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Foreword

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The 2020–2021 legislative session was one of the busiest legislative sessions on crime and punishment in recent memory. Much was accomplished. Much still needs to be tackled. Several significant criminal justice reform measures were passed:

- Abolishing the death penalty in Virginia;[1]
- Authorizing judges to sentence a defendant after a jury trial, changing 224 years of precedent;[2]
- Ending the presumption against bail;[3]
- Authorizing parole eligibility and review for juvenile offenders;[4]
- Preventing an individual from being arrested/prosecuted for purchasing/possessing a controlled substance after reporting an overdose to emergency services;[5]

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* Mr. Giarratano spent thirteen years on Death Row in Virginia, where he served as a client advisor for the Virginia Coalition on Jails and Prisons and as a member of the advisory board of the Center for Teaching Peace, Washington, D.C. His fight to avoid electrocution attracted the support of advocates as diverse as columnist James J. Kilpatrick and Amnesty International, many of whom argued that there is serious doubt as to Mr. Giarratano's guilt. Mr. Giarratano has also attracted significant attention due to the innovative legal scholarship he has brought to his involvement in right-to-counsel and other death penalty related litigation, and to the articles he has published on Death Row issues.

1. Act of Mar. 24, 2021, ch. 345, 2021 Va. Acts __, __ (codified as amended in scattered sections of VA. CODE ANN. tits. 19.2, 53.1 (Cum. Supp. 2021)). For an in-depth look into the history of the death penalty in Virginia and this monumental reform, see Corinna Barrett Lain & Douglas A. Ramseur, *Disrupting Death: How Specialized Capital Defenders Ground Virginia's Machinery of Death to a Halt*, 56 U. RICH. L. REV. 183 (2021).

2. Act of Nov. 5, 2020, ch. 43, 2020 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 19.2-264.3, -288, -295, -295.1, -295.3 (Cum. Supp. 2021)).

3. Act of Mar. 24, 2021, ch. 337, 2021 Va. Acts __, __ (codified as amended at § 19.2-120, -124 (Cum. Supp. 2021)).

4. Act of Mar. 31, 2020, ch. 529, 2020 Va. Acts 799, 806 (codified as amended at §§ 19.2-387, -389, -391, 53.1-136, -165.1 (Cum. Supp. 2021)).

5. Act of Apr. 9, 2020, ch. 1016, 2020 Va. Acts 1964, 1964 (codified as amended

• Prohibiting law enforcement/jail officers from strip searching minors;[6]

• Enacting a police reform omnibus bill banning the use of chokeholds by law enforcement, requiring law enforcement to undergo training in de-escalation techniques, creating a duty to intervene if law enforcement officers witness misconduct by other officers, and banning no-knock-warrants;[7]

• Expanding the authority of Civilian Review Boards in Virginia to investigate incidents of police misconduct, and giving the authority to issue subpoenas;[8]

• Legalizing simple possession of marijuana;[9]

• Creating degrees of robbery;[10]

• Prohibiting vehicle searches based on the odor of marijuana;[11]

• Requiring judges in criminal proceedings to take mental/emotional conditions into consideration;[12]

• Allowing for automatic expungement of certain misdemeanors from criminal records and for individuals to petition circuit courts to have certain misdemeanor/felony convictions to be expunged;[13]

• Allowing individuals to obtain a restricted driver's license without paying court fines;[14]

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at § 18.2-251.03 (Cum. Supp. 2021)).

6. Act of Apr. 11, 2020, ch. 1181, 2020 Va. Acts 2454, 2454 (codified as amended at § 53.1-30 (Repl. Vol. 2020)).

7. Act of Oct. 28, 2020, ch. 37, 2020 Va. Acts __, __ (codified as amended in scattered sections of VA. CODE ANN. tits. 9.1, 15.2, 18.2, 19.2, and 52 (Repl. Vol. 2020 & Cum. Supp. 2021)).

8. Act of Oct. 28, 2020, ch. 30, 2020 Va. Acts __, __ (codified as amended at §§ 9.1-507, -601, 15.2-1507 (Cum. Supp. 2021)).

9. Act of Apr. 7, 2021, ch. 550, 2021 Va. Acts __, __ (codified as amended in scattered sections of VA. CODE ANN. tits. 2.2, 3.2, 4.1, 5.1, 6.2, 9.1, 15.2, 16.1, 17.1, 18.2, 19.2, 22.1, 23.1, 24.2, 33.2, 46.2, 48, 51.1, 53.1, 54.1, 58.1, 59.1, 65.2 (Cum. Supp. 2021)).

10. Act of Apr. 7, 2021, ch. 534, 2021 Va. Acts __, __ (codified as amended at §§ 16.1-269.1, 18.2-58 (Cum. Supp. 2021)).

11. Act of Nov. 9, 2020, ch. 51, 2020 Va. Acts __, __ (codified as amended in scattered sections of VA. CODE ANN. tits. 15.2, 18.2, 46.2 (Cum. Supp. 2021)).

