

**WOMEN  
IN THE  
CRIMINAL  
JUSTICE  
SYSTEM:  
PATHWAYS TO  
INCARCERATION  
IN VIRGINIA**





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*We offer a special thank you to Amy Fettig at the ACLU's National Prison Project, who helped with her thoughtful comments and guidance.*

*Finally, we gratefully acknowledge the early and continued support of The Secular Society in nurturing and providing funding for this project.*



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PHOTO: MICHELLE FRANKFURTER/ACLU

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# Executive Summary

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Incarcerated women often become engaged with the criminal justice 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.

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*\*For citations for any of the facts in this summary, please see the full report.*

In Virginia and across the country, women are being incarcerated at rates that are increasing much more rapidly than men.

Between June 30, 2000 and June 30, 2014, the average daily population of adult women incarcerated in jails across the U.S. increased by 55%, from approximately 70,400 women inmates in 2000 to 108,800 women inmates in 2014.

The population of adult men incarcerated in jails across the U.S. only increased by 16% during the same time period, from approximately 543,100 men inmates in 2000 to 631,600 men inmates in 2014. Women composed 15.3% of the average daily population in Virginia’s local and regional jails in 2014, about one percent higher than the percentage of women incarcerated in local jails nationally. This represents a 32% increase between 2010 and 2014—more than double the national increase during the same time period. In contrast, the average number of men inmates only increased about 4% between 2010 and 2014.

These statistics give rise to a few critical questions: Why is the incarceration of women increasing in Virginia at much higher rates than the incarceration of men? Are there gender-specific factors that are not being addressed through ongoing legislative and policy efforts to reduce Virginia’s prison and jail populations? If so, what are they? And what reforms must be made to ensure that women are included in our efforts to promote safe communities while reducing the number of Virginians sentenced to prison and jail time?

## Reasons Women are Incarcerated

Women incarcerated in the U.S. tend to be young, unmarried, plagued by poverty, and lacking in education and job skills.

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## Women in the Criminal Justice System

Women incarcerated in the U.S. tend to be young, unmarried, plagued by poverty, and lacking in education and job skills. More than half of all women in U.S. prisons, and 80% of all women in jails, are mothers. Most were the sole or primary caregiver to young children before their incarceration.

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More than half of all women in U.S. prisons, and 80% of all women in jails, are mothers. Most were the sole or primary caregiver to young children before their incarceration. Incarcerated women often become engaged with the criminal justice 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.

A woman’s race, ethnicity, socioeconomic status, sexual orientation, and immigration status can contribute to her risk of substance abuse and dependency. As the national ACLU explains in its report “Caught in the Net,” “[w]omen may use drugs to help them work long hours or perform multiple jobs to make ends meet, or to help them survive poor workplace conditions and sexual harassment on the job.” Economic pressures also force many women to remain in abusive living situations, which can in turn lead to drug use. In many cases, a combination of all of these factors play a role in a woman’s involvement with drugs. Three of the four primary crimes for which women are incarcerated in Virginia – drug possession and distribution, larceny, and shoplifting – are often economically motivated and committed to support drug dependencies. These offenses are typically a consequence of circumstances – lack of access to employment, family stability, drug treatment, and protection from sexual and physical abuse.



Photo: Community members in Richmond joined the march for prison reform on January 21, 2017. Phuong Tran/ACLU-VA



Women report economic need as the underlying motivation for their crimes more than twice as often as men. There is a direct correlation between women's mental health conditions and the likelihood that they will engage in crime and become incarcerated. Between 2011 and 2012, a larger percentage of women in prison (20%) or jail (32%) than men in prison (14%) or jail (26%) met the threshold for serious psychological distress in the past 30 days. During the same time period, a larger percentage of women in prison (66%) or jail (68%) than men in prison (35%) or jail (41%) had a history of mental health problems. These characteristics of a typical offender in the Virginia criminal justice system are often overlooked and must be considered in creating and implementing reforms that will adequately address the problems in the system.

### **Stakeholders Who Can Impact Women's Incarceration**

This report considers stakeholders at various levels of the justice system including: police who decide whom to arrest, release, or book into jail; Commonwealth's Attorneys (CAs) who decide whom to prosecute and whom to recommend for pre-trial release or a diversion program; judges and magistrates who decide whether to hold or release someone on bail while their case is pending; and community supervision officers who decide how to respond to violations of community supervision conditions.

From the beginning of a criminal case to sentencing, CAs have unparalleled authority to decide outcomes – such as who gets released on bail, who gets a plea deal, and which cases go to trial. Judges have vast discretion to decide whether someone may be released on bail, and how much bail to set. They also heavily rely on recommendations from the CA as to whether bail should be set (and in what amount) or whether a defendant is referred for pre-trial services.

### **Unique Impacts of the Criminal Justice System on Women**

The most recent national data available indicates that women generally receive greater leniency than men when judges, magistrates, or bail commissioners make pre-trial custody and release decisions. Women can nevertheless face significant financial obstacles to securing pre-trial release when cash bond is set. If a judge denies bail, the defendant must remain in jail throughout the court process. The time between arrest and a criminal trial can take months. If the defendant does

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## Lavette's Story

Lavette Mayes was separated from her children, lost her small business, and spent 14 months in jail – all because she couldn't afford to post bail. Her story is a tragedy of the United States' unjust mass incarceration system, which holds over 2.3 million people today and incarcerates a greater portion of its population than any other country.

Eighty percent of women in jails are mothers like Lavette, many of whom are stuck because they can't afford bail. Lavette ended up taking a plea bargain just so she could reunite with her children. "I don't think society understands," she says. "When you incarcerate women, you're incarcerating the whole family."

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not promptly work out a plea deal, she risks losing her job, her housing, and – 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 exercising her right to prove her innocence before a jury and losing her children and her home. 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 defendant with a long criminal 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 defendants to explain why they committed a crime. Even if they did, defendants 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. These defendants instead slip through the cracks and remain in a cycle of arrest, detention, incarceration, and recidivism.

Even when diverted to community supervision programs,



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In Virginia, a criminal conviction can create life-long barriers to employment, education, housing and other opportunities.  
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women still face high rates of failure. Supervision conditions – including available treatment or programming – often fail to address women’s specific risk factors or treatment needs. Violations may also result from the challenges of juggling community supervision requirements with work and family responsibilities. As the majority of women who become involved in the criminal justice system are mothers, childcare duties further complicate supervision requirements that involve frequent court appearances and meetings with probation officers, with no extra money to spend on babysitters or reliable fast transportation across town. All of these issues make women particularly vulnerable to being incarcerated not because they commit crimes, but because they may run afoul of one of the burdensome obligations of their probation.

In Virginia, a criminal conviction can create life-long barriers to employment, education, housing and other opportunities. These include:

- Loss or denial of public housing assistance.
- Requirements by private landlords to disclose prior convictions on a housing application. Landlords can deny an application solely on the basis of a prior drug manufacturing or distribution conviction, or if the landlord subjectively believes a person’s criminal record puts other tenants or the premises at risk of substantial harm.
- Denial or eviction from public housing. If someone is evicted from public housing because of a drug crime, for example, a public housing authority must prohibit that person from public housing for at least three years. Public housing agencies can also refuse admission based on past criminal records related to drug use.
- Difficulty or inability obtaining a professional license, certificate, or registration.
- Ineligibility for Temporary Assistance for Needy Families (TANF) program due to a felony drug conviction.

### **Recommendations**

The ACLU of Virginia recommends that the Governor or the Virginia General Assembly convene a committee, task force or work group to study women’s pathways into Virginia’s criminal justice system.

The work group should include representatives from the Virginia Indigent Defense Council, the Department of Criminal Justice Services, the Virginia Sentencing Commission, the Virginia State Police, and the Virginia Departments of Corrections and Juvenile Justice Services, as well as other stakeholders, including criminal justice and prison reform advocates; individuals who provide direct services to currently and formerly incarcerated women and their families; individuals with knowledge of drug addiction and recovery; representatives from local sheriff's departments and Commonwealth's Attorney's offices; civil rights and civil liberties advocates; at least two formerly incarcerated women; and women's rights advocates.

The workgroup should make recommendations regarding:

- Education and training of those involved in the criminal justice, mental health, and drug treatment arenas about the unique needs and characteristics of women and mothers in the criminal justice system;
- Increased investment of public dollars in treatment and services to address the underlying causes of women's involvement with crime in a community setting, not a correctional setting;
- Improved collection and tracking of data on women in the criminal justice system – at the state and local levels – that will inform future policymaking, such as: 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;
- Identification of the statutes, regulations, and policies driving the increase in women's involvement in the criminal justice system and recommended legislative, administrative, and/or local policy reforms that will reduce the number of women involved in the criminal justice and corrections systems across Virginia;
- Identification and revision of educational policies that drive girls into the juvenile justice system, and creation of programs for educators and child welfare professionals to identify the signs of sexual victimization and support girls who have been traumatized by violence;
- Identification of ways to increase women's eligibility for,



## THE PROBLEM

# THE OVER-INCARCERATION OF WOMEN IS A SYMPTOM OF A COMPLEX NETWORK OF SOCIAL BARRIERS, ECONOMIC INEQUALITY, REPRODUCTIVE INJUSTICE, AND RACIAL AND SEXUAL DISCRIMINATION DEEPLY WOVEN INTO OUR SOCIETY.

participation in, and successful completion of diversion and drug court programs;

- Revision of the Virginia Sentencing Guidelines to include policies that reflect an understanding of women’s levels 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.

Law enforcement agencies should ensure that police officers are complying with the statutory mandate to issue summonses for misdemeanor violations unless there is clear evidence that the subject will not respond to the summons, will continue the violation, or is a danger to self or others. Local judges, prosecutors and law enforcement should implement reforms to increase referrals to pre-arrest crisis intervention programs and pre-booking diversion programs. Finally, judges and prosecutors should eliminate the use of cash bail and instead utilize alternative risk reduction strategies, such as proven non-

discriminatory risk assessment tools combined with pre-trial services and supervised release programs.

The ACLU of Virginia also recommends legislative action including:

- Increasing the felony larceny threshold to at least \$1,500;
- Repealing Virginia’s three strikes petit larceny statute;
- Establishing eligibility for record expungement;
- Enacting plea guidelines for prosecutors;
- Amending laws regarding jury sentencing to ensure juries will have access to the sentencing guidelines available to judges and, particularly in the absence of that reform, repealing the authority of prosecutors to demand jury trials over the objections of defendants;
- Expanding eligibility and increasing resources for pre-trial diversion programs;
- Increasing funding for data collection and analysis; and
- Increasing funding for alternative sentencing and community-based treatment programs.

This is by no means an exhaustive list of the reforms necessary to reduce the widespread and discriminatory suffering imposed by over-incarceration of women in Virginia. Further investigation into women’s prison and jail conditions – including access to adequate healthcare and visitation with children – as well as post-release factors that influence women’s recidivism rates is necessary. The over-incarceration of women is a symptom of a complex network of social barriers, economic inequality, reproductive injustice, and racial and sexual discrimination deeply woven into our society. This paper is intended to be the first step in a long campaign to reform the criminal justice system for all women in Virginia.



# PEOPLE.





# NOT PRISONS.





# Introduction

In 1980, Virginia prisons housed only 303 women inmates. By June 30, 2015, that number had reached 3,123 – a 930% increase over 35 years

Across the country, women are the fastest growing population of individuals incarcerated in prisons and jails. In 2015, nearly 2.2 million people were incarcerated in the United States.<sup>1</sup> Nearly 9.4% of them were women.<sup>2</sup> While the number of men incarcerated in the United States decreased by 1.8% between 2014 and 2015,<sup>3</sup> the number of incarcerated women increased by 0.7% during that time period.<sup>4</sup>

Virginia has generally followed national trends of the population of incarcerated men decreasing while the population of incarcerated women either increases or remains stagnant. In 1980, Virginia prisons housed only 303 women inmates. By June 30, 2015, that number had reached 3,123 – a 930% increase over 35 years.

The number of women incarcerated in local jails – which typically house inmates convicted of low-level crimes or people awaiting trial – is increasing at a faster rate than any other segment of the correctional population.<sup>5</sup> Women in jail now account for about half of all incarcerated women in the United States.<sup>6</sup>

Between June 30, 2000 and June 30, 2014, the average daily population of adult women incarcerated in jails across the U.S. increased by 55%, from approximately 70,400 women inmates in 2000 to 108,800 women inmates in 2014.<sup>7</sup> The population of

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1 Danielle Kaeble & Lauren Glaze, *Correctional Populations in the United States, 2015*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, at 1 (Dec. 2016).

2 *See id.*, at 15 (ACLU of Virginia calculations).

3 *See id.*, at 15, 17 (ACLU of Virginia calculations).

4 *See id.*, at 15, 17 (ACLU of Virginia calculations).

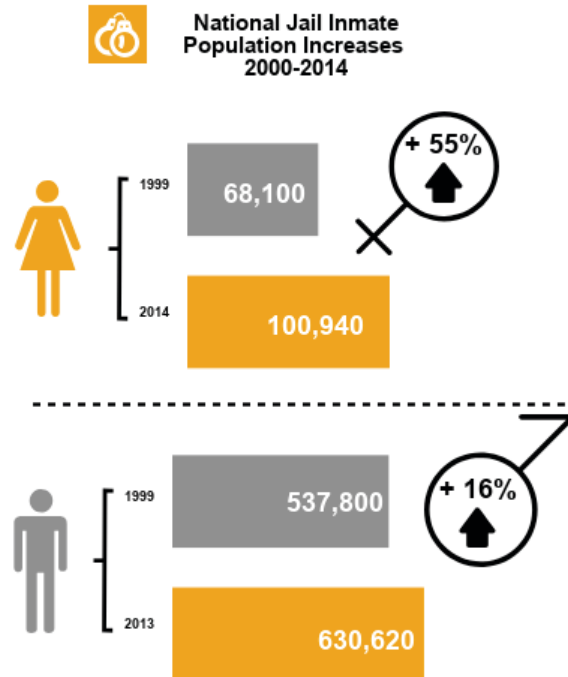
5 Elizabeth Swavola, Kristine Riley & Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform*, VERA INSTITUTE OF JUSTICE, at 6 (2016), <https://www.vera.org/publications/overlooked-women-and-jails-report>.

6 *Id.*

7 Zhen Zeng, *Jail Inmates in 2016*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, at 9 (Feb. 2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> (total population of juvenile women inmates was 600 and total population of adult women inmates was 70,400 at mid-year 2000; total



adult men incarcerated in jails across the U.S. only increased by 16% during the same time period, from approximately 543,100 men inmates in 2000 to 631,600 men inmates in 2014.<sup>8</sup>



Source: Zhen Zeng, Jail Inmates in 2016, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, at 9 (Feb. 2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf>.

Women composed 15.3% of the average daily population in Virginia's local and regional jails in 2014, about 0.6% higher than the percentage of women incarcerated in local jails nationally.<sup>9</sup> This represents a 32% increase between 2010 and 2014. In contrast, the average number of men inmates only increased about 4% between 2010 and 2014.<sup>10</sup>

population of juvenile women inmates was 300 and total population of adult women inmates was 108,800 at mid-year 2014).

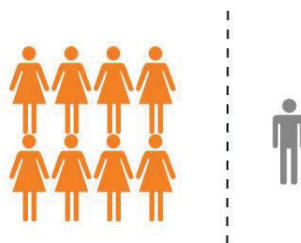
<sup>8</sup> *Id.*, at 9 (total population of 550,200 adult male inmates and 7,100 juvenile male inmates at mid-year 2000; total population of 631,600 adult male inmates and 3,900 juvenile male inmates at mid-year 2016).

<sup>9</sup> ACLU of Virginia analysis of Average Daily Population Reports published by the Virginia Compensation Board, Jan. 31, 2014 through Dec. 31, 2014; Todd D. Minton & Zhen Zeng, Jail Inmates at Midyear 2014, Table 3, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (June 2015), <https://www.bjs.gov/content/pub/pdf/jim14.pdf> (showing 14.7% of inmates in local jails were women in midyear 2014).

<sup>10</sup> ACLU of Virginia analysis of Average Daily Population Reports



## Jail Incarceration Rates, 2010-2014



The average inmate population in Virginia's local and regional jails increased by a ratio of 8 females for every one male between 2010 and 2014

Why is the incarceration of women increasing in Virginia at much higher rates than the incarceration of men? Are there gender-specific factors that are not being addressed through ongoing legislative and policy efforts to reduce Virginia's prison and jail populations?

Source: ACLU of Virginia analysis of Average Daily Population Reports published by the Virginia Compensation Board).

These statistics give rise to a few critical questions: Why is the incarceration of women increasing in Virginia at much higher rates than the incarceration of men? Are there gender-specific factors that are not being addressed through ongoing legislative and policy efforts to reduce Virginia's prison and jail populations? If so, what are they? And what reforms must be made to ensure that women are included in our efforts to promote safe communities while reducing the number of Virginians sentenced to prison and jail time?

While there are multiple ways women can become incarcerated in Virginia, this paper will focus on women who are in the custody of Virginia's local and regional jails and the Virginia Department of Corrections. It will provide an overview, based on the available data, of the women who come into contact with the criminal justice system in Virginia and across the U.S., as well as the crimes for which they are most frequently incarcerated. It will also identify the typical pathways that bring women into jail and prison across the United States, and in Virginia. This report will conclude with recommended legislative and policy changes that will set Virginia on the path toward reducing women's incarceration rates while promoting healthy families and safe communities.

published by the Virginia Compensation Board, Jan. 31, 2010 through Dec. 31, 2010, and Jan. 31, 2014 through Dec. 31, 2014.



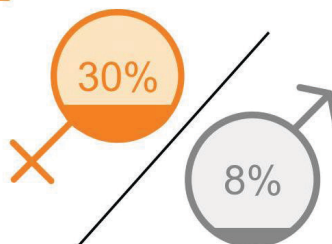


# Typical Woman Offender

Women incarcerated in the U.S. tend to be young, unmarried, plagued by poverty, and lacking in education and job skills.<sup>11</sup> More than half of all women in U.S. prisons, and 79% of all women in jails, are mothers.<sup>12</sup> Most were the sole or primary caregiver to young children before their incarceration.<sup>13</sup>

Incarcerated women often become engaged with the criminal justice system as a result of their 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.

 Percentage of incarcerated population receiving public assistance



Source: Lawrence A. Greenfeld & Tracy L. Snell, Women Offenders, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics (2000) at 8.

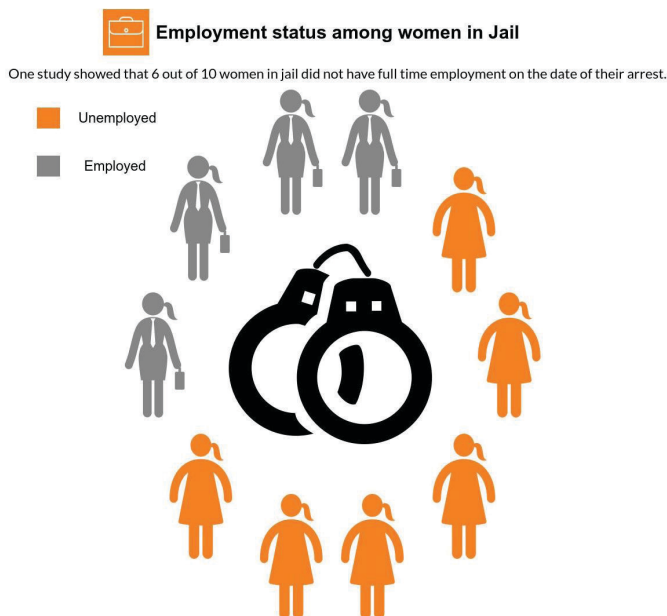
Studies have shown that nearly 30 percent of incarcerated women receive public assistance, compared to 8 percent of incarcerated men.

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- <sup>11</sup> Katherine Van Wormer, WORKING WITH FEMALE OFFENDERS: A GENDER-SENSITIVE APPROACH, at 66 (2012).
- <sup>12</sup> Swavola, et al., *supra* note 28, at 12; Wendy Sawyer, *Bailing moms out for Mother's Day*, PRISON POLICY INITIATIVE BLOG (May 8, 2017), <https://www.prisonpolicy.org/blog/2017/05/08/mothers-day/>; Susan W. McCampbell, *The Gender-Responsive Strategies Project: Jail Applications*, U.S. DEP'T OF JUSTICE NAT'L INST. OF CORRECTIONS, at 4 (2005), <https://s3.amazonaws.com/static.nicic.gov/Library/020417.pdf>; see also Lauren E. Glaze & Laura M. Maruschack, *Parents in Prison and Their Minor Children*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, at 1 (Aug. 2008; rev'd March 2010), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf>.
- <sup>13</sup> Swavola, et al., *supra* note 28, at 12; Wendy Sawyer, *supra* note 36; Van Wormer, *supra* note 32, at 66; Polly F. Radosh, *Reflections on Women's Crime and Mothers in Prison*, 48 CRIME & DELINQUENCY 300, 306-308 (2002).



