

# Running Up The Score: How Virginia Rewards Prosecutors for Overcharging

Arlington County, Prosecutorial Reform, CA Difference Project · May 19, 2019

## SUMMARY:

- In Virginia, state funding for individual prosecutors's offices (i.e. "Commonwealth's Attorneys," or "C.A.'s" for short) is determined in large part by the frequency with which each office convicts defendants of felonies.
- This creates an obvious financial incentive for C.A.'s to overcharge cases as felonies, and a disincentive to offering leniency where warranted. Prosecutors overcharging felonies is thought to be the main cause of mass incarceration.
- In Virginia, the Commonwealth's Attorneys in Arlington/Falls Church and Fauquier are among the leaders in overcharging felonies, outpacing even Stafford County, and easily lapping other Northern Virginia jurisdictions.

It goes without saying that a criminal case should be dealt with solely on its own merits: the seriousness of the crime, the harm to the victim, and information about the defendant's life circumstances that weighs in favor of leniency, among other factors. As the criminal justice system has evolved from a system of trials to a system of pleas—[nearly 95% of convictions in state courts result from guilty pleas](#)—the duty to weigh those factors and determine the appropriate punishment falls mainly on prosecutors. It is therefore essential that prosecutors be completely free from influence external to the case, either on an individual or an institutional level.

Unfortunately, Virginia law makes that a complicated proposition. Here's why: Virginia rewards prosecutors for overcharging.

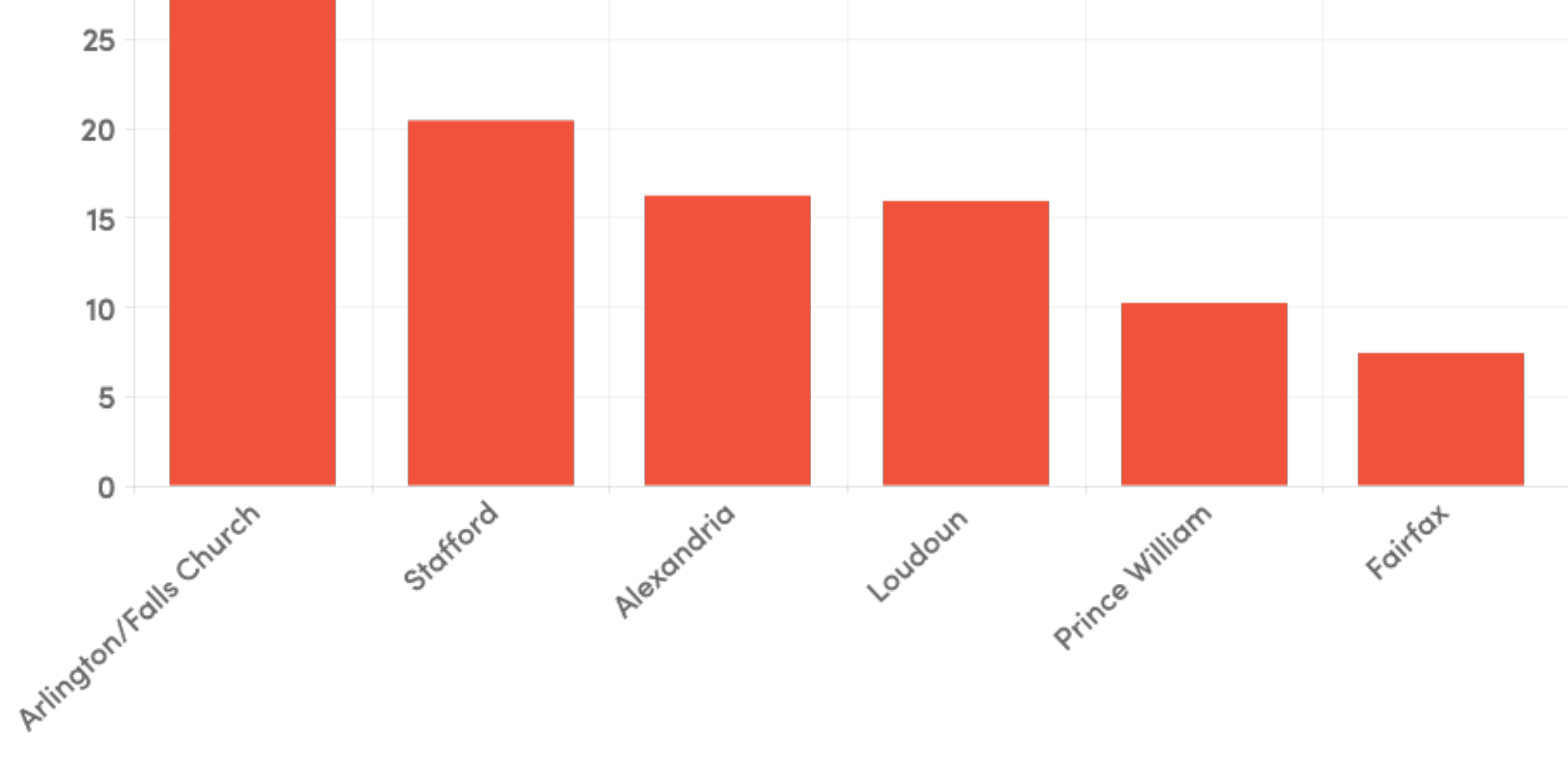
**“The more often a Commonwealth’s Attorney opts to treat a crime as a felony rather than a misdemeanor, the more money it is likely to receive from the state.”**

