

10-20-2017

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Recommended Citation

Bill Rice, *A Reform Long Overdue: Raising Virginia's Felony Grand Larceny Threshold*, 21 RICH. PUB. INT. L. REV. 1 (2017).

Available at: <http://scholarship.richmond.edu/pilr/vol21/iss1/3>

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A REFORM LONG OVERDUE:
RAISING VIRGINIA'S FELONY GRAND LARCENY
THRESHOLD

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ABSTRACT

Virginia has one of the lowest felony grand larceny thresholds in the nation. This low threshold has not been adjusted with inflation since 1980 and, thus, results in a high number of felony convictions in the state today. This article examines the current debate surrounding Virginia's felony grand larceny threshold and presents a remedy that will reasonably manage the state's interests in preventing future larcenies while not unduly punishing citizens for committing minor crimes.

INTRODUCTION

From Hammurabi's code¹ to Islamic jurisprudence² to the modern American legal system,³ the precept of proportionality has been a component of legal systems across history. *Lex talionis*, more commonly presented as "an eye for an eye," has been a staple of Western legal systems.⁴ This principle states that the punishment for a crime should be proportional to the same degree as the original crime.⁵ In his famous work *On Crimes and Punishments*, Italian criminologist Cesare Beccaria argued, "it is necessary that the infamy inflicted by the laws should be the same" as the infamy of the crime being punished.⁶ This principle is readily found throughout U.S. constitutional law, such as the Eighth Amendment's recognition "that punishments grossly disproportionate to the severity of the offense are prohibited as cruel and unusual punishment" or its Excessive Fines Clause.⁷ Even the Due Process Clause's jurisprudence recognizes that punitive damages in civil cases must be reasonable and proportionate to the amount of harm done to the

¹ See generally Yale Law School, *The Code of Hammurabi*, THE AVALON PROJECT (L.W. King trans.) (2008), <http://avalon.law.yale.edu/ancient/hamframe.asp>.

² Hisham M. Ramadan, *Larceny Offenses in Islamic Law*, 2006 MICH. ST. L. REV. 1609, 1611.

³ Martin R. Gardner, *Felony and Misdemeanor*, in THE OXFORD COMPANION TO AMERICAN LAW 305 (Kermit L. Hall et. al. eds., 2002).

⁴ WESLEY CRAGG, THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE 14 (2003).

⁵ *Id.*

⁶ CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT at 83 (Albany, W.C. Little & Co. 1872). See also Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 769 (2010).

⁷ Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3104-05 (2015).

plaintiff.⁸ Thus, it is reasonable to expect proportionate sentencing throughout our legal system.

However, Virginia's current statutes on larceny contain, as this article argues, a staggeringly disproportional construction and punishment of what most would recognize as low-level nonviolent theft. Currently, felonious grand larceny is defined at § 18.2-95 of Virginia Code as committing simple larceny "not from the person of another of goods and chattels of the value of \$200 or more,"⁹ with anything less constituting petit larceny (a misdemeanor).¹⁰ Virginia has not altered this threshold since it was first established in 1980.¹¹ According to the Bureau of Labor Statistics, when accounting for inflation, \$200 in 1980 is tantamount to \$531.76 in 2008¹² and nearly \$600 in 2017.¹³ Virginia's felony grand larceny threshold remains tied with New Jersey for the lowest in the country.¹⁴ Out of all 50 states, 39 states retain felony larceny thresholds of \$500 or greater with the most common thresholds being \$500 and \$1,000.¹⁵ The punishments for grand larceny in Virginia include "imprisonment in a state correctional facility for not less than one nor more than twenty years or, in the discretion of the jury or court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than \$2,500, either or both."¹⁶

Virginia Code also includes a section on conspiracy to commit grand larceny that carries a penalty of imprisonment in a state correctional facility for not less than one year nor more than 20 years.¹⁷ This punishment is more severe than any other punishment for conspiracy to commit a non-capital felony in the Commonwealth.¹⁸ As the Virginia State Crime Commission elaborates:

Under the general conspiracy statute, the 10 years imprisonment, or a felony punishable by up to one year in jail if the conspired crime had a maximum punishment of less than five years. Therefore, under Virginia law, the potential

⁸ *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003). *See also* Jackson, *supra* note 7, at 3105.

⁹ VA. CODE ANN. § 18.2-95(ii) (2017).

¹⁰ *Id.* at § 18.2-96(2).

¹¹ VA. STATE CRIME COMM'N, GRAND LARCENY (2008), <http://vscc.virginia.gov/documents/grand%20larceny.pdf>.

¹² *Id.*

¹³ Jordy Yager, *Is Virginia's Larceny Threshold Just Right or Too Low?*, WVTF VIRGINIA PUBLIC RADIO (June 20, 2017), <http://wvtf.org/post/virginias-larceny-threshold-just-right-or-too-low#stream/0>.

¹⁴ Alanna Durkin Richer, *Virginia Is for Felonies? Petty Theft Law From 1980s Sticks*, ASSOCIATED PRESS (Mar. 18, 2017), <https://www.usnews.com/news/best-states/virginia/articles/2017-03-18/virginia-is-for-felonies-petty-theft-law-from-1980s-sticks>.

¹⁵ VA. STATE CRIME COMM'N, *supra* note 11.

¹⁶ VA. CODE ANN. § 18.2-95 (2017).

¹⁷ *Id.* at § 18.2-23.

¹⁸ VA. STATE CRIME COMM'N, *supra* note 11.

punishment for conspiracy to commit grand larceny is twice as great as the punishment for conspiracy to commit first degree murder.¹⁹

Yet one cannot look at the legal sentences of grand larceny or its related offenses alone to truly understand the complications of becoming a felon in the United States. For, although “we tend to assume that when someone has finished a criminal sentence, the government has finished punishing and controlling them,”²⁰ this is far from the reality, especially in the Commonwealth of Virginia. As criminologist William R. Kelly explains in *The Future of Crime and Punishment: Smart Policies for Reducing Crime and Saving Money*:

Substantial constraints are placed on ex-offenders, constraints that significantly limit where they work and live, as well as whether they are able to access community resources and assistance. [...] When offenders finish lengthy periods in prison or are discharged from probation, they typically encounter considerable roadblocks to accessing things like housing, health care, employment, education, and mental health and substance abuse treatment, among others. [...] Whether intentional or coincidental, we continue to punish offenders well after they have ‘paid their debt to society.’²¹

Specific to Virginia, felons are prohibited from voting, serving on juries, running for office, becoming a notary public, and carrying a firearm.²² The implications of this regressive threshold are expansive: an individual found guilty of stealing a cellphone, which averaged around \$560 in 2017,²³ would lose their right to vote until that right was restored by the governor. In one instance, one young man was found guilty of grand larceny after shoplifting a pair of eyeglasses worth \$230, according to the Associated Press.²⁴ The conviction not only led to the loss of his civil rights, but also to the loss of his job, which is a common situation for ex-felons who face limited opportunities for jobs, education, and housing both in Virginia and across the United States.²⁵ Virginia’s regressive felony grand larceny threshold also plays a substantial role in the Commonwealth’s “school-to-prison pipeline.” The commonwealth currently leads the nation in referring juveniles into the criminal justice system.²⁶ This statistic is supported by §

¹⁹ *Id.*

²⁰ WILLIAM R. KELLY, *THE FUTURE OF CRIME AND PUNISHMENT: SMART POLICIES FOR REDUCING CRIME AND SAVING MONEY* 43 (Rowman & Littlefield 2016).

