

FALL 2019

WOMEN IN THE CRIMINAL LEGAL SYSTEM



Far too many people are incarcerated in the United States and in Virginia. According to the Prison Policy Initiative, nearly 70,000 people were incarcerated in Virginia in 2018 – more than the entire population of cities such as Harrisonburg, Charlottesville and Blacksburg. What isn't widely known is that women are the fastest growing group of incarcerated people in our state. Here we'll explore why that is and what we can do about it.

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INTRODUCTION

The criminal legal system in Virginia is unrelenting.

In many cases the initial reason someone gets touched by the system can be relatively minor but have lifelong consequences. Shoplifting something worth less than \$500 is a good example.

The first time you steal something worth less than \$500 from a store, that's a misdemeanor that is punishable by up to 12 months in jail and up to a \$2,500 fine. Depending on the circumstances (including the race of the person charged), however, people who are convicted usually pay a much smaller fine – though one that may be difficult for many to come up with – and won't be sentenced to any jail time.

But regardless of the punishment, once that initial touch occurs, the system's claws come out and never retract.

For one thing, if a magistrate chooses to impose a cash bail, the person being charged may have to report to jail immediately if they can't pay even if their actual sentence at conviction doesn't carry any jail time. While sitting in jail, that person can lose their job and ability to support their family. For a minor drug crime, like possession of a small amount of marijuana, someone can also face harsh consequences outside the criminal legal system, such as losing their housing, job or custody of their kids.

If the person who stole a \$5 sack of apples does the same thing again two more times, that's now a Class 6 felony, with the same possible punishment as the original misdemeanor, but now a more significant result comes into play. We're talking about serving time in prison, not the local jail.

We're also talking about losing your civil rights, including the right to vote, for your whole life, unless a governor chooses to give your rights back. Virginia is one of only three states that permanently disenfranchises people for any felony conviction, for the rest of their life. There are hundreds of other collateral consequences to being convicted of even the smallest of felony offenses that will follow a person forever and can ruin their life.

What group of people is currently experiencing the brunt of this unfair system? Women. Our 2018 report, "Women in the Criminal Justice System: Pathways to Incarceration," noted an alarming statistic: Between 1980 and 2015, the number of women housed in Virginia prisons increased by 930%. Across the country, women are the fastest growing population of individuals incarcerated in prisons and jails, and Virginia is no exception.

Why? Women incarcerated in the U.S. tend to be young, unmarried, plagued by poverty and lacking in education and job skills. Incarcerated women often become engaged with the criminal legal system as a result of attempts to cope with challenging aspects of their lives, such as poverty, unemployment and physical or mental health struggles – especially those arising from drug addiction and past instances of trauma.

The increasing incarceration of women has much to do with what we choose to call a crime, what punishments we impose, the way women are treated while incarcerated, and the barriers we put in front of them when they are released. This has to change.



Photo: Steve Rhodes/Creative Commons



defendants to explain why they committed a crime. Even if they did, people who are not convicted of drug crimes may be ineligible for drug court, diversion or referral to a drug treatment program in lieu of incarceration. They instead slip through the cracks and remain in a cycle of arrest, detention, incarceration and recidivism and for the low-level, non-violent offenses for which women are usually arrested in Virginia.

CAs could play a critical role in reducing the number of women behind bars, but in order to do that they need to be educated and trained about the real circumstances of women and mothers in the criminal legal system.

CAs should begin collecting data on numbers and growth trends, activities underlying specific charges, commonly charged offenses, physical and mental health status, income levels, race, sexual orientation, age, parental status, immigration status, and place of residence. This data would not only better inform their decisions in individual cases but would help inform and influence future policy reforms.

Prosecutors' Role in Reducing Incarceration of Women

Prosecutors should use their powerful influence over lawmakers to advocate for revision of the Virginia Sentencing Guidelines to include policies that reflect an understanding of women's true level of culpability and control with respect to drug crimes, and methods of encouraging judges (and juries) to consider factors such as an individual's familial obligations during sentencing.

CAs should work with law enforcement and judges to implement reforms to increase referrals to pre-arrest crisis intervention programs and pre-booking diversion programs and immediately implement office policies against seeking cash bail.

While this is not an exhaustive list of the ways that your local CA can help reduce the widespread and discriminatory suffering resulting from over-incarceration of women in Virginia, it is a start. Find out who your CA is and let them know that you want them to be part of the solution.

Your local Commonwealth's attorney can help reduce the widespread and discriminatory suffering resulting from over-incarceration of women in Virginia. Find out who your CA is and let them know that you want them to be part of the solution.

