RHODE ISLAND’S STATEHOUSE-TO-PRISON PIPELINE

How “Tough-On-Crime” Lawmaking Results in Overcriminalization and Mass Incarceration

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EXECUTIVE SUMMARY

What if somebody told you that being a serial graffiti artist could get you a longer prison sentence than being a serial drunk driver; that you could be sentenced to one year in prison for the crime of covering up a public monument, a penalty that was as severe as violating a protective order issued on behalf of a sexual assault victim; that if you want to steal fruits and vegetables, you should take them from a supermarket rather than a farm because you could face a sentence five times as long for doing the latter; that stealing $250 of those fruits and vegetables would land you a longer prison sentence than stealing $5,000 of just about anything else; that a felony drug conviction from your teenage past could prevent you from volunteering at your child’s school 20 years later; that you could face years in jail for advertising your drug store for a week without having a pharmacist available during business hours; and that if you’re worried that somebody might, with impunity, remotely shoot an animal over the Internet, you needn’t worry because there’s a criminal sentence for that?

This is not Wonderland; rather, it is a glimpse into Rhode Island’s lawmaking on criminal justice over the past eighteen years. As part of the ACLU of Rhode Island’s longstanding campaign against legislation that punishes too many people for too many crimes for far too long, we decided to examine just how deep-seated the problems of overcriminalization and mass incarceration in the state were by going straight to the source – the legislation that defines criminal activity and establishes the sentencing penalties for that activity. Specifically, we reviewed every public law that the General Assembly has enacted since 2000 to examine the creation of, and revision to, criminal conduct and its statutory consequences. We came up with some eye-opening findings. This report analyzes those findings and offers a number of recommendations for addressing what we call the “statehouse-to-prison pipeline.”

Below is a summary of our key findings:

- Between 2000 and 2017, the Rhode Island General Assembly created more than 170 new crimes, and also increased the criminal sentences for dozens of existing offenses.

- Many of the laws establishing “new” crimes actually make criminal offenses out of conduct that is already prohibited by other laws, but create harsher penalties and lead to more serious consequences.

- Laws like these not only increase the punishment and sentencing range for people who commit certain offenses, they vastly expand the power of police and prosecutors to coerce defendants to waive their right to a jury trial and prod innocent defendants to plead guilty.
• Increasing penalties that turn a crime from a misdemeanor into a felony, or establishing new felony crimes for many non-violent offenses, has serious collateral consequences beyond the length of the prison sentence that an offender faces.

• In the comparatively rare instances when the legislature reduces or repeals criminal penalties, they are generally to address patently archaic laws, not to promote positive substantive sentencing reform.

• The length of prison sentences established by new laws is largely arbitrary, and little consideration is given to the ramifications that flow from setting them.

• Just as the prison sentences imposed by the laws are arbitrary, so are the fines that are set in establishing penalties.

• Some increased penalties are enacted when their greatest impact is almost certain to fall heavily on the young or, occasionally, the mentally ill.

• Sometimes the General Assembly makes crimes out of issues du jour, or of conduct that could be addressed in less drastic ways, but these laws will likely remain on the books for decades.

We offer a number of recommendations for the General Assembly based on these findings:

• Create a commission to recodify the criminal laws with the goal of reducing arbitrary penalties, eliminating duplicative crimes, and decriminalizing some offenses.

• Require prison impact statements with the introduction of sentencing bills so that the fiscal impact of such legislation cannot be ignored.

• Require racial impact statements to help reduce the significant racial disparities in the criminal justice system.

• Reclassify from felonies to misdemeanors any crimes without prison sentences, or with sentences of less than one year.

• Stop passing new duplicative criminal laws and enhanced penalties for various property and other crimes, or at least require a compelling and documented justification for their passage.

• Re-examine and revise statutes that disqualify, automatically or presumptively, people with felony records from employment or professional licensing.

• Change the “get tough on crime” culture to one that is “smart on crime.”
BACKGROUND

In recent years, the problem of mass incarceration has been at the forefront of much public and political discussion. The dubious role of the United States in locking up, by far, more people per capita than any other country;\(^1\) the skyrocketing fiscal costs associated with incarceration;\(^2\) the use of incarceration instead of other approaches to address certain crimes;\(^3\) the lengthy nature of many criminal sentences that is leading to geriatric prison populations;\(^4\) and the clear racial disparity in incarceration rates\(^5\) have all propelled this issue into the spotlight and prompted a much-needed examination of sentencing and incarceration policies.

Nationally, concerns about this issue have managed to unite both the left and the right, perhaps best epitomized by the formation in 2014 of a bi-partisan “Coalition for Public Safety,” funded largely by the Koch Brothers, and formed with such groups as the ACLU, Grover Norquist’s Americans for Tax Reform and the liberal Center for American Progress. All these groups have signed on to the Coalition’s mission of “reduc[ing] our jail and prison populations and associated cost” and “end[ing] the systemic problems of overcriminalization and overincarceration - particularly of low-income communities and communities of color.”\(^6\)

Locally, the ACLU of Rhode Island has been deeply involved for decades in addressing this issue. A major ACLU class-action lawsuit that lasted for over 20 years, Palmigiano v. Garrahy, helped alleviate severe prison overcrowding conditions at the Adult Correctional Institutions (ACI),\(^7\) and led to a mechanism to require the release of prisoners should the ACI population exceed certain caps.\(^8\) The ACLU of Rhode Island has also unceasingly lobbied to limit draconian sentencing, and has sought to promote change through examination of deep-seated racial disparities in the criminal justice system.\(^9\)

In 2015, Rhode Island government officially became part of this discussion as well. In July of that year, Governor Gina Raimondo appointed a justice reinvestment task force, composed of a wide range of stakeholders coordinated by the Council of State Governments.\(^10\) Their recommendations led to the passage by the state Senate in 2016 of a package of legislative reforms designed to address a few of the issues that have exacerbated the mass incarceration problem in Rhode Island.\(^11\) Although the reforms were modest, they were a clear and significant step in the right direction. Unfortunately, after passing the Senate, the package of legislation died in the House in the closing hours of the 2016 legislative session.

