

Issue: 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 the society that the vast majority will rejoin.

Unfortunately, the balancing of these three purposes has gotten out of kilter in Virginia and in the U.S. 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 the 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 Criminal 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. This kill-by-committee approach has repeatedly suffocated Democratic efforts to change Virginia's lowest-in-the-nation threshold for determining if a misdemeanor larceny should be considered a felony. Most states set the cutoff at \$1,500 or above. Since 1980, Virginia has set it at \$200.

Here is a look at some of the issues that characterize 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 waning of

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http://www.pewtrusts.org/-/media/assets/2017/03/pspp_national_imprisonment_and_crime_rates_fall.pdf

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

In the last legislative session, a bill was proposed [SB940] 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 are forced to give sentences without any discretion or consideration of the specific circumstances, clearly inappropriate sentences could result. An example cited by The Washington Post is that 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. Because of mandatory sentencing, 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% of eligible prisoners in

² <https://www.urban.org/research/publication/processing-and-treatment-mentally-ill-persons-criminal-justice-system>

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

⁴ <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates>

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/>

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.

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.⁸

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".⁹

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 continues to grow for nonviolent crimes.

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 5:1.¹⁰ Historically, black juveniles are more likely to have their cases referred to adult court.¹¹

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 set of 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.¹²

And in Virginia, the disenfranchisement of felons 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.¹³ The rate of Virginia's disenfranchisement of African-Americans is 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

⁸ The Age and Crime Relationship, Social Variation, Social Explanations, by Jeffery T. Ulmer and Darrell Steffensmeier 2014

⁹ <https://www.brookings.edu/blog/social-mobility-memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow/>

¹⁰ <http://www.sentencingproject.org/the-facts/#map>

¹¹ <https://www.nap.edu/read/9747/chapter/8>

¹² <https://www.brookings.edu/blog/social-mobility-memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow/>

¹³ <http://www.sentencingproject.org/the-facts/#map>

recent years.¹⁴ 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.¹⁵

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 have left behind, leading to harmful outcomes in those communities.

Children with a parent in prison are also 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 its members are behind bars, presumably due to the frayed social fabric caused by the missing members of the community.¹⁶

Democrats' Attempts at Reform

Gov. Terry McAuliffe has been active on this front, but is often thwarted by the Republican majorities.

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 re-instated.¹⁷

In early 2017, he proposed that convicted felons who are later found to be innocent by DNA evidence can be exonerated from prison even if the person plead guilty. After having pled guilty, about 10% of felons are later exonerated by DNA.¹⁸ Governor McAuliffe also wants to eliminate suspension of driver's licenses for unpaid court fees, which essentially criminalizes poverty.

Gov. McAuliffe, along with many other lawmakers, has proposed increasing the dollar value amount at which theft is considered a felony. Time after time, bills which propose this increase have been batted down by Republicans.

In early 2017, Gov. McAuliffe tried to alleviate the Virginia courts' procedure of revoking the driver's licenses of people who haven't paid court fees. 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.¹⁹

¹⁴ <http://www.dailypress.com/news/dp-nws-budget-item-virginia-33-20141128-story.html>

¹⁵ <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends>

¹⁶ <http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html?pagewanted=all&mcubz=0>

¹⁷ <https://www.americanprogress.org/issues/criminal-justice/news/2017/04/07/430095/six-states-leading-charge-second-chance-policies/>

¹⁸ https://www.washingtonpost.com/local/virginia-politics/mcauliffe-proposes-criminal-justice-reforms/2017/01/03/4810ef3a-d1eb-11e6-9cb0-54ab630851e8_story.html?utm_term=.08f7c146e95d

¹⁹ http://www.richmond.com/news/virginia/virginia-lawmakers-look-to-reduce-driver-s-license-suspensions-for/article_db6b1bad-d619-5157-94ca-e7bb2alc97e5.html

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.²⁰

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.²¹

Common-sense Reforms for Virginia

Increase dollar trigger for felony theft

It is more likely that a theft in Virginia will be a felony, not a misdemeanor, than in any other state. A majority of states consider theft a felony if the value of the goods or cash is more than \$1,000. Since 1980, Virginia's cutoff has been \$200. If the amount had been increased at the same rate as inflation over the past 37 years, it would be three times the current level. In each legislative session for the past three years, a Democrat has proposed increasing the cutoff to \$500. These bills died without a vote in the Courts of Justice committee, where the membership of 20 includes 14 Republicans.²² In addition, 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.²³ 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.²⁴

Education & 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 Corporation²⁵ report that showed that education led to a 43% 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% of prisoners had access to higher education.²⁶ The Virginia Department of Corrections states that in 2012 to 2013, just under 6000 prisoners received some kind of educational or vocational training. The prison population of Virginia is around 60,000.

²⁰ http://www.dailyprogress.com/news/local/report-millions-impacted-by-driver-s-license-suspensions-due-to/article_7ab067e6-a32c-11e7-88f3-634bbac9a7d8.html

²¹ <http://www.dailypress.com/news/dp-nws-legis-notebook-20160118-story.html>

²² HB1704 (2017), HB 396 (2016) HB 1369 (2015)

²³ HB 2071 (2017)

²⁴ http://www.justicepolicy.org/uploads/justicepolicy/documents/va_justice_system_expensive_ineffective_and_unfair_final.pdf

²⁵ A Meta-Analysis of Programs That Provide Education to Incarcerated Adults

Lois M. Davis, Robert Bozick, Jennifer L. Steele, Jessica Saunders, Jeremy N.V. Niles; 2013.

²⁶ <https://www.vera.org/newsroom/press-releases/new-report-helps-expand-access-to-higher-education-in-prison>

89% of re-offenders are unemployed at the time of the new offense. Those who do have jobs are more likely to remain out of prison.²⁷ Every dollar spent on educational and vocational training in prison saves \$4 to \$5 down the road.²⁸

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% 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.²⁹

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 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/day but jail costs \$75/day.

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 policies in Virginia 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, raise the ridiculously low \$200 level after which a larceny is considered a felony, and do more for prisoners with mental health issues or addictions. [See Local Majority's Opioid Report.] The state is proud of its history; it can eliminate policies that history is sure to frown on, by reforming its criminal justice system.

²⁷ <http://www.prisoneducation.com/prison-research-papers/vocational-training-in-prison>

²⁸ <https://www.rand.org/news/press/2013/08/22.html>

²⁹ The Truth About Commercial Bail Bonding in America, by the National Association of Pretrial Services Agencies, August 2009.

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