

THE NEED FOR A SECOND LOOK IN VIRGINIA

*Long sentences and
sentencing reform
in Virginia*



The Need for a Second Look in Virginia

Policy Brief
February 2022

Virginia is at a crossroads entering the 2022 legislative session. Progressive reforms, including abolishing the death penalty and broadening appeal rights, were a focal point of the last several years, but were primarily partisan with the support of only three Republicans. In 2022, control of Virginia will split, with the House of Delegates and Executive Branch controlled by Republicans, and the Senate of Virginia slightly leaning Democrat. While this poses a challenge for legislative activity, it provides an opportunity to step back and explore the critical issues faced by Virginia's adult criminal justice system.

The number of people in Virginia's prison system, which declined for the first time in 2009 after four decades of growth, has plateaued in recent years. Virginia's system remains plagued with dysfunction that disproportionately impacts communities of color and keeps people locked up for extremely long sentences. These practices have resulted in a costly system. In 2014, the Justice Policy Institute reported that Virginia spent \$1.064 billion to run its prison system, and even with a population decrease, the 2020 budget increased 25 percent to \$1.34 billion.¹ However, this is only part of the story. The toll of mass incarceration in Virginia has fallen disproportionately on the shoulders of its Black and Brown citizens, with devastating consequences. This is particularly pronounced among those persons serving extreme prison sentences. Some key data points in Virginia include:

- Virginia ranks 9th by prison population size and 13th by incarceration rate per capita in the United States.² Reform packages, including efforts to change jury sentencing, geriatric parole, and alternatives to incarceration over the last several years, have contributed to a slight decline in the overall prison population. However, over half of the prison admissions in 2020 were nonviolent offenses that could be addressed outside of confinement. And Virginia has done little to tackle long prison terms, which increasingly sustains mass incarceration.

¹ Commonwealth of Virginia Office of Public Safety – 2014-16 Biennial Budget (Richmond, VA: Virginia Department of Corrections, 2014), <https://dpb.virginia.gov/budget/buddoc14/pdf/partb/publicsafety.pdf>; see also, *Virginia Department of Corrections Management Information Summary Annual Report For the Fiscal Year Ending June 30, 2020* (Richmond, VA: Virginia Department of Corrections, 2020), <https://vadoc.virginia.gov/media/1623/vadoc-financial-annual-mis-report-2020.pdf>

² E. Ann Carson, *Prisoners in 2020 – Statistical Tables* (U.S. Department of Justice, Office of Justice Programs, pg. 7 – 15, 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>

- There remain stark disparities within the adult prison system in Virginia. Despite accounting for only 19 percent of the state population, Black people comprise 55 percent of the prison population. On average, Black individuals received a sentence 62 months more for the same offense when compared to white people.
- Disposition data indicate an alarming trend of low-level individuals sentenced to confinement. In 2020, of the 5,294 sentencing recommendations of *probation only*, 74 percent received imprisonment or jail time.
- One in seven people in Virginia prisons, 4,193 individuals, is serving a life sentence or a virtual life sentence (serving at least 50 years). Since the 1970s, this number has increased by more than 90 percent.³ Currently, Virginia is ranked 20th in the nation for the number of people serving a life or virtual life sentence and 13th for the number of people serving a life sentence.⁴ With the recent abolishment of the death penalty, this population is predicted to continue to grow.⁵
- The increased use of long prison terms has a devastating effect on an already aging prison population. The latest reporting indicates that 14 percent of the prison population is at least 55 years old, nearly doubling the proportion from 2011 when it was only 8 percent.⁶
- With parole abolished, a second look resentencing provision is necessary to address this “stacking up” of aging people serving extreme sentences.

³ Frank Green, “Number of prison inmates serving life sentences continues to rise in Virginia and nationally, report finds,” *Richmond Times-Dispatch*, February 17, 2021, https://richmond.com/news/state-and-regional/number-of-prison-inmates-serving-life-sentences-continues-to-rise-in-virginia-and-nationally-report/article_a1a45c9f-24e7-50cf-9c6d-125cc2f73025.html

⁴ Ashley Nellis, “No end in sight: America’s enduring reliance on life imprisonment” (The Sentencing Project, Washington, DC: 2021). <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>

⁵ Ashley Nellis, “Virginia’s move to end capital punishment has a major flaw,” *The Washington Post*, March 12, 2021, https://www.washingtonpost.com/opinions/local-opinions/virginia-capital-punishment-end-flaw/2021/03/11/8ec86348-802b-11eb-ac37-4383f7709abe_story.html

⁶ *State Responsible Offender Demographic Profile FY2019* (Richmond, VA: Virginia Department of Corrections, 2019), <https://vadoc.virginia.gov/media/1472/vadoc-research-state-responsible-demographic-report-2019.pdf>; see also *State Responsible Offender Demographic Profile FY2014* (Richmond, VA: Virginia Department of Corrections, 2014).

<https://vadoc.virginia.gov/media/1359/vadoc-research-state-responsible-demographic-report-2014.pdf>

Virginia Continues to Rely Heavily on Incarceration at Sentencing

Of the 22,000 individuals sentenced in 2020 in accordance with the Virginia Sentencing Commission (VSC), more than 16,000 received a prison sentence. The VSC uses a series of automated tools to calculate recommended sentence length, including a system called SWIFT and the Nonviolent Risk Assessment (NVRA). SWIFT considers the committing offense circumstances and prior criminal record, and the NVRA is designed to identify individuals who have committed nonviolent offenses for potential diversion from prison.⁷ The NVRA was developed in 1994 to offset the expansion of the prison population anticipated by abolishing parole.⁸ Implementing truth-in-sentencing policies was expected to result in a longer length of stay for people convicted of violent crimes. The NVRA, on the other hand, aimed to reduce the use of incarceration for people convicted of nonviolent crimes by diverting people to probation, community service, or substance use disorder treatment. The assessment considers age, gender, employment, marital status, prior convictions, and prior incarcerations. For those sentenced for violent behavior, there is no similar tool. Their sentence is at the discretion of the statutory code and sentencing guidelines.