A more watered-down version of the bills did end up getting signed into law in September 2017.\(^12\) The legislative package made some important changes to the state’s criminal laws and practices, but it must be considered only the first step in promoting meaningful criminal justice reform.
Separate from mass incarceration, but deeply intertwined with it, is the problem of **overcriminalization**. This problem too has united the political spectrum – with the ACLU, the National Association of Criminal Defense Lawyers, the Heritage Foundation, and Right on Crime all denouncing this dangerous, but always growing, practice.

By making crimes out of conduct that is best handled through civil enforcement, if at all, overcriminalization can have an obvious and direct impact on promoting mass incarceration. Regardless of its influence on the prison population, however, overcriminalization has an insidious influence on criminal justice in other ways. It often takes the form of passing duplicative and overlapping statutes that can lead to the stacking of criminal charges against an individual, which can “force innocent individuals to plead guilty not because they actually are, but because exercising their constitutional right to a trial is prohibitively expensive and too much of a risk.”

Further, the mere presence of a criminal record often has severe and deleterious effects on individuals even if they never spend a day at the ACI. Similarly, the imposition of non-incarcерative punishments – whether it is probation, suspension of a license or other penalties short of prison – can have an impact on offenders’ lives for years to come. Indeed, while Rhode Island’s prison population is smaller per capita than most other states, its probation population has for many years been among the highest.

In talking about these issues, one must also always keep in mind the persistent and significant racial disparities in the enforcement of the criminal laws. A look, for example, at the state’s drug laws demonstrates their substantial disparate enforcement on the basis of race. The racial breakdown of Rhode Island’s male incarcerated population, as reported by the Department of Corrections, is shocking: One in 265 white adult males in the state are incarcerated; but one in 83 Hispanic males and one in 29 black adult males are imprisoned.

Overcriminalization and mass incarceration fuel these figures.

Although there are many reasons for the epidemic of overcriminalization and mass incarceration, there can be little debate about where it all starts – with the passage of legislation that both defines criminal activity and establishes the sentencing penalties for that activity. It is that starting point that is the subject of this report. Just as, in recent years, the public has been grappling with mitigating the harm caused by the school-to-prison pipeline, an examination of the “statehouse-to-prison pipeline” is long overdue.

Every year the Rhode Island General Assembly is flooded with “get tough on crime” bills, expanding the reach of the criminal law and increasing sentences for crimes that are already on the books. On the other hand, rarely do bills get introduced, much less enacted, to significantly reduce criminal penalties. To an observer, there appears to be an ever-growing spiral of crimes and penalties, with the end nowhere in sight. As a result, the number of people incarcerated in the state per 100,000
residents has more than tripled since 1980, as illustrated by a graph created by the Prison Policy Initiative (Figure 1). Looking at it another way: between 1976 and 2014, the ACI population increased more than five-fold: the ACI housed 603 inmates in 1976 and 3,214 inmates four decades later.21

In a similar vein, since 1997, when this data started being collected, the DOC chart below shows that Rhode Island’s probation population has increased by more than 17% (Figure 2). According to the Bureau of Justice Statistics, Rhode Island is second in the nation in its rate of probation supervision (2,822 per 100,000 residents), a rate that is 85% higher than the national average.22

With assistance from students in the ACLU’s Roger Williams University School of Law Chapter, the ACLU of Rhode Island decided to examine how prevalent the expansion of our criminal laws and penalties actually was.23 To do so, we reviewed every public law enacted by the General Assembly between 2000 and 2017.24 The results were eye opening, and form the basis for this report and for a number of recommendations that address our findings.

Figure 1. Rhode Island Prison Incarceration Rate, 1978-201525
Figure 2. Probation Population in Rhode Island: 1997-2016
FINDINGS

1. Between 2000 and 2017, the Rhode Island General Assembly created more than 170 new crimes, and also increased the criminal sentences for dozens of existing offenses.26

It is somewhat overwhelming to contemplate the large number of crimes that the General Assembly constructs on a yearly basis. At the same time, as will be discussed later on, laws reducing or repealing criminal sentences were relatively rare and, with only a few highly notable exceptions, generally involved repealing patently archaic or unconstitutional criminal laws.

The vast number of new statutes passed demonstrates a gratuitous and excessive alacrity by legislators to immediately turn to the criminal law to address perceived wrongs and harms. And little by little, year-by-year, these new laws have an impact on the ACI's population count and on the administration of criminal justice. At bottom, the prison and probation population cannot help but expand with so many new laws and increased penalties encouraging more and harsher punishment.

2. Many of the laws establishing “new” crimes actually make criminal offenses out of conduct that is already prohibited by other laws, but create harsher penalties and lead to more serious consequences.

The fact that so many new criminal laws are actually variations of current criminal prohibitions should not be surprising. It would be fanciful to believe that 170 types of nefarious activity were perfectly legal until the General Assembly got around to passing a law in recent years prohibiting it.

However, the duplication engendered by these new laws is far from innocuous. Often the new statute, by focusing on a specific subset of a broader crime, disproportionately expands the severity of punishment for conduct that is already illegal. To give a simple example, the general penalty for stealing property or money (“larceny”) is a misdemeanor if the value of what has been stolen is less than $1,500. 27 A misdemeanor carries a maximum prison sentence of one year.28 In 2014, however, the legislature singled out “larceny of farm products” for special punitive treatment. Under a law enacted that year, stealing only $250 worth of farm products became a felony punishable by up to five years imprisonment.29 That is, stealing produce from a farm carries five times the prison sentencing sanction that stealing the same amount of produce from a supermarket carries. Because of a law enacted in 2017 recalibrating larceny
penalties, the disparity is actually even more pronounced than that. Larceny of other property worth up to $5,000 now carries a maximum three-year sentence.30

Carving out increased penalties for already existing illegal conduct without a compelling justification is unfair and arbitrary. Sometimes it is based on a constituent or special interest group’s grievance after being a victim of the crime and feeling that the punishment wasn’t tough enough. Sometimes a high-profile crime prompts a determination to get “tougher” on the offense. But this ultimately random and capricious approach to meting out punishment is an extremely dubious way to write the criminal laws and determine how much time a person facing prison should serve.