## How Do Women Get Tangled Up in the Criminal Justice System?

Incarcerated women often become engaged with the criminal justice system as a result of their 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.



Source: Elizabeth Swavola, Kristine Riley & Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform*, Vera Institute of Justice (2016), at 10.

Incarcerated women are also more likely to have had a tough upbringing characterized by physical and sexual abuse, with two-thirds of women in prison having suffered abuse before incarceration.<sup>14</sup> This history of abuse often impacts adult relationships.<sup>15</sup> Among women in jail, 86% experienced sexual assault, and 77% experienced intimate partner violence prior to incarceration.<sup>16</sup>

Furthering this point, many women in prisons and jails were involved in coercive and abusive relationships, which may have been the underlying cause of their incarceration.<sup>17</sup>

Women in prisons and jails are also likely to struggle with substance abuse disorders. Among women in jail, 82% report alcohol or substance dependencies.<sup>18</sup> According to Amy Fettig,

<sup>14</sup> Amy Fettig, *Women Prisoners: Altering the Cycle of Abuse*, 36 AM. BAR. ASS'N HUMAN RIGHTS MAG. (2009), [https://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol36\\_2009/spring2009/women\\_prisoners\\_altering\\_the\\_cycle\\_of\\_abuse.html](https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol36_2009/spring2009/women_prisoners_altering_the_cycle_of_abuse.html); Radosh, note 37, at 306; Van Wormer, *supra* note 32, at 66.

<sup>15</sup> Van Wormer, *supra* note 32, at 66.

<sup>16</sup> Swavola, et al., *supra* note 28, at 11.

<sup>17</sup> Fettig, *supra* note 41.

<sup>18</sup> Swavola, et al., note 28, at 9-10.

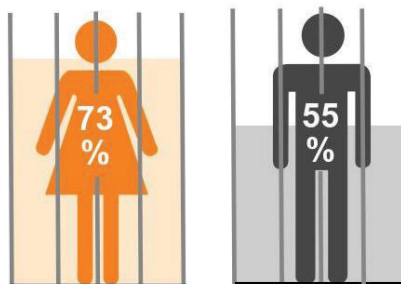
## SUBSTANCE ABUSE

# STUDIES INDICATE THAT SIGNIFICANT NUMBERS OF FEMALE PRISONERS SUFFER FROM THE DUAL PROBLEMS OF MENTAL ILLNESS AND DRUG ABUSE.

staff counsel at the National Prison Project at ACLU, “Studies indicate that significant numbers of female prisoners suffer from the dual problems of mental illness and drug abuse. Drug use for women is often characterized as self-medication. And because prescription medications and counseling to treat mental illness are beyond the reach of low-income women, illegal drugs become the only available option.”<sup>19</sup>



### Prevalence of mental illness among incarcerated population



Seventy-three percent of incarcerated women have been found to have mental health issues, compared 55 percent of male prisoners.

Source: Amy Fettig, *Women Prisoners: Altering the Cycle of Abuse*, 36 Am. Bar. Ass'n Human Rights Mag. (2009).

19 Fettig, *supra* note 41.

STOP  
THE  
NEW JIM CROW



# Pathways to Incarceration

Women of color – who, according to at least one study, “use drugs at a rate equal to or lower than white women” – are more likely to be arrested than white women for drug-related crimes.

## Substance Abuse

The intersection of race, gender, and poverty is on display at its starkest in the War on Drugs.<sup>20</sup> In addition to being largely ineffectual at eliminating the drug market<sup>21</sup> and considered by many to be an economic disaster,<sup>22</sup> the War on Drugs has fueled disproportionate arrests of people of color, especially women of color.<sup>23</sup> Women of color – who, according to at least one study, “use drugs at a rate equal to or lower than white women” – are more likely to be arrested than white women for drug-related crimes.<sup>24</sup> Though black women are disproportionately incarcerated in facilities operated by the Virginia Department of Corrections for drug crimes in Virginia, incarceration rates show that white women – particularly those from rural areas hit

<sup>20</sup> The disproportionate, gendered effects have been known for some time. See L. Maher & R. Curtis, *Women on the edge of crime: Crack cocaine and the changing contexts of street-level sex work in New York City*, 18 CRIME L. & SOCIAL CHANGE 221, 221 (1992) (“Nowhere is the gendered relation between women and the law more apparent in America at the moment than with respect to the current ‘war on drugs’.”).

<sup>21</sup> Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353, 355-56 (2010); Danielle Snyder, *One Size Does Not Fit All: A Look at the Disproportionate Effects on Federal Mandatory Minimum Drug Sentences on Racial Minorities and How They Have Contributed to the Degradation of the Underprivileged African-American Family*, 36 HAMLINE J. PUB. L. & POL’Y 77, 83-85 (2015).

<sup>22</sup> Levy-Pounds, *supra* note 46, at 354 n. 6.

<sup>23</sup> See ACLU, *et al.*, *Caught in the Net: The Impact of Drug Policies on Women and Families* (2005), [https://www.aclu.org/files/images/asset\\_upload\\_file431\\_23513.pdf](https://www.aclu.org/files/images/asset_upload_file431_23513.pdf); Levy-Pounds, *supra* note 46, at 354. (“Of all the communities impacted by the war on drugs, poor African Americans have arguably experienced the most dramatic and lasting effects of the war.”); Candace Kruttschnitt & Rosemary Gartner, *Women’s Imprisonment*, 30 CRIME & JUST. 1, 9 (2003) (“[S]ome factors may have had disproportionate effects on the growth in the female prison population. The war on drugs, for example, appears to have had a greater impact on the growth rate of women’s, compared to men’s, prison populations, at least at the state level.”).

<sup>24</sup> ACLU, *et al.*, *supra* note 48, at Executive Summary.



hardest by the opioid epidemic — are the fastest growing prison and jail population in Virginia.<sup>25</sup>

A woman’s race, ethnicity, socioeconomic status, sexual orientation, and immigration status can contribute to her risk of substance abuse and dependency. As the national ACLU explains in its report “Caught in the Net,” “[w]omen may use drugs to help them work long hours or perform multiple jobs to make ends meet, or to help them survive poor workplace conditions and sexual harassment on the job. Economic pressures also force many women to remain in abusive living situations, which can in turn lead to drug use...In many cases, a combination of all of these factors...play a role in a woman’s involvement with drugs.”<sup>26</sup>

Additionally, factors such as a woman’s race and socioeconomic status “also impact a woman’s ability to obtain the appropriate healthcare, treatment, therapy, and social support to address addiction.”<sup>27</sup> The lack of “childcare or family centered treatment presents a particularly difficult barrier to women, who are more often than men the primary caretakers of young children. Many residential treatment programs require stays from one month to a year, making participation in such programs unrealistic for many women with children and/or other obligations, such as eldercare responsibilities.”<sup>28</sup> Moreover, black and Latina or Hispanic women face more significant barriers to accessing substance abuse treatment than white women.<sup>29</sup>

Research further shows women tend to use drugs at higher rates than men prior to arrest.<sup>30</sup> One study found that 40% of women in state prisons and 19% of women in federal prisons reported

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<sup>25</sup> Statistics based on the ACLU of Virginia’s analysis of incarceration data published by the Virginia Department of Corrections between 1998 and 2016. These trends are reflected across the country. See Eli Hagar, *A Mass Incarceration Mystery*, THE MARSHALL PROJECT (Dec. 15, 2017), <https://www.themarshallproject.org/2017/12/15/a-mass-incarceration-mystery>.

<sup>26</sup> ACLU, *et al.*, *supra* note 48 at 11.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> *Id.* at 13.

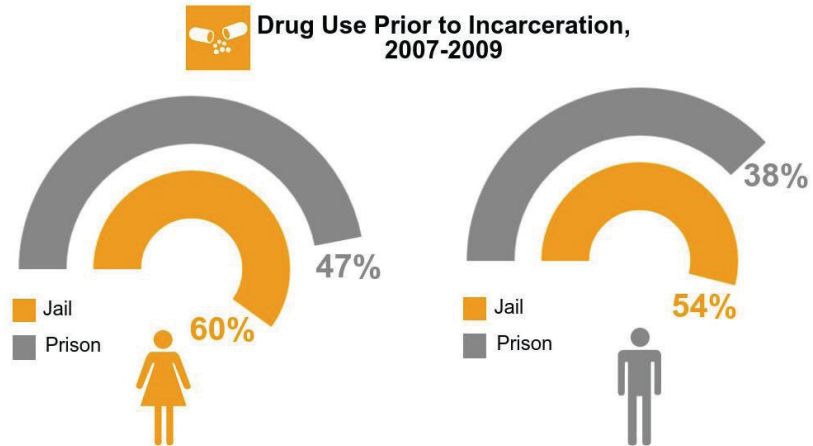
<sup>29</sup> *Id.*, at 13. (“SAMHSA reports that an individual’s race is one of the main factors in determining whether an individual will be admitted to treatment outside the context of the criminal justice system: whites represented almost 62% of treatment admissions nationwide, while African Americans represented only 24% and Latinos less than 13%... [A]ccording to the Drug and Alcohol Services Information System, ‘Hispanic admissions [for substance abuse treatment] were 77 percent male and 23 percent female compared with 69 percent male and 31 percent female among non-Hispanic admissions.’”)

<sup>30</sup> Kruttschnitt & Gartner *supra*, note 48, at 21; Lawrence A. Greenfield & Tracy L. Snell, *Women Offenders*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (2000), at 8.

committing the offense for which they are currently incarcerated while under the influence of drugs.<sup>3132</sup>

During 2007-09, more women in prison (47%) or jail (60%) used drugs during the month before the current offense than men in prison (38%) or jail (54%).<sup>33</sup>

Research further shows women tend to use drugs at higher rates than men prior to arrest.



Source: Jennifer Bronson, Ph.D., et al., Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009, U.S. Dep't of Justice, Bureau of Justice Statistics, at 6-7 (2017), <https://www.bjs.gov/content/pub/pdf/dudaspi0709.pdf>

In another study that sampled nearly 500 women in jails across the country, 82% had experienced alcohol or drug abuse or dependency in their lifetime.<sup>34</sup>

### Poverty

Nearly a million Virginians were estimated to have been living in poverty in 2016. More than 57% of them were identified as girls or women.<sup>35</sup>

<sup>31</sup> ACLU, et al., *supra* note 48, at 18.

<sup>32</sup> ACLU et al., note 48, at 18.

<sup>33</sup> Jennifer Bronson, Ph.D., et al., *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, at 6-7 (2017), <https://www.bjs.gov/content/pub/pdf/dudaspi0709.pdf>.

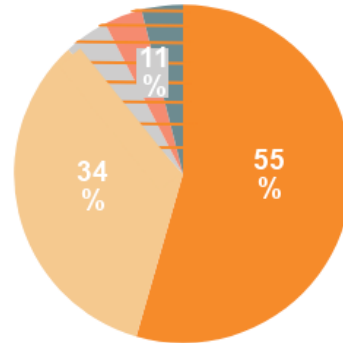
<sup>34</sup> Shannon M. Lynch, et al., *Women's Pathways to Jail: The Roles and Intersections of Serious Mental Illness and Trauma*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, at 14-15 (2012).

<sup>35</sup> U.S. Census Bureau, *Poverty Status in the Past 12 Months by Sex by Age: Virginia, 2016*, 2012-2016 American Community Survey 5-Year Estimates, available at [https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16\\_5YR/B17001/0400000US51](https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_5YR/B17001/0400000US51) (estimating that 921,664 Virginians were living below the poverty level in 2016: 403,763 identified as male and 517,901 (56.19%) identified as female).



### Racial Breakdown of Women in Poverty in Virginia, 2016

White Black Other



In Virginia, 921,664 people were estimated to have been in poverty in 2016. Women made up 56% of that number, with 55% of them estimated to be White, 34 percent Black, 4.3% Asian, 3.7% two or more races, and 4 percent American Indian, Alaska Native, Native Hawaiian or Other Pacific Islander, or another race.

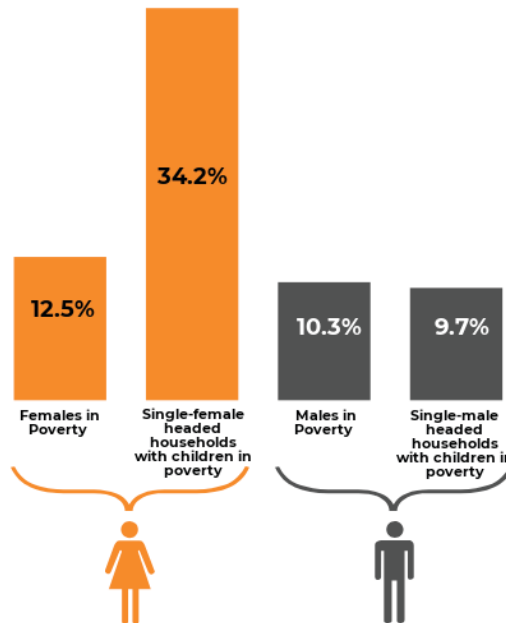
Source: United States Census Bureau, 2011-2015 American Community Survey 5-Year Estimates: Virginia, Poverty Status in the Past 12 Months.

### WOMEN'S EXPERIENCES WITH POVERTY

34.2% of single mothers in Virginia with children under 18 years old living in their household were estimated to be living below the federal poverty line in 2016, compared with only 9.7% of households with single fathers.



### 2016 Poverty Rates in Virginia



Source: United States Census Bureau, 2012-2016 American Community Survey 5-Year Estimates: Virginia, Poverty Status in the Past 12 Months.

Additionally, 28.6% of single mothers in Virginia with children under 18 years old living in their household were estimated to be living below the federal poverty line in 2016, compared with only 14.8% of households with single fathers.<sup>36</sup>

The correlation between poverty and crime is well-documented.<sup>37</sup> In general, those on the economic margins of society are far more likely to experience significant stress and problems with drugs.<sup>38</sup> These types of stressors may account for higher involvement in larceny, theft, check and welfare fraud, and forgery among women living in poverty.<sup>39</sup> This is compounded in Virginia, which, has one of the lower felony larceny thresholds in the country.<sup>40</sup> This means that any crime involving theft becomes a felony if the value of the goods or money involved is \$500 or higher.

Three of the four primary crimes for which women are incarcerated in Virginia – drug possession and distribution, larceny, and shoplifting – are often economically motivated and committed to support drug dependencies.

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<sup>36</sup> U.S. CENSUS BUREAU, *Poverty Status in the Past 12 Months of Families by Family Type by Presence of Related Children Under 18 Years by Age of Related Children: Virginia 2016*, 2012-2016 American Community Survey 5-Year Estimates, available at <https://factfinder.census.gov/faces/tableserVICES/jsf/pages/productview.xhtml?src=CF>. See Appendix; Table 1

<sup>37</sup> See, e.g., Dana Haynie & Darrell Steffensmeier, *Gender, Structural Disadvantage, and Urban Crime: Do Macrosocial Variables Also Explain Female Offending Rates?*, 38 CRIMINOLOGY 403, 406 (2000) (“Traditional criminological theories[, including economic strain,] all recognize economic hardship [and] unemployment . . . as factors that promote crime.”); *id.* at 432 (“[S]tructural disadvantage—adverse economic conditions and conditions of social disorganization—affects the social order so that criminogenic pressures increase on both the female and the male populations.”); Francisca D. Fajana, *The Intersection of Race, Poverty, and Crime*, 41 J. POVERTY L. & POL’Y 120, 120 (2007) (describing “the long tradition of intertwining race, poverty, and crime”); see generally Lance Hannon & James Defronzo, *The Truly Disadvantaged, Public Assistance, and Crime*, 45 Soc. PROBS. 383 (1998).

<sup>38</sup> Meda Chesney-Lind & Lisa Pasko, *The Female Offender: Girls, Women, and Crime* 119 (3<sup>rd</sup> ed. 2013).

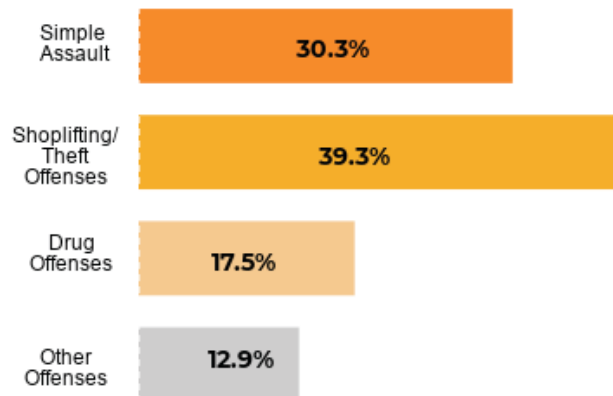
<sup>39</sup> Van Wormer, *supra* note 32, at 75, 83. See also Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 549 (2012) (noting that crimes of poverty include “public benefits fraud, low-level drug dealing, panhandling, prostitution and minor thefts.”).

<sup>40</sup> At least 30 states have felony thresholds set at \$1000 or higher. See Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conference of State Legislatures at 2 (June 2015), <https://www.ncsl.org/documents/cj/sentencing.pdf>.





### Average Women's Arrests in Virginia 1999-2016



Source: ACLU of Virginia's internal analysis of annual Crime in Virginia reports published by the Virginia State Police (1999-2016), available at [http://www.vsp.state.va.us/Crime\\_in\\_Virginia.shtm](http://www.vsp.state.va.us/Crime_in_Virginia.shtm).

Women's offenses are typically a consequence of circumstances – lack of access to employment, family stability, drug treatment, and protection from sexual and physical abuse.

Poverty and accompanying factors contribute “to women’s participation in drug-related crime as a mechanism for survival, as well as to some women’s propensity to use drugs as a means of self-medicating.”<sup>41</sup> Women’s offenses are typically a consequence of circumstances – lack of access to employment, family stability, drug treatment, and protection from sexual and physical abuse.<sup>42</sup> Women report economic need as the underlying motivation for their crimes more than twice as often as men.<sup>43</sup> The poverty-crime problem translates to higher arrest rates in impoverished areas than their more affluent neighbors.<sup>44</sup> Speaking generally, in

<sup>41</sup> Nekima Levy-Pounds, *Beaten By the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L.J. 462, 464 (2006).

<sup>42</sup> Robin Levi & Ayelet Waldman, Eds., *INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN'S PRISONS* 13 (1st ed. 2011).

<sup>43</sup> Michele Eliason, Janette Taylor & Rachel Williams, *Physical Health of Women in Prison: Relationship to Oppression*, 10 J. CORRECTIONAL HEALTH 175, 188 (2004). See also Joseph Cudjoe & Tony A. Barringer, *More Than Mere Ripples: The Interwoven Complexity of Female Incarceration and the African-American Family*, 2 MARGINS 265, 274 (2002) (“[D]eteriorating economic conditions push women to the brink faster than men; as the primary caretakers of children, women may be driven by poverty to engage in more ‘crimes of survival.’”)

<sup>44</sup> Melissa S. Kearney, et al., *Ten Economic Facts about Crime and Incarceration in the United States*, THE HAMILTON PROJECT at 5 (May 1, 2014) (“[C]rime tends to concentrate in disadvantaged areas...”), <http://www.hamiltonproject.org/papers/ten-economic-facts-about-crime-and-incarceration-in-the-united-states>; Barbara D. Warner, *Community Characteristics and the Recording of Crime: Police Recording of Citizens' Complaints of Burglary and Assault*, 14 JUST. Q. 631, 633 (1997) (“Net the actual amount of crime, arrest rates are higher in poor, nonWhite, and immigrant communities.”).

communities “where poverty has eroded individual opportunity and neighborhood structure,” women often respond by engaging in illegal activity.<sup>45</sup> Arrest rates thus tend to be higher in impoverished areas than elsewhere, which further promotes economic marginalization of poor communities.<sup>46</sup> This is due to a number of factors, including, for example, the availability of public services, which tend to be offered at higher rates in white middle-class neighborhoods.<sup>47</sup>

This problem is also self-perpetuating. The poorest families face higher risks of becoming crime victims.<sup>48</sup> This is particularly true for black women, for whom “poverty is the major correlative” to involvement in crime.<sup>49</sup>

Additionally, research consistently demonstrates that where a significant number of children live below the poverty line, the economic environment contributes to a “circle of criminal arrests and incarceration.”<sup>50</sup> The likelihood that a teenage girl will be arrested is much greater if she comes from a poor family.<sup>51</sup> Contributing risk factors include living in neighborhoods with high crime rates and rates of teenage pregnancy and early motherhood, having unsatisfactory experiences at school, and lacking supportive networks at home.<sup>52</sup>

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<sup>45</sup> Haegyung Cho, Note, *Incarcerated Women and Abuse: The Crime Connection and the Lack of Treatment in Correctional Facilities*, 14 S. CAL. REV. L. & WOMEN'S STUD. 137, 146 n. 85 (2004).