While the NVRA was intended to identify individuals who committed low-risk, nonviolent behavior for potential diversion from prison, research has uncovered concerning sentencing trends. Only 42 percent of those determined to be low risk by the NVRA received a non-custodial sentence. The most common diversions were probation supervision, jail in lieu of prison time, and restitution. For example, of the nearly 5,300 individuals recommended for probation in 2020, only 26 percent received the sanction. Nearly 8 in 10 people received a blended sentence of confinement and probation. The alternative is even less frequent: less than 2 percent of those recommended for incarceration received a probation-only sentence.⁹

Between 2018 and 2020, the VSC reports an overall sentencing guidelines compliance rate of 83 percent, a 9 percent mitigation rate, and an 8 percent aggravation rate.¹⁰ Judges were more likely to lengthen sentences for sexual assault, obscenity, and murder and more likely to shorten sentences for robbery and burglary. In 2020, 25 percent of robbery sentences and 15 percent of burglary were below the recommendation.¹¹

⁷ "SWIFT," Virginia Criminal Sentencing Commission, accessed December 6, 2021, <http://www.vcsc.virginia.gov/swift.html>.

⁸ Brandon Garrett, Alexander Jakubow and John Monahan, "Nonviolent Risk Assessment in Virginia Sentencing: The Sentencing Commission Data," Virginia Criminal Justice Policy Reform Project, University of Virginia School of Law, 2018, pg.

³ <http://www.vcsc.virginia.gov/2018meetings/UVA%20Law%20School%20->

⁹ "Virginia Criminal Sentencing Commission, Data Dashboard," (2021), <http://www.vcsc.virginia.gov/datadashboard.html>

¹⁰ "Virginia Criminal Sentencing Commission Annual Report 2020," <http://www.vcsc.virginia.gov/2020VCSCAnnualReport.pdf>.

There were 71,000 sentencing events between 2018 and 2020. Within these sentencing decisions, 30 percent received probation or no incarceration, 33 percent went to prison for an average of 24 months, and 36 percent went to jail for an average of four months.

There is evidence that new court commitments are receiving a slightly shorter sentence in recent years, down 6 percent on average. Still, with over 20,000 sentencing events each year, the impact on the prison population has been minimal.¹²

In 2021, 17 percent of Virginia's prison population was estimated to be serving a life sentence or a virtual life sentence (at least 50 yrs.)

This negligible impact results from the number of people receiving lengthy prison terms. The average prison sentence is 18 years, up 20 percent in the last decade.¹³ This trend is not unique to Virginia; research done by the Urban Institute found that 44 reporting states saw sharp increases in their longest prison sentences.¹⁴ Virginia now has a significant portion of its population serving a life sentence. Reporting in 2021 found 1,239 people serving life with parole, 1,628 people serving life without parole, and 1,326 serving a virtual life sentence (at least 50 years).¹⁵ This translates to 17 percent of Virginia's prison population.

Virginia's restrictive release practices block the exit for thousands of individuals, costing the state hundreds of millions of dollars

There are 2,727 individuals still eligible for parole who were sentenced before the 1995 abolition and are serving extraordinarily long sentences. The average length of stay for a parole-eligible individual is 277 months. Meanwhile, the average time served for people sentenced under truth-in-sentencing is 91 months, with an average of 80 months

remaining on their term,¹⁶ or at least 15 years in prison.¹⁷ Virginia's restrictive release practices block the exit for thousands of individuals, costing the state hundreds of millions of dollars.

¹¹ "Virginia Criminal Sentencing Commission Annual Report 2020."

¹² "Virginia Criminal Sentencing Commission, Data Dashboard (2021)"

¹³ Virginia Criminal Sentencing Commission, Data Dashboard (2021)

¹⁴ Leigh Courtney, et al., "A Matter of Time: The Causes and Consequences of Rising Time Served in America's Prisons" (Washington, D.C., The Urban Institute, 2017), <https://apps.urban.org/features/long-prison-terms/trends.html>

¹⁵ Nellis, "No end in sight: America's enduring reliance on life imprisonment."

¹⁶ *State Responsible Offender Demographic Profile FY2019*.