### Table 1. Comparison of Selected “New” Crimes to Original Crime

<table>
<thead>
<tr>
<th>Original Crimes</th>
<th>Sentence</th>
<th>Year</th>
<th>Statutory Citation</th>
<th>Crime Summary</th>
<th>“New” Crimes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault</td>
<td>1 year/$1,000 fine</td>
<td>2001</td>
<td>§11-5-16</td>
<td>Creates crime of assault of health care provider or EMS personnel</td>
<td>3 years/$1,500 fine</td>
</tr>
<tr>
<td>Larceny</td>
<td>Theft of $1,500 or less: 1 year/$500 fine  If theft is between $1,500 and $3,000: 3 years/$1,500 fine  If theft is between $5,000 and $10,000: 6 years/$3,000 fine  If theft is over $10,000: 10 years/$5,000 fine</td>
<td>2006</td>
<td>§11-41-25.1</td>
<td>Creates crime of motor fuel theft</td>
<td>If theft is $500 or less: 1 year/$500 fine  If theft is more than $500: 10 years/$5,000 fine</td>
</tr>
<tr>
<td>Larceny</td>
<td>See above</td>
<td>2014</td>
<td>§11-41-33</td>
<td>Makes it a crime to steal farm products</td>
<td>If farm product less than $250: 1 year/$1,000 fine  If farm product $250 or more: 5 years/$5,000 fine</td>
</tr>
<tr>
<td>Assault</td>
<td>1 year/$1,000 fine</td>
<td>2017</td>
<td>§11-5-3.1</td>
<td>Makes it a crime to assault a delivery person</td>
<td>3 years/$3,000 fine</td>
</tr>
</tbody>
</table>
3. Laws like these not only increase the punishment and sentencing range for people who commit certain offenses, they vastly expand the power of police and prosecutors.

By being able to charge individuals with multiple crimes for similar conduct, or to charge them with a crime containing a greater penalty than the more generic offense, prosecutors are in a much stronger position to encourage criminal defendants to plead guilty and waive their right to a jury trial where the state must prove the crime. As one legal scholar has explained it: “When deciding whether to plead guilty, any rational defendant (more to the point, any rational defense lawyer) takes account of the sentence the defendant may receive if he goes to trial and loses... By stacking enough charges, prosecutors can jack up the threat value of trial and thereby induce a guilty plea, even if the government’s case is weak.”

It is easy to see how this can happen. As with “larceny of farm products,” a 2006 law enactment unnecessarily made it a specific, separate crime to steal motor fuel. At the time, the penalties imposed for this new offense were no different than the general penalties for larceny: a misdemeanor if the fuel stolen had a value of $500 or less, and a felony, with a potential ten year prison sentence, if the fuel’s value was more than $500. Thus, the new law’s major practical effect was not substantial. But the impact became more serious when the General Assembly, in 2012, revised the general larceny statute to increase the felony threshold from $500 to $1,500. As a result, stealing between $500 and $1,500 worth of fuel remains, by inertia, a felony carrying a ten-year prison sentence; for almost any other type of larceny, the offense would be a misdemeanor carrying a maximum one-year sentence. It is not hard to imagine a person who believes they are innocent nonetheless pleading guilty to a lesser crime of “larceny” rather than face a potential ten-year prison sentence under the more specific statute.

The injustice has been made even greater as a result of amendments made to the larceny statute in one of the 2017 justice reinvestment laws. Under the new law, larceny of property or money up to $10,000 carries a maximum six-year sentence. Thus, under the 2006 “theft of motor fuel” law, stealing $501 worth of gasoline is now punishable more harshly than stealing $10,000 of almost anything else.

Overcriminalization also has an obvious impact on the depth of the legal representation that can be provided criminal defendants. Harried public defenders simply are not in a position to conduct thorough investigations or otherwise invest the time it might be useful to invest in dealing with all of their clients, particularly those charged with “minor” crimes, when their workload is overwhelming. Indeed, while the Rhode Island Public Defender has 49 full-time attorneys, a recent report estimated that “there should be 136 to 145 full-time public defenders to provide reasonably effective defense.”
4. Increasing penalties that turn a crime from a misdemeanor into a felony, or establishing new felony crimes for many non-violent offenses, has serious collateral consequences beyond the length of the prison sentence that an offender faces.

Of the more than three-dozen preexisting offenses for which the General Assembly increased the penalties between 2000 and 2017, about one-third of them raised the penalties from a misdemeanor into a felony. The collateral consequences associated with a criminal record – and especially a felony record – can haunt an ex-offender for life, long after their sentence has expired.

As a federal judge recently pointed out:

“Under federal law alone, a felony conviction may render an individual ineligible for public housing, section 8 vouchers, Social Security Act benefits, supplemental nutritional benefits, student loans, the Hope Scholarship tax credit, and Legal Services Corporation representation in public-housing eviction proceedings. Moreover, in addition to the general reluctance of private employers to hire ex-convicts, felony convictions disqualify individuals from holding various positions.

“Oftentimes, the inability to obtain housing and procure employment results in further disastrous consequences, such as losing child custody or going homeless. In this way, the statutory and regulatory scheme contributes heavily to many ex-convicts becoming recidivists and restarting the criminal cycle.”

Similar consequences apply at the state level, particularly in the context of qualifying for a wide array of employment opportunities. A felony conviction can often serve as an automatic or presumptive disqualification for occupational licensing and, as noted above, remains a factor in many private employers’ hiring decisions.

Perhaps most prominently, all felony drug offenses are, in a disservice to the English language, often classified as “crimes of violence” for purposes of employment and licensing.

Another black hole that has the potential to suck in ex-offenders: about two dozen professional licensing statutes that allow for denial or revocation of a license if the person has ever been convicted of a “crime of moral turpitude.” As the ACLU has argued, this is a meaningless term that can cover just about every crime imaginable.