12. Act of Apr. 7, 2021, ch. 523, 2021 Va. Acts __, __ (codified as amended at §§ 19.2-120, -163.03, -299, & 37.2-808 (Cum. Supp. 2021)).

13. Act of Apr. 27, 2021, ch. 524, 2021 Va. Acts __, __ (codified as amended at §§ 19.2-392.6 to -392.12 (Cum. Supp. 2021)).

14. Act of Mar. 24, 2021, ch. 336, 2021 Va. Acts __, __ (codified as amended at § 18.2-271.1 (Cum. Supp. 2021)).

• Creating a Public Defender Office in Chesterfield County.[15]

All are sensible and long-overdue reforms. Yet a bill to scrap mandatory minimum sentences (except for the murder of a law enforcement officer)—also a key aim of reformers—passed both the Senate and House of Delegates but died in Conference Committee.[16]

Mandatory minimums have played a prominent role in state criminal sentencing for more than twenty-five years. Though Virginia judges must formally sentence within the ranges of punishments spelled out in law, they typically have the authority to suspend any of that time as they see fit. But mandatory minimums are an exception to that rule: they require judges to impose at least a certain specific amount of jail or prison time for over 200 crimes—from guns to drugs, from raping a child to assaulting police officers.[17]

Supporters of the laws contend they are a necessary safeguard against overly lenient judges—ensuring that serious crimes get at least some real punishment.[18] But critics assert that the rules strip judges' discretion, and that prosecutors unfairly stack up such charges to pressure defendants to plead guilty.[19]

Another bill, SB1301, also passed in the Senate but was left in the House Appropriations Committee.[20] That bill would have banned the use of solitary confinement in the Virginia Department of Corrections and juvenile facilities. Solitary confinement, isola-

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15. Act of Mar. 24, 2021, ch. 341, 2021 Va. Acts __, __ (codified as amended at § 19.2-163.04 (Cum. Supp. 2021)).

16. S.B. 1443, Va. Gen. Assembly (Reg. Sess. & Spec. Sess. I 2021) (continued to the Special Session and subsequently failed to pass).

17. Peter Dujardin, *Bill to Scrap Mandatory Minimum Sentences Fails as Lawmakers Unable to Reach Agreement*, DAILY PRESS (Mar. 03, 2021) https://www.dailypress.com/news/crime/dp-nw-mandatory-minimums-20210304-tjivqkpb2bep3bxmgt6whl6u3y-story.html [https://perma.cc/KS5F-LVL7]; *see* VA. CRIM. SENT'G COMM'N, APPENDIX B: MANDATORY MINIMUM LAWS IN VIRGINIA, http://www.vcsc.virginia.gov/Man_Min.pdf [https://perma.cc/WD82-4L52].

18. *See* Morning Edition, *Former Prosecutor on Why He Supports Mandatory Minimums*, NPR (May 31, 2017, 5:03 AM), https://www.npr.org/2017/05/31/530843623/former-prosecutor-on-why-he-supports-mandatory-minimums [https://perma.cc/ZXC9-2QDN].

19. Shorstein, Lasnetski & Gihon, *Mandatory Minimum Prison Sentences Give Prosecutors Excessive Power at the Expense of Defendants' Rights*, JACKSONVILLE CRIM. LAW. BLOG (Mar. 16, 2018), https://www.jacksonvillecriminallawyerblog.com/mandatory-minimum-prison-sentences-give-prosecutors-excessive-power-expense-defendants-rights/ [https://perma.cc/5MY9-HS2S].

20. S.B. 1301, Va. Gen. Assembly (Reg. Sess. & Spec. Sess. I 2021) (continued to the Special Session and subsequently left in the House Committee on Appropriations).

tion, special housing, long-term segregation—whatever the euphemism—lawmakers need to pay serious attention to this dangerous practice. From personal experience I can state that no one exits long-term isolation unscathed. I was confined for eight years in long-term segregation at Red Onion State Prison. This was not because I was a rule breaker or troublemaker, per se. I reported abuse to the outside world, initiated lawsuits, and generated publicity to spotlight abusive practices. There are countless studies about the negative psychological effects of long-term segregation (i.e., locked in a cell twenty-four hours a day, with allowance for three showers per week and three one-hour periods of recreation per week in a small cage).[21] Lawmakers need to remain cognizant of the fact that we send lawbreakers to prison *as* punishment. We do not send offenders to prison *to be punished.*

The goals and purposes of a system of punishments, though often quite diverse, can generally be stated along these lines: vindication of the law, crime prevention, and offender rehabilitation. Disputes over punishment generally center on which goal is to take priority over the others and why. Because there are different types of crimes and because crimes are committed by different types of people, all of which require different and innovative kinds of responses, we should always tread carefully and not generalize about the issues concerning crime and punishment. Nevertheless, there has been one common-sense consensus that most all agree on: punishment can function properly (i.e., serve its legitimate moral function) only if it comes to an end. Punishment's moral function is to help reform the offender's character, and it necessarily follows that it makes little sense to punish someone who has reformed. Thus, it has been recognized that the duration of punishment is not to be a measurement of the exchange value of the offense; there must be a valid and just means of adjusting the duration of the punishment to the useful reformation of the prisoner during the term of his imprisonment. The primary aim of a penalty that deprives liberty, once an offender has been convicted and sentenced to prison, is the reformation and social rehabilitation of the prisoner. Once that aim is realized, further incarceration becomes useless, inhumane

21. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 130–31 (2003) (citations omitted) (reviewing studies that found various psychological symptoms emerging from prison isolation, including anxiety, depression, paranoia, hallucinations, and suicidal tendencies).

to the person being punished, and a burdensome waste of societal resources.