To learn more about women in the criminal legal system, read our full report: acluva.org/women-in-prison

PROSECUTORS COULD BE PART OF THE SOLUTION

By: Jenny Glass, Director of Advocacy

Over the last 35 years our criminal legal system has become increasingly dependent on harsh and often mandatory sentences for low-level offenses. Fortunately, there is a powerful elected official, your Commonwealth's attorney, who has the authority and discretion to intervene, take these circumstances into account, and divert women away from jail and prison. The only trouble is - they often don't.

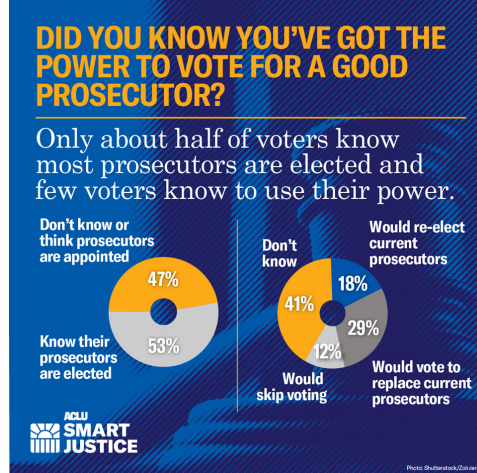
A Commonwealth's attorney (CA) is the top prosecutor in a city or county. A prosecutor is a law enforcement official and an attorney who represents the interests of the state in a criminal case. A prosecutor has a duty to seek justice in every case, whether that means putting a violent person behind bars, listening to the wishes of a crime victim or dismissing charges against an innocent defendant.

Women face significant financial obstacles to securing pretrial release when cash bond is set. If a judge denies bail, the woman must remain in jail throughout the court process, which can take months. If she does not promptly work out a plea deal, she risks losing her job, her housing and – in many cases – custody of her children.

in many cases – custody of her children. A judge's decision to deny a mother bail or to set bail without regard for her ability to pay can put tremendous pressure on her to accept a plea deal instead of exercising her right to a trial. No mother should be forced to choose between proving her innocence before a jury and losing her children and her home.

The Importance of Collecting Data

The CAs and judges with discretion to facilitate plea deals seldom take the time to discover the full story behind a woman's criminal history. For example, a person with a history of petty theft who is before the court on her third misdemeanor shoplifting offense (which, under Virginia law, constitutes a felony) may have been shoplifting to support a drug addiction. Yet, judges, CAs and overburdened court-appointed defense attorneys rarely ask criminal



FELONY LARCENY THRESHOLD



By: Nicole Tortoriello, The Secular Society Women's Rights Advocacy Counsel

To halt or even reverse the growing rate of women who are being incarcerated, we must look at reforms that will address the types of offenses for which women are most commonly arrested. Raising the felony larceny threshold and eliminating the three strikes petit larceny statute would be important steps toward making Virginia smarter and fairer on crime and would reduce the number of people who are needlessly felonized every year.

We know from our 2018 report that women report economic need as the underlying motivation for their crimes more than twice as often as men. According to our analysis of average women's arrests in Virginia from 1999 to 2016, shoplifting and theft offenses accounted for 39.3% of arrests analyzed.

These factors explain why raising the felony larceny threshold would help reduce the rate at which women are being incarcerated in Virginia. Under current law, any crime involving theft becomes a felony if the value of the goods or money at issue is \$500 or higher. This is one of the lowest felony thresholds in the country – at least 30 states have threshold set at \$1,000 or higher, including our neighbors Maryland, West Virginia, Tennessee, North Carolina and Washington, D.C. Meanwhile, Virginia is one of just six states with a threshold set at \$500 or below.

What does this mean in practice? In Virginia, any crime for which punishment includes a prison sentence longer than a year is a felony. All other crimes are misdemeanors. According to the Virginia sentencing statute, the lowest level felony is punishable by at least one year in prison, or a shorter sentence accompanied by a fine of up to \$2,500. Felonies also come with additional penalties, including loss of citizenship rights (including the right to vote) and state collection of the person's DNA. The low felony threshold also disparately impacts low-income communities.

According to a 2017 report from the Pew Charitable Trusts analyzing data from 30 states that increased their felony larceny thresholds between 2000 and 2012, "[r]aising the felony theft threshold has no impact on overall property crime or larceny rates." Further, they found no correlation between a state's felony larceny threshold and its property crime and larceny rates.