There are some crimes that are felonies even though they carry no risk of a prison sentence whatsoever. That is because, by statutory definition, any crime that carries
with it a fine greater than $1,000 is automatically deemed a felony. As a result, any person who “allows to be injured any fire hydrant” or who is convicted of a second offense of transporting horses while stacked on two or more levels – crimes which the General Assembly decided did not deserve time in prison – is still an ex-felon and faces many of the same collateral consequences that a person who has served a lengthy prison sentence will encounter. In 2016 and 2017, Senate-passed “justice reinvestment” legislation would have addressed this problem by revising the definitions of felony and misdemeanor, but the House refused to go along.

In short, increasing penalties to meet the standard for a felony has much greater ramifications than a potentially longer prison sentence. To use an example cited earlier, when a person steals $260 worth of farm products, he or she now faces a lifetime of consequences as a felon that somebody stealing $1,500 of something else does not.

Table 2. Selected Crimes Increased from Misdemeanors to Felonies

<table>
<thead>
<tr>
<th>Year</th>
<th>Crime</th>
<th>Penalty Before</th>
<th>Penalty After</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>Increases penalties for an employer to knowingly fail to secure workers' compensation</td>
<td>Misdemeanor $1,000 Fine</td>
<td>Felony 2 years in prison</td>
</tr>
<tr>
<td>2008</td>
<td>Increases penalties for third offense of furnishing alcoholic beverages to underage person</td>
<td>Misdemeanor 1 year</td>
<td>Felony 3 years</td>
</tr>
<tr>
<td>2013</td>
<td>Increases penalties for third graffiti offense conviction</td>
<td>Misdemeanor $1,000 Fine</td>
<td>Felony 2 years in prison and $2,000 fine</td>
</tr>
<tr>
<td>2014</td>
<td>Increases penalties for unlawfully affixing or distributing a cigarette tax stamp</td>
<td>1st Offense: Violation $500 fine</td>
<td>1st Offense: Felony $10,000 fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2nd Offense: Misdemeanor 1 year in prison/$1,000 fine</td>
<td>2nd offense: Felony 5 years/$5,000 fine</td>
</tr>
<tr>
<td>2016</td>
<td>Increases penalties for cruelty to animals resulting in death, expanded in 2017 to include crime of hoarding</td>
<td>Misdemeanor 11 months/$500 fine</td>
<td>Felony 5 years/$1,000 fine</td>
</tr>
</tbody>
</table>
5. In the comparatively rare instances when the legislature reduces or repeals criminal penalties, they are generally to address patently archaic laws, not to promote positive substantive sentencing reform.

Chart 3 in the Appendix contains information regarding crimes that have been repealed or had their penalties reduced since 2000. Compared to the number of new crimes created, it is a meager list in terms of both numbers and scope. In 2004, one bill that was passed did more than any other in that decade to “clean the books,” by repealing sixteen obsolete 19th Century statutes, including ones banning blasphemy and the advocacy of anarchy. The vast majority of the other actions taken by the General Assembly in this regard are hardly more earth-shattering. They include repealing a statute that made it a crime to hire a horse or carriage with the intent to cheat the owner, repeal of a 1938 law imposing penalties for importing bovine animals without a permit, and passage of a bill in 2014 that let school principals off the criminal hook if they violated state fire drill laws.

The one substantive area where the General Assembly has made progress in bucking the trend of longer sentences involves drug laws. By removing penalties for possession of a hypodermic needle in response to the AIDS crisis, eliminating mandatory minimum sentences for some drug offenses, decriminalizing possession of small amounts of marijuana, and providing for Good Samaritan immunity to promote medical assistance for drug overdose victims, the legislature has taken some important steps in slowly dismantling the complete failure known as the “war on drugs.” But this is an area that truly is an exception to the rule, and even there, exceptions to the exception exist.

Table 3. Selected Repealed Crimes

<table>
<thead>
<tr>
<th>Year</th>
<th>Statutory Citation</th>
<th>Crime Repealed</th>
<th>Sentence Repealed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>§11-18-19</td>
<td>Repeals statute making it illegal to hire a horse or carriage with intent to cheat the owner</td>
<td>Repealed 30 days/$20 fine</td>
</tr>
<tr>
<td>2004</td>
<td>§11-15.6</td>
<td>Repeals statute making it a crime to carry a subversive flag in a parade where the American flag is also being carried</td>
<td>Repealed 3 months/ $100 fine</td>
</tr>
<tr>
<td>2012</td>
<td>§20-1-26</td>
<td>Reduces, from misdemeanor to a violation, penalties for importing or possessing freshwater invasive aquatic plants</td>
<td>Repealed 90 day prison sentence; retained $500 fine</td>
</tr>
<tr>
<td>2014</td>
<td>§23-28.12-15</td>
<td>Revises penalties for violation by school principals of fire alarm and fire drill laws</td>
<td>Revised designated misdemeanor fine $50 to violation fine of $200</td>
</tr>
<tr>
<td></td>
<td>§23-28.12-36</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2015</td>
<td>§4-5-10</td>
<td>Repeals penalty for importing bovine animals without permit</td>
<td>Repealed 1 year/$500 fine</td>
</tr>
</tbody>
</table>
In the few other areas where progress has been made in addressing the time that criminal offenders spend in prison, one also must watch for regression. Thus, in 2008 the General Assembly passed an important law increasing the amount of “good time” credits that many prisoners could accrue, helping to alleviate severe overcrowding at the ACI. But only four years later, the legislature began to undermine this reform by amending it to exclude inmates serving time for specific felonies even though “good time” provides an important incentive to prisoners to participate in treatment and educational programs, potentially reducing their recidivism rates.

6. The length of prison sentences established by new laws is largely arbitrary, and little consideration is given to the ramifications that flow from setting them.

The amount of prison time imposed for crimes often has no rhyme or reason, and there further appears to be little thought to given to the actual consequences – both fiscal and social – that flow from those penalties. As noted previously, increased sentences that turn a crime from a misdemeanor into a felony have severe and long-lasting ramifications for offenders.