<sup>46</sup> Benjamin H. Harris & Melissa S. Kearney, *The Unequal Burden of Crime and Incarceration on America's Poor*, BROOKINGS INSTITUTE (Apr. 28, 2014), <http://www.brookings.edu/blogs/up-front/posts/2014/04/28-unequal-burden-crime-americas-poor-kearney-harris> (“Rates of crime and incarceration disproportionately impact low-income and minority communities, and contribute to the social and economic marginalization of the poor.”). For example, from 2001-2009, Washington, D.C., saw an increase in arrests, while the crime rate decreased. The two wards with the greatest increase in arrests—27% and 34%—have “some of the highest percentages of people of color in the District and the highest unemployment rates.” Conversely, the arrest rate in Northwest, containing the most affluent wards, is much lower. Just. Pol’y Inst., *A Capitol Concern: The disproportionate impact of the justice system on low-income communities in D.C.*, at 2-4 (July 2010), [http://www.justicepolicy.org/images/upload/10-07\\_EXS\\_CapitolConcern\\_AC-PS-RD-DC.pdf](http://www.justicepolicy.org/images/upload/10-07_EXS_CapitolConcern_AC-PS-RD-DC.pdf).

<sup>47</sup> Warner, note 69, at 633.

<sup>48</sup> Kearney, *et al.*, *supra* note 69.

<sup>49</sup> Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 42 (1995).

<sup>50</sup> Jennifer Ward, *Snapshots: Holistic Images of Female Offenders in the Criminal Justice System*, 30 FORDHAM URB. L.J. 723, 738 (2003); Van Wormer, *supra* note 32, at 44 (“Poverty is a major risk factor for delinquency and often is accompanied by other risk factors related to family disruption.”).

<sup>51</sup> Van Wormer, *supra* note 32, at 44 (“Lower-class adolescent females tend to confront higher risk levels than youth from the higher echelons.”).

<sup>52</sup> Van Wormer, *supra* note 32, at 44.



PEOPLE  
OVER  
PROFIT  
END FOR-PROFIT PRISONS



## SCHOOL-TO-PRISON PIPELINE

One way in which discrimination due to racist policies has manifested is the school-to-prison pipeline, wherein “discrimination pushes minority students out of school and into the criminal justice system.”<sup>53</sup> School administrators’ recent emphasis on a “punitive approach to school discipline” that includes police presence in schools helped establish the pipeline.<sup>54</sup> The phenomenon affects students of all demographics, but the most disproportionate effects fall on schools with high percentages of low-income and minority students.<sup>55</sup> The symptoms are increased suspension, expulsion, and arrests of minority and low-income students, with black boys and girls bearing the brunt of these policies.<sup>56</sup>

According to data collected by the U.S. Department of Education from the 2011-2012 school year, black girls were suspended six times as often as white girls, whereas black boys were suspended three times as often as white boys.<sup>57</sup> Virginia has the highest rate of student referrals to law enforcement in the nation (15.8 referrals for every 1,000 students), and the second-highest rate of referrals for black students (25.3 referrals for every 1,000 students).<sup>58</sup>

Girls who are suspended from school are more likely to drop out, and face a greater likelihood of

having contact with the juvenile justice system. Though girls of all races face severe economic consequences when they drop out of school, the consequences of dropping out are particularly severe for black and Latina or Hispanic girls, who face a greater prevalence of unemployment and low-wage work. Moreover, the income gap between high school graduates and those who did not finish high school is greater for women than it is for men.<sup>59</sup> This is particularly problematic given the high prevalence of single-wage-earning black families headed by women, and the number of black children who rely on women wage-earners.<sup>60</sup>

Girls who are LGBTQ are also disproportionately harmed by the school-to-prison pipeline. Approximately 4-8% of youth identify as LGBTQ, but one study found as many as 13-15% of youth in juvenile detention are LGBTQ.<sup>61</sup> The Center for Transgender Equality notes that “[f]amily rejection, homelessness, and hostility in the foster-care and other safety-net systems often serve to funnel LGBTQ youth into the juvenile justice system.”<sup>62</sup> Despite LGBTQ students’ clear vulnerability to harassment, discrimination, and violence at school, a 2010 study found that LGBTQ youth “were up to three times more likely to experience harsh disciplinary actions in school than their non-LGBTQ counterparts.”<sup>63</sup>

53 Rebecca Klein, *The Assault at Spring Valley High Shows the School-to-Prison Pipeline in Action*, THE HUFFINGTON POST, Oct. 27, 2015, [http://www.huffingtonpost.com/entry/spring-valley-school-to-prison\\_us\\_562f92c7e4b0c66bae59765a](http://www.huffingtonpost.com/entry/spring-valley-school-to-prison_us_562f92c7e4b0c66bae59765a). See also India Geronimo, *Systemic Failure: The School-to-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J.L. Soc’y 281, 281 (2012) (“The school-to-prison pipeline is the nationwide trend where poor and minority students are funneled out of the education system and into the criminal justice system.”)

54 Geronimo, *supra* note 78, at 282.

55 *Id.* at 286; Klein, *supra* note 78 (“Black students are far more likely to be punished and targeted by school authorities.”)

56 Klein, *supra* note 78.

57 Kimberlé Williams Crenshaw, *et al.*, *Black Girls Matter: Pushed Out, Overpoliced, and Underprotected*, at 16 (2016), [http://www.law.columbia.edu/sites/default/files/legacy/files/public\\_affairs/2015/february\\_2015/black\\_girls\\_matter\\_report\\_2.4.15.pdf](http://www.law.columbia.edu/sites/default/files/legacy/files/public_affairs/2015/february_2015/black_girls_matter_report_2.4.15.pdf).

58 Chris Zubak-Skees & Ben Wieder, *A State-by-State Look at Students Referred to Law Enforcement*, CENTER FOR PUBLIC INTEGRITY (Apr. 2015), <https://www.publicintegrity.org/2015/04/10/17074/state-state-look-students-referred-law-enforcement> (last visited Aug. 23, 2018).

59 NATIONAL WOMEN’S LAW CENTER, *When Girls Don’t Graduate, We All Fail: A Call to Improve High School Graduation Rates for Girls* at 8 (2007), [http://www.nwlc.org/sites/default/files/pdfs/when\\_girls\\_dont\\_graduate.pdf](http://www.nwlc.org/sites/default/files/pdfs/when_girls_dont_graduate.pdf).

60 Crenshaw, *et al.*, *supra* note 82, at 25.

61 Harper Jean Tobin, *Putting Prisons on the LGBT Agenda*, THE HUFFINGTON POST, Apr. 1, 2014, [https://www.huffingtonpost.com/harper-jean-tobin/putting-prisons-on-the-lg\\_b\\_5065219.html](https://www.huffingtonpost.com/harper-jean-tobin/putting-prisons-on-the-lg_b_5065219.html).

62 Nat’l Center for Transgender Equality, *Standing With LGBTQ Prisoners: An Advocate’s Guide to Ending Abuse and Combatting Imprisonment*, April 10, 2014, <https://transequality.org/issues/resources/standing-lgbt-prisoners-advocate-s-guide-ending-abuse-and-combatting-imprisonment> (last visited Aug. 23, 2018).

63 *Id.*



What can we do to create a  
World where no youth are locked up?

From the  
Mouths of  
fourth graders

Javier

Russell

Josiah

Noah

Zachary

Eisa

LAUREN

JOSUE

Jonathan

Tarig

Ailin

Nancy

SAM

Jessica

Wade

Mariah

RISEONS  
DON'T  
MORR



## DISPROPORTIONATE CRIMINALIZATION OF LGBTQ WOMEN

Systemic bias, abuse, and profiling of LGBTQ people by law enforcement has resulted in a disproportionate percentage of women who identify as lesbian, bisexual, transgender, or nonbinary becoming involved in the criminal justice system.

A recent national study of incarcerated people showed 26.4% of women in jails, and 33.3% of women in prisons, identified as lesbian or bisexual women – 8 to 10 times greater than the estimated 3.6 percent of women in the U.S. who identify as lesbian or bisexual women.<sup>64</sup> The study showed incarceration rates for lesbian and bisexual women were three times higher than the overall incarceration rate for adults in the U.S.<sup>65</sup> The study also found that lesbian and bisexual women in prison tended to be younger, had a higher prevalence of poor mental health, and had a lower education level, than straight women in prison. They were also more likely to be black or of other non-Hispanic, non-white races.<sup>66</sup>

Transgender people, especially those who are poor or people of color, report high rates of harassment, discriminatory arrests, and physical and sexual assault by law enforcement.<sup>67</sup> Approximately 16% of transgender adults have been incarcerated at some point in their lives, compared to 2.7% of all adults who have been in jail and 10.2% of all adults who have been incarcerated or under criminal justice supervision.<sup>68</sup> Once in prison or jail, transgender women are often denied necessary

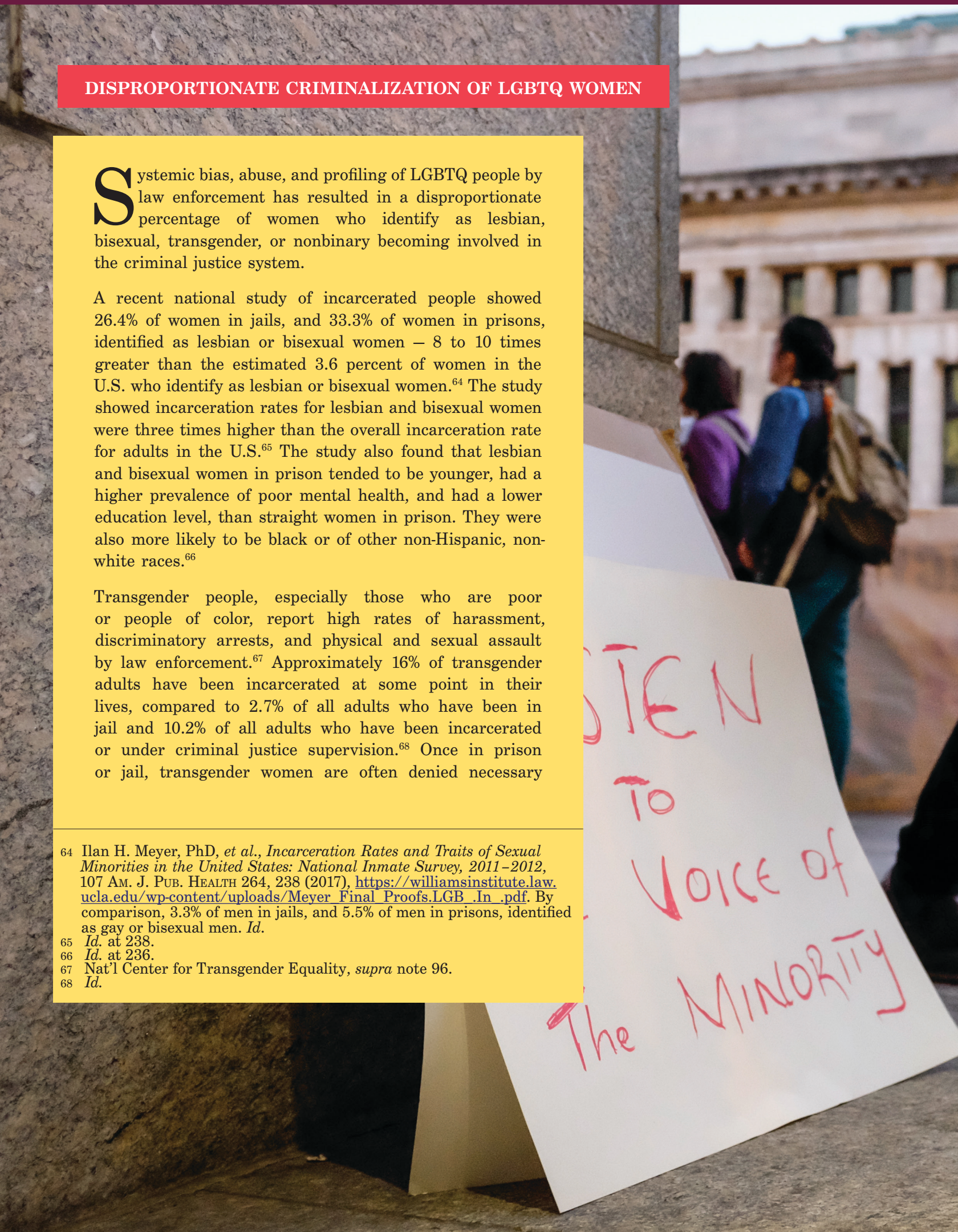
<sup>64</sup> Ilan H. Meyer, PhD, et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 AM. J. PUB. HEALTH 264, 238 (2017), [https://williamsinstitute.law.ucla.edu/wp-content/uploads/Meyer\\_Final\\_Proofs.LGB\\_In.pdf](https://williamsinstitute.law.ucla.edu/wp-content/uploads/Meyer_Final_Proofs.LGB_In.pdf). By comparison, 3.3% of men in jails, and 5.5% of men in prisons, identified as gay or bisexual men. *Id.*

<sup>65</sup> *Id.* at 238.

<sup>66</sup> *Id.* at 236.


<sup>67</sup> Nat'l Center for Transgender Equality, *supra* note 96.

<sup>68</sup> *Id.*



STIEN  
To  
VOICE of  
The MINORITY





healthcare, such as hormone therapy, and prohibited from grooming in a manner that matches their gender identity. Denying transgender people critical healthcare services can cause significant psychological harm, including increased risk of suicide. Further, transgender women are usually housed in men's facilities, putting them at high risk of sexual assault and violence. This often results in transgender women being placed in solitary confinement for their protection – even though solitary confinement is a cruel and inhumane punishment usually reserved for inmates and prisoners who pose a danger to *other people*.

While recent studies provide insight into the disproportionate criminalization of lesbian, bisexual, and transgender women, there is a significant need for further research and more comprehensive data collection. Current evidence shows that most of the issues identified as pathways to incarceration for all women – poverty, untreated mental health and medical conditions, substance use disorders, the school-to-prison pipeline, and physical and sexual abuse – are amplified for LGBTQ people.<sup>69</sup> It is well documented that stigmatization of LGBTQ people results in discrimination and community marginalization, which in turn leads to higher rates of poverty, lack of adequate health care, and homelessness, as well as greater vulnerability to domestic abuse, sexual assault, and physical violence.<sup>70</sup>

Lesbian, bisexual, and transgender women are also often perceived as failing to conform to feminine sex stereotypes (e.g., labeled as masculine or aggressive), which may in turn cause them to be viewed by law enforcement and the judicial system as threatening or dangerous – leading to more punitive treatment.<sup>71</sup> Given the disproportionate representation of lesbian, bisexual, and transgender women among all inmates and prisoners, more must be done to educate and train law enforcement and the judiciary—as well as prison and jail administrators – about the specific issues driving the over-incarceration of lesbian, bisexual, and transgender women, and identify policy and procedural changes geared toward ending this disproportionate cycle of incarceration.

<sup>69</sup> M.V. Lee. Badgett, Laura E. Durso, & Alyssa Schneebaum, *New Patterns of Poverty in the LGBT Community*, WILLIAMS INSTITUTE (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>.

<sup>70</sup> See Center for American Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People of Color*, MOVEMENT ADVANCEMENT PROJECT (Aug. 2016), <https://www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf>; Lourdes Ashley Hunter, et al., *Intersecting Injustice: A National Call to Action Addressing LGBTQ Poverty and Economic Justice for All*, SOCIAL JUSTICE SEXUALITY PROJECT GRADUATE CENTER, CITY UNIVERSITY OF NEW YORK (Mar. 2018), <http://socialjusticesexuality.com/files/2018/04/Poverty-Reports-Exec-Summary.pdf>.

<sup>71</sup> Meyer, *et al.*, *supra* note 86, at 239.

## Trauma and Victimization

Women are most frequently arrested and incarcerated for property offenses, such as shoplifting, embezzlement, and other types of larceny; drug crimes; and simple assault. A woman's engagement in these crimes, however, may be a symptom of past or current physical or sexual abuse, intimate partner violence, untreated or poorly managed mental health conditions, or other types of victimization.<sup>72</sup>

For example, a comprehensive study of women in jails recently showed that 86% experienced sexual violence in their lifetime; 77% experienced domestic partner violence; and 60% experienced caregiver violence.<sup>73</sup>

.....

A woman's engagement in these crimes, however, may be a symptom of past or current physical or sexual abuse, intimate partner violence, untreated or poorly managed mental health conditions, or other types of victimization.

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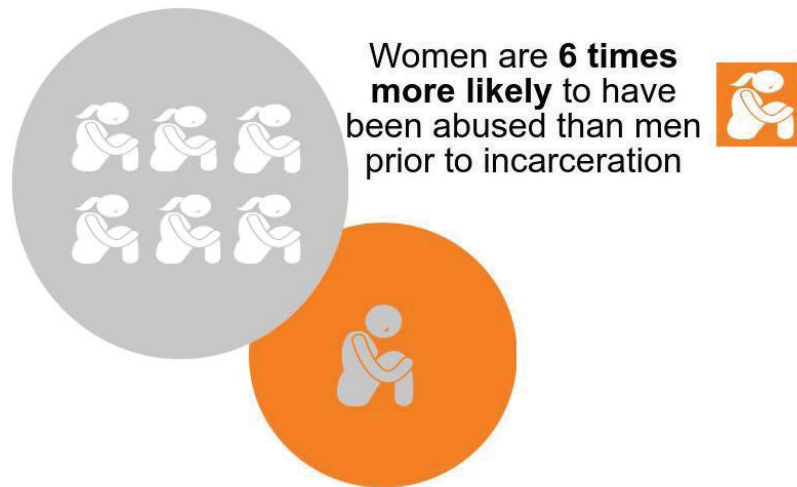
Shannon M. Lynch, et al., *Women's Pathways to Jail: The Roles and Intersections of Serious Mental Illness and Trauma*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE ASSISTANCE (2012), at 32.

<sup>72</sup> See Lynch, et al., *supra* note 60, at 67 ("Experiences of intimate partner violence were a factor in women's drug offending and commercial sex work."); United Nations, Report of the Special Rapporteur on violence against women, its causes and consequences, *Pathways to, conditions and consequences of incarceration for women*, at 5 (Aug. 2013), [http://dag.un.org/bitstream/handle/11176/273207/A\\_68\\_340-EN.pdf?sequence=3&is-Allowed=y](http://dag.un.org/bitstream/handle/11176/273207/A_68_340-EN.pdf?sequence=3&is-Allowed=y) ("Numerous studies in the United States illustrate a strong correlation between incarceration and prior abuse, and the nexus with women's involvement in the activities for which they were incarcerated including drug use, prostitution and intimate involvement with criminals.").

<sup>73</sup> Lynch, et al., *supra* note 60, at 15, 32.



A study of women in state prisons showed 57% had been physically or sexually abused prior to incarceration, and that the rate of prior sexual abuse of women prisoners was six times higher than the comparable rate for incarcerated men.<sup>74</sup>



Source: Dana M. Britton, *Feminism in Criminology: Engendering the Outlaw*, 571 ANNALS AM. ACAD. POL. & SCI. 57, 63 (Sept. 2000).