²¹ *Id.*

²² LEVAR STONEY, SEC’Y OF THE COMMONWEALTH, RESTORATION OF RIGHTS (Aug. 22, 2016), <https://restore.virginia.gov/restoration-of-rights-process/>. See also VA. CONST. art. II, § 1.

²³ International Data Corporation, *Average selling price for smartphones worldwide in 2013 and 2017, by region (in U.S. dollars)*, STATISTA (2017), <http://www.statista.com/statistics/283334/global-average-selling-price-smartphones/>.

²⁴ See Richer, *supra* note 14.

²⁵ *Id.* See also KELLY, *supra* note 20.

²⁶ Susan Ferriss, *Virginia Tops Nation in Sending Students to Cops, Courts: Where Does Your State*

22.1-279.3:1(B) of the Virginia Code, which requires school officials to report juvenile felony offenses to law enforcement.²⁷ Thus, it does not come as a surprise that, besides the category of “All Other (except Traffic),” the offense of larceny is the leading category for juvenile arrests in Virginia.²⁸ In regard to shoplifting, certain data indicate that black and Latino men are overly suspected of shoplifting, which arguably contributes to a racial disparity component of the effects of this low, felony larceny threshold.²⁹ In regard to Virginia’s school-to-prison pipeline issue, minority students are much more likely to be referred to law enforcement than their white counterparts with black students being 3.6 times more likely to face suspension than white students.³⁰

Despite numerous bipartisan attempts to raise the Commonwealth’s felony larceny threshold—the most recent being failed Senate Bill 816³¹—these efforts have been consistently defeated usually at the urging of the retail industry lobby.³² So the question remains, with all the negative societal consequences, why retain such a low felony larceny threshold? In order to answer this question, we must examine our historical and current understanding of legal concepts such as larceny, grand and petit larceny,

Rank?, CTR. FOR PUB. INTEGRITY (Apr. 10, 2015, 5:00AM), <https://www.publicintegrity.org/2015/04/10/17089/virginia-tops-nation-sending-students-cops-courts-where-does-your-state-rank>.

²⁷ VA. CODE ANN. § 22.1-279.3:1(D) (2017).

²⁸ VA. UNIF. CRIME REPORTING PROGRAM, DEP’T OF STATE POLICE, CRIME IN VIRGINIA 67–68 (2016).

²⁹ RACHEL SHTEIR, *THE STEAL: A CULTURAL HISTORY OF SHOPLIFTING* 88–89 (Penguin Press 2011) (“The most overrepresented groups of shoplifters are young African American and Latino men. Among the first to document the inequity was JoAnn Ray, a professor emeritus in social work at Eastern Washington University. In 1984, after Ray compared court records with a thousand questionnaires she randomly distributed at ten different shopping centers in Spokane, she found “considerable differences may exist between people who shoplift and those few who get caught.” Shoplifters who answered Ray’s questionnaire were overwhelmingly young and white, whereas those she pulled from court data were very old or very young Hispanic and black men...Twenty-five years later, criminologists continue to argue that African Americans are overrepresented in store data because of profiling or ‘shopping while black.’ A pool of lawsuits brought against stores for ‘SWB’ over the past decade exposes the tenacity of this prejudice. In one case in New York in 2005, Macy’s paid the state attorney general’s office \$600,000 in sanctions after an investigation concluded that whereas the percentage of nonwhite shoppers in Macy’s, as in most stores in most states, hovers between 10 and 12 percent, 75 percent of people detained for shoplifting were ‘nonwhite.’”).

³⁰ JASON LANGBERG & ANGELA CIOLFI, *SUSPENDED PROGRESS* (Legal Aid Justice Center ed. 2016), <https://www.justice4all.org/suspension/>; Evie Bland & Alex Harwin, *Black Students More Likely to be Arrested at School*, EDUCATION WEEK (Jan. 24, 2017), <http://www.edweek.org/ew/articles/2017/01/25/black-students-more-likely-to-be-arrested.html> (“In Virginia, black students make up 39 percent of the enrollment in public schools with at least one arrest but 75 percent of school-based arrests.”).

³¹ See S.B. 816, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

³² Patrick Wilson, *Va. Senate Panel Advances Bill to Raise Felony Larceny Threshold to \$500*, RICHMOND TIMES-DISPATCH (Jan. 23, 2017), http://www.richmond.com/news/virginia/government-politics/va-senate-panel-advances-bill-to-raise-felony-larceny-threshold/article_68bf0bae-57b6-516d-bf7b-95c05b056bc4.html; Yager, *supra* note 13.

and felonies and misdemeanors. In turn, this article calls for an amendment to the felony larceny threshold in Virginia to protect civil rights of low level offenders and make the punishment for these crimes proportional to their harm to society.

I. HISTORY OF LARCENY LAW

The concept and law of larceny is deeply intertwined with other acts of thievery, such as embezzlement, robbery, burglary, or fraud. For example, in the earliest legal structures, such as ancient Babylonian Code of Hammurabi, theft was dealt with and punished in various ways.³³ The type of property stolen, the amount of property stolen, the means by which the property was stolen, the socio-economic status of the perpetrator, and the socio-economic status of the victim all factored into the process for determining guilt and an appropriate sentence.³⁴ In Mosaic law, theft was also punished according to various factors.³⁵ While the Ten Commandments prohibit stealing, subsequent passages in the Book of Exodus outline sentences and means for determining guilt depending on a variety of factors.³⁶ Founded on Mosaic law, Islamic law and jurisprudence also possess views on theft that vary depending upon the earlier listed factors.³⁷ In fact, the crime of larceny covers a diverse jurisprudence that varies between the different theological schools of thought (e.g., Hanafi vs. Hanbali).³⁸

As Kathleen Brickley explains in *The Jurisprudence of Larceny*, during these ancient times “personal property holdings were limited in form and number, but the rudimentary nature of the medieval chattel did not diminish its importance.”³⁹ Thus, those found guilty of theft were often sentenced severely and most likely facing execution.⁴⁰ Punishment was not the only central component of early theft law; compensation for the victim was also key. Whether it was in the form of the original property or equivalent monetary payment or services, restoration of the victim’s property was often a mandated component of ancient codes of law.⁴¹ In 12th and 13th century Eu-

³³ See Yale Law School, *supra* note 1.