Besides the specific larceny statutes that have been previously cited to show their outsized punishment compared to similar crimes, the randomness of other sentences is also hard to ignore. Why, for example, does falsifying anatomical gift documents for financial gain carry a five year prison sentence, while purchasing body armor after conviction of a felony crime of violence have a three year maximum sentence?

In terms of the severity of the harm to individuals, does it make sense that knowingly violating a protective order issued on behalf of a victim of sexual assault carries the same penalty (one year imprisonment) as “willfully ... cover[ing] or keep[ing] covered” a public statue, and less of a penalty than being a serial graffiti offender (two years imprisonment for third conviction) or stealing more than $250 worth of farm products (five years imprisonment)? Is using a counterfeit token at a gaming facility (ten years imprisonment) truly five times worse than selling a motor vehicle knowing that the airbag is inoperable (two years imprisonment)?

Often, it seems, one could just as easily pull numbers out of a hat to determine the length of sentence for some crimes.

Further, with incarceration generally costing more than $40,000 a year per inmate, increases in sentences can lead to a constantly growing Corrections budget, without any corresponding return on public safety.
A glaring example of increasing sentences merely for the sake of increasing sentences can be found with the passage of a bill in 2015 amending the penalties for “sex trafficking of a minor.” Surely this is a heinous crime deserving severe punishment, but at the time the bill was introduced, this crime carried a penalty of 40 years in prison. The enacted 2015 bill amended the maximum penalty to 50 years. Exactly what criminal justice purpose is served by this increase is a mystery. An extra ten years tagged onto an already harsh four-decade prison sentence (half of a person’s life) can hardly be expected to serve as more of a deterrent. Nor is it clear how useful this extra dose of retribution is, if it keeps an offender in prison until he is 85 years old instead of 75. If just one person is given those extra ten years to serve, in 2017 dollars it would cost taxpayers approximately half-a-million dollars – and that does not include the additional medical costs to the taxpayers associated with warehousing geriatric prisoners. But, of course, it will be the taxpayers two generations from now who will be stuck paying an even larger bill – all to what end?

Table 4. Prison Sentences Imposed for Selected Crimes, By Severity

<table>
<thead>
<tr>
<th>Year</th>
<th>Statutory Citation</th>
<th>Crime</th>
<th>Prison Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>§19-14.9-13</td>
<td>Makes it a crime to engage in the unlicensed business of debt collection</td>
<td>1 year</td>
</tr>
<tr>
<td>2009</td>
<td>§11-37-2-2</td>
<td>Makes it a crime to knowingly violate a protective order issued on behalf of a victim of sexual assault</td>
<td>1 year</td>
</tr>
<tr>
<td>2009</td>
<td>§11-44-13</td>
<td>Amends law barring the defacing of public monuments to also make it a crime to willfully “cover or keep covered” a monument</td>
<td>1 year</td>
</tr>
<tr>
<td>2010</td>
<td>§31-53-4</td>
<td>Makes it a crime to install an airbag in a motor vehicle that does not meet federal safety standards or to misrepresent the presence of an airbag when one does not exist.</td>
<td>2 years</td>
</tr>
<tr>
<td>2013</td>
<td>§11-44-21.1</td>
<td>Increases penalties for third graffiti offense conviction</td>
<td>2 years</td>
</tr>
<tr>
<td>2012</td>
<td>§11-47-20.4</td>
<td>Makes it a crime to possess, own or purchase body armor if the person has been previously convicted of a felony crime of violence.</td>
<td>3 years</td>
</tr>
<tr>
<td>2014</td>
<td>§11-41-33</td>
<td>Makes it a crime to steal farm products</td>
<td>If farm product $250 or more: 5 years</td>
</tr>
<tr>
<td>2013</td>
<td>§42-61.3-2</td>
<td>Makes it a crime to use a counterfeit slug at a casino</td>
<td>10 years</td>
</tr>
<tr>
<td>2006</td>
<td>§11-41-25.1</td>
<td>Creates crime of motor fuel theft</td>
<td>If theft is more than $500: 10 years</td>
</tr>
</tbody>
</table>
Although House and Senate Finance Committees regularly scrutinize the fiscal impact of bills on every other conceivable subject, criminal laws generally get a free ride despite their consequential fiscal costs. The only time that “prison impact” statements are required is when a bill carries a mandatory minimum sentence,\textsuperscript{61} which is one area that the General Assembly has, positively, generally shied away from. However, there is no logical reason why the costs associated with increased prison sentences should be given less scrutiny than any other legislation that has fiscal consequences for the state – whether it involves public education, assistance to low-income families, or expansion of social services.\textsuperscript{62} It is unfortunate that “getting tough on crime” resonates so much more than “getting smart on crime.”

7. Just as the prison sentences imposed by the laws are arbitrary, so are the fines that are set in establishing penalties.

While misdemeanors, by definition, cannot carry a fine greater than $1,000, the sky is the limit when setting fines for the commission of felonies. They often have no relation to either the prison sentence or to similar offenses. For example, in the years this report studied, one of the higher fines that was enacted was for the crime of intentionally falsifying documents relating to anatomical gifts for financial gain. This crime includes a penalty of up to $50,000 in fines.\textsuperscript{63} Compare that to the fine associated with purchasing body armor if convicted of a felony crime of violence: $5,000.\textsuperscript{64} And can one rationally explain why using a counterfeit slug at a casino carries a huge $100,000 fine\textsuperscript{65} while video voyeurism nets a $5,000 fine?\textsuperscript{66} And other than for shock value, is there any point to authorizing a $500,000 fine for possessing slightly more than one ounce of a substance containing a detectable amount of synthetic drugs?\textsuperscript{67}

Table 5. Fines Imposed for Selected Crimes (Prison Sentence Not Included)