The same rationale applies to the question of parole, a mechanism for the early release of offenders (albeit under supervision) before completion of their actual sentence. The Commonwealth abolished parole in 1995.[22] The legislation to reinstate parole was tabled until next year.[23] Parole is designed as an opportunity for a prisoner to transition back into society. The restrictions on parolees are supposed to encourage good behavior after incarceration. In fact, even before prisoners get out of custody, the possibility of parole gives them an incentive to avoid trouble. Parole also reduces prison overcrowding and grants offenders who are considered unlikely to harm others the benefit of supervised life in society. Parole helps the Commonwealth try to cut down on the high costs of maintaining large prison populations while keeping the citizens at large safe.

The average daily population in the Virginia Department of Corrections is roughly 24,000 prisoners.[24] While their numbers, offenses, and demographics fluctuate from year-to-year, one fact remains constant: *nearly every offender that goes to prison eventually comes out.* Understanding that these men and women are returning, and continue to return, to their homes, families, and neighborhoods, the question for us as citizens of the Commonwealth is: how do we want these ex-offenders to return to the community? Do we want them to arrive with or without support, with or without supervision, or with or without set conditions of release? What is the answer? Whatever it is, it needs to start with an understanding that higher parole rates do not mean softer sentences, but rather safer streets.

In light of the current debate, I would suggest instituting a system of presumptive parole that incorporates both discretionary release and mandatory supervision. That is, shift the mandate of the Parole Board from deciding "whether" an inmate is paroled to "when" and "under what conditions," reserving post-sentence supervision only for those inmates who waive their parole hearing,

22. Act of Oct. 13, 1994, ch. 2, 1994 Va. Acts 18, 21–22 (codified as amended in scattered sections of VA. CODE ANN. tits. 18.2, 19.2, 53.1 (Repl. Vol. 2014, Repl. Vol. 2015 & Repl. Vol. 2020)).

23. S.B. 1370, Va. Gen. Assembly (Reg. Sess. 2021) (passed by indefinitely by the Rehabilitation and Social Services Senate committee).

24. VA. DEP'T OF CORR., MONTHLY POPULATION SUMMARY 1–2 (2021).

are ineligible for parole, or are too dangerous to warrant parole. Mirror presumptive parole after the presumptive sentencing structure of the sentencing guideline already in place. Stipulate that inmates are presumptively paroled after serving a defined portion of their sentences. Like the judge in sentencing, the Board should state reasons in writing when deciding not to parole an inmate. In this way the responsibility of the Parole Board is reconstituted to determine 'when,' not 'if,' to parole an inmate, enabling the Board to surmount the political risks and liabilities that currently hamper its decision-making process. For inmates who complete their sentences physically behind bars, grant the Parole Board the authority to determine, at discharge, the length of an offender's term of post-release supervision. While the period of supervision should be commensurate with the term of incarceration, it should also reflect the risks and needs of the individual. Because offenders under post-release supervision will have "served their time," the role of parole in implementing post-release supervision should be constructive rather than punitive—guiding, not catching, offenders as they transition from prison. Terms and length of post release supervision could be worked out. Vest the Parole Board with the resources and responsibility to determine how to handle the technical violations of offenders under its supervision. Just as sentencing judges, who employ the sentencing guidelines, can make use of a wide range of intermediate sanctions; so too the Board should have the discretion and the options to address technical violations using the limited resources of the Commonwealth in an efficient and cost-effective manner. Perhaps breaking a curfew or skipping a treatment meeting results in a fine, or perhaps a positive drug test results in spending the weekend in jail or enhanced treatment. Why jeopardize a parolee's home, family, job, and stability by putting them back in jail for a month? In order to legitimately aid and effectively supervise offenders in their transition to the community, the Parole Board must have the necessary discretion and resources to ensure that every violation is addressed in a practical, parsimonious, and predictable manner. The role of the Parole Board should be to fashion individualized terms of supervision for every offender returning to the community in anticipation of the expiration of their sentence. Combining presumptive discretionary parole and manda-tory supervision empowers the Parole Board to use both the carrot and the stick in releasing and supervising returning offenders. By providing incentives for inmate rehabilitation, while planning for those unwilling, unable, or

unready to change, we can ensure that every returning offender benefits from the supervision and support of the Virginia Parole Board as they transition from prison to community.

The Commonwealth made great strides in the area of criminal just reform. We just need to remember that reform is an ongoing process.

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