a drug dealer who was physically and emotionally abusive towards Kemba. Out of fear, she did engage in illegal activities such as delivering money to others in her boyfriend’s drug ring. Although she did not sell or use drugs, she acknowledged her participation and pled guilty to conspiracy charges. Mandatory sentencing meant that she was sentenced to 24 years in prison.⁷

No Parole

In 1991, Virginia abolished parole. Offenders who committed felonies after the ban have no possibility of early release for good behavior. Although prisoners sentenced before 1991 may still be eligible for parole, very few are actually granted parole. Only about 3 percent of eligible prisoners in

Virginia are released on parole, the lowest rate in the country. As of October 2016, there were 2,765 inmates eligible for parole—but not granted it—for pre-ban felonies. However, the Virginia Parole Board has recently softened its stance on parole for prisoners whose convictions were based on three strikes laws. The state legislature is slated to consider this in the 2019 legislative session; it would turn the Parole Board policy into law.⁸

The minimal use of parole combined with long sentences keeps many elderly people in prison who are no longer a threat to public safety. Crimes are much less likely to be committed by older people, as the peak age for committing homicide peaks in the early twenties and decreases steadily from there.⁹

Imprisonment for Nonviolent Drug Crimes

According to the Brookings Institution, "In every year from 1993 to 2009, more people were admitted for drug crimes than violent crimes. In the 2000s, the flow of incarceration for drug crimes exceeded admissions for property crimes each year. Nearly one-third of total prison admissions over this period were for drug crimes".¹⁰

This trend has continued to the present, as the Federal Bureau of Prisons reports that about 46% of inmates in the summer of 2017 were there for drug charges. Again, with long mandatory sentences already swelling the numbers, the prison population of nonviolent offenders continues to grow.

Virginia Justice is Unjust to African-Americans

Statistically, every stage of the criminal justice system falls far more heavily on African-American inmates. Blacks outnumber whites in Virginia prisons by a ratio of 5:1.¹¹ Historically, black juveniles are more likely to have their cases referred to adult court.¹²

Consider the racial disparities when it comes to drug crime: Although people of every race use illegal drugs at very similar rates, blacks are much more likely to be imprisoned for drug crimes than whites. In 2011, whites comprised about 70% of the total population of the U.S., but only about 30% of the prisoners convicted for drug crimes. Blacks are 3 or 4 times more likely to be arrested for drug crimes, and about 9 times more likely to end up in prison.¹³

In Virginia, the longstanding voter disenfranchisement of felons, now ended, has meant 22 percent of the voting-age population of African-Americans could not vote. The disenfranchisement of the overall population is only 7.5 percent. From another perspective, of 506,680 convicted felons who lost the right to vote, 271,994 are black.¹⁴ The rate of Virginia's disenfranchisement of African-Americans has been exceeded only by Kentucky and Florida.

The Cost of Incarceration

Mass incarceration keeps many dangerous people off the streets. But it is extremely expensive. In Virginia, the yearly budget of the Department of Corrections has hovered near or above \$1 billion in recent years.¹⁵ The average cost per year to keep someone in prison or jail in Virginia is about \$21,300 according to the Vera Institute of Justice.¹⁶

But the fiscal costs aren't the only toll. Even though mass incarceration keeps many dangerous people off the streets, it also keeps people behind bars who were never violent or who are no longer violent.

Mass incarceration also can decimate the communities the prisoners leave behind, leading to harmful outcomes for community members.

For instance, children with a parent in prison are paying a price. These children—2% of all children—don't do as well academically as their peers. Boys with a father in prison become more aggressive physically.

A very surprising finding is that some communities experience a *rise* in crime as more of their members are behind bars, presumably due to the frayed social fabric caused by the missing members of the community and loss of income to families.¹⁷

Democrats' Attempts at Reform

Former Governor Terry McAuliffe was been active on this front, but was often thwarted by the Republican majorities in the legislature.

When his executive order to restore voting rights to felons who had served their sentences was ruled unconstitutional by the Virginia Supreme Court, Governor McAuliffe began restoration of voting rights, individual by individual. As of April 2017, more than 156,000 Virginians had had their voting rights reinstated.¹⁸

In early 2017, he proposed that convicted felons who are later found to be innocent by DNA evidence can be released from prison even if the person pleads guilty. After having pled guilty, about 10% of felons are later exonerated by DNA.¹⁹

Governor McAuliffe also wanted to eliminate the suspension of driver's licenses for unpaid court fees, which essentially criminalizes poverty. In early 2017, he tried to alleviate the Virginia courts' procedure of revoking the driver's licenses for that reason. However, in March of 2017, he compromised with Republicans who agreed to alleviate the burden the rule puts on the poor by demanding only a down payment of the amount owed.²⁰ Current Governor Ralph Northam also wants to end this practice, but approval from the General Assembly is required. In 2019, Republicans blocked a bill [SB 1013] that would have ended this practice. The Legal Aid and Justice Center has published a study showing that, over the years, 977,000 Virginians have lost their licenses this way; its federal lawsuit against the practice was dismissed in May by a judge saying the case should be decided in state court.²¹

A 2016 bill [SB 130] which would have removed mandatory minimum sentences in Virginia failed in committee. This bill was introduced by a Democrat, Senator John S. Edwards.²²

Common-sense Reforms for Virginia

Increase Dollar Trigger for Felony Theft

Until recently, it was more likely that a theft in Virginia would be a felony, not a misdemeanor, than in almost any other state. A majority of states consider theft a felony if the value of the goods or cash is more than \$1,000. Virginia's cutoff was \$200 from 1980 until July 2018, when it increased to \$500, which many criminal justice experts still consider to be too low. If the felony threshold amount had been increased at the same rate as inflation over the past four decades, it would be around \$600.