³⁴ *Id.*

³⁵ See Exodus 22:1–4 (New King James).

³⁶ Compare Exodus 20:15 (New King James) (forbidding theft entirely), with Exodus 22:1–4 (New King James) (describing punishments for specific thefts).

³⁷ See Ramadan, *supra* note 2, at 1610–11.

³⁸ *Id.* at 1623–24.

³⁹ Kathleen F. Brickley, *The Jurisprudence of Larceny: An Historical Inquiry and Interest Analysis*, 33 VAND. L. REV. 1101, 1110 (1980).

⁴⁰ *Id.* at 1114–15.

⁴¹ *Id.* at 1104.

rope, larceny evolved into an offense not just against the property owner, but also against the Crown itself: that is, “stealing constituted a breach of the king’s peace.”⁴² Therefore, convicted thieves were often punished with forfeiture of goods and perpetual disinheritance of lands and other wealth.⁴³ By the 17th century, British common law recognized larceny as the “felonious taking and carrying away of the goods of another,” and included trespass in the taking.⁴⁴

Between 1688 and 1800, the British Parliament passed a series of laws drastically increasing the penalties for theft.⁴⁵ These increased punitive measures were a part of a larger trend in English law that involved the creation of a legal canon that historians now refer to as the “Bloody Code,” because Parliament expanded the practice of capital punishment and increased the severity of punishments for even the most petit of crimes.⁴⁶ For instance, under this legal system, shoplifting an item worth more than five shillings could be punishable by hanging.⁴⁷ However, these severe punishments lacked a deterrence effect, as Rachel Shteir explains in *The Steal: A Cultural History of Shoplifting*:

The Shoplifting Act did not stop shoplifting. Although the murder rate remained low, shoplifting flared, as did theft generally in London, where most historians agree that it comprised the majority of all crimes. Shoplifting was the third most prevalent offense among transported women.⁴⁸

According to Shteir, this was not the only failed attempt to stifle shoplifting through severe punishment, because even with increased executions and the creation of an official thief catcher, shoplifting continued to spike in London during this period.⁴⁹ Yet, as will be explored more in the next section, the punishments for these offenses began to evolve. For example, among these early legal statutes, many colonies distinguished between *grand* and *petit* larceny, with the former constituting stealing property worth a large sum of money and the latter constituting stealing property worth a less significant sum of money.⁵⁰ After the American Revolution, most states retained the basics of their colonial statutes, including the distinction of larceny from other types of theft and the division between grand

⁴² *Id.* at 1120.

⁴³ *Id.* at 1130.

⁴⁴ Brickley, *supra* note 39, at 1107.

⁴⁵ Shteir, *supra* note 29, at 18.

⁴⁶ *Id.*

⁴⁷ *Id.* at 18–19.

⁴⁸ *Id.* at 19.

⁴⁹ *Id.* at 22.

⁵⁰ See, e.g., Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIS. 326, 340 (1982).

and petit larceny.⁵¹ The Commonwealth of Virginia's statutes on grand and petit larceny have been on the books since the early 19th century with only small changes since 1849.⁵²

Beyond retaining British common law, Virginia added a few clarifications to its larceny laws through case law. In *Dunlavey v. Commonwealth*, the Virginia courts defined larceny as “the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently.”⁵³ Virginia case law recognizes another distinction between larcenies by means of theft, namely, larceny by stealth and larceny by trick.⁵⁴ Larceny by stealth “simply refers to the original version of the common law offense and occurs when one person intentionally misappropriates property from the possession of another without the prior possessor’s consent.”⁵⁵ Yet this conception of larceny did not cover instances of fraud or trickery, where the original owner of the property “consented” to give their property over to the thief based on false information or other dubious circumstances (e.g., where the “consenter” is a minor or an intellectually or developmentally disabled individual). Therefore, the concept of larceny by trick was eventually established, specifically after *The King v. Pear*.⁵⁶ Additionally, as American law evolved overall, certain states began to consolidate offenses related to the stealing of property under a single theft statute, but distinguished between violent theft crimes, like robbery or burglary, and nonviolent theft crimes, like larceny and embezzlement.⁵⁷ However, Virginia retained its statutory distinctions between varying types of theft.⁵⁸

As discussed, history shows us that grand larceny was thought of as an act of theft that involved what society viewed as large sums of money, while petit larceny reflected what the society viewed as small sums of money. This notion is not reflected in the Commonwealth's larceny statutes today, because \$200 is not a large sum of money in our society. Other laws adjust their monetary thresholds in accordance with inflation, including laws requiring political committees to report bundled contributions from lobbyists,⁵⁹ laws dictating when organizations that do business with the fed-

⁵¹ See, e.g., *Allen v. Commonwealth*, 2 Leigh 727 (Va. 1830).

⁵² John Wesley Bartram, *Pleading for Theft Consolidation in Virginia: Larceny, Embezzlement, False Pretenses and § 19.2-284*, 56 WASH. & LEE L. REV. 249 (1999).

⁵³ *Dunlavey v. Commonwealth*, 35 S.E.2d 763, 764 (Va. 1945).

⁵⁴ Bartram, *supra* note 52, at 260.

⁵⁵ *Id.*

⁵⁶ *Id.* at 261.

⁵⁷ *Id.* at 250.

⁵⁸ *Id.* at 251–52.

⁵⁹ 52 U.S.C. § 30104(i)(3)(A)-(B); 52 U.S.C. § 30116(c)(1)(A)-(B). See also CHRISTOPHER BERG, FED.

eral government must undergo audits,⁶⁰ laws setting exemption thresholds for franchise sales,⁶¹ or laws establishing federal estate and gift tax exemption thresholds.⁶² If public officials and large private companies experience legal benefits of increasing legal thresholds according to inflation, the same should apply to a confused youth caught stealing a cellphone or a developmentally disabled individual apprehended shoplifting a pair of "Beats by Dre" headphones.

II. HISTORY OF FELONY

Despite theft valued at \$200 to \$400 not fitting our current concept of grand larceny, it still constitutes a felony. For example, there was a time in early American history when both grand and petit larceny were considered felonies, but the development of American law expanded the concepts of felonies and lesser crimes, like misdemeanors.⁶³ Since the earliest times of British common law, a felony was understood as constituting the most serious of crimes.⁶⁴ British jurist William Blackstone described a felony as comprising "every species of crime which occasioned at common law the forfeiture of lands or goods," and "to which capital or other punishment may be superadded, according to the degree of guilt."⁶⁵ The crimes often classified as a felony under English common law included "homicide (eventually divided by statute into murder and manslaughter), mayhem, arson, rape, robbery, burglary, larceny, prison breach, and rescue of a felon."⁶⁶ As the Martin R. Gardner explains in *The Oxford Companion to American Law*:

ELECTION COMM'N, LOBBYIST BUNDLING DISCLOSURE THRESHOLD RAISED (Feb. 2015), <https://www.fec.gov/updates/lobbyist-bundling-disclosure-threshold-raised/>.