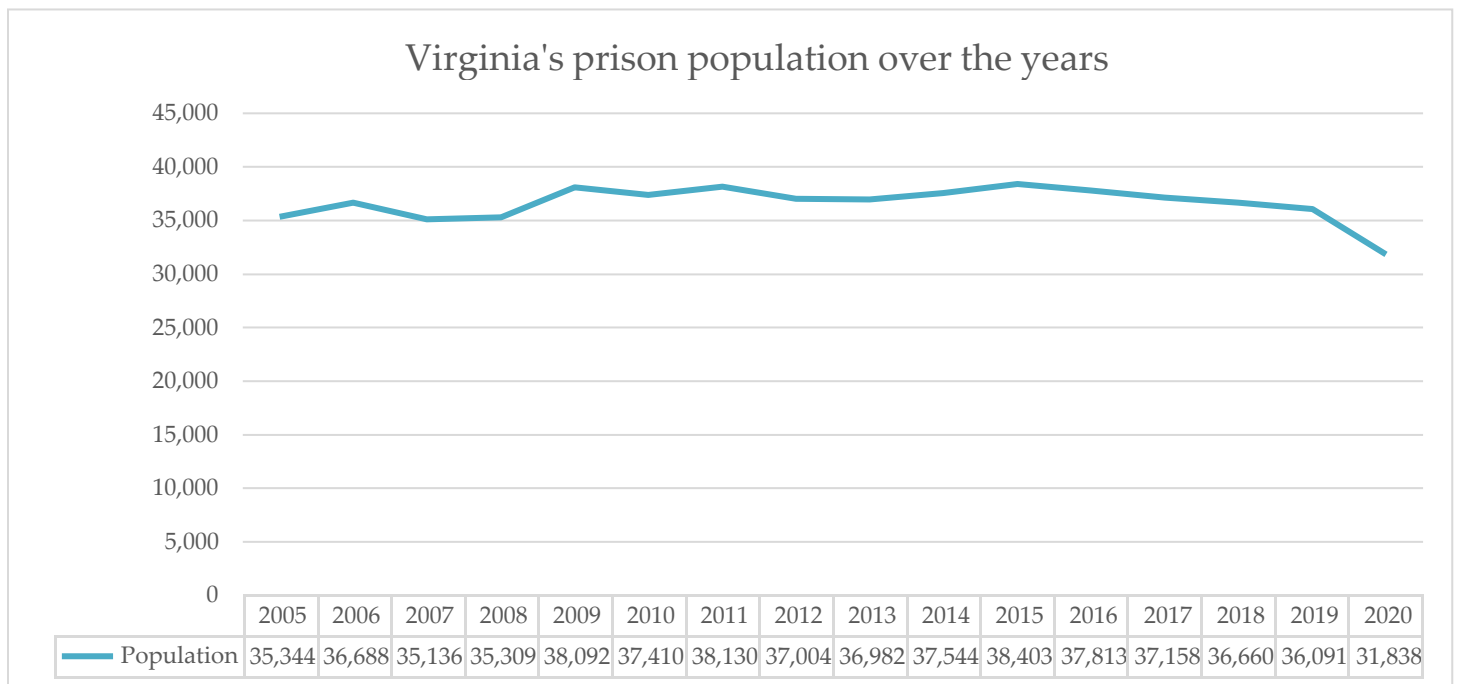
¹⁷ Ibid.

Long Prison Terms Contribute to Virginia as a National Leader in Incarceration

As of December 2021, Virginia has 24,456 people incarcerated.¹⁸ Over the last decade, the population has been declining slowly, with only a 7 percent decrease between 2011 and 2019.¹⁹ In terms of confinement, Virginia ranks 13th nationally by the rate per 100,000 in the overall population, and compared to neighboring states, it is the highest.

<u>State</u>	<u>Rate per 100,000</u>
Virginia	472
West Virginia	424
Pennsylvania	387
North Carolina	346
Maryland	330

Over the last 15 years, the prison population has remained relatively flat, with a peak of 38,092 in 2011. However, the “stacking up” of people serving long prison terms should cause concern for the future.