Virginia raised its felony larceny threshold to \$500 in 2018, the first increase since 1980. This increase was not even enough to keep up with inflation. Even worse, the legislation that increased the threshold also permits judges to put those convicted on probation indefinitely until they pay all their restitution. This is a heavy-handed sentencing option that is costly to taxpayers, and unfairly targets low-income people with additional state surveillance. It's past time to increase Virginia's felony larceny threshold to at least \$1,500 without such unjust strings attached.

A related Virginia law which over-penalizes people who have committed property crimes is Virginia's "three strikes" petit larceny statute. Under this law, a person's third conviction for shoplifting is automatically a felony – regardless of the value of the items or money stolen for any of the three offenses. This means that someone who is arrested for stealing items valued at as little \$10 three times can be convicted of a felony and sent to prison for up to five years, even though they only stole \$30 of goods. Such high punishments for such minor crimes simply don't make sense.

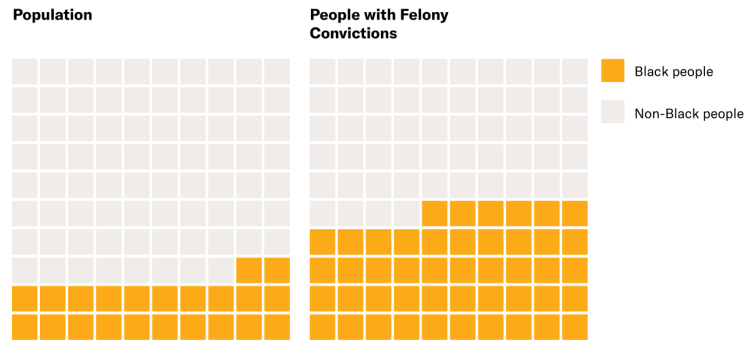
HOUSING DISCRIMINATION

By: Jennifer Safstrom, Tony Dunn Legal Fellow

Access to housing is essential to the success of those who are transitioning back into communities after experiences within the criminal legal system. Access to safe, sustainable housing helps people integrate into the community and is shown to reduce recidivism. Unfortunately, inequities in the criminal legal system carry over into housing and directly limit access to housing by people who have been convicted of crimes, including the rising number of women entering our criminal legal system.

In Chesterfield County, although African Americans make up just 22% of the county's population, they comprised 46% of individuals convicted of a felony between 2007 and 2017. This disproportionate representation is not reflective of who is committing crimes. White people and African American people commit crimes at nearly identical rates. It is a testament to who is being policed and how law enforcement is applying the law, with African Americans paying the price.

Black People Make Up 22% of Chesterfield County Population, but 46% of People with Felony Convictions



Source: 2010 Decennial Census; virginiacourtdata.com

Due to these inequitable practices, blanket policies on the basis of criminal history make it three times harder for an African American person with a prior conviction in Chesterfield to obtain a lease than for a white person. These trends are also true on the state level: Due to policing practices and inequities in how laws are enforced, African Americans in Virginia are 2.6 times more likely than a white person to have a disqualifying criminal record.

Longstanding obstacles in the criminal legal system have created race-based differences in case outcomes, and the result is that people of color are disproportionately punished in the long-term because of barriers to re-entry in housing, credit and employment. This is true despite the fact that neither federal nor state fair housing laws permit policies that have a disparate impact on the basis of race.

Sterling Glen Apartments in Chesterfield previously had a policy that categorically banned many individuals with a criminal record, including those with felonies and many misdemeanors, from renting their properties. As part of the settlement

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Sterling Glen's revised policy provides a framework for how landlords can screen applicants fairly as individuals and avoid discrimination. Under the policy, the landlord first screens applicants based on their income and credit eligibility, prior to looking at an applicant's criminal background.

related to community or property safety, and only has a five-year lookback period. Under the policy, an applicant for housing would not be asked or disqualified because of arrests, charges, pardoned, expunged, or vacated convictions, juvenile records, or other case dispositions.

Most significantly, the new policy approved in the settlement assures individualized consideration for every applicant. This individual review allows a prospective tenant to share mitigating information with housing providers as part of the application review process. This is important because this additional information can provide prospective landlords with context about each applicant, including the facts or circumstances surrounding their criminal conduct, proof of rehabilitation efforts, and evidence of a good tenant or employment history.

Everyone deserves a place to live, and no one should be discriminated against when they seek housing.

In addition to the new policy, as part of the settlement, Sterling Glen has also agreed to train their employees in fair housing practices. This lawsuit was brought to help ensure that every individual has the opportunity to be considered for housing, regardless of who they are, the color of their skin, or something in their past.

As this case demonstrates, everyone deserves a place to live, and no one should be treated differently when they seek housing.