⁶⁰ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78,594 (Dec. 26, 2013) (to be codified at 2 C.F.R. pt. 200.501); Ken Tysiac, *Grant reform increases single-audit threshold, changes audit rules*, J. ACCT., (Dec. 20, 2013), <http://www.journalofaccountancy.com/news/2013/dec/20139321.html>.

⁶¹ Disclosure Requirements and Prohibitions Concerning Franchising, 81 Fed. Reg. 31,501 (May 19, 2016) (to be codified at 16 C.F.R. pt. 436); FED. TRADE COMM'N, FTC ADJUSTS MONETARY THRESHOLDS FOR THREE EXEMPTIONS IN FRANCHISE RULE (May 16, 2016), <https://www.ftc.gov/news-events/press-releases/2016/05/ftcadjusts-monetary-thresholds-three-exemptions-franchise-rule>.

⁶² INTERNAL REVENUE SERV., REV. PROC. 2016-55 (2017); Ashlea Ebeling, *IRS Announces 2017 Estate And Gift Tax Limits: The \$11 Million Tax Break*, FORBES MAG. (Oct. 25, 2016, 2:33PM), <https://www.forbes.com/sites/ashleaebeling/2016/10/25/irs-announces-2017-estate-and-gift-tax-limits-the-11-million-tax-break/#2574f37f3b70>.

⁶³ *Grand Larceny*, BLACK'S LAW DICTIONARY 1012 (10th ed. 2014); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 335 (3d ed. 1982).

⁶⁴ KELLY, *supra* note 20, at 13.

⁶⁵ 4 Sir William Blackstone, Of Felonies, Injurious to the King's Prerogative, in *Commentaries on the Laws of England* (1765-1769) 7 (Loang Int. 2017), <http://lonang.com/library/reference/blackstonecommentaries-law-england/bla-407/>.

⁶⁶ Gardner, *supra* note 3.

Felonies were defined as crimes the commission of which resulted in forfeiture of lands and goods in addition to imposition of the death penalty, except for mayhem, which was punished by mutilation [. . .] While the original list of common law felonies was short, Parliament eventually added a host of new felonies, so that by Blackstone's time in the eighteenth century, the list of felonies extended to the hundreds. All of these felonies were punishable by forfeiture of land and goods and, theoretically, by death.⁶⁷

This British understanding of felony carried over to into early American law.⁶⁸ Like its British progenitor, American law during the early years of settlement imposed the death penalty as punishment for a comprehensive list of offenses.⁶⁹ But American society and the law evolved away from the Crown in the time leading up to the Revolutionary War, especially in its views on proportional punishment. Seventh century reformers, like William Bradford, were followed by 18th century reformers, such as Thomas Jefferson and Benjamin Rush, who advocated for instituting more proportional sentences, developing laws based on science and reason, and embracing a view of law that moved away from mere retribution toward a focus on crime prevention, victim restoration, and offender reformation.⁷⁰ During this legal evolution, the law began to recognize differing levels of severity of certain crimes, as well as some common mitigating and aggravating factors.⁷¹ For example, murder crimes were distinguished based on varying degrees of the offense determined by using factors like premeditation, intent, and state-of-mind.⁷² Similarly, property crimes distinguished between varying types of offense, but also reduced the severity of punishment based on circumstances, such as the value of the property in question and the means by which it was stolen and/or damaged.⁷³

History shows us that felony offenses are meant to comprise those crimes society views as the most serious and severe. For instance, the latest edition of *Black's Law Dictionary* defines a felony as "a serious crime" and lists examples such as "burglary, arson, rape, and murder."⁷⁴ Thus, it is difficult to justify categorizing the nonviolent theft of an item worth \$250 as a felony along side murder, rape, robbery, or malicious and unlawful wounding.

⁶⁷ *Id.*

⁶⁸ Bradley Chapin, *Felony Law Reform in the Early Republic*, 113 Pa. Mag. of Hist. & Biography 163, 166 (1989) ("Though no comprehensive history of American law at the moment of independence has been written, extant work indicates that a very large part of the common and statutory felony law of England operated in the colonies at the at time. It was a savage law that punished with death a long list of crimes.").

⁶⁹ *Id.*

⁷⁰ *See id.* at 168–72.

⁷¹ *See id.* at 169.

⁷² *Id.*

⁷³ *See* Chapin, *supra* note 68, at 180.

⁷⁴ *Felony*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Further, as the law stands today, it is considered more serious than the misdemeanor crimes of simple assault,⁷⁵ driving while intoxicated,⁷⁶ sexual battery,⁷⁷ and stalking that knowingly places another in reasonable fear of death, criminal sexual assault, or bodily injury.⁷⁸ Despite its misclassification, those who argue for maintaining grand larceny as a felony argue that doing so increases the deterrent effect of the law, as the next section explains.

III. DETERRENCE

Opponents of raising Virginia's felony grand larceny threshold argue that the low threshold serves as an effective deterrent measure against theft and shoplifting.⁷⁹ Raising the threshold, they argue, would inevitably lead to an increase in thievery misdemeanors of items worth \$500 to \$1,000.⁸⁰ For example, the Virginia Retail Merchants Association, one of the most consistently vocal opponents of raising the commonwealth's larceny threshold, argues that raising the felony larceny threshold will lead to "death by a thousand cuts" to small businesses across Virginia as property crime and shoplifting will inevitably jump.⁸¹ The Association also refers to attempts to increase the felony larceny threshold as "making it easier to steal."⁸² Similar organizations across the country make the same arguments, and they advocate for states to not only maintain their current thresholds, but, if possible, lower them even more.⁸³

The deterrence argument has been around since the earliest of human legal codes.⁸⁴ As stated in *Key Concepts in Crime and Society*, "there is no

⁷⁵ VA. CODE ANN. § 18.2-57 (1950).

⁷⁶ *Id.* at § 18.2-270.

⁷⁷ *Id.* at § 18.2-67.4.

⁷⁸ *Id.* at § 18.2-60.3(A).

⁷⁹ DEP'T OF CRIMINAL JUSTICE SERV., 2015 BLUEPRINTS FOR CHANGE: CRIMINAL JUSTICE POLICY ISSUES IN VIRGINIA 2, 6–7 (2015); Margaret Matray, *Bill to raise felony theft threshold advances in state Senate committee*, VIRGINIAN-PILOT (Jan. 25, 2017), https://pilotonline.com/news/local/bill-to-raise-felony-theft-threshold-advances-in-state-senate/article_e59f765-6751-56da-900d-79f49a6f94cb.html; *Felony Threshold—\$200 Why?*, VA. RETAIL FED'N (Nov. 9, 2011), <http://www.retailmerchants.com/newsletter-retail-advocate/2011-11-09.htm>.

⁸⁰ DEP'T OF CRIMINAL JUSTICE SERV., *supra* note 79.