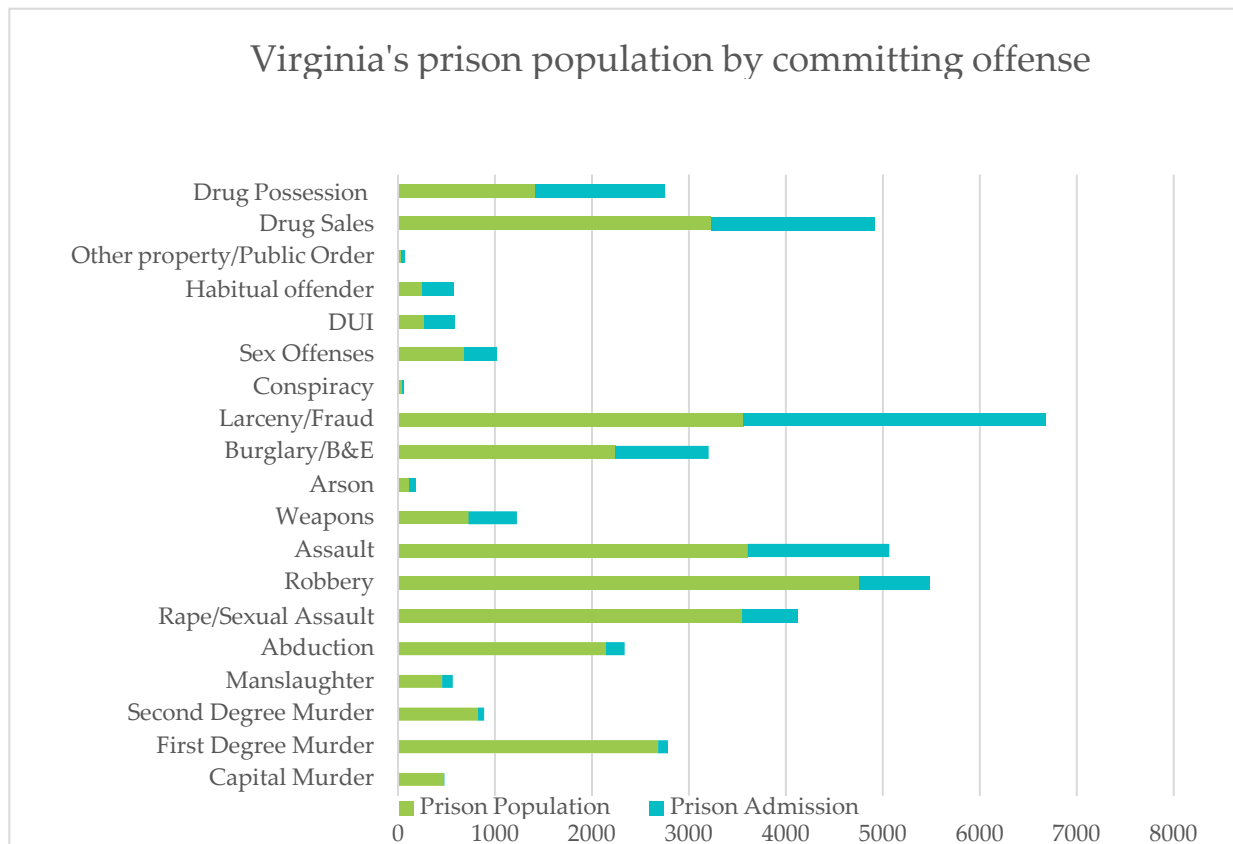


¹⁸ “Virginia Department of Corrections Monthly Population Summary December 2021,”

https://vadoc.virginia.gov/media/1729/vadoc-monthly-offender-population-report-2021-12.pdf_1

¹⁹ Virginia Department of Corrections, Monthly Population Reports, accessed on December 19, 2021. [do you have a URL for this?]

About half of annual admissions to Virginia prisons are comprised of drug sales, drug possession, and larceny, all nonviolent offenses. However, the annual standing prison population in 2019 was comprised of 72 percent violent offenses. Robbery was the most common offense among those in prison, representing 14 percent (4,751 people) of the population.



This is a good place to spend a few moments discussing prison population dynamics. Across the country, decades of “tough on crime” policies passed by opportunistic politicians seeking the support of a public sold on racialized fear by the media culminated in more people going to prison (admissions) and staying there longer (length of stay) than at any point in history.²⁰ Most recent policy reforms have targeted reducing admissions, but how long people stay in prison, particularly for violent and repeat offenses, has received relatively little attention. This narrow focus threatens efforts to achieve significant reductions in the prison population.

²⁰ A Matter of Time: The Causes and Consequences of Rising Time Served in America’s Prisons (2017)

An additional problem is that measuring time served in prison gives the misperception that sentence length does not play an important role in driving mass incarceration. It is traditionally measured by the “average of the exit cohort” method, by which the total amount of time served by everyone released from prison in a given year is simply divided by the number of people leaving prison that same year. The problem with this approach is that you have to be released from prison for your length of stay to be counted. For those individuals serving long prison terms and life sentences, the release rate is very low, and they are disproportionately undercounted relative to the people serving shorter sentences. This method misses the “stacking effect” of long prison terms. People in prison for long prison terms are a small proportion

Individuals in prison for violent crimes typically serve exceptionally long prison terms and thus stack up in the prison population

of each year’s admission cohort, but they “stack up” in the overall population due to policies that keep them behind bars.

For example, looking at an admission cohort in 2000, people convicted for a violent offense comprised about one in three people entering prison that year. By 2014, that same cohort was 80percent of people locked up for a violent crime. This tells a different story about the impact of long prison terms on mass incarceration. In fact, while length of stay has been relatively flat for about 90 percent of the prison population, it has grown dramatically for the people serving the longest prison terms.²¹ This is the “stacking effect” in action.

Thus, while examining Virginia’s admissions and release numbers gives the impression that the state is primarily incarcerating people for nonviolent, less serious offenses, it is masking the impact of long prison terms on the prison population. For example, the three offense categories that accounted for 51 percent of prison admissions account for 24 percent of the annual standing prison population. Conversely, homicide offenses contributed 2 percent of admissions in 2020, but 23 percent of the standing population. Individuals in prison for violent crimes typically serve exceptionally long prison terms and, thus, stack up in the prison population at significant cost and limited public safety benefits.