Although Democrats in the legislature made many attempts to increase this cutoff prior to the 2018 session, these bill died in committees—and every committee has a Republican majority.

In 2017, other Democratic proposals—for compensating victims of wrongful imprisonment or expunging the records of juveniles convicted of larcenies with a value of less than \$750—died the same way. A 2012 report by the Justice Policy Institute estimated that changing that amount to \$600 could save the state approximately \$22.5 million over six years.²³

Education and Vocational Training in Prison

The Vera Institute of Justice reports that 95% of prisoners will eventually be released. It is in society's best social and financial interest that these former prisoners become productive citizens. The most effective way to keep former inmates from re-offending is to offer vocational training in prison, which in turn makes it more likely that the former prisoners will find employment. This has been shown in numerous studies, most notably by a Rand Corporation²⁴ report that showed that education led to a 43 percent reduction in recidivism.

Are prisoners receiving appropriate educational and vocational training to help them get jobs upon release? The short answer is 'no'. Only about a third of prisoners have access to vocational training. In 2015, only 6 percent of prisoners had access to higher education.²⁵ The Virginia Department of Corrections states that in 2012 to 2013, just under 6,000 prisoners received some kind of educational or vocational training. The prison population of Virginia is around 60,000.

Eighty nine percent of re-offenders are unemployed when they commit the new offense. Those who do have jobs are more likely to remain out of prison.²⁶ Every dollar spent on educational and vocational training in prison saves \$4 to \$5 down the road.²⁷

Cash Bail

Bail is money paid by a defendant to a court to ensure he or she will return as required. If the defendant is unable to post bond, a bail bondsman may do so and charge the defendant a non-refundable fee, which can be 10 percent of the bail amount and doesn't depend on whether the defendant appears. And when a defendant fails to show up, it is often the government that tracks them down—even though the bail bondsman was paid to do so. The bail bond industry is driven by private profit, not public safety.²⁸

Current bail practices do not consider the likelihood that the defendant will flee, the ability of the defendant to pay the bail, or the dangerousness of the defendant. Instead, a correlation is assumed between wealth of the defendant and risk; there is no proof, however, of any such correlation. The cash bail system results in pre-trial freedom for wealthier defendants—not those who are most likely to commit another crime or unlikely to show up for trial.

Judges should have discretion to set bail based on these factors and others, such as criminal records and the age of the defendant. Unnecessarily putting people in jail not only has adverse effects on the defendant—who may be innocent—but it is also expensive. Pretrial supervision costs Virginia \$4 per day but jail costs \$75 per day.

Virginia Attorney General Mark Herring (D) is advocating for bail reform. He asks why dangerous people who can afford bail are released, but poor people who do not pose a risk to society are held before their trial.²⁹ Some prosecutors have begun to stop setting bonds on those who are unlikely to flee, but the long-term solution is legislative.

Summation

Virginia was hardly alone in pushing for more draconian justice back in the 1990s, when crime levels had risen and there was great anxiety about safety. But other states have begun to reverse course and have undertaken major reforms that are already resulting in the release of hundreds of inmates and the rebalancing of the objectives of criminal justice.³⁰ Virginia should follow the lead of these other states and reform its criminal justice policies. The state's policies have put a particularly heavy burden on the poor and on African-Americans. But all Virginians will benefit from reforms that lessen the length of sentences, further increase the threshold for felony theft, and do more for prisoners with mental health issues or addictions.

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³https://www.urban.org/research/publication/processing-and-treatment-mentally-ill-persons-criminal-justice-system/view/full_report

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⁵ <http://www.sentencingproject.org/publications/trends-in-u-s-corrections/>

⁶ <http://www.washingtonpost.com/wp-srv/WPcap/1999-10/09/035r-100999-idx.html>

⁷ <http://www.sentencingproject.org/issues/sentencing-policy/>, <http://www.sentencingproject.org/stories/kemba-smith/>

⁸https://www.richmond.com/news/local/crime/bill-would-change-virginia-s-three-strikes-law-on-parole/article_d211cd69-ac55-5e04-b09a-c6fdcf974264.html

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¹⁰<https://www.brookings.edu/blog/social-mobility-memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow>

¹¹ <http://www.sentencingproject.org/the-facts/#map>

¹² <https://www.nap.edu/read/9747/chapter/8>

¹³<https://www.brookings.edu/blog/social-mobility-memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow/>

¹⁴ <http://www.sentencingproject.org/the-facts/#map>

¹⁵ <http://www.dailypress.com/news/dp-nws-budget-item-virginia-33-20141128-story.html>

¹⁶ <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends>

¹⁷<http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html?pagewanted=all&mcubz=0>

¹⁸<https://www.americanprogress.org/issues/criminal-justice/news/2017/04/07/430095/six-states-leading-charge-second-chance-policies/>

¹⁹https://www.washingtonpost.com/local/virginia-politics/mcauliffe-proposes-criminal-justice-reforms/2017/01/03/4810ef3a-d1eb-11e6-9cb0-54ab630851e8_story.html?utm_term=.08f7c146e95d

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²² <http://www.dailypress.com/news/dp-nws-legis-notebook-20160118-story.html>

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²⁴ A Meta-Analysis of Programs That Provide Education to Incarcerated Adults

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²⁵ <https://www.vera.org/newsroom/press-releases/new-report-helps-expand-access-to-higher-education-in-prison>

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³⁰<https://www.themarshallproject.org/2017/07/19/nine-lessons-about-criminal-justice-reform?ref=collections>