⁸¹ *Id.*; *Virginia Retail Merchants Association response to McAuliffe State of the Commonwealth*, AUGUSTA FREE PRESS (Jan. 11, 2017, 10:09 PM), <http://augustafreepress.com/virginia-retail-merchants-association-response-mcauliffe-state-commonwealth/>; *Virginia Retail Merchants Associations 2017 Position Page*, VA. RETAIL MERCH. ASS'N (Jan. 23, 2017), <http://www.virginiaretail.org/wp-content/uploads/2010/12/VRMA-Legislative-Agenda-2017-for-MemberPackets.pdf>.

⁸² VA. STATE CRIME COMM'N, *supra* note 11; AUGUSTA FREE PRESS, *supra* note 81; VA. RETAIL MERCH. ASS'N, *supra* note 81.

⁸³ SHTEIR, *supra* note 29, at 119–121.

⁸⁴ ROSS COOMBER ET AL., *KEY CONCEPTS IN CRIME AND SOCIETY* 160 (1st ed. 2015).

concept so pervasive in criminology,” because “it is implied in every theory and perspective about crime ever constructed.”⁸⁵ Deterrence theory, generally stated, is the idea that the more severe the punishment, the less likely individuals will be to engage in the crime. Deterrence is often divided between two types: *specific* and *general*. *Specific* deterrence pertains to “the effect of punishment on particular individual being punished, suggesting the punishment lowers the likelihood that the offender will reoffend.”⁸⁶ *General* deterrence pertains to “the threat of punishment that keeps all of the rest of us from engaging in crime in the first place.”⁸⁷ The efficacy of deterrence, both specific and general, derives from three main qualities: severity, swiftness, and certainty. That is, “other things being equal, legal punishment is more costly when it is more certain (more likely than not to be a consequence of crime), severe (greater in magnitude), and swift (the punishment arrives sooner rather than later after the offense).”⁸⁸ While many deterrence proponents focus on severity,⁸⁹ the other two elements are equally important, and certainty is arguably the most essential.⁹⁰ As the original intellectual proponent of deterrence theory, Cesare Beccaria, argued, “one of the greatest curbs on crimes is not the cruelty of punishments, but their infallibility.”⁹¹ Beccaria explained, “the certainty of a punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with hope of impunity; even the least evils, when they are certain, always terrify men’s minds.”⁹²

However, some criminologists argue that a lack of certainty and swiftness often leaves the intended deterrent effect of severe sentences moot.⁹³ For certainty, they argue, “the odds are heavily in the offender’s favor.”⁹⁴ Only about 40 percent of property crimes are even reported to the police, and of those reported, only one in five actually lead to arrest.⁹⁵ Higher certainty of a crime being reported also correlates to the offense’s severity, because more severe crimes are more likely to be reported.⁹⁶ As Kelly puts it, “overall, the odds of even coming in the front door of the justice system are

⁸⁵ *Id.*

⁸⁶ KELLY, *supra* note 20, at 51.

⁸⁷ *Id.*

⁸⁸ Paternoster, *supra* note 6, at 783.

⁸⁹ *See* KELLY, *supra* note 20, at 53.

⁹⁰ *See* Paternoster, *supra* note 6, at 783.

⁹¹ *Id.* at 769 (citing CESARE BECCARIA, ON CRIMES AND PUNISHMENT 58 (Henry Paolucci trans., MacMillan 1986)).

⁹² *Id.*

⁹³ *See* KELLY, *supra* note 20, at 54.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

relatively low, and many offenders probably know that.”⁹⁷ Swiftness (or celerity) in the criminal justice system fares no better. For example, due process guarantees and favors long, thorough processes over quick, decisive action.⁹⁸ “In the criminal justice system, not only are punishments uncertain, they are far in the future compared with the benefits of offending,” Raymond Paternoster writes.⁹⁹ In support of his assertion that deterrence “is naturally diminished” by the punishment’s “lack of temporal proximity to the offending decision,” Paternoster compares the criminal offender to a prospective dieter:

Think for a moment of the predicament of the dieter tempted by a delicious slice of chocolate cake. The pleasures are powerful and immediate, and the pain of added pounds is down the road, removed in time. The cake would be eaten unless this dieter can imagine in their mind an immediate cost—say the feeling of defeat at breaking her diet or shame at succumbing to the seduction. In order to offset the immediate pleasure of eating the chocolate cake, the tempted dieter would have to be able to perceive an immediate pain of breaking the diet.¹⁰⁰

In Paternoster’s view, one of the main weaknesses of deterrence is that the “pain” of legal sanctions is “too far removed in time” to outweigh the short-term “pleasure” derived from the crime.¹⁰¹ Still others argue that, for some offenders, the long-term benefits of committing an offense may outweigh the potential costs.¹⁰²

Notably, the data presented above refer to the objective evidence on the state of certainty and swiftness of punishment in our criminal justice system. However, what matters more to the efficacy of deterrence theory is not the objective reality, but rather the subjective perceptions of potential offenders.¹⁰³ That is, if the likelihood of getting caught for jaywalking is 90 percent, but most jaywalking offenders perceive the likelihood as 10 percent, then jaywalking would not be effectively deterred by the former objective fact. Likewise, evidence suggests that a disconnect exists between the objective consequences of criminal behaviors and the subjective perceptions of the consequences for criminal behaviors, and that disconnect is problem-

⁹⁷ *Id.*

⁹⁸ KELLY, *supra* note 20, at 54.

⁹⁹ Paternoster, *supra* note 6, at 821.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 822.

¹⁰² KELLY, *supra* note 20, at 55 (“Punishment likely does not outweigh the lack of opportunity and the barriers many offenders face. What kind of a threat is potential punishment to someone addicted to drugs? Or someone who realistically has no opportunity for legitimate work? Or someone who is unable to resist antisocial impulses because of a brain disorder?”).

¹⁰³ See Gary Kleck, Brion Sever, Spencer Li, & Mark Gertz, *The Missing Link in General Deterrence Research*, 43 CRIMINOLOGY 623, 642–643 (2005).

atic for many offenders.¹⁰⁴ For instance, criminologist Gary Kleck found that counties with actual high rates of certain, swift, and severe punishments for crime did not result in the individuals in those counties accurately perceiving the local criminal justice system as high in certainty, swiftness, and severity of punishment.¹⁰⁵ Further, the lack of correlations between perceived and actual punishment levels was consistently weak “when the full sample of respondents was stratified into those who had at least one prior arrest (the ‘experienced’) and those with no prior arrests.”¹⁰⁶ In another study, Lance Lochner found that “while most of the literature on criminal deterrence assumes that individuals know the true arrest rates and that an increase in those arrest rates will immediately deter crime,” the evidence indicates that the deterrence effect is highly correlated with individual perception instead of objective fact.¹⁰⁷ That is, “individuals who engage in crime while avoiding arrest tend to reduce their perceived probability of arrest; those who are arrested raise their perceived probability.”¹⁰⁸ Couple these studies with the statistic that most property crime goes unreported, and the theoretical basis for severe punishment as a deterrent to larceny further weakens.