Childhood physical or sexual abuse is also a pathway to jail or prison for many women. When compared with girls who have not been abused and neglected during childhood, abused and neglected girls are nearly twice as likely to become involved in the juvenile justice system, twice as likely to be arrested as adults, and 2.4 times more likely to be arrested for a violent crime.<sup>75</sup>

## CHILDHOOD PHYSICAL OR SEXUAL ABUSE IS ALSO A PATHWAY TO JAIL OR PRISON FOR MANY WOMEN.

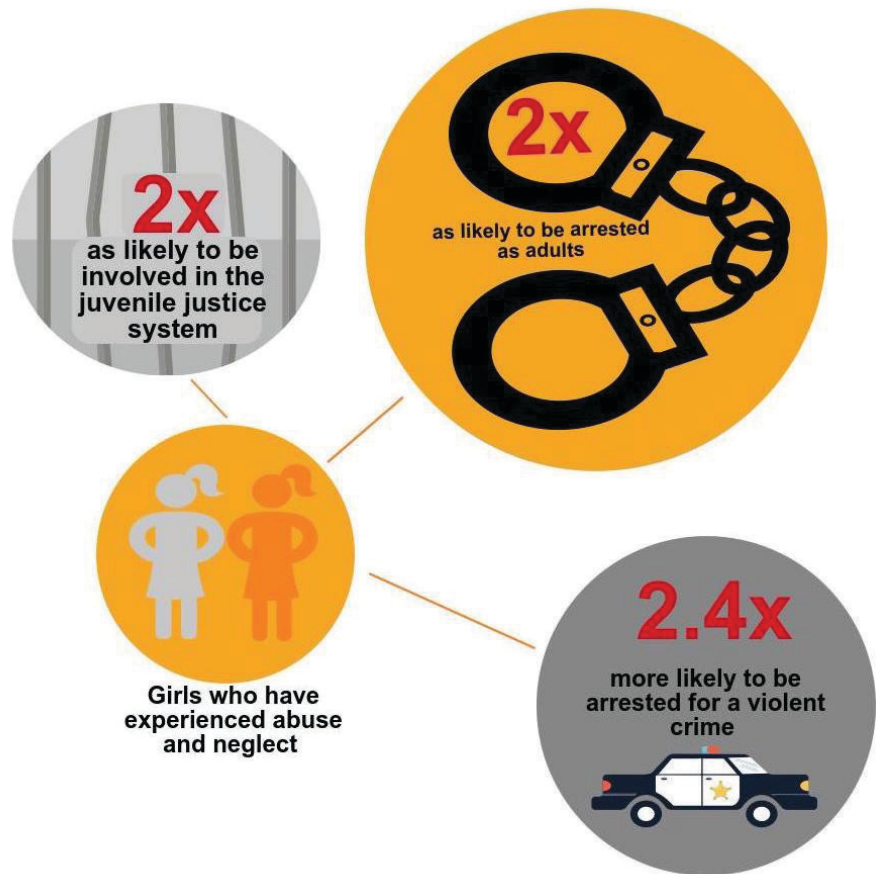
<sup>74</sup> Greenfeld & Snell, *supra* note 54, at 8 (showing that 12% of incarcerated women had been abused before turning eighteen, 20% had been abused after turning eighteen, and 25% had been abused during both periods of their life); Dana M. Britton, *Feminism in Criminology: Engendering the Outlaw*, 571 ANNALS AM. ACAD. POL. & SCI. 57, 63 (Sept. 2000).

<sup>75</sup> Cathy Spatz Widom, Ph.D., *Childhood Victimization and the Derailment of Girls and Women to the Criminal Justice System*, in *Research on Women and Girls in the Justice System: Plenary Papers of the 1999 Conference on Criminal Justice Research and Evaluation—Enhancing Policy and Practice Through Research*, Vol. 3, NAT'L INSTITUTE OF JUSTICE, at 28 (Sept. 2000).



## Prevalence of incarceration among girls with abusive backgrounds

Studies focused on domestic violence survivors have shown that abusers frequently use economic abuse – such as preventing a victim from working or sabotaging her attempts to obtain employment – to increase a victim’s dependence on the abuser, thus making it less likely that the victim will leave the relationship.



Source: Cathy Spatz Widom, Ph.D., *Childhood Victimization and the Derailment of Girls and Women to the Criminal Justice System*, in *Research on Women and Girls in the Justice System: Plenary Papers of the 1999 Conference on Criminal Justice Research and Evaluation—Enhancing Policy and Practice Through Research*, Vol. 3, Nat’l Institute of Justice (Sept. 2000), at 28.

Further emphasizing the connection between victimization and likelihood of incarceration, studies focused on domestic violence survivors have shown that abusers frequently use economic abuse – such as preventing a victim from working or sabotaging her attempts to obtain employment – to increase a victim’s dependence on the abuser, thus making it less likely that the victim will leave the relationship. When a victim does manage to work, she may have a high incidence of absenteeism, lateness, and harassment that makes her continued employment precarious.<sup>76</sup>

<sup>76</sup> Shelby A. D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women from Leaving Abusive Relationships*, 12 TEXAS J. WOMEN & LAW 452, 476 (2003).

These experiences often cause women to turn to economic crimes, such as embezzling money or passing bad checks, as a means of escaping an abusive relationship.<sup>77</sup>

Additionally, according to a report funded by the Bureau of Justice Assistance, witnessing violence has been found to be “associated with women’s onset of engaging in property crimes, fighting, and use of weapons. Sometimes this stemmed from affiliation with criminal networks, and often women’s use of weapons or aggression appeared to arise from efforts to protect themselves or others.”<sup>78</sup>

Women’s experiences of child and adult trauma are also significant predictors of their overall mental health difficulties. Extensive victimization (e.g., victimization during childhood followed by further victimization as an adult) is directly associated with greater mental health problems, and mental health problems are directly associated with engaging in criminal activities and becoming incarcerated.<sup>79</sup>

Domestic violence and trauma is also connected to women’s drug use. As explained in the “Caught in the Net” report, “Researchers have consistently found high levels of past and current physical and emotional abuse in the lives of women who use or abuse illicit drugs. Many have suggested a direct relationship between violence experienced by women and substance abuse. For example, the 1989 National Women’s Study found a correlation between the number of violent assaults a woman sustains in her lifetime and the severity of her drug or alcohol dependency.”<sup>80</sup> Without adequate community resources, such as affordable and accessible substance abuse treatment, many abuse survivors become involved in the criminal justice system due to their substance abuse disorders.<sup>81</sup>

## Mental Health Conditions

There is a direct correlation between women’s mental health conditions and the likelihood that they will engage in crime and

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<sup>77</sup> Kathleen J. Ferraro & Angela M. Moe, *Mothering, Crime and Incarceration*, SOCIOLOGY FACULTY PUBLICATIONS at 6 (2003), [https://scholarworks.wmich.edu/sociology\\_pubs/4](https://scholarworks.wmich.edu/sociology_pubs/4).

<sup>78</sup> Lynch, *et al.*, *supra* note 60, at 67.

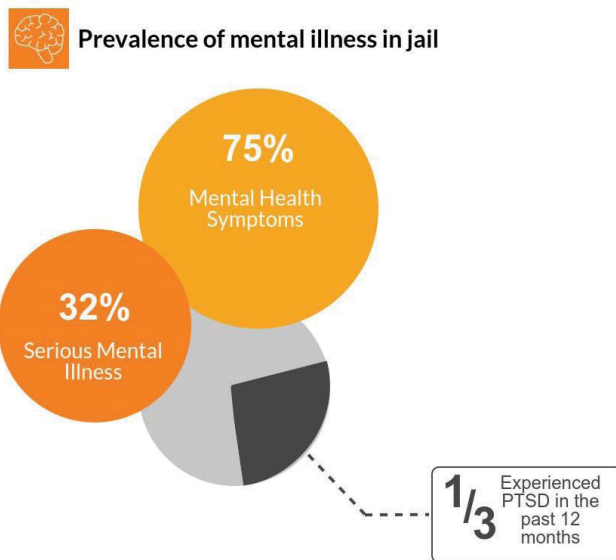
<sup>79</sup> *Id.* at 66-67.

<sup>80</sup> ACLU, *et al.*, *supra* note 48, at 9.

<sup>81</sup> Holly M. Harner, *et al.*, *Posttraumatic Stress Disorder in Incarcerated Women: A Call for Evidence-Based Treatment*, 1 PSYCHOLOGICAL TRAUMA: THEORY, RES., PRACT., & POL’Y 58, 59 (2013).

become incarcerated. Between 2011 and 2012, a larger percentage of women in prison (20%) or jail (32%) than men in prison (14%) or jail (26%) met the threshold for serious psychological distress in the past 30 days. During the same time period, a larger percentage of women in prison (66%) or jail (68%) than men in prison (35%) or jail (41%) had a history of mental health problems.<sup>82</sup>

A recent study of women in jails found that 32% had serious mental illness (SMI), such as major depression, bipolar disorder, or schizophrenia and one third had experienced PTSD in the past 12 months.<sup>83</sup> Another study found that 75% of women in jails reported mental health symptoms within the past 12 months.<sup>84</sup>



Sources: Shannon M. Lynch, *et al.*, *Women's Pathways to Jail: The Roles and Intersections of Serious Mental Illness and Trauma*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE ASSISTANCE, at 14-15 (2012); Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, at 4 (2006).

Women offenders generally report mental health problems and serious mental illness at a greater incidence than do male offenders.<sup>85</sup> Prisons and jails do not provide suitable environments

<sup>82</sup> Jennifer Bronson, Ph.D., *et al.*, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, at 4 (June 2017), <https://www.bjs.gov/content/pub/pdf/imhprpj1112.pdf>.

<sup>83</sup> Lynch, *et al.*, *supra* note 60, at 14-15, 65.

<sup>84</sup> Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, at 4 (2006).

<sup>85</sup> Lynch, *et al.*, *supra* note 60, at 14-15.



for women to receive treatment for these conditions. As explained in the national ACLU's report "Worse Than Second-Class," "[women] in custody are frequently guarded during their most private moments by men without a woman guard present, despite the potential for abuse and degradation... The loss of privacy experienced by people in prison is especially damaging to the many incarcerated women who are also victims of past sexual abuse, since close supervision can reinforce feelings of vulnerability and can re-traumatize women who have experienced violence by men. The presence of male guards in women's facilities also increases the danger of staff sexual misconduct, which remains a serious problem despite increased awareness of the issue" and the federal Prison Rape Elimination Act (PREA) regulations.<sup>86</sup>

Jails are particularly ill-equipped to provide women inmates with the comprehensive mental health care necessary to prevent them from engaging in criminal behavior upon release. A study commissioned by the Bureau of Justice Assistance recently found that 30 to 45% of women in jail with a current mental health disorder reported severely impaired functioning associated with a serious mental illness, PTSD, or substance abuse disorder in the past year. These offenders apparently do not have access to treatments necessary to address their mental health conditions and help them improve their basic level of functioning. These levels of reported impairment, combined with the high rates of serious mental illness, PTSD, and substance abuse disorders among women in jail suggest there is a critical need for additional mental health assessment and treatment resources within this population.<sup>87</sup>

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<sup>86</sup> ACLU, *Worse Than Second-Class: Solitary Confinement of Women in the United States* at 3 (Apr. 2014), [https://www.aclu.org/sites/default/files/assets/worse\\_than\\_second-class.pdf](https://www.aclu.org/sites/default/files/assets/worse_than_second-class.pdf).

<sup>87</sup> Lynch, *et al.*, *supra* note 60, at 66.

## CHALLENGES WITH RE-ENTRY

JAILS ARE PARTICULARLY ILL-EQUIPPED TO PROVIDE WOMEN INMATES WITH THE COMPREHENSIVE MENTAL HEALTH CARE NECESSARY TO PREVENT THEM FROM ENGAGING IN CRIMINAL BEHAVIOR UPON RELEASE.



PHOTO: JERICA DECK/THE HAMPTON SCRIPT



# Women in Virginia's Criminal Justice System

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While the ACLU of Virginia is engaged in ongoing investigations of, and advocacy regarding, women's jail and prison conditions, the analysis in this report is limited to the initial pathways to women's incarceration. This remains an important piece of the over-incarceration picture for women's imprisonment that must be addressed.

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Given the typical characteristics of women offenders and national trends discussed above, is Virginia's criminal justice system set up to effectively address the ever-increasing percentage of women incarcerated in prisons and jails? To answer this question, the discussion below analyzes each step of the criminal justice system – from arrest, to prosecution, to sentencing, incarceration, and reentry – to identify policy changes necessary to address the specific issues underlying women's pathways into the criminal justice system.

This discussion will consider the following stakeholders:

- Police who decide whom to arrest, release, or book into jail;
- Commonwealth's Attorneys who decide whom to prosecute and whom to recommend for pre-trial release or a diversion program;
- Judges and magistrates who decide whether to hold or release someone on bail while their case is pending; and
- Community supervision officers who decide how to respond to violations of community supervision conditions.

This report does not, however, examine the conditions women experience in Virginia's jails and prisons. While the ACLU of Virginia is engaged in ongoing investigations of, and advocacy regarding, women's jail and prison conditions, the analysis in this report is limited to the initial pathways to women's incarceration. This remains an important piece of the over-incarceration picture for women's imprisonment that must be addressed.



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**Is Virginia’s criminal justice system set up to effectively address the ever-increasing percentage of women incarcerated in prisons and jails?**

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### **MISDEMEANOR VS. FELONY**

Under Virginia law, a misdemeanor is usually punishable by up to one year in a local or regional jail, but is sometimes only punished by a fine and/or community supervision. A felony offense is punishable by one or more years of jail time and incarceration in a state prison, as well as by fines, fees, court costs, and at least a year of supervised probation. A felony is also punished by the loss of citizenship rights – including the right to vote – and state collection of the person’s DNA. For most felony cases, judges may voluntarily follow sentencing guidelines established by the Virginia Sentencing Commission, however, juries are asked to sentence without being given access to the guidelines.

Virginia's court system, state police, jails, prisons, and community supervision programs do not make sufficient data available to the public, and, thus, inhibit researchers' ability to study trends in the jail and prison population.

While the Virginia State Police provide arrest data on an annual basis, they only delineate that data by race or sex, and do not identify arrestees who identify as Hispanic or Latinx. The public accordingly lacks access to data showing arrest rates based on the racial characteristics of arrestees by gender. For example, the Virginia State Police do not release data showing how many black women were arrested for shoplifting, and how many white women were arrested for assault, during a given year and in a given locality. This inhibits researchers from identifying specific cities and counties which may be targeting people for arrest based on their race, gender, or both.

A new law went into effect on July 1, 2018, that will permit the public to request aggregated criminal court data from the Office of the Executive Secretary. This law will also require OES to compile an online database of this data by July 1, 2019. Unfortunately, prior to the passage of this law, access to court data was available solely through the Virginia Supreme Court's Online Case Information system which only provided information by case; no aggregated or bulk data was available for General District and Circuit courts. No reasonable analysis of the demographics of convictions in the Commonwealth was practicable, save for the work of open data organizations who would write software to compile data from the courts' databases. Though the ACLU of Virginia obtained felony prosecution and conviction data from all 118 jurisdictions through one of these open government organizations,<sup>88</sup> the courts' data entry methods inhibit effective data analysis by creating separate entries for every charge against an individual defendant, regardless of whether the charges were for a single incident or arrest. This inhibits aggregate data analysis, as it is difficult to identify typical sentence lengths

88 Virginia Court Case Information System, [www.virginiacourtcaseinfo.org](http://www.virginiacourtcaseinfo.org).



for women convicted of specific crimes when it is extremely difficult to determine how many charges are represented by each recorded jail or prison sentence.

The ACLU of Virginia, with the help of volunteer statisticians, was able to identify preliminary trends in women's court prosecution and conviction data. These insights, however, are limited in their scope and utility because state courts in each individual jurisdiction do not follow the same data entry practices. For example, one court clerk's office may routinely enter a charge for stealing property valued over \$200 as a violation of Virginia Code § 18.2-95. A court clerk in another jurisdiction may routinely enter the same charge as a violation of Virginia Code § 18.2-95(ii). Both entries list the correct statute, but only the latter identifies the specific charge. This is because Virginia Code § 18.2-95 contains three subsections listing separate criminal offenses: (i) stealing property valued over \$5 directly from another person; (ii) indirectly stealing property valued over \$200; and (iii) stealing a firearm. A researcher analyzing how many people were prosecuted for a theft above the \$200 felony larceny threshold risks overincluding or underincluding such prosecutions because it is impossible to isolate all convictions under § 18.2-95(ii), specifically.

Anonymized digital jail inmate data, which the ACLU of Virginia obtained through a FOIA request to the Virginia Compensation Board, is also organized by criminal charge and contains many of the same roadblocks for researchers as the court data. It does, however, follow a standard method of entering criminal charges that could serve as a model for individual courts.

The Virginia Department of Corrections declined to provide anonymized prisoner data in response to the ACLU of Virginia's FOIA request (by statute, the release of such data is discretionary). VDOC produces annual reports analyzing its data for state responsible inmates. While these reports only represent a snapshot in time (June 30<sup>th</sup> of each calendar year), they provide insight into the racial characteristics of women prisoners incarcerated in VDOC facilities. VDOC does not provide any insights about the race, age, and geographic location of women who are under VDOC custody but are either incarcerated in a local, regional, or federal facility, or are under community supervision.



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During an average year between 1999 and 2016, over 87% of women’s arrests were for three types of crimes: simple assault (30.3%), shoplifting or larceny offenses (39.3%), or drug/narcotic offenses (17.5%).

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## Arrest

There were 276,144 arrests in Virginia in 2016.<sup>89</sup> Over 28 percent of them were women.<sup>90</sup> Virginia’s pattern of arrests mirrors national numbers,<sup>91</sup> with black people arrested in numbers disproportionate (39.9%) to their representation within the state population (20%).<sup>92</sup> Virginia does not delineate arrest data by gender and race, or identify the number of arrestees who are Hispanic or Latinx.

Of the total number of arrestees in 2016, 58.9% were white, 39.9% were black, 1.1% were Asian or Pacific Islander, and .1% were American Indian or Alaskan Native.<sup>93</sup>

The types of crimes for which women are arrested in Virginia have been remarkably consistent between 1999 and 2016.<sup>94</sup> They reflect a national pattern in which women are primarily arrested for non-violent crimes linked to poverty and untreated drug dependency or mental health conditions.

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<sup>89</sup> VA. DEP’T OF STATE POLICE, *Crime in Virginia, 2016*, at 64 (2017), available at [http://www.vsp.state.va.us/downloads/Crime\\_in\\_Virginia/Crime%20in%20Virginia%202016.pdf](http://www.vsp.state.va.us/downloads/Crime_in_Virginia/Crime%20in%20Virginia%202016.pdf).

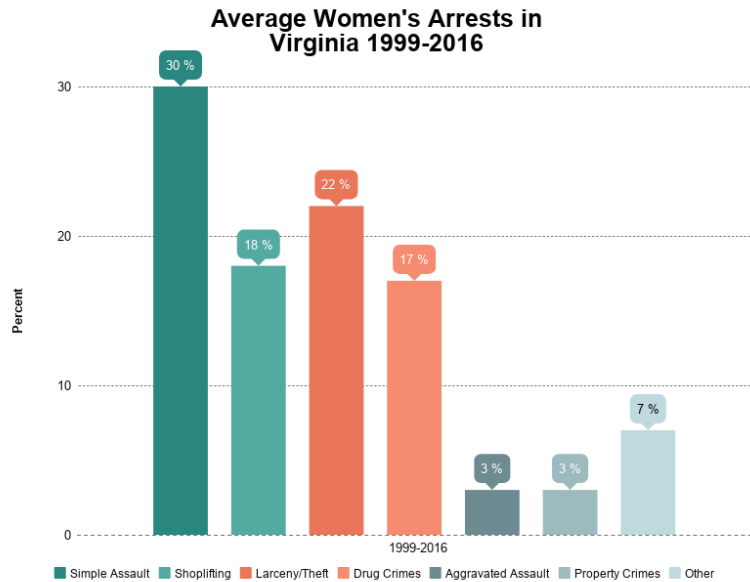
<sup>90</sup> *Id.* at 64.

<sup>91</sup> *Id.* Of the 8.4 million people arrested in the United States in 2016, 69.6% were white, 26.9% were black, 2.0% were American Indian or Alaska Native, 1.2% were Asian, and 0.3% were Native Hawaiian or Other Pacific Islander. Among jurisdictions collecting data on the ethnicity of arrestees, 18.4% of arrestees were Hispanic or Latinx. Unfortunately, the FBI does not delineate arrest data by gender and race. When compared with the racial makeup of the United States’ population, however, the percentage of black people who were arrested in 2016 (26.9%) was more than double the percentage of black people estimated to be in the general population that year (12.6%). *Estimated Number of Arrests*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21> (last visited Mar. 6, 2018). For the breakdown of the 2016 United States population by race and ethnicity, see Appendix; Table 2.

<sup>92</sup> The U.S. Census Bureau estimates that in 2016, the total population in Virginia was broken down by racial and ethnic categories as shown in Appendix; Table 3

<sup>93</sup> VA. DEP’T OF STATE POLICE, *Crime in Virginia, 2016*, *supra* note 124 at 64 (2017).

<sup>94</sup> ACLU of Virginia analysis of *Crime in Virginia* reports published by the Virginia State Police between 1999 and 2016. See Appendix; Table 4



Source: ACLU of Virginia analysis of arrest data published annually by the Virginia State Police in *Crime in Virginia* (1999-2016), [http://www.vsp.state.va.us/Crime\\_in\\_Virginia.shtm](http://www.vsp.state.va.us/Crime_in_Virginia.shtm).

During an average year in this time period, over 87% of women's arrests were for three types of crimes: simple assault (30.3%), shoplifting or larceny offenses (39.3%), or drug/narcotic offenses (17.5%).<sup>95</sup>

The prevalence of shoplifting and larceny offenses among women's arrests in Virginia are consistent with studies showing that women often engage in crime out of economic necessity or to support an addiction. For example, women's shoplifting arrests showed a telling pattern during and after the Great Recession.