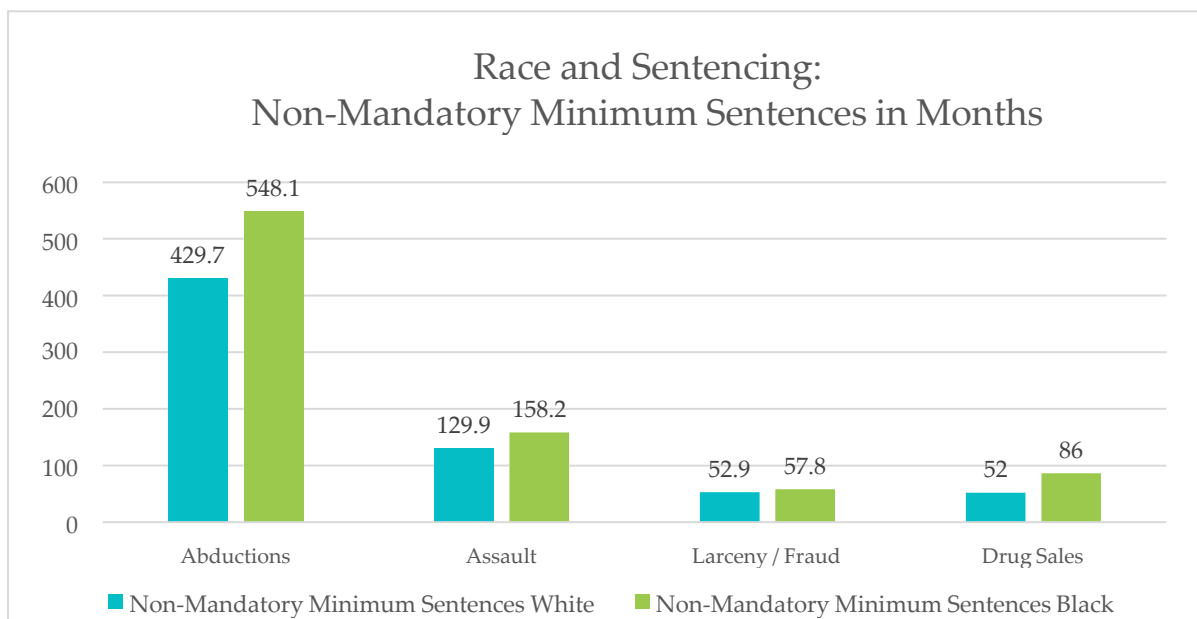
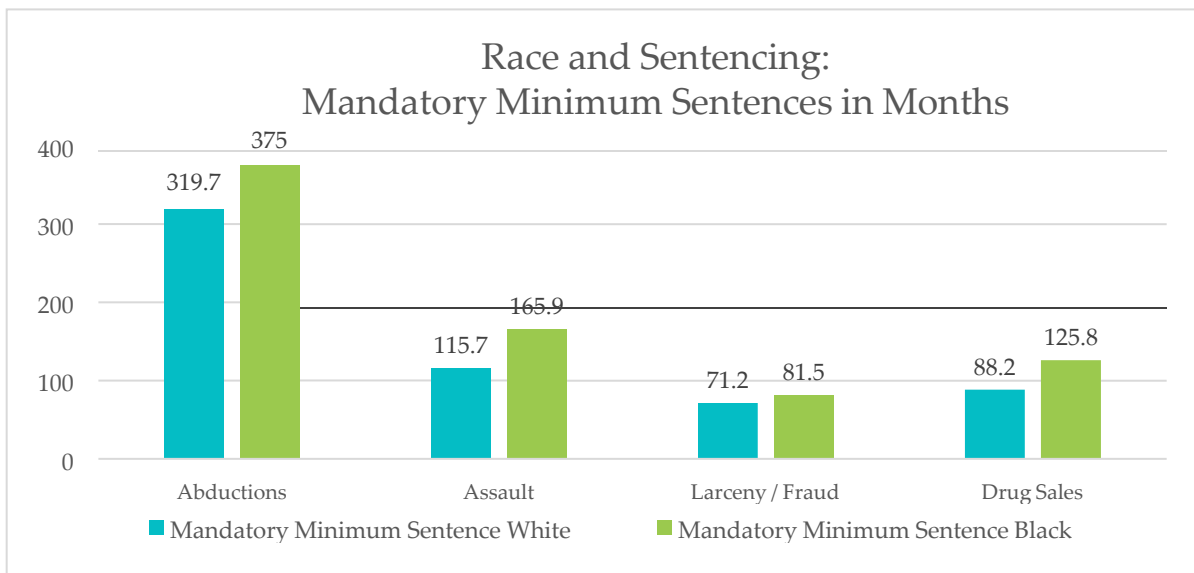
Simply focusing on admissions and nonviolent offenses is wholly insufficient to address decades of punitive sentencing and restrictive release policies that have driven mass incarceration in Virginia. It also does not address indefensible racial disparity in sentencing and corrections and delivers little return on public safety. Meaningful and sustainable reform demands that policymakers and practitioners confront how the state responds to serious, violent crime.

²¹ A Matter of Time: The Causes and Consequences of Rising Time Served in America’s Prisons (2017)