Commonwealth's Attorneys — or "C.A.'s" for short — are the elected chief prosecutors in every county, city and town in Virginia. As constitutional officers, each chief Commonwealth's Attorney is his or her own boss, answerable only to the electorate (and to a lesser extent the Attorney General). Each C.A. runs his or her own office separately from the others. Those offices are staffed with Assistant Commonwealth's Attorneys — the "line" prosecutors who represent the government in criminal cases in court. Each elected prosecutor is responsible for his or her own budget, as well. The money needed to operate each C.A.'s office and hire staff comes from the state government, supplemented in some places by local governments.

This is where we start to encounter a major problem—all of the Commonwealth's Attorneys in Virginia (there are over 100 of them) essentially compete for the same pool of money the state makes available for funding their offices. And they have a big say in how large a share of that money they receive. Their "say" comes in the form of how aggressively they elect to prosecute allegations of criminal conduct. To be specific, how big a share of the funds a C.A.'s office receives depends largely on how often that Office opts to pursue felony punishment.

That's right: the more often a Commonwealth's Attorney's Office opts to treat crimes as felonies rather than misdemeanors, the more money it is likely to receive from the state. Essentially, Virginia rewards prosecutors for being as aggressive and punitive as possible, and in doing so disincentivizes their use of discretion in favor of leniency.

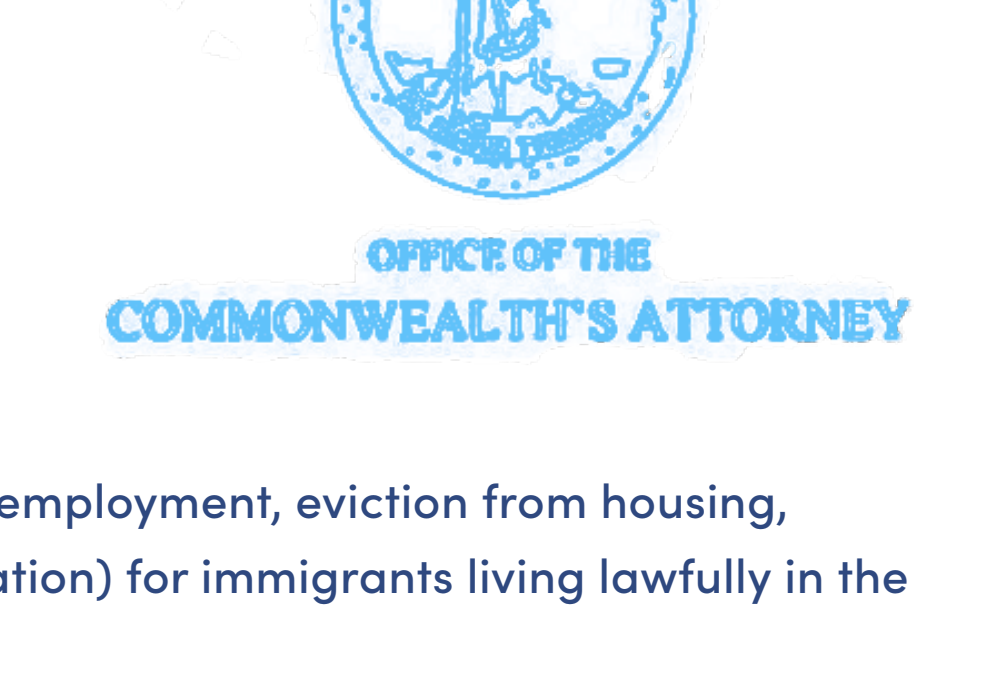
## Who's Overcharging Felonies?