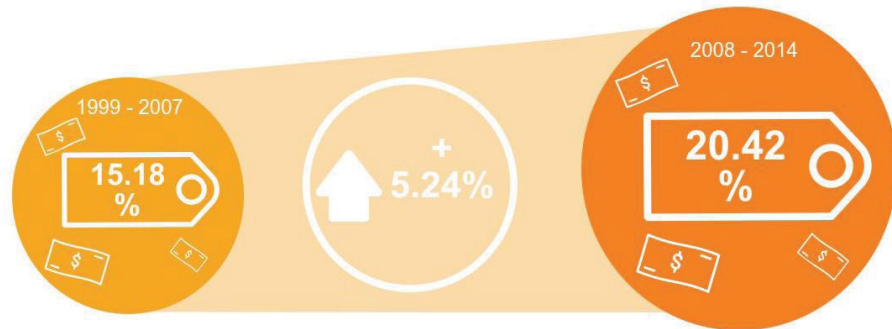
Between 1999 and 2007, shoplifting accounted for 15% of all women's arrests in Virginia. This percentage increased sharply in 2008, and averaged 20% of women who were arrested between 2008 and 2014.<sup>96</sup>

<sup>95</sup> ACLU of Virginia analysis of *Crime in Virginia* reports published by the Virginia State Police between 1999 and 2016. Male offenses were similarly consistent between 1999 and 2016, but showed different patterns in types of offenses. For example, Drug/Narcotic Offenses (27.8%); Simple Assault (26.9%); and Larceny Offenses and Shoplifting (22%) composed 76.7% of arrests. Other frequent offenses included; Burglary/B&E (3.8%); Destruction of/Damage to Property/Vandalism (3.9%); Aggravated Assault (3.9%); Weapons Law Violations (3.7%); Robbery (1.7%); Other (6.3%). See Virginia State Police, *Crime in Virginia* (2017), [http://www.vsp.state.va.us/Crime\\_in\\_Virginia.shtm](http://www.vsp.state.va.us/Crime_in_Virginia.shtm).

<sup>96</sup> ACLU of Virginia analysis of *Crime in Virginia* reports published by



 **Average women's arrest rates for shoplifting, 1999-2014**



Virginia also has a special “three strikes” law that automatically turns a person’s third conviction for shoplifting into a felony – regardless of the value of the items stolen for any of the three shoplifting offenses.

Source: *Crime in Virginia*, 1999-2016, Va. Dep’t of State Police (2017), [http://www.vsp.state.va.us/Crime\\_in\\_Virginia.shtm](http://www.vsp.state.va.us/Crime_in_Virginia.shtm).

Theft crimes, such as shoplifting or passing bad checks, are classified as either misdemeanors or felonies based on the monetary value of what was stolen. This is known as the “felony threshold.” In Virginia, stealing any item valued more than \$500 is a felony.<sup>97</sup> This is among the lower felony larceny thresholds in the country; until this year, it had not been raised since 1980.<sup>98</sup> For context, in 1980 a gallon of gasoline cost 86 cents and iPhones didn’t exist.<sup>99</sup> Today, a gallon of gas costs \$2.84 and an iPhone retails for over \$500.<sup>100</sup> Increasing the threshold to \$500 is actually going backwards. In 1980 dollars, it would be a threshold of \$168.08, less than the \$200 set then.<sup>101</sup>

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the Virginia State Police between 1999 and 2015.

<sup>97</sup> Va. Code Ann. § 18.2-95.

<sup>98</sup> VA. DEP’T OF CRIMINAL JUSTICE SERVICES, *Virginia Felony Larceny Threshold: 35 Years Later*, at 1 (2015), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/dcjs/virginia-felony-larceny-threshold-35-years-later.pdf>. At least 30 states have felony thresholds set at \$1000 or higher. See Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conference of State Legislatures at 2 (June 2015), <https://www.ncsl.org/documents/cj/sentencing.pdf>.

<sup>99</sup> *Fact #915: March 7, 2016 Average Historical Annual Gasoline Pump Price, 1929-2015*, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP’T OF ENERGY (last visited Aug. 27, 2018), <https://www.energy.gov/eere/vehicles/fact-915-march-7-2016-average-historical-annual-gasoline-pump-price-1929-2015>.

<sup>100</sup> National average according to AAA as of August 19, 2018. See AAA *Gas Prices*, <https://gasprices.aaa.com/state-gas-price-averages/>.

<sup>101</sup> *CPI Inflation Calculator*, Bureau of Labor Statistics, <https://data.bls.gov/cgi-bin/epicalc.pl?cost1=200.00&year1=198007&year2=201807> (last visited Aug. 27, 2018) (computing \$500 in July 1980 to July 2018).

regardless of the value of the items stolen for any of the three shoplifting offenses.<sup>102</sup> This creates a situation in which a woman who was arrested for stealing food valued at \$10 on three occasions can be convicted of a felony and incarcerated in a state prison for up to five years, even though she only stole a combined \$30 of goods.<sup>103</sup>

## Prosecution

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 Commonwealth 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.

The CA appoints assistant prosecutors to help carry out the duties of the office. These obligations include prosecuting all felony criminal offenses in the city or county. Felony offenses range from murder, rape, and robbery to drug possession and thefts of more than \$500, as well as arguably petty offenses like signing a job application for a state job that includes misinformation. CAs typically handle most misdemeanor prosecutions as well, though they are not required to do so.

With these responsibilities, however, comes enormous power. From the beginning of a criminal case to the end result, CAs have unparalleled authority to decide outcomes – such as who gets released on bail, who gets a plea deal, and which cases go to trial.<sup>104</sup> Moreover, for a variety of reasons, prosecutors are rarely sanctioned for ethical or constitutional violations. The result is undeniable: in the criminal justice system, a prosecutor has far more power than any other public official.

These vast powers give prosecutors the ability to affect nearly every part of Virginia's criminal justice system – including whether to prosecute low-level offenders under Virginia's three-strikes larceny statute.

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<sup>102</sup> Under Va. Code Ann. § 18.2-104, a third or subsequent larceny is a Class 6 felony.

<sup>103</sup> Va. Code Ann. § 18.2-104.

<sup>104</sup> See ACLU of Virginia, *Unparalleled Power: Commonwealth's Attorneys, Voters, and Criminal Justice Reform in Virginia* (June 2016), <https://www.acluva.org/en/publications/unparalleled-power-commonwealths-attorneys-voters-and-criminal-justice-reform-virginia>



Commonwealth’s attorneys are rarely questioned about their oversized influence on criminal justice policy. Because nearly three-fourths of all CA elections are uncontested, Virginia voters seldom have the option of removing a CA from office.

## KAAMILYA’S STORY: PART I

Kaamilya is a 38-year-old African-American woman from the greater Washington, D.C. area who now lives in Northern Virginia. She has struggled with addiction to opioids for over 20 years. When she was employed, she worked minimum wage jobs without health benefits. She shoplifted to support her addiction, and had been convicted of misdemeanor larceny offenses several times. But because she was never arrested or convicted of a drug offense, she was not eligible for a diversion program and drug treatment was not included in her sentences. The judges who sentenced her never asked her why she shoplifted so frequently.

Kaamilya was most recently arrested for shoplifting about \$20 of merchandise from a pharmacy in Fairfax County—a toy for her five-year-old son and a few bottles of iced tea. Because she had two prior misdemeanor shoplifting convictions in that jurisdiction, the Commonwealth’s Attorney prosecuted her under the felony “three strikes” shoplifting statute. Kaamilya was sentenced to serve two years in state prison. The Commonwealth’s Attorney also prosecuted her for contributing to the delinquency of a minor because her son was with her when she committed the third shoplifting offense.

When Kaamilya asked for her sentence to include time at Guest House, a comprehensive, gender-responsive re-entry program for recently incarcerated women — the Judge refused her request.

“It was not even an option for him . . . . My judge was like, ‘No, you are not getting off that easy. You are going to prison. I am going to make an example out of her.’ Those were his exact words in the courtroom: ‘we’re going to make an example out of her.’”

### Pre-Trial Detention

When a person is arrested or booked into jail, a magistrate judge typically sets a bail amount according to a fixed fee schedule. Under Virginia law, a person who has been arrested is entitled to an immediate hearing before a judge. During that hearing, the judge will decide whether there was probable cause for the arrest and whether that person is eligible for release on bail. The judge will also determine whether the person qualifies for a public defender or a court-appointed defense attorney.

Judges have vast discretion to decide whether someone may be

released by paying bail or acquiring a bond. Bail is a sum of money that a defendant pays to get out of jail while awaiting trial. The bail payment can be returned to the defendant pending the outcome of their case, but if the defendant fails to comply with any court requirements after posting bail, she loses her payment. If a defendant does not have the means to pay bail, she may acquire a bond, also called a bail bond. This is a payment made on the defendant's behalf by a third party to secure their release while awaiting trial. The third party typically charges defendants or their families nonrefundable fees for making the payment. Judges further possess great discretion in determining how much bail to set in a given case. They also heavily rely on recommendations from the CA as to whether bail should be set (and in what amount).

According to the Vera Institute of Justice, “women generally receive greater leniency than men when judges, magistrates, or bail commissioners make pretrial custody and release decisions. On average, women were released on their own recognizance (ROR) at higher rates; were denied release less often; and when bail was set, amounts were lower for women than for men. This may be because women have less extensive criminal histories, and their alleged offenses typically pose less of a public safety risk than those of men.”<sup>105</sup>

Women can nevertheless face significant obstacles to securing pre-trial release when cash bond is set. According to a report from the national ACLU and the Prison Policy Initiative, “A previous study found that women who could not make bail had an annual median income of just \$11,071. Among those women, black women had a median annual income of only \$9,083 (just 20% that of a white non-incarcerated man).”<sup>106</sup> When the typical \$10,000 bail amounts to a full year's income, women will be disproportionately kept in jail while their case proceeds.<sup>107</sup>

If a judge denies bail or bail is set above the defendant's ability to pay, the defendant must remain in jail throughout the court process. The time between arrest and a criminal trial can take months. If the defendant does not promptly work out a plea deal, she risks losing her job, her housing, and — in many cases —

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<sup>105</sup> Swavola, et al., note 28, at 29 (internal citations omitted).  
<sup>106</sup> Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2017*, ACLU & THE PRISON POLICY INITIATIVE, at 3 (2017), <https://www.aclu.org/report/womens-mass-incarceration-whole-pie-2017>.

<sup>107</sup> *Id.*



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No mother should be forced to choose between exercising her right to prove her innocence before a jury and losing her children and her home.

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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 exercising her right to prove her innocence before a jury and losing her children and her home.

### CASH BOND

Virginia currently does not provide data analyzing how the cash bond system affects individuals based on their gender. Other states which have studied this issue have found that systems requiring cash bond disproportionately prevent women offenders from securing release from pre-trial detention.<sup>108</sup> This is due to the wide range of social barriers affecting women who become involved with the criminal justice system, as well as systemic gender inequality.<sup>109</sup>

For example, in 2016 women earned 80 cents for every dollar earned by a white man, on average. But black women earned only 63 cents, and Latinas or Hispanic women earned just 54 cents, for every dollar earned by a white man.<sup>110</sup> The wage gap has real consequences for women struggling to retain employment and hold their families together while trying to avoid a prolonged – and financially devastating – period of incarceration. Given the steadily increasing women's jail population and the significant discretion afforded to judges in Virginia to order cash bond, this issue warrants further data collection and analysis delineated by gender and race if a decision is not made to end the use of cash bail completely.

<sup>108</sup> Swavola, et al., *supra* note 28, at 29-30.

<sup>109</sup> Swavola, et al., *supra* note 28, at 29.

<sup>110</sup> NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, *Fact Sheet: America's Women and the Wage Gap* (Apr. 2017), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf>.

## Plea Deals & Sentencing

### *Sentencing Guidelines*

The Virginia Sentencing Commission is a judicial branch agency charged with developing, implementing, and administering felony sentencing guidelines used in Virginia circuit courts. Compliance with the sentencing guidelines is voluntary, though judges are nevertheless required to complete sentencing guidelines

worksheets in all cases covered by the guidelines (approximately 95% of felony sentencing events).<sup>111</sup>

In FY2016, 82% of sentences were within the recommended guidelines range in jail and prison cases.<sup>112</sup> Departures from the guidelines are typically no more than one year above or below the recommended range.<sup>113</sup> Judges are required to submit to the Sentencing Commission written reason(s) for sentencing outside the guidelines range.<sup>114</sup>

Virginia’s judges are not limited by any standardized or prescribed reasons for departing from the guidelines. They may cite multiple reasons for departure in each case. The Sentencing Commission publishes a report analyzing sentencing guidelines departures each year. In FY2016, only 9.8% of guidelines cases resulted in sanctions below the recommended range.<sup>115</sup>

While the Sentencing Commission does not delineate data by gender, circumstances disproportionately affecting women – including past or current experiences of violence; economic status motivations; marginal role in the offense or the drug trade as a whole; physical or mental health; pregnancy; or family responsibilities – were rarely listed as the reason a judge deviated below the sentencing guidelines range.<sup>116</sup> For example, in FY2016, family ties and responsibilities were cited in only 1.5% of cases granting downward departures. The defendant’s minor role in drug-related offenses received even less consideration at sentencing – “offender not the leader” was listed as the reason for sentencing below the guidelines range in only 0.9% of drug cases in FY2016.<sup>117</sup>

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<sup>111</sup> Va. Code Ann. § 19.2-298.01; VA. CRIMINAL SENTENCING COMMISSION, *2016 Annual Report*, at 8 (2016), <http://www.vcsc.virginia.gov/2016Annual-reportfinal.pdf> [hereinafter 2016 VCSC Report].

<sup>112</sup> *Id.* at 17.

<sup>113</sup> *Id.* at 40.

<sup>114</sup> Va. Code Ann. § 19.2-298.01. *See* 2016 VCSC Report, *supra* note 128, at 18 (“Each year, as the Commission deliberates upon recommendations for revisions to the guidelines, the opinions of the judiciary, as reflected in their departure reasons, are an important part of the analysis.”)

<sup>115</sup> *See* 2016 VCSC Report, *supra* note 128, at 18. The report noted that “[f]or 339 of the 2,257 mitigating cases, a departure reason could not be discerned.” *Id.*

<sup>116</sup> *See id.* at 18 (“The most frequently cited reasons for sentencing below the guidelines recommendation were: the acceptance of a plea agreement, a sentence to a less-restrictive sanction, judicial discretion, the defendant’s cooperation with law enforcement, the defendant’s lack of or minimal prior record, court procedural issues such as a sentence recommendation provided by the attorneys, and mitigating offense circumstances.”)

<sup>117</sup> ACLU of Virginia calculations from data in VCSC Report, *supra* note 128.

### *Bifurcated Trials*

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In FY2016, 90.6% of felony criminal cases reported to the Virginia Sentencing Commission were decided by a guilty plea.

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Virginia has a bifurcated process for adjudicating felony criminal cases where the case is tried to a jury. In bifurcated trials, the jury decides whether the defendant is guilty or innocent during the first phase of the trial. The jury makes its sentencing decision during a second phase of the trial, and is presented with information about the defendant's prior criminal record to help them make a sentencing decision, but unlike a judge trying a case, has no access to the sentencing guidelines. Only two other states besides Virginia have bifurcated jury trials for non-capital offenses.

Under this system, defendants accused of felonies in Virginia must decide whether to plead guilty, or, if they plead not guilty, whether to have their cases tried before a judge or a jury. Empirical evidence has shown that juries are more likely than judges to acquit criminal defendants.<sup>118</sup> However, when a defendant is sentenced by a jury, jurors are not permitted to review or consider the sentencing guidelines, and judges are not required to adjust jury sentences to fit within the recommended sentencing range. Perhaps as a result, when juries convict a defendant they tend to impose harsher sentences.<sup>119</sup> Judges are extremely reluctant to reduce a jury's sentence even where it clearly exceeds the guidelines.

Moreover, Virginia sentencing juries are not able to offer alternatives to incarceration. For example, a jury cannot sentence someone to probation or allow that person to serve jail time on weekends in order to keep a job.

Under Virginia's truth-in-sentencing laws, people convicted of felonies must serve at least 85% of their sentence. This enhances the risk of chancing a jury trial that may end with a much harsher

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<sup>118</sup> Harry Kalven, Jr. & Hans Zeisel, *THE AMERICAN JURY* 56 (1966).  
<sup>119</sup> In FY2016, only 43% of jury sentences reported to the Virginia Sentencing Commission concurred with the sentencing guidelines (which juries are not permitted to consult). 2016 VCSC Report, *supra* note 128, at 28. In cases in which the sentence was more severe than the recommended range, the sentence exceeded the guidelines maximum by a median value of 37 months. *Id.* See also Nancy J. King & Rosevelt L. Noble, *Felon Jury Sentencing in Practice: A Three-State Study*, 57 *Vand. L. Rev.* 885, 910 (2004) (finding that sentences by juries in Virginia drug cases were on average four to fourteen years higher than those imposed by judges). While Virginia judges may modify a sentence recommended by a jury, they did so for only 16% of jury sentences reported to the commission in FY2016. 2016 VCSC Report, *supra* note 128, at 28.



sentence than a judge would have issued. The alternative is putting your faith in one judge and giving up your constitutional right to be tried before a jury of your peers.

The result of this system is that defendants charged with felonies face tremendous pressure to make a deal with the CA. In FY2016, 90.6% of felony criminal cases reported to the Virginia Sentencing Commission were decided by a guilty plea and 8.2% were decided by a bench trial. Less than 1% of felony convictions for property and drug offenses – the majority of crimes for which women are arrested – were decided by jury trials during FY2016.<sup>120</sup>

### *Plea Deals*

For the low-level, non-violent offenses for which women are usually arrested in Virginia, CAs typically offer standard and quick plea deals at arraignment or shortly thereafter. Both the sentencing guidelines ranges and the jury sentencing system affect a defendant's bargaining power during plea deal negotiations. The more uncertainty associated with going to trial, the more likely a defendant will accept an unfavorable plea deal.

When a woman defendant is denied bail or does not have the means to pay cash bail, a plea deal may be the only way to avoid catastrophic consequences such as loss of housing or employment. Mothers face additional pressure to take a plea deal, particularly single mothers or those who act as a child's primary caretaker.

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 defendant with a long criminal 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 defendants to explain *why* they committed a crime. Even if they did, defendants 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. These defendants instead slip through the cracks and remain in a cycle of arrest, detention, incarceration, and recidivism.

Additionally, when women face more complex charges, their

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120 2016 VCSC Report, *supra* note 128, at 27-28.

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Virginia’s current  
drug policies  
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– typically  
women – with  
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approaches to  
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typically low-level role in a criminal enterprise often disadvantages them in plea negotiations. For example, the war on drugs legislation was designed to target major players in the drug trade. By reducing sentences or charges in exchange for “substantial assistance,” lower-level players are, in theory, protected by the system. This policy assumed that low-level players would have information that could lead to major players.

For women, the opposite is most often true. As the “Caught in the Net” report explains, women are usually given more routine responsibilities in drug distribution, and therefore “not only lack information useful to prosecutors, but also often erroneously believe that they could not be found guilty or be subject to long sentences based on uninformed, inconsequential, or coerced activity.”<sup>121</sup> Often referred to as “the girlfriend problem,” women are frequently pulled into their significant other’s offenses by minimally or unknowingly participating in crimes.<sup>122</sup>

Virginia’s current drug policies target low-level participants – typically women – with severe punitive approaches to deterrence.<sup>123</sup> Even if unintentional, the effects are significant: Women can be sentenced to ten or more years in prison because of the mere presence of drugs in their homes or minimal involvement in drug-related crimes.<sup>124</sup> Plea deal arrangements, by contrast, can involve a suspended sentence, “time served” during pre-trial detention, community service, and/or drug treatment.

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<sup>121</sup> ACLU, *et al.*, *supra* note 48, at 11.

<sup>122</sup> United Nations, *supra* note 93, ¶ 6; AM. CIVIL LIBERTIES UNION, “‘Girlfriend problem’ harms women and children, impacted families call mandatory sentences unfair and destructive,” June 14, 2005, <https://www.aclu.org/news/girlfriend-problem-harms-women-and-children-impacted-families-call-mandatory-sentences-unfair>.

<sup>123</sup> ACLU, *et al.*, *supra* note 48, at 12.