<table>
<thead>
<tr>
<th>Year</th>
<th>Statutory Citation</th>
<th>Crime</th>
<th>Fine Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>§11-47-20.4</td>
<td>Makes it a crime to possess, own or purchase body armor if the person has been previously convicted of a felony crime of violence.</td>
<td>$5,000 fine</td>
</tr>
<tr>
<td>2000</td>
<td>§11-38-6</td>
<td>Makes it a crime to initiate a riot or destroy property during a riot at the Wyatt Detention Facility</td>
<td>$10,000 fine</td>
</tr>
<tr>
<td>2007</td>
<td>§23-18.6.1-17</td>
<td>Makes it a crime to intentionally falsify documents relating to anatomical gifts for financial gain</td>
<td>$50,000 fine</td>
</tr>
<tr>
<td>2014</td>
<td>§44-20-39</td>
<td>Increased penalties for forging cigarette stamp</td>
<td>$500,000 fine</td>
</tr>
<tr>
<td>2014</td>
<td>§21-28-4.01.1</td>
<td>Increased penalties to possess, sell, distribute, etc. a substance containing a detectable amount of synthetic drugs</td>
<td>Between 1 oz. and 1 kg: $500,000 fine</td>
</tr>
<tr>
<td></td>
<td>§21-28-4.01.2</td>
<td></td>
<td>More than 1 kg: $1,000,000 fine</td>
</tr>
</tbody>
</table>
8. Some increased penalties are enacted when their greatest impact is almost certain to fall heavily on the young or, occasionally, the mentally ill.

One of the lengthiest floor debates in the House in the 2013 session involved a bill to make a conviction for a third graffiti offense a felony, with all the consequences that flow from this activity performed almost exclusively by young people. By turning this offense into a felony instead of relying on restitution or other more meaningful penalties, the consequences that flow from this sentencing classification on young adults will only have a negative social and financial burden on them – and the public – for decades to come.

The same is true when the legislature enacted extremely harsh penalties in 2007 for drag racing. Obviously, this is a dangerous activity, but again it is one committed almost exclusively by the young. Yet the draconian penalties that were adopted for “street racing” are significantly higher than penalties on the books for much more serious driving misconduct. For example, street racing with a passenger in the motor vehicle – without any accident or other endangering behavior – carries a five-year prison sentence. However, an adult who drives drunk with a child 13 years or younger in the car faces a maximum one-year penalty! Further, a second offense of street racing within a five-year period – without a passenger, any accident or other endangering behavior – is a felony. Driving under the influence a second time with a BAC of between .08% and .15% or above carries a maximum one-year sentence.

To give another example, in 2001 the General Assembly made it a felony, carrying a three-year prison sentence, to knowingly and willfully assault a health care provider or emergency medical services personnel, even though most other assaults without serious bodily injury are classified as misdemeanors. In doing so, legislators ignored concerns from representatives of the mental health community, who pointed out that the people most likely to engage in such conduct are people suffering from some mental illness or otherwise in an emotionally disturbed state. Yet they face more serious punishment than others engaged in identical, if not more serious, assaultive behavior.

Table 6. Comparison of DUI and Street Racing Penalties

<table>
<thead>
<tr>
<th></th>
<th>Driving Under the Influence*</th>
<th>Street Racing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Offense</td>
<td>0-1 Year in prison</td>
<td>1 Year in prison</td>
</tr>
<tr>
<td></td>
<td>$100-$500 in fines</td>
<td>$500-$1,000 in fines</td>
</tr>
<tr>
<td>2nd Offense</td>
<td>10 days -1 Year in prison</td>
<td>2 Years in prison</td>
</tr>
<tr>
<td></td>
<td>$400-$1,000 in fines</td>
<td>$1,000 in fines</td>
</tr>
<tr>
<td>3rd Offense</td>
<td>1-5 Years in prison</td>
<td>5 Years in prison</td>
</tr>
<tr>
<td></td>
<td>$400-$5,000 in fines</td>
<td>$2,500 in fines</td>
</tr>
</tbody>
</table>

* Maximum sentence listed. Sentence can vary based on BAC level.
9. Sometimes the General Assembly makes crimes out of issues du jour, or of conduct that could be addressed in less drastic ways, but these laws will likely remain on the books for decades.

There are times when an issue may go away – if it even existed at all – but the crime remains on the books due to zealous overreactions from legislators. In 2014, for example, the General Assembly quickly passed a law making it a felony to engage in the crime of what was then being referred to as a “knockout assault.” The statute makes it a separate assault crime to cause or attempt to cause “another person to be rendered unconscious by a single punch, kick, or other singular striking motion to the head of such person for the purpose of bringing about the loss of consciousness.”74

The law was passed in response to national news media stories alleging that this “knockout game” was a new trend among urban youth. In fact, it turned out that this was largely a myth,75 but the law is unlikely to be repealed anytime soon.

Similarly, does anyone recall why it was deemed essential in 2006 for the General Assembly to pass a law making it a crime to remotely shoot an animal via the Internet?76

The table on the following page samples a handful of the laws enacted in recent years whose necessity seems doubtful at best: to name a few, they include making it a specific crime for an adult who enters a school bus without permission to refuse to leave;77 making it a crime, instead of a civil violation, to take shellfish from certain designated ponds by using scuba gear;78 and criminalizing the conducting of seminars on Oriental medicine in violation of regulations.79 All of these laws, and many others like them, will probably remain on the books for perpetuity, even if the crimes and issues fade into irrelevance, if they were ever relevant at all.
<table>
<thead>
<tr>
<th>Year</th>
<th>Statutory Citation</th>
<th>Crime</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>§31-22-11.7</td>
<td>Makes it a crime for an adult who enters a school bus without</td>
<td>1 year/$1,000 fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>permission to refuse to leave after being ordered to do so</td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>§5-62-10</td>
<td>Makes it a crime to falsify a certificate of authenticity or any</td>
<td>1 year/$1,000 fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>similar written instrument for a work of fine art</td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>§20-6-30</td>
<td>Makes it a crime to take shellfish from certain designated ponds by</td>
<td>30 days/$500 fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>using scuba gear</td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>§5-19.1-23</td>
<td>Makes it a crime to advertise a drug store without having a</td>
<td>1 year/$1,000 fine (for each day)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>pharmacist available during business hours</td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>§20-1-25</td>
<td>Makes it a crime to remotely shoot an animal over the Internet</td>
<td>90 days/$500 fine</td>
</tr>
<tr>
<td>2009</td>
<td>§11-44-13</td>
<td>Amends law barring the defacing of public monuments to also make it</td>
<td>1 year/$500 fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>a crime to willfully “cover or keep covered” a monument</td>
<td></td>
</tr>
<tr>
<td>2014</td>
<td>§11-41-33</td>
<td>Makes it a crime to steal farm products</td>
<td>If farm product $250 or more:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>5 years</td>
</tr>
<tr>
<td>2015</td>
<td>§5-37.2-19</td>
<td>Makes it a crime to conduct seminars on Oriental medicine in</td>
<td>1 year/$1,000 fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>violation of regulations</td>
<td></td>
</tr>
</tbody>
</table>
CONCLUSION and RECOMMENDATIONS