Long Prison Terms Disproportionately Impact Black Virginians

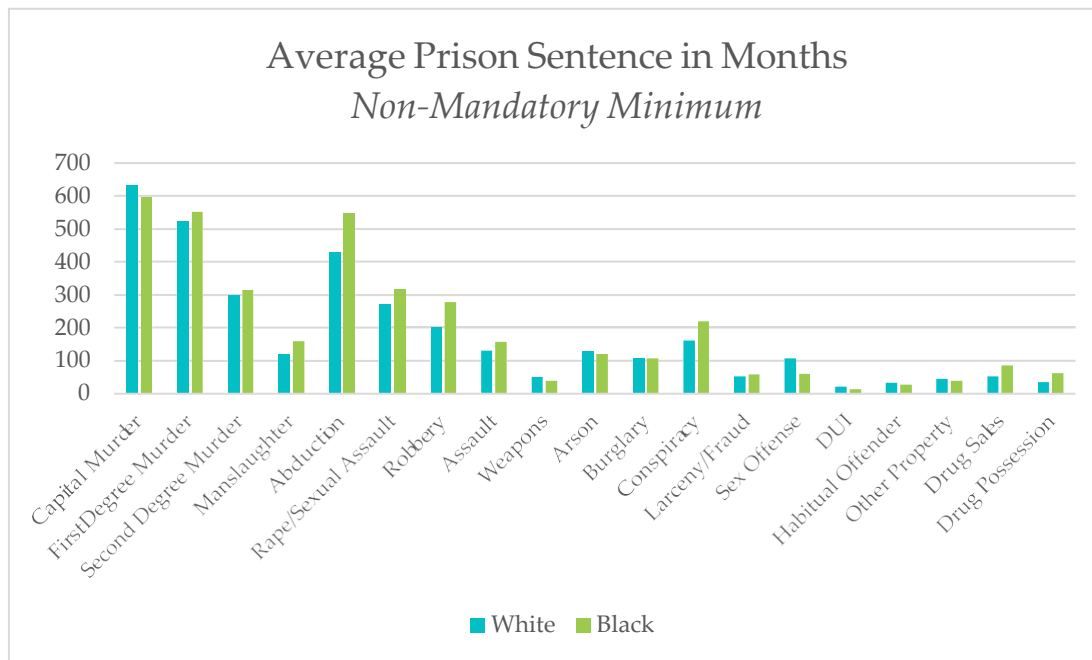
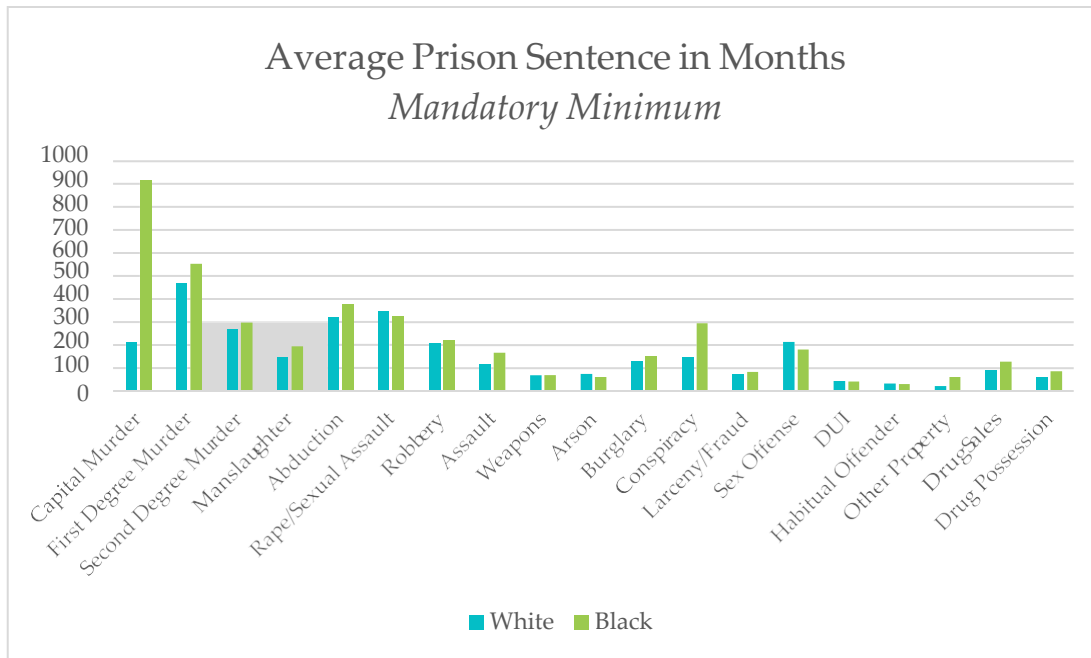
On average, Black people in Virginia receive harsher sentences for the same offense. Among mandatory minimum dispositions, the average sentence was 38 percent longer for Black people than white people with the same controlling offense.²² Among non-mandatory minimum sentences, the average sentence was 10 percent longer for Black people than white people with the same controlling offense.

Looking at specific offenses:



²² Virginia Department of Corrections, Monthly Population Reports.

Black individuals were sentenced more harshly in 12 of 19 offense categories with a mandatory minimum penalty and 14 of 19 in non-mandatory minimum sentencing scenarios.



Further, there are underlying flaws in the assessment process that contribute to disproportionately punitive treatment for young adults of color in Virginia.²³ Young people, and specifically young Black men, under the age of 25 are disproportionately determined to be at higher risk according to the Nonviolent Risk Assessment (NVRA) tool.

²³ Megan T. Stevenson and Jennifer L. Doleac, "Algorithmic Risk Assessment in the Hands of Humans," 2021, <https://doi.org/10.2139/ssrn.3489440>.

Virginia ranks 8th in the country in the percentage of the prison population that is Black (55 percent) and is one of only 12 states where more than 50 percent of the prison population is Black

Young Black people were 4 percentage points more likely to be incarcerated after a risk assessment than white people and their sentences were 17 months longer.²⁴ The impact on young people is somewhat mitigated by judicial discretion to recognize *youthfulness* as a sentencing consideration. However, the NVRA has been shown to increase the use and the length of incarceration for people under 25. Based on 2020 sentencing data, people under age 25 were sentenced to an average of 8.6 years in prison, compared to the overall average of 7.9 years.²⁵

These disparities in sentencing drive alarming rates of racial disproportionality in Virginia's prison system that stand out nationally. Virginia ranks 8th in the country in the percentage of the prison population that is Black (55 percent) and is one of only 12 states where more than 50 percent of the prison population is Black. Regionally, it ranks behind only Maryland, which is number one in the nation, for the proportion of the prison population comprised of Black people. This translates to an alarming rate of 1 in 80 Black Virginians incarcerated.²⁶ In 2019, Black people made up 55 percent of the prison population in Virginia, compared to only 19 percent of the total state population.²⁷ Black people are particularly overrepresented in incarceration for violent and drug-related offenses, accounting for 60 percent of those.²⁸

Virginia's Restrictive Release Policies Drive Long Prison Terms

Parole was abolished in Virginia in 1995, but as of June 2019 there were still 2,728 parole-eligible people in prison.²⁹ In the first nine months of 2021, the parole board heard more than 2,000 cases. It granted parole to only 134 people during this period, including 21 geriatric parole grantees. This translates to a 5 percent grant rate, significantly lower than neighboring states. Maryland reports a 40 percent grant rate, while West Virginia reports 36 percent.³⁰

In the first nine months of 2021, the parole board denied more than 2,000 applicants, 60 percent of whom were Black. Moreover, 69 percent of the denials were within the geriatric population (55 years and older), the group with the lowest propensity to recidivate, including an individual who was 93 years old.³¹ Parole in Virginia remains a "blocked exit" because too often the decision to release hinges on relitigating the circumstances of the crime. Best practice in parole release decision-making demands a presumption that the goals of punishment have been met on the date of initial parole eligibility.