<sup>124</sup> Fettig, *supra* note 40. *See also* Polly F. Radosh, *Reflections on Women’s Crime and Mothers in Prison*, 48 CRIME & DELINQUENCY 300, 307 (2002) (“A woman who drives her boyfriend to make drug deals and waits in the car until after the deal is completed may end up serving a longer sentence than her boyfriend, who is the actual dealer. Drug convictions and sentencing rely very heavily on informant deals. The driver in the car would not have knowledge that would be beneficial to authorities and thus could not ‘deal’ with prosecutors on her own behalf. Also, loyalty to boyfriends or husbands prevents many women from making deals, even when they have such knowledge. A review of more than 60,000 federal drug cases indicates that men are much more willing to sell out women to get a shorter sentence than women are likely to sell out men.”).

## DIVERSION

When a defendant without any previous drug convictions pleads guilty, or enters a plea of not guilty, for possession of a controlled substance or marijuana, a judge may defer further court proceedings and place the person on probation. The terms of probation must include (1) successfully completing a treatment or education program, (2) remaining drug and alcohol free during the probation period and submitting to drug tests, (3) making “reasonable efforts” to secure and maintain employment, and (4) completing community service. Though holding down a job and attending the appointments and meetings implicated by these requirements requires transportation, the diversion program still requires the DMV to suspend participants’ driver’s licenses for six months if they were arrested for possession of drugs other than marijuana.<sup>125</sup>

## DRUG COURTS

In Virginia, as in other states, adult drug courts divert participants from incurring a criminal record. Successful graduates have their criminal charge(s) withdrawn and the arrest may be expunged from the participant’s legal record. The arrest is not erased from criminal justice databases, however. This means employers and landlords who run criminal background checks on job and housing applicants will likely learn of the arrest.

There are currently 33 adult drug courts in Virginia.<sup>126</sup> Virginia courts do not provide data showing how many criminal

<sup>125</sup> Va. Code Ann. § 18.2-251 . License suspension is left to the judge’s discretion for marijuana possession convictions, but is required if the possession occurred while operating a motor vehicle. This carve out for marijuana possession does not apply to juveniles.

<sup>126</sup> SUP. CT. OF VA., Virginia Drug Treatment Court Dockets, [http://www.courts.state.va.us/courtadmin/aoc/djs/programs/dtc/dtc\\_directory.pdf](http://www.courts.state.va.us/courtadmin/aoc/djs/programs/dtc/dtc_directory.pdf) (last visited Aug. 23, 2018).



defendants were eligible for referral to drug court. Only 290 women offenders were referred to an adult drug court between July 1, 2015 and June 30, 2016. Of those referred, 249 (86%) presented with high enough treatment needs and risk factors to qualify for drug court.<sup>127</sup>

While data is not available showing the racial makeup of adult drug court participants by gender, the vast majority of adult drug court participants were white (62%). Only 35% of participants were black; 0.5% identified as Hispanic. In 2015 and 2016, “the typical participant in drug court was a White single male, high school graduate, between the ages of 20 and 39.”<sup>128</sup>

The requirements for successfully completing drug court are particularly difficult for low-income people to navigate; participants:

- Must appear before the judge regularly, up to once a week.<sup>129</sup>
- Must pay all court-ordered court fines, fees, and restitution before graduation.
- Must complete court-ordered treatment program.
- Must obtain and keep employment throughout program, and
- Must “submit to frequent and random drug testing.”<sup>130</sup>

A single mother working a minimum-wage job (\$7.25 per hour in Virginia) would likely find it extremely difficult, if not impossible, to successfully complete drug court and avoid a conviction.

<sup>127</sup> SUP. CT. OF VA. DEP'T OF JUDICIAL SVS., *Virginia Drug Treatment Courts: 2016 Annual Report* (2017), <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/dtc/resources/2016annualreport.pdf> [hereinafter 2016 Va. Drug Court Report] (ACLU of Virginia analysis of report data). Of the 718 cases referred to an adult drug treatment court between July 1, 2015 and June 30, 2016, 428 were men. Of the 609 people who scored high enough on the Risk and Needs Triage (RANT) questionnaire to qualify for drug court, 360 (%) were men. 84% of men who took the RANT questionnaire scored high enough to be eligible for drug court. The majority (59%) of active participants in adult drug court participants in 2016 were men.

<sup>128</sup> *Id.* at 9.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 19, 36, 52.



A black and white photograph of a person walking on a city street, partially obscured by a dark blue text box. The person is wearing a dark jacket and a patterned scarf. The street has a crosswalk with white stripes. In the background, there is a manhole cover and a curb.

## JESSICA'S STORY

“The reason why I couldn’t do drug court is I didn’t have the money to pay the babysitter. I’ve got a five-bedroom house and a car. I was the director of operations with the bachelor’s degree. But that does not mean that I could successfully go through drug court. I lost my job as a director, and I’m about to lose my car and my five-bedroom house. If you don’t have the ability to get to drug court every day and the fees that it costs to get there, to pay the babysitter – all that, it’s a setup for failure. I should be pressed to make sure I’m doing well in recovery as an addict, not make [drug court] the hardest challenge of my life on top of becoming sober.”

## Community Supervision

Often considered an alternative to incarceration, probation (also referred to as community supervision) is frequently set with unrealistic conditions that undermine its goal of keeping people out of prison or jail.<sup>131</sup> A significant number of women receive sentences that include community supervision, due to their propensity to commit low-level, non-violent offenses.

Many women, however, do not complete their community supervision successfully. Women often violate the terms of their supervision for technical reasons, such as a missed appointment or unpaid fines or fees, rather than because they committed a new offense.

Many women, however, do not complete their community supervision successfully.<sup>132</sup> Women often violate the terms of their supervision for technical reasons, such as a missed appointment or unpaid fines or fees, rather than because they committed a new offense.<sup>133</sup> Violations typically result in additional requirements on their supervised release or new sanctions, including short stays in jail or the revocation of a suspended sentence.<sup>134</sup>

There are a number of reasons for community supervision failure among women. Supervision conditions – including available treatment or programming – often fail to address women’s specific risk factors or treatment needs. Violations may also result from the challenges of juggling community supervision requirements with work and family responsibilities. As women who become involved in the criminal justice system are overwhelmingly mothers, childcare duties further complicate supervision requirements that involve frequent court appearances and meetings with probation officers, without the income to spend on babysitters or reliable fast transportation to meetings.<sup>135</sup> All of these issues make women particularly vulnerable to being incarcerated not because they commit crimes, but because they may run afoul of one of the burdensome obligations of their probation.

As of June 30, 2016 (the most recent data available), 14,483 women were under Virginia Department of Corrections community supervision in Virginia.<sup>136</sup> The number of women under local community supervision is not available. The vast majority (90%) of women under VDOC supervision were on probation. Only 130 women were in a diversion center.<sup>137</sup> VDOC does not provide

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<sup>131</sup> Kajstura, *supra* note 124, at 4.

<sup>132</sup> Swavola, et al., note 28, at 32.

<sup>133</sup> Swavola, et al., note 28, at 32.

<sup>134</sup> Swavola, et al., note 28, at 32.

<sup>135</sup> Kajstura, *supra* note 124, at 4.

<sup>136</sup> VADOC Statistical Analysis and Forecast Unit, *SR Offender Population Profile FY 2016*, at 24 (April 2018), <https://vadoc.virginia.gov/about/facts/research/VADOCDemographicReportFY2016.pdf>.

<sup>137</sup> *Id.*



gender or race data for offenders who were incarcerated or reincarcerated due to a probation violation. Local and regional jails and courts similarly do not provide a reliable data source showing the number of people serving probation sentences following a jail sentence, their demographic characteristics, or how many of them were incarcerated or reincarcerated because of a probation violation.

## KAAMILYA'S STORY: PART II

"I never had drug charges. All of my charges stemmed from my addiction, so they were shoplifting and stealing cars and stuff like that to keep me high. Maybe that's one of the reasons why a judge never wanted to sentence me to rehab—because I didn't get caught with drugs.

I sat in prison with women from southwest Virginia who were sentenced to three years for a first violation. They go back to a town with one streetlight. They've been stripped of everything: you can't have a driver's license; you have a felony on your record, no one wants to hire you; there's no public transportation where you live and the only way you could get to a job is to drive. And if you get behind the wheel of a car and get pulled over, then you have violated the terms of probation and you end up right back up in prison.

No one is proactive about us not going back to prison. They make it as hard as they possibly can so we will continue to come back into this system. To me, it feels like a modern-day form of slavery: I've done your sentence and then you strip me of everything else. If I didn't have Guest House, where would I be living right now? Because in the state of Virginia I can't get housing. It's only by the grace of God that I have the job that I have.

No one takes any of those things into effect. They say, "do your sentence, get out, and become a productive citizen." Well I can't be a 'productive citizen' if you have all these Scarlet Letters attached to me. I really wish that they would be a little more proactive when they do the sentencing — think about the long-term effects, and think about why they continue to see this person show up in their courtroom. What can we do differently to help this person not continue to show up in the courtroom?

Do not give me drug treatment inside of a prison with four over-worked counselors that have caseloads of 300 women at a time. They have no time to sit down and talk to me and get down to a deeper level of why I do the same things that I do.

I leave prison not having any tools to make it. And then go right into the County programs with case managers that have the same caseloads as the ones in prison. They have no time to sit down and talk to you.

## Collateral Consequences

In Virginia, a criminal conviction can create life-long barriers to employment, education, housing and other opportunities, including:

- Lose or be denied public housing assistance.<sup>138</sup>
- Private landlords can require applicants to disclose prior convictions on a housing application.<sup>139</sup> Landlords can deny an application solely on the basis of a prior drug manufacturing or distribution conviction, or if the landlord subjectively *believes* a person’s criminal record puts other tenants or the premises at risk of substantial harm.<sup>140</sup>
- If someone is evicted from public housing because of a drug crime, for example, a public housing authority must prohibit that person from public housing for at least three years.<sup>141</sup> Public housing agencies can also refuse admission based on past criminal records related to drug use.<sup>142</sup>
- It may be difficult, if not impossible, to obtain a professional license, certificate, or registration.<sup>143</sup>

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<sup>138</sup> Federal statutes and HUD regulations require that a public housing authority (PHA) or an owner of assisted housing have the authority evict tenants the PHA determines to be engaged in criminal activity—regardless of whether they have been arrested for or convicted of any crime. Federal law also requires states to allow a PHA to reject applicants based on past convictions for “crimes of physical violence to persons or property” or “criminal acts which would adversely affect the health, safety or welfare of other tenants,” including “drug-related criminal activity,” and “illegal use of a drug.” 24 C.F.R. § 960.203(c)(3), 204; 42 U.S.C. 13661(c). HUD regulations *require* PHAs to reject applicants if the PHA has “reasonable cause to believe” that any member of the household is currently using an illegal drug, or has a “pattern of illegal use of a drug that may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.” 24 CFR § 960.204(a)(2)(i), (ii). PHA leases must be allow the PHA to terminate a lease if it determines (with or without an arrest or conviction) that a tenant or a tenant’s guest engaged in drug-related criminal activity “on or off the premises” or if a household member is “illegally using a drug.” 24 CFR § 966.4(l)(5). Virginia cities and counties have discretion to shape public housing policies.

<sup>139</sup> Va. Code Ann. § 36-96.2(F).

<sup>140</sup> Va. Code Ann. § 36-96.2(D), (F).

<sup>141</sup> 24 C.F.R. 982.553.

<sup>142</sup> 24 C.F.R. 982.553.

<sup>143</sup> A criminal conviction can be the sole basis for denying a professional license, certificate, or registration in a diverse range of fields—including many professions typically occupied by women (e.g., cosmetology, nursing, dental hygienists)—if it “directly relates to the occupation or profession for which the license, certificate or registration is sought.” Va. Code Ann. § 54.1-204(A). Regulatory boards also have “authority to refuse a license, certificate or registration if, based upon all the information available, including the applicant’s record of prior convictions, it finds that the

- A person with a felony drug conviction may be ineligible for Temporary Assistance for Needy Families (TANF) program if certain conditions are not met.<sup>144</sup>

- All of these collateral consequences make it more difficult for low-income people – especially women who are single parents or a child’s primary caretaker – to comply with the rigorous requirements of probation or drug court/diversion programs.

A few programs in Virginia, including Transition Services for Women in Roanoke, and Friends of Guest House in Fairfax, have provided formerly incarcerated or criminal justice-involved women with the support and resources they need to break the cycle of incarceration. These programs, however, are few and far between. They also lack sufficient financial support from the state.

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applicant is unfit or unsuited to engage in such occupation or profession.” *Id.* In determining whether a conviction “directly relates” to the occupation in question, regulatory boards employ a broad nine-factor test that gives them enormous discretion to deny past offenders a professional license, certificate, or registration. Va. Code Ann. § 54.1-204(B).

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Va. Code Ann. § 63.2-505.2.

## FRIENDS OF GUEST HOUSE



Friends of Guest House is a comprehensive, gender-responsive reentry program located in Fairfax, Virginia, that addresses healthcare, employment, education, housing, and family/community reconnection for post-incarceration women. In so doing, Guest House has had tremendous success helping its residents break the cycle of crime by fully addressing its root causes. Without re-entry support, 70% of ex-offenders nationwide re-offend within two years. Among Guest House graduates, fewer than 10% reoffend.<sup>145</sup>

Guest House provides case management, mental health, and substance abuse counseling, life skills training, and direct help or community referrals for healthcare, education, vocational training, job placement, housing, emergency needs (food, shelter, etc.), child custody and, generally, navigating the post-incarceration environment in constructive ways.

ACLU of Virginia focus group interviews conducted with nearly all of Guest House’s residents and program participants in July 2017 demonstrated the program’s value and effectiveness, as well as the scarcity of similarly effective programs for women in Virginia. Most program participants had been incarcerated in multiple local or regional jail facilities in various areas of Virginia. All of them had to engage in extraordinary self-advocacy to obtain a place at Guest House. Many indicated that completing the program was their best and only chance to obtain substance abuse treatment and mental health counseling, obtain employment, and take the steps necessary to successfully reenter the community.

<sup>145</sup> *About Friends of Guest House – A women’s reentry program in Northern VA*, Friends of Guest House, <https://friendsofguesthouse.org/about/> (last visited Aug. 24, 2018).



# Incarceration

The data on women who are incarcerated has long been obscured by the larger picture of men's incarceration. The disaggregated numbers presented here are an important first step to ensuring that women are not left behind in the effort to end mass incarceration.

## PRISONS VS. JAILS

Virginia has two primary types of jail facilities: local jails and regional jails.<sup>146</sup> Local jails generally serve the locality (e.g., city or county) in which they are located. They are managed by locally elected sheriffs, and accounted for 43.4% of the total jail inmate days in FY2016.<sup>147</sup> Regional jails house inmates from multiple localities. They are administered by a superintendent who serves the regional jail board or jail authority (which is generally composed of two members from each participating locality: the sheriff and an appointed representative).<sup>148</sup> Regional jails accounted for 56.0% of total inmate days in FY2016.<sup>149</sup> The Commonwealth of Virginia provides substantial funding for local and regional jails, but has little direct

<sup>146</sup> The City of Danville also operates a jail farm pursuant to Virginia Code Section 53.1-96, in which “any person convicted and sentenced to confinement in jail...may be confined and required to do such work as may be assigned him during the term of his sentence.” It has a 120 bed capacity, but does not house women. It was operating at 126% capacity in FY2016. See VA. COMPENSATION BD., *FY2016 Jail Cost Report: Annual Jail Revenues and Expenditures Report*, at 59 (Nov. 1, 2017), <http://www.scb.virginia.gov/docs/fy16jailcostreport.pdf>.

<sup>147</sup> *Id.* at IV.

<sup>148</sup> VA. DEP'T OF CRIMINAL JUSTICE SVS., *Virginia's Peculiar System of Local and Regional Jails*, at 3 (2010), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/research/virginias-peculiar-system-local-and-regional-jails.pdf> [hereinafter *Virginia's Peculiar System*].

<sup>149</sup> *FY2016 Jail Cost Report*, *supra* note 185, at IV.

authority over their operation other than certification and inspection of facilities.<sup>150</sup>

The following types of individuals may be confined in a local or regional jail, and are the responsibility of the locality and referred to as local responsible (“LR”) inmates:

- Individuals charged with a felony, misdemeanor, or ordinance violation who are not released on bail;
- Offenders sentenced to jail following conviction of a local ordinance or misdemeanor;
- Offenders sentenced to 12 months or less following a felony conviction; or
- Offenders awaiting a probation or parole revocation hearing due to violation of the conditions of their probation, parole, or post-release supervision.<sup>151</sup>

The Virginia Department of Corrections is responsible for housing individuals convicted of felonies and sentenced to serve one or more years in prison. Such individuals are referred to as state responsible (“SR”) offenders. VDOC operates 26 major institutions (e.g., prisons), eight field units, five work centers, two diversion centers, and one detention center.<sup>152</sup> SR offenders may be incarcerated in a local or regional jail during the time between when they are sentenced and when they are transferred to a facility operated by VDOC, such as a state prison or diversion center.<sup>153</sup> VDOC may also enter into contracts with local or regional jails to hold state responsible offenders on contract or as part of a work release program.<sup>154</sup>

<sup>150</sup> Virginia’s Peculiar System, *supra* note 163, at 1.

<sup>151</sup> *Id.*

<sup>152</sup> Va. Dep’t of Corrections, *Management Information Summary Annual Report For the Fiscal Year Ending June 30, 2017*, at 6 (2017), <https://vadoc.virginia.gov/about/facts/managementInformationSummaries/2017-mis-summary.pdf> [hereinafter *Management Information Summary*].

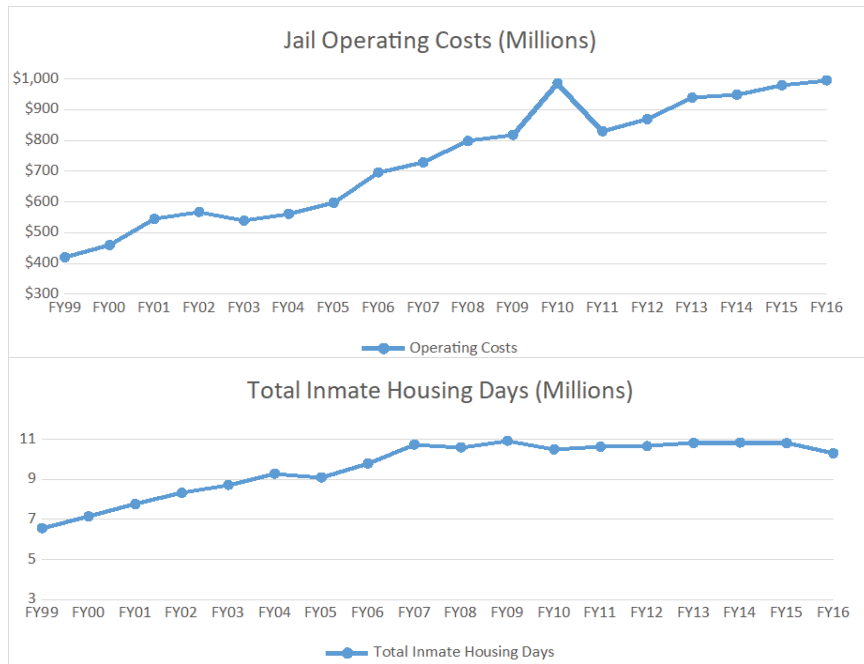
<sup>153</sup> The Virginia Department of Corrections is to take these inmates into custody within 60 days of the date the Circuit Court clerk mailed final sentencing order. Va. Code Ann. § 53.1-20.

<sup>154</sup> Virginia’s Peculiar System, *supra* note 163, at 1. Jails receive per diem payments from the federal government to hold state and federal prisoners. About 28% of local and regional jail space is used by state and federal inmates. *Id.*

## Prison and Jail Population Increases

### Local and Regional Jails

In FY1998, inmates spent 5,921,327 days housed in Virginia’s jails. By FY2016, that number had increased by 72% to 10,209,820 days – with facilities operating 125% above capacity, on average.<sup>155</sup> While the ACLU of Virginia’s primary concern is safeguarding liberty, over-incarceration is also a significant fiscal matter and a tremendous waste of taxpayer dollars. The cost to operate all of Virginia’s jails has skyrocketed: increasing 178% from \$358 million in FY1998 to \$995.6 million in FY2016.<sup>156</sup>



Source: Virginia Compensation Board

Women composed 15.3% of the average daily population in Virginia’s local and regional jails in 2014, about one percent point higher than the percentage of women incarcerated in local jails nationally.<sup>157</sup> This represents a 32% increase between 2010 and 2014. In contrast, the average number of men inmates only

<sup>155</sup> *FY2016 Jail Cost Report*, supra note 161, at 2; ACLU of Virginia analysis of Annual Jail Revenues and Expenditures Reports published by the Virginia Compensation Board for Fiscal Years 1998 through 2017.