Others argue that rational decision-making is not a component of most offender and potential offender behavior.¹⁰⁹ For example, in interviews with prison inmates, “offenders describe the decision-making process as one of just not thinking about the consequences, since their immediate needs prevail.”¹¹⁰ As one prisoner put it, “See, you’re not thinking about those things [arrest]...you’re thinking about that big pay check at the end of 30 to 45 minutes.”¹¹¹ Another prisoner noted, “at the time, you throw all your instincts out the window...cause you’re just thinking about money, and money only...that’s all that’s on your mind, because you want that money.”¹¹² Additionally, our analysis of deterrence must consider that “the public does not know very much about the maximum and minimum punishments provided by law for different offenses, nor is the public very aware of any changes to those punishments.”¹¹³ As David A. Anderson found in his 2002 study, a majority of active criminals either perceived no risk of apprehen-

¹⁰⁴ *See id.* at 624.

¹⁰⁵ *Id.* at 653.

¹⁰⁶ Paternoster, *supra* note 6, at 807 (citing Kleck et al., *supra* note 103, at 643 tbl. 2).

¹⁰⁷ *See* Lance Lochner, *Individual Perceptions of the Criminal Justice System* 31 (Nat’l Bureau of Econ. Research, Working Paper No. 9474, 2003), <http://www.nber.org/papers/w9474.pdf>.

¹⁰⁸ *Id.*

¹⁰⁹ *See* KELLY, *supra* note 20, at 55.

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Paternoster, *supra* note 6, at 805.

sion or were incognizant of the likely punishments for their crimes.¹¹⁴ In fact, 35 percent of imprisoned convicted felons said they never even considered the possible penalty of committing the crime that landed them in prison.¹¹⁵ Kelly adds, “when we consider that roughly 35-40 percent of offenders are mentally ill and many have substantial neurodevelopmental impairments or deficits, what sense does it make to presume a process of deliberation about cost and benefit, an assessment of reward and punishment?”¹¹⁶ In the case of shoplifting, a 2008 study found that “the vast majority of individuals with a lifetime of history of shoplifting...had a lifetime history of at least one psychiatric diagnosis.”¹¹⁷ Additionally, one must consider the objective or perceived costs of legal punishment and their relation of those costs to the offender’s perception of the benefits of criminal acts. In 1965, C. Ray Jeffery found that the efficacy of legal punishment was weak, not only because of low certainty and swiftness in legal sanction, but also because the immediate utility of crime was often much higher than the long-term costs of punishment from the offender’s perspective.¹¹⁸ As Jeffery explains, there “are no aversive stimuli in the environment at that moment.”¹¹⁹

But it is the data, or lack thereof, that are most damning to deterrence theory and the idea that severe punishments for a crime generally result in both general and specific prevention of that crime. For example, “we do not have very solid and credible empirical evidence that deterrence through the imposition of criminal sanctions works very well.”¹²⁰ Put another way, even though “there can be no doubt that sanctions attached to criminal laws act as deterrents in some general sense,” the reality is “there is no evidence that their impact is what deterrence theorists suggest ought to be the case.”¹²¹ During the 1990s and the early 2000s, the crime rate dropped at the same time as many “tough-on-crime” deterrence measures were being taken across the United States, which are often touted as clear evidence of deterrence theory’s effectiveness.¹²² However, a substantial body of evidence

¹¹⁴ David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging*, 4 J. AM. L. & ECON. REV. 295 (2002).

¹¹⁵ *Id.* at 305.

¹¹⁶ KELLY, *supra* note 20, at 56.

¹¹⁷ Carlos Blanco et al., *Prevalence and Correlates of Shoplifting in the United States: Results From the National Epidemiologic Survey on Alcohol and Related Conditions (NESARC)*, AM. J. PSYCHIATRY 905, 910 (2008).

¹¹⁸ See C.R. Jeffery, *Criminal Behavior and Learning Theory*, 56 J. CRIM. L. & CRIMINOLOGY 294, 299 (1965); Paternoster, *supra* note 6, at 773–774.

¹¹⁹ Jeffery, *supra* note 118, at 299; Paternoster, *supra* note 6, at 777.

¹²⁰ Paternoster, *supra* note 6, at 766.

¹²¹ CRAGG, *supra* note 4, at 44.

¹²² *The Curious Case of the Fall in Crime*, ECONOMIST (July 20, 2013), <https://www.economist.com/news/leaders/21582004-crime-plunging-rich-world-keep-it-down>

points to a more complicated and nuanced reality. First and foremost, crime plummeted across the globe in most developed nations, including in countries that took a much less heavy-handed approach to legal punishment.¹²³ For example, between 1993 and 2001, Canada's incarceration rate dropped about 10 percent, while their overall crime dropped at comparable numbers to that of the United States for the same period.¹²⁴ What is more, in 2003, researchers Anthony N. Doob and Cheryl Marie Webster reviewed 25 years of data and literature on the effects of punishment severity on crime deterrence and reduction and found that “a reasonable assessment of the research to date—with a particular focus on studies conducted in the past decade—is that sentence severity has no effect on the level of crime in society.”¹²⁵

Regarding recidivism, the empirical data on deterrence is no better. In 1987, the Canadian Sentencing Commission concluded that “such factors as the rate of recidivism, the relative success of early release from custody and the ‘undeterrability’ of certain groups of offenders have called into question the possibility of achieving with any significant degree of success the goal of individual deterrence,”¹²⁶ adding that “there is little or no evidence to sustain an empirically justified belief in the deterrent efficacy of legal sanctions.”¹²⁷ In 2011, the Pew Charitable Trusts found that “recidivism rates have been largely stable since the mid-1990s,” even with increased severity of punishments.¹²⁸ Three years later, the Bureau of Justice Statistics published a special report on recidivism of prisoners released in 30 states in 2005 (tracking them through 2010).¹²⁹ The report found that 67.8 percent of prisoners released in 2005 in the 30 states studied were arrested within three years of release, while 76.6 percent were arrested within five years of release.¹³⁰ These data paint a compelling picture: not only does sentence severity have little to no effect on general crime prevention, but it also appears to have little to no effect on preventing individual recidivism.

governments-should-focus-prevention-not.

¹²³ *Id.*

¹²⁴ Paternoster, *supra* note 6, at 797.

¹²⁵ Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003).

¹²⁶ J.R. OMER ARCHAMBAULT ET AL., SENTENCING REFORM: A CANADIAN APPROACH 135 (Canadian Government Publishing Centre: Supply and Services Canada 1986).

¹²⁷ *Id.* at 136.

¹²⁸ PEW CHARITABLE TRUSTS, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISON 12 (2011),

http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/staterecidivismrevolvingdooramericaprison20pdf.pdf.