²⁴ Ibid.

²⁵ [Virginia](http://www.vcsc.virginia.gov/sgdata.html) Criminal Sentencing Commission, Sentencing Guidelines FY2019-FY2020 Data, accessed December 6, 2021.

²⁶ Ashley Nellis, "The Color of Justice: Racial and Ethnic Disparity in State Prisons," (Washington, DC: The Sentencing Project, 2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

²⁷ United States Census Bureau, accessed December 6, 2021, <https://data.census.gov/cedsci/table?q=virginia>.

²⁸ *State Responsible Offender Demographic Profile FY2019*.

²⁹ Virginia Department of Corrections, Monthly Population Reports.

³⁰ Mariel E. Alper, "By the Numbers: Parole Release and Revocation across 50 States (Minneapolis, MN: University of Minnesota, 2016), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/parole_by_the_numbers_updated.pdf.

Release decision-making should be based only on considerations after incarceration, such as program completion, disciplinary record, and an individual's preparation to safely return to the community. When parole boards repeatedly return to the details of the crime, which are static and can never be changed, and discount any progress an individual has made since entering prison, the goal of rehabilitation and transformative change is undermined.

It is solely the job of the sentencing court to determine the appropriate sanction that meets the goals of punishment, and parole board members should not be determining an individual's fate by revisiting the details of the offense during each parole hearing. That is a prescription to deny release for people who often have pristine records while in prison. Unfortunately, that is precisely what happens in Virginia. In the first nine months of 2021, nearly 60 percent of the denials were justified by the statement that "more time is necessary based on the circumstances of the offense. "This contravenes best practice and renders Virginia's parole system deeply ineffectual.³²

Virginia's Prison Population is Getting Older, with Little Public Safety Benefit

With such a large portion of the prison population serving at least 10 years, Virginia is experiencing a significant increase in older adults behind bars. The latest reporting in 2020 shows that 14 percent of the prison population was geriatric, or over 55 years old, compared to just 8 percent in 2011. The percentage of people over 45 years old increased to 33 percent in 2020, compared to 28 percent a decade earlier.³³ This has tremendous implications for the correctional budget. According to an analysis by the Justice Policy Institute, the healthcare costs for the geriatric population are 34 percent higher than the general population. A 2018 estimate indicates that Virginia spent over \$10,000 per geriatric individual for health care costs.³⁴ As the population remains stuck with long prison terms, the price tag will continue to increase. This spending to keep an aging prison population behind bars years beyond any public safety benefit is not supported by evidence. Crime is a young person's pursuit, and the research is conclusive that the risk of criminal offending declines precipitously with age. Research has conclusively shown that by age 50, most people have significantly outlived the years in which they are most likely to commit crimes. Arrest rates drop to just over two percent at age 50 and are almost zero percent at age 65.³⁵ Nationally, aging people return to prison for new convictions at a rate between 5 and 10 percent, which is a fraction of recidivism rates for people in their 20s and 30s.³⁶ In 2012, a Maryland court decision, *Unger v. State of Maryland*, resulted in the release of 200 individuals, many of whom had committed serious violent offenses. The story of the people released from Maryland prisons due to the *Unger* court decision best exemplifies the wisdom of releasing people who have served long prison terms.

A 2018 estimate indicates that Virginia spent over \$10,000 per geriatric individual for healthcare costs

³¹ Virginia Parole Board, "Monthly Decisions," Accessed October 1, 2021. <https://vpb.virginia.gov/parole-decisions/>

³² Monthly Decisions, (2021)

³³ 2011 - 2019: *Offender Population Trend Report*, (Richmond, VA: 2020) <https://vadoc.virginia.gov/media/1473/vadoc-offender-population-trend-report-2015-2019.pdf>; See also, 2011 - 2015: *Offender Population Trend Report*, (Richmond, VA: 2020). <https://vadoc.virginia.gov/media/1343/vadoc-offender-population-trend-report-2011-2015.pdf>

The average age of those released was 64, and they had served an average of 40 years in prison. In the eight years since the ruling, these individuals have posted a recidivism rate of under 3 percent. This is much lower than the 40 percent recidivism rate for all persons released from Maryland prisons after three years. In fact, the cohort was five times more likely to pass away from old age than to recidivate for a new crime.³⁷

Other states have had similar experiences. New York reported a 7 percent reconviction rate for those 50 to 64 years old and only 4 percent for those 65 and older; Virginia experienced a 1 percent reconviction rate for those 60 and older.³⁸ In Washington, DC, 80 people have been released due to policies that permit people who were incarcerated when they were younger than 25 years of age and have served a minimum of 15 years in prison to apply for a "second look" resentencing. Not only is the recidivism rate nearly zero for this population, but many are putting their lived experience to work and keeping their communities safe by working as violence interrupters and credible messengers. Thus, not only has the release of people serving long prison terms not jeopardized public safety, but it has also made communities safer. In short, decarceration is a public safety strategy. It should be encouraged further by allowing individuals to access a process by which they can demonstrate their readiness to leave prison and return to serve their families and communities.