In 2015, in one fell swoop, California Governor Jerry Brown vetoed nine bills that arrived at his desk. His veto message was identical for every one of those bills, and was short and to the point:

“Each of these bills creates a new crime -- usually by finding a novel way to characterize and criminalize conduct that is already proscribed. This multiplication and particularization of criminal behavior creates increasing complexity without commensurate benefit.

“Over the last several decades, California’s criminal code has grown to more than 5,000 provisions covering every almost conceivable form of human misbehavior. During the same period, our jail and prison populations have exploded.

“Before we keep going down this road, I think we should pause and reflect how our system of criminal justice could be made more human, more just and more cost-effective.”

Rhode Island would benefit greatly from heeding this advice.

In the meantime, the ACLU of Rhode Island offers a number of recommendations for dealing with this significant criminal justice issue. Some are simple, some less so, but all are designed to ensure more rationality and fairness in a system that involves one of the most profound powers of the state – depriving its residents of their liberty:

1. CREATE A COMMISSION TO RECODIFY THE CRIMINAL LAWS.

To the best of our knowledge, it has been more than 40 years since the General Assembly engaged in a comprehensive review of the state’s criminal laws. One way to address many of this report’s findings en masse would be to establish a commission with the task of recodifying the state’s criminal laws. The time has come for such an effort in order to restore some rationality to the criminal sentencing statutory process. The commission should be given the goal of recodifying those laws, reducing arbitrary penalties for crimes in general and readjusting the sentences for similar crimes in particular, re-examining whether certain criminal offenses should instead be amended to contain only civil penalties, and eliminating unnecessarily duplicative offenses that allow for stacking of criminal charges.

At the very least, if only as an interim measure, the General Assembly should appoint a commission to repeal obsolete and unconstitutional criminal statutes from the books. The General Laws are filled with archaic and unconstitutional criminal laws. Occasionally, they even get wrongly enforced – at a cost to taxpayers. For a number of years, the Senate has passed legislation to create a commission with the goal of removing such statutes (as well as laws beyond the criminal context). Unfortunately, the bill has never passed the House. Just as the state is making a concerted effort to repeal unnecessary laws and regulations that impact business in the state, our criminal justice laws surely deserve a similar look.
2. REQUIRE PRISON IMPACT STATEMENTS WITH THE INTRODUCTION OF SENTENCING BILLS.

It is extremely poor and unjustifiable policy to pass criminal laws with potentially severe fiscal (and social) consequences while turning a blind eye to that impact. The General Assembly routinely subjects to strict scrutiny social services-related legislation that will impact the state’s finances. There is no reason for criminal sentencing legislation – which can add millions of dollars to the state budget – to get a free ride. A dozen or so states currently have laws or policies in place to address this issue through the requirement of “prison impact statements.”

In fact, the “justice reinvestment” package approved by the Rhode Island Senate in 2017 contained such a provision, but the House, regrettably, removed it before final passage. Rhode Island should join with other states that require the preparation of a fiscal impact statement before the introduction of any bill increasing prison sentences or creating new crimes. Legislators should not be able to continue to pass criminal sentencing laws without a transparent nod to the fiscal costs involved in doing so.

3. REQUIRE RACIAL IMPACT STATEMENTS.

The racial disparities in prison sentencing, in Rhode Island and across the country, are well established. In response to this clear impact, a few states, including Connecticut, have taken the idea of “prison impact statements” one step further by requiring “racial impact statements” when sentencing bills are considered. Rhode Island should adopt a similar measure.

4. RECLASSIFY FROM FELONIES TO MISDEMEANORS ANY CRIMES WITHOUT PRISON SENTENCES, OR WITH SENTENCES OF LESS THAN ONE YEAR.

Because a felony is defined as any crime that carries a penalty of more than a $1,000 fine or more than one year in prison, there are crimes on the books that are not considered serious enough to warrant imprisonment – or imprisonment for more than a year – but that still tag the offenders as felons due to the amount of the fine imposed. The 2017 justice reinvestment package sought to remedy this problem by redefining a felony as consisting of only those offenses that authorized more than a year in prison, but the House stripped that reform from the package. This revision should be passed.

5. STOP PASSING NEW Duplicative CRIMINAL LAWS AND ENHANCED PENALTIES FOR VARIOUS PROPERTY AND OTHER CRIMES, OR AT LEAST REQUIRE A COMPELLING JUSTIFICATION FOR THEIR PASSAGE.

As this report has noted, even as the General Assembly has taken steps to recognize the role of inflation in the dividing line between misdemeanors and felonies in the context of larceny, it continues to create exceptions for financial-related crimes that undermine that effort. The same is true for non-financial crimes. Passage of any bill that seeks to carve out enhanced penalties for a generic crime – such as larceny or assault – should require a written finding that special needs justify such a duplicative law or increased penalties and that its passage is likely to have a deterrent effect.
6. RE-EXAMINE AND REVISE STATUTES THAT DISQUALIFY, AUTOMATICALLY OR PRESUMPTIVELY, INDIVIDUALS WITH FELONY RECORDS FROM EMPLOYMENT OR PROFESSIONAL LICENSING.