¹²⁹ U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (Apr. 2014),

<https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

¹³⁰ *Id.* at 1.

Although these data may seem counterintuitive, the impotency of sentence severity in crime deterrence aligns with a logical understanding of what we know about general human behavior and criminal behavior. For example, people commit crimes for a number of sometimes intersecting reasons, ranging from substance abuse to mental illness to neurocognitive developments, deficits, and impairments to poverty and disadvantage education to employment to homelessness.¹³¹ These factors become even more potent for those with a criminal history, especially convicted felons or those leaving imprisonment:

While prison, and more rather than less prison, may send a deterrent message to would-be offenders that punishment is credible and severe, it may, in the long-term, make it much more difficult for those who have been imprisoned to desist when they leave the penitentiary. [. . .] Confronted by the fact that employment is substantially impaired because of their criminal record, public housing is restricted, and other penalties to citizenship exist, crime subsequent to imprisonment may be the more rational alternative for some past offenders.¹³²

This may be even more true for those engaged in larceny and shoplifting. As Shteir explains in *The Steal*, there are a number of motivations for shoplifters, most often motivations associated with impulse-control and deep-seated psychological issues.¹³³ She recounts the work of the University of Minnesota's Jon Grant on shoplifting, who believes the act to be a pathology.¹³⁴ She writes:

In 2001, after he used neuroimaging to compare kleptomaniacs' brain waves with those of cocaine addicts, he found that the addicts' brain activity more resembled each other than that of nonaddicts: 'Consistent with the hypo-frontality of addictions, cocaine dependent subjects have demonstrated compromised white matter microstructure in inferior frontal regions. Similar white matter microstructural findings have been demonstrated in individuals with kleptomania,' he wrote. But the point of the study was not just to demonstrate that shoplifting resembles substance addictions; it was, Grant said, to prove 'there's actually a patho-physiology as to why some people can't control [shoplifting].'¹³⁵

This aligns with Carlos Blanco's 2008 study on shoplifting and mental illness, which found that shoplifting was "a behavioral manifestation of im-

¹³¹ KELLY, *supra* note 20, at 68–84.

¹³² Paternoster, *supra* note 6, at 820.

¹³³ SHTEIR, *supra* note 29, at 7.

¹³⁴ *Id.* at 162.

¹³⁵ *Id.* (quoting Jon E. Grant, Judson A. Brewer, & Marc N. Potenza, *The Neurobiology of Substance and Behavioral Addictions*, CNS SPECTRUMS 924, 927 (Jan. 2007), https://www.researchgate.net/profile/Judson_Brewer/publication/6653491_The_neurobiology_of_substance_and_behavioral_addictions_CNS_Spectrums_1112_924-930/links/0912f50b39df9b3c17000000/The-neurobiology-of-substance-and-behavioral-addictions-CNS-Spectrums-1112-924-930.pdf).

paired impulse control and possibly [. . .] a symptom of a broader impaired control syndrome with an underlying common factor.”¹³⁶ Blanco's study also found that, as shoplifting was more common among those with higher education and income, it was unlikely that financial considerations were the main motivator for the act in most cases.¹³⁷ These data indicate that some types of motivating factors cannot be easily deterred simply through the threat of severe punishment.

One could argue that there is an unseen deterrent effect that we are not accounting for when it comes to the felony grand larceny threshold. Perhaps the current threshold in Virginia and elsewhere is deterring a specific population of individuals from stealing and shoplifting goods worth between \$200 and \$500 or between \$200 and \$1,000. Perhaps these individuals would begin stealing and shoplifting at these dollar amount ranges if the threshold were to be raised. This might be a convincing argument, but, again, the data tells us differently. In February 2016, Pew Charitable Trusts published a study covering 28 states that increased their felony larceny thresholds between 2001 and 2011.¹³⁸ Pew examined the crime trends in these states within that time period and compared them to states that did not increase their thresholds.¹³⁹ Pew found that “changes in state felony theft thresholds have not interrupted the long nationwide decline in property crime and larceny rates that began in the early 1990s.”¹⁴⁰ Specifically, Pew found that (a) increasing the threshold had no impact on overall property crime or larceny rates, (b) states that increased their theft thresholds had the same average decrease in crime as states that did not change their theft threshold laws, and (c) “the amount of a state’s felony threshold—whether it is \$500, \$1,000, \$2,000, or more—is not correlated with its property crime and larceny rates.”¹⁴¹ Opponents of raising Virginia’s felony larceny threshold often ignore this comprehensive study and instead point to recently reported statistics from California.¹⁴² In early 2016, some claimed that California’s Proposition 47 led to a substantial increase in property crime and shoplifting.¹⁴³ Proposition 47 passed in 2014 and increased the state’s

¹³⁶ Carlos Blanco et al., *supra* note 117, at 911.

¹³⁷ *Id.*

¹³⁸ PEW CHARITABLE TRUSTS, *THE EFFECTS OF CHANGING STATE THEFT PENALTIES* (2016), <http://www.pewtrusts.org/~media/assets/2017/02/the-effect-of-changing-state-theft-penalties.pdf>.

¹³⁹ *Id.* at 1.

¹⁴⁰ *Id.* at 4.

¹⁴¹ *Id.* at 1.

¹⁴² Yager, *supra* note 13.

¹⁴³ Don Thompson, *California Ballot Measure Blamed for Shoplifting Jump*, ASSOCIATED PRESS (May 14, 2016), <https://apnews.com/4b1790b2b12d4d119d1947d9a15695d2/california-ballot-measure-blamed-shoplifting-jump>.

felony larceny threshold from \$400 to \$950.¹⁴⁴ However, unlike the Pew study, which examined the trends in crime across numerous states for at least three year after the threshold was increased, the data from California related to Proposition 47 only incorporated statistics from a year or two after it went into effect.¹⁴⁵ This limited analysis led the Center on Juvenile and Criminal Justice to conclude in its own 2016 study on the effects of Proposition 47 that “it is too early to conclusively determine whether or not Prop. 47 has had an impact on crime.”¹⁴⁶ Proposition 47 is also not easily comparable to a bill that would simply raise Virginia’s felony larceny threshold because the former was much more extensive in its provisions than the latter. That is, Proposition 47 did much more than increase the felony larceny threshold: it was a comprehensive bill that (a) reclassified a number of non-violent crimes like shoplifting, grand theft, receiving stolen property, forgery, fraud, and writing bad checks valued at less than \$950 as a misdemeanor offense, (b) reclassified personal use of most illegal drugs as a misdemeanor, and (c) allowed for re-sentencing of currently incarcerated individuals serving time for any of the reclassified sentences.¹⁴⁷ Thus, in the case of Prop. 47, a number of other variables exist that could affect the crime rate that would not be present in a bill merely increasing Virginia’s felony larceny threshold from \$200 to \$500.