Virginia Needs a Second Look Resentencing Provision

A second look mechanism is the type of innovative policy reform that can significantly alter Virginia's long prison-sentenced population

Long prison sentences are a failed policy that drives mass incarceration, delivers little returns on public safety, and comes at a tremendous financial and human cost, particularly among communities of color. Parole was intended to check excessive sentencing and establish incentives for people in prison to take advantage of programming and other opportunities to turn their lives around and demonstrate their fitness for release. Unfortunately, parole has become politicized and, as a result, increasingly dysfunctional. Virginia abolished parole

in 1995 and has been indefensibly restrictive in granting release to deserving candidates. Moreover, since the abolition of parole, harsh truth-in-sentencing laws offer no avenues of review for extreme sentences. A second look resentencing provision, whereby every individual is given an opportunity to petition the court for release from prison after having served some minimum amount of time, is necessary to address the shortcomings in Virginia's parole and sentencing system and restore proportionality and fairness.

³⁴ "The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars" (Washington, DC: Justice Policy Institute, 2018), https://justicepolicy.org/wp-content/uploads/2021/06/The_Ungers_5_Years_and_Counting.pdf

³⁵ "At America's Expense: The Mass Incarceration of the Elderly," American Civil Liberties Union, NYU School of Law," https://www.aclu.org/sites/default/files/field_document/elderlyprisonreport_20120613_1.pdf.

³⁶ Ibid.

³⁷ "Only two individuals have been re-arrested for a new crime, and 10 have passed away", personal correspondence to author, August 2021.

³⁸ "The Ungers, 5 Years and Counting."

Support for a second look provision has been growing nationally among sentencing experts, fueled in part by the proliferation of extremely long criminal sentences during the U.S. incarceration boom. “The fact that American prison rates remain high after nearly two decades of falling crime rates is due in part to the nation’s exceptional use of long confinement terms that make no allowance for changes in the crime policy environment,” one study explained.³⁹ Many researchers believe the country’s use of lengthy sentences—sentences that are much longer than those in other Western democracies—merits the creation of a mechanism for their review by a court at some point in time.

The American Law Institute (ALI),⁴⁰ as part of a nearly 10-year-long review of sentencing to revise the Model Penal Code, noted that “[w]hen ever a legal system imposes the heaviest of incarcerative penalties, it ought to be the most wary of its own powers and alert to opportunities for the correction of errors and injustices.”⁴¹ The lack of any potential early review of sentences also removed any incentive for an individual to participate in programming or comply with the institution’s rules, because any hope to earn early release was absent. A second look mechanism, the ALI said, is intended to ensure that long sentences “remain intelligible and justifiable at a point in time far distant from their original imposition.”⁴²

The ALI’s recommendation includes:⁴³

- A judicial decisionmaker or judicial panel will rule upon applications for a sentence modification from any individual who has served a minimum of 15 years in prison. These 15 years can result from time served for a single sentence or consecutive sentences.
- This sentence modification is “analogous to a resentencing in light of present circumstances.”
- The judicial decisionmaker or judicial panel should have the authority to modify any element of the original sentence, regardless of whether a mandatory minimum was part of the original sentence.
- Sentences cannot be modified to make the term of imprisonment longer.
- The sentencing commission is instructed to develop guidelines for considering release and explore implementing retroactive application of this provision.
- Appointed counsel can be provided for those in need.

Two of Virginia’s neighbors – Washington, DC and Maryland – have passed second look legislation in recent years, and another – West Virginia – considered legislation in 2020. Washington DC’s second look initiative was a response to the Supreme Court’s rulings on juvenile life without parole. While the District does not have any youth serving life without parole, 1,625 people have served at least 15 years as of August 2021, with the possibility of spending the rest of their life in prison.⁴⁴ Many were sentenced for crimes that occurred while under 18 years of age. In response to this alarming trend, the Washington, DC Council.

³⁹ American Law Institute, *Model Penal Code: Sentencing, Proposed Final Draft* (April 2017), 568.

⁴⁰ The American Law Institute, founded in 1923, is a membership organization comprised of practicing attorneys, judges, and law professors. Among other responsibilities, the American Law Institute issues models of law intended to guide policy and practice.⁴¹ *Model Penal Code: Sentencing, Proposed Final Draft*, pg. 569.

⁴¹ *Model Penal Code: Sentencing, Proposed Final Draft*, pg. 568.

passed the Incarceration Reduction Amendment Act of 2016 (IRAA), which provides an opportunity for early release for individuals sentenced as youth who served at least 20 years. IRAA has been incredibly successful, resulting in expansions in 2018 and 2020 to include individuals who were sentenced when they were under 25 years old. Nearly 30 percent of Washington, DC residents serving a prison term are now eligible for IRAA.⁴⁵ The reform has been highly successful, with only a 1.3 percent recidivism rate since its initial implementation.⁴⁶

In 2021, Maryland passed the Juvenile Restoration Act. This law allows judges to issue sentencing relief for youth convicted as adults who have served at least 20 years. Similar to Washington DC, this reform aligned Maryland with the Supreme Court's ruling that life without the possibility of parole for minors is cruel and unusual punishment. As seen in Washington, DC and Maryland, a second look mechanism is the type of innovative policy reform that can significantly alter Virginia's long prison-sentenced population and bring much needed proportionality to the system.

⁴² *Model Penal Code: Sentencing, Proposed Final Draft*, pg. 568.

⁴³ *Model Penal Code: Sentencing, Proposed Final Draft*, pg. 565-566.

⁴⁴ FOIA, "DC Inmates Sentencing and Designation", September 6 2021.

⁴⁵ "A Second Look at Injustice" (Washington D.C., The Sentencing Project, 2021). <https://www.sentencingproject.org/wp-content/uploads/2021/05/A-Second-Look-at-Injustice.pdf>

⁴⁶ N.A., *Incarceration Reduction Amendment Act (IRAA) Implementation Support – Unpublished* (Washington DC: Justice Policy Institute, 2021)

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