The punishment facing ex-felons does not end once their sentence is completed. Instead, collateral consequences follow them wherever they go, deeply hindering their rehabilitation. One particularly insidious barrier are the dozens of state laws that either automatically or presumptively disqualify ex-offenders from a wide range of jobs or professional licenses. They should be reviewed and revised so that a past criminal record does not turn into a lifetime scarlet letter for potentially hundreds of jobs. At a minimum, the often-broad definition of what constitutes a “crime of violence” for disqualification purposes should be narrowed.

Other statutes disqualify people from licensing based on an open-ended “moral turpitude” standard. While the General Assembly, to its credit, has not passed a licensing law in years that contains this particular disqualification, the references to it that still exist, scattered throughout the General Laws, should be stricken.

7. CHANGE THE “GET TOUGH ON CRIME” CULTURE TO ONE THAT IS “SMART ON CRIME.”

Creating more and more offenses and responding to high-profile individual crimes with increased sentences are very unproductive ways to deal with crime, as the evidence is scant that increased sentences have any effect on the crime rate. Whether for fiscal, social, pragmatic or humanitarian reasons, the General Assembly should spend more time considering all the adverse consequences that have arisen from a “get tough on crime” approach, and recognize that the time has come for a different, smarter approach.

Our criminal justice system is broken in many ways. Taking steps to address the “statehouse-to-prison pipeline” is an essential component to fixing that system, promoting fairness, and reining in the deep-seated problems of overcriminalization and mass incarceration. The ACLU of Rhode Island is hopeful that this report will generate a discussion that promotes reform of this system in accordance with our recommendations.
ENDNOTES


6 https://www.coalitionforpublicsafety.org/


8 R.I.G.L. 42-26-13.3.


14 https://www.nacdl.org/overcrim/


17 See fn. 15.


21 Ibid., page 15.

General Assembly passed a new drug law containing some of the harshest penalties enacted in the 18 years

animal.

and $5,000.

14 (veterinarians).

background check laws often cite “felony drug offenses” as well. See, e.g., R.I.G.L. §23 "felony banking violations" as disqualifying of licensed health care facilities, and includes all "felony drug offenses." This statute is often referenced in other criminal record background check laws, and includes other non-violent crimes such as “felony larceny” and "felony banking violations” as disqualifying offenses. Even when this statute is not explicitly referenced, other background check laws often cite "felony drug offenses" as well. See, e.g., R.I.G.L. §23-1-52(c)(employees at adult day care programs).


An American Bar Association study of collateral consequences cites 291 Rhode Island laws or regulations that either allow or require disqualification based on a person’s felony record. https://niccc.csgjusticecenter.org/search/?jurisdiction=42

See R.I.G.L. §23-17-37, which lists “disqualifying [criminal record] information” for persons working at licensed health care facilities, and includes all "felony drug offenses." This statute is often referenced in other criminal record background check laws, and includes other non-violent crimes such as “felony larceny” and "felony banking violations” as disqualifying offenses. Even when this statute is not explicitly referenced, other background check laws often cite "felony drug offenses" as well. See, e.g., R.I.G.L. §23-1-52(c)(employees at adult day care programs).

See, e.g., R.I.G.L. §5-3-1-12 (public accountant license); R.I.G.L. §5-8.1-15 (land surveyors); and R.I.G.L. §5-25-14 (veterinarians).

See ACLU of Rhode Island testimony explaining the problem with use of this phrase here:


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See ACLU of Rhode Island testimony explaining the problem with use of this phrase here:


P.L. 2015, ch. 60, §1; P.L. 2015, ch. 64, §1.


Legislation addressing the “war on drugs” has not completely escaped escalation. In 2014, for example, the General Assembly passed a new drug law containing some of the harshest penalties enacted in the 18 years
studied: a 50 year/$500,000 sentence merely for possessing one ounce or more of a substance containing a detectable amount of synthetic drugs. P.L. 2014, ch. 81, §1; P.L. 2014, ch. 90, §1.

50 P.L. 2008, ch. 9, Article 7, §2.

62 The “justice reinvestment” package approved by the Senate included a requirement for prison impact statements, one of this report’s recommendations, but the House removed that provision before approving the package. http://webserver.rilin.state.ri.us/BillText/BillText17/SenateText17/S0009.pdf
70 R.I.G.L. §31-27-2(d)(5)(ii). Obviously, in noting examples like these, we are not recommending increasing the penalties for the lesser crime, but instead to consider lowering the penalty for the higher one. Unfortunately, and consistent with this report’s theme, however, it appears the General Assembly might think otherwise. See, e.g., http://webserver.rilin.state.ri.us/BillText/BillText17/SenateText17/S0539.pdf
72 R.I.G.L. §11-5-16. P.L. 2001, ch. 74; P.L. 2001, ch. 201. To be fair, over the decades, the General Assembly has carved out more than 20 special exceptions to the general assault statute to address particular types of assaults or victims, including “assault and battery in the collection of a loan,” “aggravated harassment of a deputy sheriff by an inmate,” “assault of school teachers, school officials or other school department employees,” and so on. See, e.g., R.I.G.L. §§11-5-6, 11-5-15, 11-5-7.
73 In a similar vein, in 2017, and again over objections from the mental health community, the General Assembly made the “hazardous accumulation of animals,” i.e., hoarding, a criminal offense, with the death of an animal in the owner’s possession becoming a felony with a five year prison sentence. P.L. 2017, ch. 439, §1; P.L. 2017, ch. 444, §1.
79 R.I.G.L. §5-37-2-19. P.L. 2015, ch. 140, §2; P.L. 2015, ch.150, §2. This offense was added to a section of the law that already criminalized the same conduct in the context of acupuncture.
81 See, e.g., Blakeslee v. St. Sauveur, ruling unconstitutional a 1923 statute barring the distribution of anonymous political literature, and awarding the plaintiff attorneys’ fees. http://riaclu.org/court-cases/case-details/blakeslee-v-st-sauveur/
82 http://webserver.rilin.state.ri.us/BillText/BillText17/SenateText17/S0281.pdf
83 http://webserver.rilin.state.ri.us/BillText/BillText17/SenateText17/S0009.pdf
84 See fn.10, supra.
85 http://webserver.rilin.state.ri.us/BillText/BillText17/SenateText17/S0011A.pdf