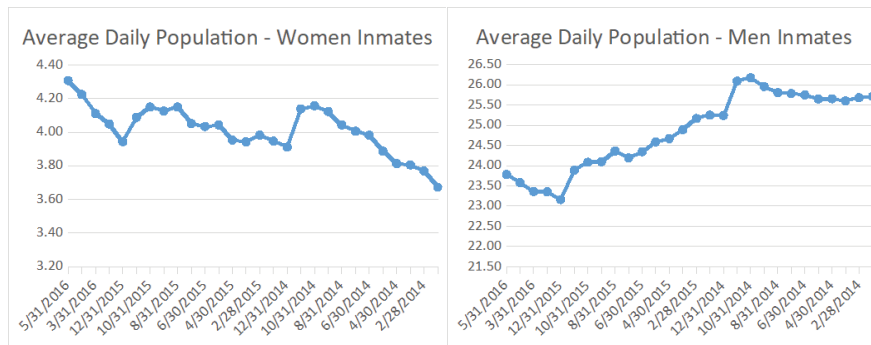
<sup>156</sup> *FY2016 Jail Cost Report*, supra note 161, at 1.

<sup>157</sup> ACLU of Virginia analysis of Average Daily Population Reports published by the Virginia Compensation Board, Jan. 31, 2014 through Dec. 31, 2014.; Todd D. Minton & Zhen Zeng, *Jail Inmates at Midyear 2014*, Table 3, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (June 2015).

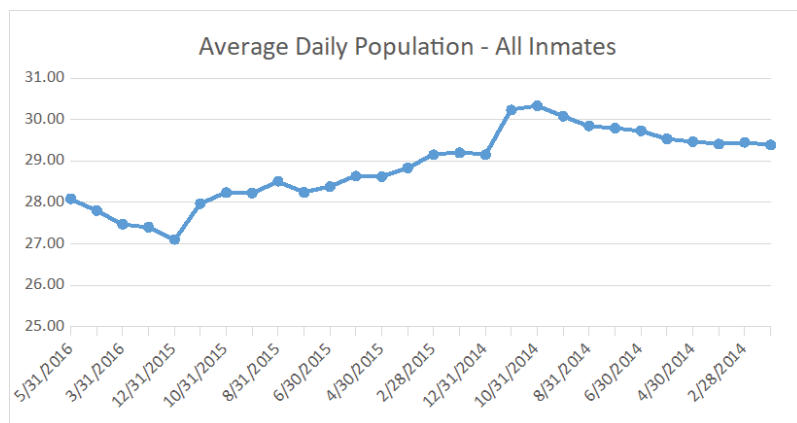


increased about 4% between 2010 and 2014.<sup>158</sup>

This pattern appears to be continuing. According to the most recent available data, the average number of women in Virginia jails during the first five months of 2016 is 10% higher than it was during the same time period in 2014, but the average male population decreased nearly 8% during that time.<sup>159</sup> These increases occurred despite the number of arrests falling for both men and women an average of 4% and 3.3% per year, respectively, between 2010 and 2015.



Source: Virginia Department of Corrections



Source: Virginia Department of Corrections

On average, 28,887 offenders were housed in DOC-operated facilities in FY2016, and an additional 1,568 offenders were housed in a privately operated prison located in Lawrenceville, Virginia.<sup>160</sup> The DOC spent \$1.2 billion in FY2017—up from \$1.17

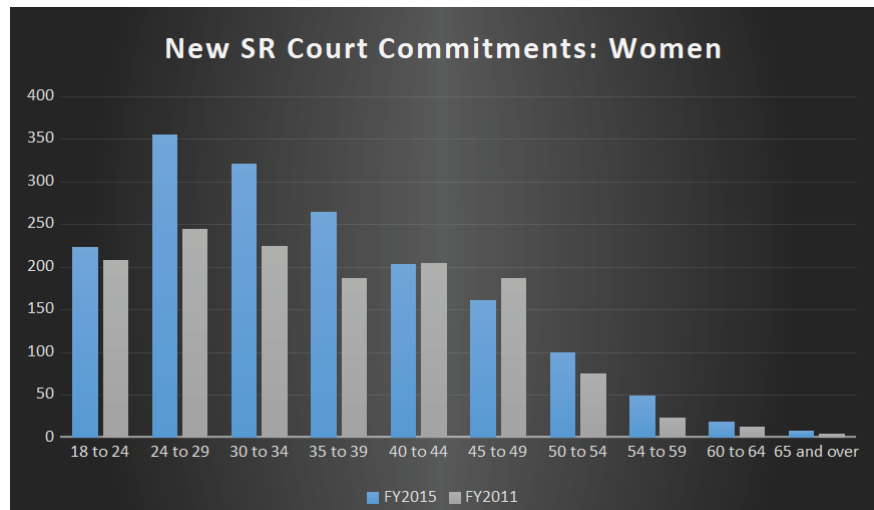
<sup>158</sup> ACLU of Virginia analysis of Average Daily Population Reports published by the Virginia Compensation Board, Jan. 31, 2010 through Dec. 31, 2010, and Jan. 31, 2014 through Dec. 31, 2014.

<sup>159</sup> ACLU of Virginia analysis of Average Daily Population Reports published by the Virginia Compensation Board, Dec. 31, 2014 through May 31, 2014, and Jan. 31, 2016 through May 31, 2016.

<sup>160</sup> Management Information Summary, *supra* note 188 at 6.

billion in FY2016.<sup>161</sup> Women offenders composed 8% of the total SR population, representing an incarceration rate of 71 women prisoners per 100,000 residents.<sup>162</sup>

The population of SR confined women increased 10.5% between FY2011 and FY2017, compared to a 0.1% decrease in the population of SR confined men during the same time period.<sup>163</sup> This trend shows no sign of stopping in Virginia, with women offenders composing 14% of all new SR court commitments in FY2015.<sup>164</sup>



Source: VA. DEP'T OF CORRECTIONS, *Female State Responsible Population Trends, FY2011-FY2015*, at 3 (Oct. 2016).

Based on forecasting prepared by the Virginia Secretary of Public Safety and Homeland Security, the population of SR confined women is projected to grow 1.8% annually between FY2017 and FY2023, faster than the 0.6% annual increase predicted for the population of SR confined men.<sup>165</sup>

<sup>161</sup>

*Id.*

<sup>162</sup>

*Id.*

<sup>163</sup>

VA. SEC. OF PUBLIC SAFETY & HOMELAND SECURITY, *Report on the Offender Population Forecasts (FY2018 to FY2023)*, at 12 (Oct. 15, 2017), <https://rga.lis.virginia.gov/Published/2017/RD375/PDF> [hereinafter *Forecasts*].

<sup>164</sup>

VA. DEP'T OF CORRECTIONS, *Female State Responsible Population Trends, FY2011-FY2015*, at 3 (Oct. 2016), [https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends\\_fy11-fy15Female.pdf](https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends_fy11-fy15Female.pdf) [hereinafter *Female SR Trends*] (showing 1,699 new female SR court commitments in FY2015); *Forecasts*, *supra* note 199, at 9 (showing 12,286 total new SR court commitments in FY2015).

<sup>165</sup>

*Forecasts*, *supra* note 199, at 12.

## Incarceration Statistics by Race and Crime<sup>166</sup>

As of June 30, 2016, the population of state responsible (“SR”) women incarcerated in a major facility, detention center, or work center operated by the Virginia Department of Corrections (VDOC) broke down as shown in Table 1.<sup>167</sup> VDOC groups crimes into different categories than the arrest data collected by the Virginia State Police. It appears, however, that simple assault would be characterized as a “violent” offense, and that larceny and shoplifting would be characterized as “property” offenses.

Offense Type	Female	F%
Violent	973	33%
Property/Public Order	1,341	45%
Drugs	592	20%
NR	73	2%
Total	2,979	100%

Race	Female	F%
White	1,913	64%
Black	1,028	35%
Hispanic	23	1%
Other	15	1%
Total	2,979	100%

In contrast, on June 30, 2016, the male SR population incarcerated in a major facility, detention center, or work center in Virginia broke down as follows:

Offense Type	Male	M%
Violent	20,154	59%
Property/Public Order	8,040	24%
Drugs	4,850	14%
NR	840	2%
Total	33,884	100%

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<sup>166</sup> Data is not publicly available regarding the race and gender characteristics of individuals incarcerated in Virginia’s local and regional jails. The ACLU of Virginia is in the process of analyzing data obtained from the Virginia Compensation Board regarding the race and crime types of women and men held in Virginia’s local and regional jails between CY2013 and CY2015.

<sup>167</sup> The most recent available Virginia Department of Corrections data indicates that 691 women SR offenders were housed in local and regional jails on June 30, 2016. Twenty-five percent of those women were charged with violent crimes, 42% were charged with property or public disturbance crimes, 23% were charged with drug crimes, and 10% were charged with an unreported crime type. See Va. Dep’t of Corrections, State Responsible Offender Demographic Profile: FY2016, at 14-15 (Apr 2018), <https://vadoc.virginia.gov/about/facts/research/VADOCDemographicReportFY2016.pdf>.



Race	Male	M%
White	12,778	38%
Black	20,030	59%
Hispanic	908	3%
Other	168	<1%
Total	33,884	100%

The statistics collected as of June 30, 2016 reflect an ongoing trend in the types of crimes for which women are incarcerated in Virginia as shown in the figure above. Between FY2011 and FY2015, an average of 91% of new women’s SR court commitments’ most serious offense was one of six types of crimes: robbery (4%), assault (10%), burglary (5%), larceny/fraud (46%), drug sales (15%), or drug possession (11%).<sup>168</sup> The number of new SR women’s court commitments in each of these categories increased between FY2011 and FY2015: violent offenses went up 14%; property offenses went up 21%; and drug offenses went up 42%.<sup>169</sup> The increase in new SR court commitments corresponds to the 32% increase in women’s drug arrests between 2009 and 2014.<sup>170</sup>

Between FY2011 and FY2015, of the population of confined SR women whose most serious crime was a property offense,

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<sup>168</sup> Female SR Trends, *supra* note 200, at 4. The population of men’s new SR court commitments showed similar trends between FY2011 and FY2015, with an average of 76% newly confined, on average, for one of six most serious offenses: robbery (8%), assault (11%), larceny/fraud (23%), burglary (11%), drug sales (14%), or drug possession (10%). The percentage of the women’s SR new court commitments (NCC) with robbery, assault, larceny/fraud, or drug possession as their most serious offense either decreased or remained steady between FY2011 and FY2015, whereas the number confined for drug sales increased by 33%. The ACLU of Virginia obtained data for the men’s SR new court commitment population by subtracting the number of women SR new court commitments in each category during each fiscal year, as noted on page 4 Female SR Trends, from the total number of new SR court commitments in each category during each fiscal year, as noted on page 5 of VA. DEP’T OF CORRECTIONS, State Responsible Offender Population Trends FY2011 – FY2015 (Sept. 2017), [https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends\\_fy11-fy15.pdf](https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends_fy11-fy15.pdf) [hereinafter *SR Population Trends*], and then calculating percentages and percent change, as shown in Appendix; Table 5.

<sup>169</sup> Female SR Trends, *supra* note 200, at 4. The ACLU of Virginia categorized VADOC offenses as follows: “Violent Offenses” include Capital Murder; First-Degree Murder; Second Degree Murder; Manslaughter; Abduction; Rape/Sexual Assault; Robbery; Assault; and Weapons Offenses. “Property Offenses” include Burglary/B&E and Larceny/Fraud. “Drug Offenses” include Drug Sales and Drug Possession. “Other Offenses” include Conspiracy; Sex Offenses; SUI; Habitual Offender; and Other Property/Public Order.

<sup>170</sup> In contrast, the number of men arrested for drug offenses between 2009 and 2013 increased by 15.5%, but the percentage of new commitments of SR men with drug sales as their most serious crime remained steady between FY2011 and FY2014.

“larceny/fraud” was the most serious crime for 72% of them, on average.<sup>171</sup> In comparison, members of the confined SR men’s population doing time for property offenses were more likely to have robbery (46%) as their most serious crime.<sup>172</sup> This contrast is even more pronounced among new court commitments whose most serious offense was a property crime: On average, 84% of women’s new court commitments’ most serious property crime was “larceny/fraud” between FY2011 and FY2015, whereas men’s new court commitments were more evenly distributed between burglary (26%), robbery (19%), or larceny/fraud (55%) as their most serious property offense.<sup>173</sup>

While the rate of imprisonment has increased for people of all races during the past 30 years, the rate of imprisonment for black people has increased at a substantially higher rate. Although the majority of prisoners are men, the population of incarcerated women has grown at higher rates than men: from 3% in 1970 to 9.4% in 2017.<sup>174</sup> Nationally, black women’s imprisonment rate rose 828% between 1985 and 1991 – significantly higher than the increase among black men (429%) and white women (241%).<sup>175</sup> Black women’s imprisonment rate doubled between 1991 and 2005.<sup>176</sup>

Like men and consistent with national prison and jail populations, women in Virginia’s jails and prisons are disproportionately women of color. In 2015, the population of women in Virginia over 18 years old was estimated to be 20% black, 72% white, and 8% Native American, Pacific Islander, Native Alaskan, or another

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<sup>171</sup> Female SR Trends, *supra* note 200, at 6 (percentages based on calculations by ACLU of Virginia staff).

<sup>172</sup> Female SR Trends, *supra* note 200, at 6; SR Population Trends, *supra* note 205, at 5. Percentages based on calculations by ACLU of Virginia staff (see note 183).

<sup>173</sup> Female SR Trends, *supra* note 200, at 6; SR Population Trends, *supra* note 205, at 5. Percentages based on calculations by ACLU of Virginia staff (see note 183).

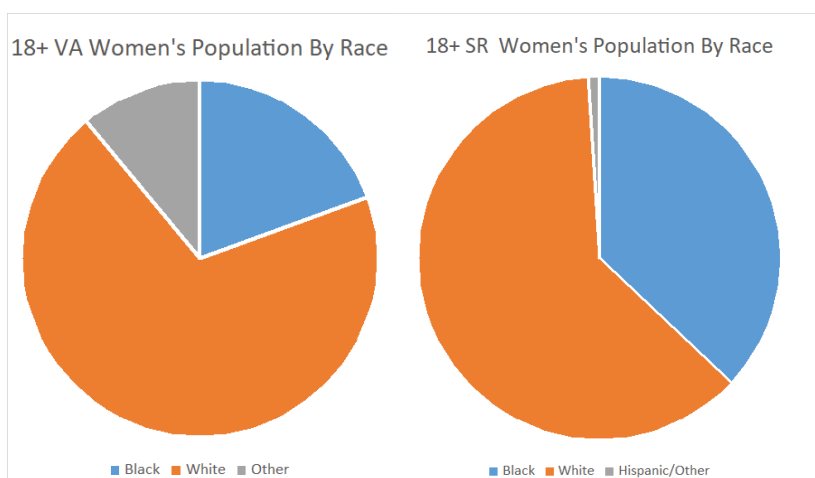
<sup>174</sup> Mark G. Harmon & Breanna Boppre, *Women of color and the war on crime: An explanation for the rise in Black female imprisonment*, 2016 J. OF ETHNICITY IN CRIM. JUST. 1, 2; The Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2017* (Mar. 2017), <https://www.prisonpolicy.org/reports/pie2017.html> (estimating that 2.3 million people are incarcerated in the United States’ “1,719 state prisons, 102 federal prisons, 901 juvenile correctional facilities, 3,163 local jails, and 76 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, and prisons in the U.S. territories.”); Aleks Kajstura, *supra* note 124, at 2, THE PRISON POLICY INITIATIVE & ACLU SMART JUSTICE (Oct. 2017), <https://www.aclu.org/report/womens-mass-incarceration-whole-pie-2017> (estimating there are 219,000 women among the 2.2 million people estimated to be incarcerated in the United States).

<sup>175</sup> Harmon & Boppre, *supra* note 189, at 2.

<sup>176</sup> Harmon & Boppre, *supra* note 189, at 2.

racial background, with 6.5% of that population identifying as Hispanic.<sup>177</sup>

As of June 30, 2015, the population of SR women over 18 years old was 37% black, 62% white, and less than one percent Hispanic or another racial group (categorized by VDOC as Native American, Pacific Islander, Native Alaskan, or an unknown racial background).<sup>178</sup> Though the numbers do not correspond perfectly due to Virginia's racial categories differing from those used by the U.S. Census Bureau, there is a wide disparity between the proportion of the SR women's population that is Black (37.94%) and the corresponding percentage of adult black women residing in Virginia (19.4%).<sup>179</sup>



Source: U.S. Census Bureau, 2012-2016 American Community Survey 5-Year Estimates; VA. DEP'T OF CORRECTIONS, *Female State Responsible Population Trends, FY2011-FY2015* at 5 (Oct. 2016).

<sup>177</sup> See U.S. Census Bureau, 2012-2016 American Community Survey 5-Year Estimates (ACLU of Virginia calculations).

<sup>178</sup> Female SR Trends, *supra* note 200, at 5.

<sup>179</sup> See U.S. Census Bureau, 2012-2016 American Community Survey 5-Year Estimates, Sex by Age: Black or African American Alone: Virginia 2015, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_16\\_5YR\\_B01001B&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_B01001B&prodType=table). Men's incarceration rates in Virginia show similar disparities. Within the population of SR men, 60.24% were identified as Black, 36.72% were identified as White, 2.32% were identified as Hispanic, and 0.72% were identified as "other." The U.S. Census Bureau estimates the 2014 18+ male population in Virginia was 74.23% White, 18.62% Black, and 7.15% "other" (As/AINA/NHOPI), with 7.63% of that population identified as Hispanic. Again, though the numbers do not provide a direct comparison, there was a large disparity between the number of Black SR men incarcerated in Virginia (60.24%) and the estimated percentage of black men over the age of 18 living in Virginia (18.62%).



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WAR =  
NEW JIM CROW

# Recommendations

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The ACLU of Virginia recommends that the Governor or the Virginia General Assembly convene a committee, task force or work group to study women’s pathways into Virginia’s criminal justice system.

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## Legislative Study

The ACLU of Virginia recommends that the Governor or the Virginia General Assembly convene a committee, task force or work group to study women’s pathways into Virginia’s criminal justice system.

The work group should include representatives from the Virginia Indigent Defense Council, the Department of Criminal Justice Services, the Virginia Sentencing Commission, the Virginia State Police, and the Virginia Department of Corrections, as well as other stakeholders, including criminal justice and prison reform advocates; individuals who provide direct services to currently and formerly incarcerated women and their families; representatives from local sheriff’s departments and Commonwealth’s Attorney’s offices; civil rights and civil liberties advocates; at least two formerly incarcerated women, and women’s rights advocates.

The workgroup should make recommendations about the following issues:

- Educating those involved in criminal justice, mental health, and drug treatment about the unique needs and characteristics of women and mothers in the criminal justice system;
- Investing public dollars in community-based treatment and services to address the underlying causes of women’s involvement with crime;
- Collecting and tracking data on women in the criminal justice system—at the state and local levels—that will inform policymaking, such as: 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;

- Identifying the statutes, regulations, and policies driving the increase in women’s involvement in the criminal justice system and recommending legislative, administrative, and/or local policy reforms that will reduce the number of women involved in the criminal justice and corrections systems across Virginia;

- Identifying and revising educational policies that drive girls into the juvenile justice system, and creating programs for educators and child welfare professionals to identify the signs of sexual victimization and support girls who have been traumatized by violence;

- Identifying how to increase women’s eligibility for, participation in, and successful completion of diversion and drug court programs;

- Revising the Virginia Sentencing Guidelines to include policies that reflect an understanding of women’s levels 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.

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**An Important First Step  
to Address Women’s  
Incarceration**

Identifying and revising educational policies that drive girls into the juvenile justice system, and creating programs for educators and child welfare professionals to identify the signs of sexual victimization and support girls who have been traumatized by violence.

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PHOTO: PHUONG TRAN/ACLU-VA



## Recommendations for Local Judges, Prosecutors, and Law Enforcement

*Increased use of summons and release.* Police departments have reduced arrest rates and jail populations by issuing citations for low-level offenses such as misdemeanor larceny, marijuana possession, or driving with a suspended license in lieu of arrest. A Virginia statute mandates that police officers issue a summons for any misdemeanor unless there is evidence that the person will not respond to the summons, will not cease the criminal behavior or is a danger to self or others. This is essentially the same procedure utilized when a speeding ticket is issued.<sup>180</sup> A focused review of officer actions to encourage increased use of the summons in lieu of arrest and booking would likely result in fewer women being held without bail or unable to pay the amount of bail ordered, which would in turn enable them to continue working during their criminal proceedings, reduce pressure on their families, and put them in a stronger negotiating position with respect to a plea deal.