Opponents of raising the threshold in Virginia also point to statistics that demonstrate organized retail crime has dramatically increased in recent years.¹⁴⁸ However, this information derives from the 2016 National Retail Federation’s (NRF) annual survey on organized retail crime.¹⁴⁹ Unlike the Pew study that used law-enforcement data, this survey only polled 59 retailers across the United States.¹⁵⁰ The survey found that “100 percent of retailers surveyed believe they have been a victim of [organized retail crime] in the past 12 months.”¹⁵¹ The key word to this statement is “believe.” There was no attempt to compare or verify objectively these beliefs to actual

¹⁴⁴ *Id.*

¹⁴⁵ Andrew Beale, *Study Finds No Correlation Between Proposition 47 Releases and Crime Rates*, OAKLAND NORTH (Oct. 13, 2016, 9:03AM), <https://oaklandnorth.net/2016/10/13/study-finds-no-correlation-between-proposition-47-releases-and-crime-rates/>.

¹⁴⁶ *Id.*; Mike Males, *New Report! Is Proposition 47 to Blame for California’s 2015 Increase in Urban Crime?*, CTR. ON JUV. & CRIM. JUST. (Mar. 15, 2016), <http://www.cjcj.org/news/10205>.

¹⁴⁷ *California Proposition 47, Reduced Penalties for Some Crimes Initiative*, BALLOTEDIA (2014), [https://ballotpedia.org/California_Proposition_47_Reduced_Penalties_for_Some_Crimes_Initiative_\(2014\)](https://ballotpedia.org/California_Proposition_47_Reduced_Penalties_for_Some_Crimes_Initiative_(2014)). See also CAL. PENAL CODE § 1170.18 (Deering 2017).

¹⁴⁸ Augusta Free Press, *supra* note 81.

¹⁴⁹ National Retail Federation, *Organized Retail Crime Survey 1* (2016), https://nrf.com/system/tdf/Documents/retail%20library/2016-NRF-Organized-Retail-Crime-Survey_Report.pdf?file=1&title=2016%20Organized%20Retail%20Crime%20Survey.

¹⁵⁰ *Id.* at 4.

¹⁵¹ *Id.*

crime data from law enforcement.¹⁵² The survey also lacks a clear definition of “retailer,” and minces its findings with statements like “some large, multi-brand retailers reported figure collectively.”¹⁵³ So does this mean that other retailers reported separately? Additionally, the sample sizes for these surveys were 59, 67, and 77 for 2016, 2015, and 2013, respectively.¹⁵⁴ If these respondents are meant to reflect all individual retail stores across the country, then these samples populations are grossly, dramatically insufficient in size.¹⁵⁵ On the other hand, if these respondents are meant to reflect large, multi-brand retailers as collectively and consistently one respondent, then the sample sizes still remain too small, because the U.S. Census Bureau estimates the number of these firms at over three million.¹⁵⁶ Further, if these respondents are, as the survey itself seems to indicate, a mix of both large and small retailers, then these data cannot accurately describe the reality of retail population and its view of felony larceny thresholds.

But this does not stop the NRT from using these data to make definitive conclusions about increasing of felony larceny thresholds across the country. For example, the survey claims that “decriminalization efforts, reducing shoplifting to a misdemeanor in many cases, is only proving to increase [organized retail crime],” and then adds a series of unverified statements about an alleged rise in the rate and nature of organized retail crime:

Organized retail criminals have become bolder, riding a wave of decriminalization efforts that have reduced shoplifting to a misdemeanor in many states. Many seem to know their rights — and ride just below the line of a felony if caught.¹⁵⁷

The only attempt to substantiate these claims with evidence and statistics comes from a single anecdotal quote from a respondent supported by NRT’s conclusion that because their 59 respondents all believed they had been the victim of organized retail crime, then that must be the case.¹⁵⁸ Not only are the logical connections for this line of thought deeply flawed, but

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 11; NATIONAL RETAIL FEDERATION, ORGANIZED RETAIL CRIME SURVEY 11 (2015), <https://nrf.com/system/tdf/Images/Resources/NRF-2015-ORC-report.pdf?file=1&title=2015%20Organized%20Retail%20Crime%20Survey>; NATIONAL RETAIL FEDERATION, ORGANIZED RETAIL CRIME SURVEY 11 (2013), https://nrf.com/system/tdf/2013_ORC_Report_FINAL.pdf?file=1&title=2013%20Organized%20Retail%20Crime%20Survey.

¹⁵⁵ See David P. Schulz, *Top 100 Retailers Chart 2015*, NATIONAL RETAIL FEDERATION (July 1, 2015), <https://nrf.com/2015/top100-table> (according to NRT’s own data, the number of stores for the top 100 retailers alone in 2014 stands at close to 290,000).

¹⁵⁶ U.S. Dep’t of Commerce, U.S. Census Bureau: Advance Monthly Sales for Retail and Food Services, June 2017 (Release No. CB17-112).

¹⁵⁷ National Retail Federation, *supra* note 149, at 11.

¹⁵⁸ *Id.*

this conclusion also flies in the face of the limited reliable data we have on the subject. As Pew concluded, there is no evidence to suggest that increasing the felony larceny threshold has resulted in or is correlated with a jump in property crime or shoplifting.¹⁵⁹

IV. CONCLUSION: A WAY FORWARD

After examining these data, there is no evidence that a low felony larceny threshold operates as an effective deterrent mechanism against property crime. Nor is there any real indication that raising Virginia's felony larceny threshold from \$200 to \$500 or \$1,000 will somehow result in a rampant increase of property crime and shoplifting. Despite this overwhelming data, individuals, like retailers and the Virginia General Assembly, may still have concerns. However, the Virginia State Crime Commission presents a compromise.¹⁶⁰ The Commission suggests a way to raise the threshold, remove the mark of felony from low-level offenders, and still retain the potential or perceived deterrent effects of legal sanction.¹⁶¹ The commission suggests updating the Commonwealth's larceny statutes to distinguish between two types of petit larceny.¹⁶² Larceny up to \$200 would still constitute petit larceny, a misdemeanor with the same current penalties as today. However, larceny between \$200 and \$500 (or even \$1,000) would constitute "Aggravated Petit Larceny," a Class 1 misdemeanor that "would carry up to 24 months in jail, double the current penalty for a Class 1 misdemeanor."¹⁶³

This is a reasonable compromise that should be pursued. Meanwhile, Virginia's low felony larceny threshold will continue to generate harmful effects across that Commonwealth for ex-offenders and society at large. Reasonably increasing this threshold would be a step toward intelligent criminal justice reform by assisting the rehabilitation and restoration of offenders into productive members of society, saving the commonwealth substantial amounts of money in the long run, and advancing a more effective strategy for combatting crime.

¹⁵⁹ Pew Charitable Trusts, *supra* note 128, at 12.

¹⁶⁰ See Va. State Crime Comm'n, *supra* note 11.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