*Pre-arrest crisis intervention programs.* Given the high rates of mental health conditions among women in prisons and jails, localities in other states have developed programs that divert people experiencing crises or trauma to health services instead of arresting them. For example, both Memphis, Tennessee, and Akron, Ohio, adopted a Crisis Intervention Team model that enables specially trained officers to respond to incidents involving people exhibiting symptoms of mental health crises or trauma. The officers then decide whether to make an arrest or refer the individual to community-based services. The CIT model has been found to significantly reduce arrest rates in such situations.<sup>181</sup>

*Pre-Booking Diversion Programs.* Pre-booking intervention programs, such as Seattle's LEAD program, give police officers discretionary authority to divert people to a community-based intervention program for offenses driven by unmet behavioral health needs and poverty, such as low-level drug and nuisance offenses and petty theft. In lieu of the normal cycle of arrest,

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<sup>180</sup> The most recent available Virginia Department of Corrections data indicates that 691 women SR offenders were housed in local and regional jails on June 30, 2016. Twenty-five percent of those women were charged with violent crimes, 42% were charged with property or public disturbance crimes, 23% were charged with drug crimes, and 10% were charged with an unreported crime type. See Va. Dep't of Corrections, *State Responsible Offender Demographic Profile: FY2016*, at 14-15 (Apr 2018), <https://vadoc.virginia.gov/about/facts/research/VADOCDemographicReportFY2016.pdf>.

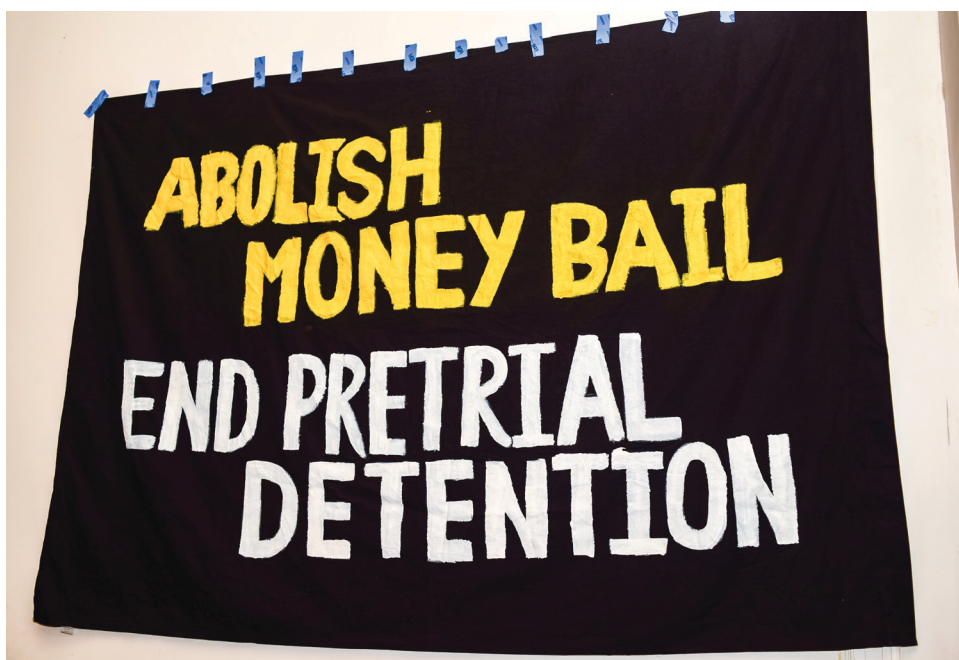
<sup>181</sup> Swavola, et al, *supra* note 28, at 25.

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### End Cash Bail

Whether a woman remains in jail should depend on her individual circumstances and risk factors, not her ability to pay to secure her release.

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booking, detention, prosecution, conviction, and incarceration, officers refer people into a case-management program providing support services such as housing and drug treatment. Prosecutors and police officers work closely with case managers to maximize the opportunity to achieve behavioral change. In the pilot LEAD program in Seattle, Washington, women constituted 34% of LEAD participants. Following enrollment in the program, Seattle's LEAD participants were 58% less likely to be arrested again when compared with people who went through the normal criminal justice process for the same offense.<sup>182</sup>

*End Cash Bail.* Whether a woman remains in jail should depend on her individual circumstances and risk factors, not her ability to pay to secure her release. Judges and prosecutors should eliminate the use of cash bail and instead utilize alternative risk reduction strategies. Risk assessment tools combined with pre-trial services and supervised release programs provide alternatives that remove unaffordable and unreasonable financial conditions of release.

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<sup>182</sup> See Susan E. Collins, et al., *Seattle's Law Enforcement Assisted Diversion (LEAD): Program effects on recidivism outcomes*, 64 EVALUATION & PROGRAM PLANNING 46-56 (Oct. 2017) (finding that compared to the system as usual, LEAD is associated with 68% lower odds of arrest and 39% lower odds of felony charges during two years after program entry). There are currently 20 LEAD programs in operation in the United States: <https://www.leadbureau.org/>. Dozens of other jurisdictions are in the process of launching, developing, or exploring such programs.

## Recommended Legislative Action

*Increase the Felony Larceny Threshold.* Virginia is spending valuable and limited resources prosecuting and incarcerating people for low-level felonies, resources that could be better directed to programs that keep communities safe. The majority of women’s arrests and subsequent incarcerations in Virginia are for shoplifting and larceny crimes. The General Assembly set a \$200 felony larceny threshold in 1980, and adjusted it this year to \$500. Unfortunately, this \$200 threshold, when adjusted for inflation, would be approximately \$585 today, so Virginia’s “increase” is actually a decrease to \$188 in 1980 dollars.. A felony for a low-level offense like theft of \$500 can destroy a woman’s family, chance at ever finding work again, educational prospects, and more significantly increase the chance she will be trapped in the revolving door of the criminal justice system. Virginia should follow the lead of many states in the U.S. by raising the threshold to at least \$1,500 and reserving the felony designation for more serious crimes. Statistically, this will result in fewer women being incarcerated in Virginia.<sup>183</sup>

*Repeal Virginia’s Three Strikes Statute.* The “three strikes” larceny statute is particularly cruel and unwarranted, often imposing severe prison sentences costing taxpayers tens of thousands of dollars for petty thefts. Furthermore, retail loss specialists have found no evidence linking an increase in the larceny threshold to increased crime. There is evidence, however, linking low-level larceny crimes to low-income women struggling to survive an abusive relationship or supporting a drug dependency. Instead of invoking severe, ineffective penalties that harm these women (and their children) and do not address the underlying cause of their offenses, Virginia would get better results by repealing this statute and using the savings to increase access to drug treatment and other community-based services.

*Enact Expungement Statutes.* Based on national, state, and local data, an increasing proportion of women are facing arrest and conviction, largely for low-level and non-violent offenses. Because women tend to work in jobs where background checks

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<sup>183</sup> Thirty states have set their felony larceny threshold at \$1,000 or more, including Georgia, South Carolina, Texas, Arkansas, Kansas, Mississippi, and North Carolina, and 45 states have set their threshold at \$500 or more. See Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conference of State Legislatures at 2 (June 2015), <https://www.ncsl.org/documents/cj/sentencing.pdf>



are most common, women are particularly at risk for long-term unemployment. To ensure this trend does not lead to lifelong unemployment and economic instability for women and their families, legislators should consider passage of laws that provide for expungement of criminal records.

*Enact Plea Guidelines for Prosecutors.* Plea guidelines would provide Commonwealth's Attorneys with guiding principles for what is permitted during plea negotiations. Such guidelines would not affect the prosecutor's ability to determine with what crime a person should be charged, but could require the prosecutor to consult a chart that generates a range of plea deals that can be offered based on the charging offense and the offender's prior history.<sup>184</sup>

*Reform Jury Sentencing.* Virginia is one of only six states that allows jury sentencing for non-capital felonies. This adds another barrier to women who are already disadvantaged by the plea bargaining process, as prosecutors often secure plea deals by threatening to request a jury trial. Three simple reforms would improve defendants' pre-trial bargaining power. First, the General Assembly should amend the bifurcated trial statute to allow defendants to waive the jury sentencing process without having to obtain agreement from the Commonwealth's Attorney and the court. Second, the General Assembly should amend Virginia Code § 19.2-257 to ensure a Commonwealth's Attorney cannot request a jury trial over a defendant's objection. Third, the law could be amended to give juries access to the Sentencing Guidelines that guide judicial sentencing.

*Expand Eligibility for Pre-Trial Diversion.* The current eligibility criteria for drug courts and diversion programs exclude many of those who need them most. The General Assembly should substantially reduce the number of offenses that are disqualifying and relax the criminal history disqualifications so that most or all defendants with substance abuse or mental health problems will have the opportunity to participate in those programs.

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<sup>184</sup> Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC, May 18, 2016, <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/>. New Jersey is currently the only state that has adopted plea deal guidelines. See Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey, available at <http://www.njcourts.gov/attorneys/assets/rules/plea.pdf>. While New Jersey's guidelines are currently inadequate, they provide a starting point upon which Virginia could improve.

Pre-trial diversion is currently available only to offenders charged with possession of a controlled substance or marijuana who do not have previous drug-related offenses. As explained in this report, many women struggling with substance dependency do not become involved in the criminal justice system by committing drug-related offenses. They may instead incur multiple low-level offenses involving larceny or public nuisance. Other states and localities have extended pre-arrest and pre-trial diversion programs to include low-level, non-violent crimes *related to* substance abuse, as opposed to limiting the program to drug crimes.

Courts, prosecutors, and nonprofits should work together to reduce barriers for women who wish to participate in diversion programs or other pretrial treatment services. This could be achieved, for example, by expanding residential placements available to women with children and working to address how women's child care needs and/or financial resources inhibit their ability to successfully complete drug court or diversion programs.

*Increase Funding for Data Collection and Analysis.* To grasp the full dimensions of women's pathways into the criminal justice system in Virginia, it is essential that data be disaggregated by race and gender. While existing data can give us some sense of underlying patterns, adopting a common policy across state and local agencies for collecting and reporting data would enhance the scope and reliability of research in this field. At minimum, VDOC, the Virginia Sentencing Commission, the Virginia State Police, DCJS, and the Virginia State Police should conduct race- and gender-sensitive analyses of their raw data and include that information in their annual reports.

Additionally, due to poor and inconsistent data entry methods in the General District Courts and Circuit Courts, it is prohibitively expensive – if not impossible – to analyze patterns of criminal charges and resulting penalties over time and by jurisdiction. The Virginia Supreme Court should implement standardized data entry protocols for all Virginia court clerks utilizing the Virginia Case Information System to ensure the correct statute and subpart (if applicable) are entered for each charge. The Virginia Compensation Board's existing data entry protocol for accurately identifying statutory subparts could be adopted for this purpose.

Though the ACLU of Virginia obtained two calendar years of inmate data from the Virginia Compensation Board, statisticians were unable to analyze the data to the degree necessary to make evidence-based policy recommendations. As an initial matter,

VDOC should exercise its discretion to release anonymized data for state responsible offenders to researchers.

*Increase Funding for Alternative Sentencing Programs.* Women who return to the community to serve an alternative sentence or following incarceration have a wide range of needs and are likely to be overwhelmed with the number of obligations they must address when they return. The General Assembly should allocate additional funds to women's transition homes and services to better coordinate services, perform more effective outreach to women prior to their release from prison or jail, and to better identify and coordinate the services those women will need once they return to their communities. VDOC, the Department of Health, and localities should also increase collaboration with and financial support for organizations that provide residential substance abuse recovery programs to recently incarcerated women. For example, Friends of Guest House in Alexandria, Transitional Options for Women, and Bethany Hall in Roanoke, offer residential recovery programs tailored to helping women establish a stable living situation upon reentry to their communities.

## **Conclusion**

This is by no means an exhaustive list, however, of the reforms necessary to reduce the widespread and discriminatory suffering imposed by over-incarceration in Virginia. Further investigation into women's prison and jail conditions – including access to adequate healthcare and visitation with children – as well as post-release factors that influence women's recidivism rates is necessary. The over-incarceration of women is a symptom of a complex network of social barriers, economic inequality, reproductive injustice, and racial and sexual discrimination deeply woven into our society. This paper is intended to be the first step in a long campaign to reform the criminal justice system for all women in Virginia.



# Methodology

The American Civil Liberties Union (ACLU) has long-standing commitments to the rights of women and the incarcerated. We decided to look at the typical pathways that lead to women's involvement with the criminal justice system more broadly, with the goal of identifying ways to reduce the number of women incarcerated in Virginia's prisons and jails through advocacy, legislation, or legal challenges.

This report was compiled after an extensive literature review; analyses of annual reports and statistics compiled by the Virginia Department of Corrections, the Virginia Department of Criminal Justice Statistics, the Virginia State Police, and the Virginia Sentencing Commission; statistical analysis of data obtained from the Virginia Compensation Board through the Virginia Freedom of Information Act; site visits to Transition Options for Women and Bethany Hall in Roanoke, Virginia; and extensive one-on-one interviews and focus group discussions with formerly incarcerated women at Friends of Guest House in Alexandria, Virginia. We focus on women's pathways to incarceration in this report because they have never been systematically explored in Virginia. By identifying trends across the state and in individual counties, we aim to help advocates, state lawmakers, and local government officials reduce the number of women incarcerated in Virginia's local and statewide corrections facilities.

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# Appendix

**Table 1 – Single-adult households by poverty level, gender, and age of children.**

Household Type	Female Household (below poverty)	Male Household (below poverty)	Female Household (at/above poverty)	Male Household (at/above poverty)
Total Single	95,357	17,067	282,830	115,464
No related children in household	13,238	4,533	124,976	55,520
Related children in household under 5 yrs only	15,547	3,252	25,082	13,201
Related children in household 5 to 17 yrs only	21,052	2,385	19,616	7,317
Related children in household under 5 yrs and 5 to 17 yrs	45,520	6,867	113,156	39,426

Source: U.S. CENSUS BUREAU, *Poverty Status in the Past 12 Months of Families by Family Type by Presence of Related Children Under 18 Years by Age of Related Children: Virginia 2016*, 2012-2016 American Community Survey 5-Year Estimates, available at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>.



**Table 2 – United States population by race and ethnicity (2016).**

	White	Black	AI/ NA	Asian	NH/ OPI	Two +
Hispanic	11.3%	0.3%	0.1%	0.0%	0.0%	0.8%
Non-Hispanic	62.0%	12.3%	0.7%	5.2%	0.2%	2.3%
Total	73.3%	12.6%	0.8%	5.2%	0.2%	3.1%

Source: U.S. Census Bureau, *2012-2016 American Community Survey 5-Year Estimates: 2016*, available at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> (last visited March 6, 2018).

**Table 3 – Virginia population by race and ethnicity (2016).**

	White	Black	AI/ NA	Asian	NH/ OPI	Two +
Hispanic	5.6%	0.3%	0.1%	0.1%	0.0%	0.6%
Non-Hispanic	63.1%	18.9%	0.2%	6.0%	0.1%	2.8%
Total	68.7%	19.2%	0.3%	6.1%	0.1%	3.4%

Source: U.S. Census Bureau, *2012-2016 American Community Survey 5-Year Estimates: Virginia 2016*, available at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> (last visited March 6, 2018).

**Table 4 – Percentage of women arrested by offense (ACLU of Virginia analysis of Crime in Virginia).**

Offense	Average % Arrests: Women
Simple Assault	30.3
Shoplifting	17.5
Larceny/Theft Offenses*	22.3
Drug/Narcotic Offenses	17
Aggravated Assault	3.4
Destruction of/Damage to Property/Vandalism	2.7
Burglary/Breaking and Entering	1.4
Other	5.4

Source: Virginia State Police, *Crime in Virginia* 1999-2016, available at [http://www.vsp.state.va.us/Crime\\_in\\_Virginia.shtm](http://www.vsp.state.va.us/Crime_in_Virginia.shtm).

\*Arrests for “Larceny/Theft Offenses” include the following categories of offenses: All Other Larceny; Counterfeiting/Forgery; Credit Card/ATM Fraud; Embezzlement; False Pretenses/Swindle/Confidence Game; Impersonation; Stolen Property Offenses; Theft from Building; Theft from Coin-Operated Machine or Device; Theft from Motor Vehicle; Theft of Motor Vehicle Parts or Accessories; Welfare Fraud; and Wire Fraud. See Virginia State Police, *Crime in Virginia: 2016* at 7-8, 33 (2017), [http://www.vsp.state.va.us/downloads/Crime\\_in\\_Virginia/Crime%20in%20Virginia%202016.pdf](http://www.vsp.state.va.us/downloads/Crime_in_Virginia/Crime%20in%20Virginia%202016.pdf).

**Table 5 – State responsible (SR) new court commitments (NCC) by gender, crime and fiscal year (FY).**

<b>Men- SR NCC</b>	<b>FY2011</b>	<b>%</b>	<b>FY2012</b>	<b>%</b>	<b>FY2013</b>	<b>%</b>	<b>FY2014</b>	<b>%</b>	<b>FY2015</b>	<b>%</b>
Robbery	887	8.5%	810	8.0%	815	8.0%	850	7.9%	782	7.4%
Assault	1,136	10.9%	1,102	10.9%	1,108	10.8%	1,187	11.1%	1,273	12.0%
Burglary/B&E	1,099	10.5%	1,064	10.5%	1,172	11.5%	1,101	10.3%	1,080	10.2%
Larceny/ Fraud	2,229	21.3%	2,281	22.5%	2,281	22.3%	2,421	22.6%	2,533	23.9%
Drug Sales	1,326	12.7%	1,399	13.8%	1,443	14.1%	1,515	14.2%	1,547	14.6%
Drug Possession	1,125	10.8%	1,005	9.9%	996	9.7%	1,072	10.0%	930	8.8%
<b>Total Men SR NCC</b>	<b>10,449</b>	<b>74.7%</b>	<b>1,0156</b>	<b>75.4%</b>	<b>10,223</b>	<b>76.4%</b>	<b>10,705</b>	<b>76.1%</b>	<b>10,587</b>	<b>76.9%</b>
<b>Women- SR NCC</b>	<b>FY2011</b>	<b>%</b>	<b>FY2012</b>	<b>%</b>	<b>FY2013</b>	<b>%</b>	<b>FY2014</b>	<b>%</b>	<b>FY2015</b>	<b>%</b>
Robbery	53	3.9%	60	4.4%	69	4.6%	59	3.4%	57	3.4%
Assault	142	10.4%	140	10.4%	165	10.9%	169	9.8%	173	10.2%
Burglary/B&E	65	4.8%	60	4.4%	82	5.4%	85	4.9%	75	4.4%
Larceny/ Fraud	650	47.6%	588	43.5%	703	46.6%	799	46.4%	800	47.1%
Drug Sales	166	12.2%	215	15.9%	204	13.5%	280	16.3%	274	16.1%
Drug Possession	163	11.9%	150	11.1%	171	11.3%	193	11.2%	193	11.4%
<b>Total Women SR NCC</b>	<b>1,366</b>	<b>90.7%</b>	<b>1,351</b>	<b>89.8%</b>	<b>1,508</b>	<b>92.4%</b>	<b>1,723</b>	<b>92.0%</b>	<b>1,699</b>	<b>92.5%</b>

Source: VA. DEP'T OF CORRECTIONS, *Female State Responsible Population Trends, FY2011-FY2015*, at 4 (Oct. 2016), [https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends\\_fy11-fy15Female.pdf](https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends_fy11-fy15Female.pdf). The population of men's new SR court commitments showed similar trends between FY2011 and FY2015, with an average of 76% newly confined, on average, for one of six most serious offenses: robbery (8%), assault (11%), larceny/fraud (23%), burglary (11%), drug sales (14%), or drug possession (10%). The percentage of the women's SR new court commitments with robbery, assault, larceny/fraud, or drug possession as their most serious offense either decreased or remained steady between FY2011 and FY2015, whereas the number confined for drug sales increased by 33%. The ACLU of Virginia obtained data for the men's SR new court commitment population by subtracting the number of women SR new court commitments in each category during each fiscal year, as noted on page 4 of VA. DEP'T OF CORRECTIONS, *Female State Responsible Population Trends, FY2011-FY2015*, (Oct. 2016), [https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends\\_fy11-fy15Female.pdf](https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends_fy11-fy15Female.pdf), from the total number of new SR court commitments in each category during each fiscal year, as noted on page 5 of VA. DEP'T OF CORRECTIONS, *State Responsible Offender Population Trends FY2011 - FY2015* (Sept. 2017), [https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends\\_fy11-fy15.pdf](https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends_fy11-fy15.pdf), and then calculating percentages and percent change.



**To File a Legal Complaint:**

If you believe your rights have been violated and would like to receive help from the ACLU of Virginia, you can contact us by phone or mail. For complete information about filing a complaint, go to: <https://acluva.org/en/online-intake-form>

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