*The above shows the felony rate: how frequently individual prosecutors' offices obtain felony convictions, comparing total felony convictions with "Group A" arrests for the last full year for which the data is available.*

Although not widely known, this information is not exactly a secret: in fact, it is published online every year by the [Virginia State Compensation Board](#), the body responsible for determining staffing needs of Commonwealth's Attorneys and other "constitutional officers." According to "staffing standards" found on the Compensation Board's website, funding for "each office [is] based only upon the duties and workload measures identified specifically in the Staffing Standards." The "workload measures" revolve almost entirely around how often the office pursues felony charges in the Circuit Court, and how frequently it obtains felony convictions and sentences: "Staffing standards are based, in part, on the average number of felony defendants for the three most recent calendar years, as reported by the Supreme Court of Virginia. . . . Staffing standards also are based, in part, on the average number of felony sentencing events for the three most recent fiscal years, as reported by the Virginia Criminal Sentencing Commission." The standards were "recommended by the Virginia Association of Commonwealth's Attorneys," which besides for being the C.A.'s professional organization, [is a powerful force and consistent opponent of criminal justice reform in the legislature.](#)

In order to understand the problem with incentivizing felony prosecutions, perhaps we should explain what felonies are and why they're so harmful. In Virginia, crimes come in two varieties, felonies and misdemeanors. Felonies are more serious than misdemeanors—they can be punished by more than a year in prison (and up to life in prison, or even death), whereas misdemeanors can only be punished with fines or jail sentences less than one year in length. They're also different in that felony convictions have profound effects on a person's civil rights, including the rights to vote, serve on a jury and possess firearms, and they entail many other damaging collateral consequences: loss of employment, eviction from housing, termination of public benefits, and adverse consequences (e.g. deportation) for immigrants living lawfully in the United States, among others.



Do prosecutors have discretion over whether to treat criminal cases as felonies rather than misdemeanors (or dismissing them)? Absolutely. In fact, that is one of the primary roles of a prosecutor: to evaluate whether allegations of criminal conduct have merit and if so, how to resolve them. Prosecutors are expected to decline felony prosecution when a defendant is deserving of leniency, or when a law seems too harsh given the facts, or the values of the community. Prosecutors can even elect not to prosecute certain crimes at all: for example, consensual same-sex intercourse between adults remained a crime in Virginia until the early-2000s, and cohabitation was a crime until 2013. Adultery is still prohibited in the Virginia Code as a class 4 misdemeanor (Va. Code § 18.2-365). Until 2017, Virginia allowed the theft of goods worth \$200 to be treated as a felony punishable by up to 20 years in prison. Virginia continues to punish the possession of marijuana extracts—the same substance found in almost all "edibles"—as a felony (Va. Code § 18.2-247(D)).

**“Do prosecutors have discretion to dismiss felonies or reduce them to misdemeanors? Absolutely. In fact, that is one of the primary roles of a prosecutor: to evaluate whether allegations of criminal conduct have merit and if so, how to resolve them.”**

Just because those laws were or are on the books hasn't obligated Commonwealth's Attorneys to enforce them exactly as written. In fact, most prosecutors haven't, for all the reasons cited above: defendants were deserving of leniency, the law was considered arcane and out-of-step with contemporary values, or it was simply too harsh.

One would hope that chief Commonwealth's Attorneys uniformly ignore the incentive to overcharge. Unfortunately, it isn't completely clear from the data that they do.

Relative to local crime rates, the likelihood that prosecutors will pursue felony punishment and the rate at which defendants are convicted of felonies varies widely by jurisdiction\*. It should be noted that the vast majority of these convictions were the result of plea bargains, the terms of which were dictated by the prosecutor, so these conviction rates are a fair reflection of prosecutorial practices and how aggressive each Commonwealth's Attorney is in the pursuit of felony punishment. Below is the percentage of Group A arrests resulting in felony convictions for the most recent full year for which data is available:

- Arlington/Falls Church: 28.9%**
- Albemarle County: 21.9%**
- Chesterfield County: 21.3%**
- Stafford County: 20.5%**
- Portsmouth: 20.4%**
- Henrico County: 20.1%**
- Virginia Beach: 19.7%**
- City of Charlottesville: 17.8%**
- City of Alexandria: 16.3%**
- Loudoun County: 16.0%\*\***
- Prince William County./Manassas: 10.3%**
- Fairfax County/City: 7.5%**

This is precisely [what critics are referring to when they mention the sky-high felony conviction rate in Arlington County and the City of Falls Church](#). Arlington County is almost four times as likely as Fairfax\*\*\* to punish an offense as a felony, almost three times as likely as Prince William County, and almost twice as likely as the City of Alexandria. In fact, one has to travel to Fauquier — well-known for its relentless pursuit of harsh punishment — to find a felony rate (29.1%) on par with Arlington's.

Whether overcharging is done with staffing levels and funding in mind, or whether it's because a prosecutor believes in being as tough on crime as possible, the effects are the same: taxpayer money is wasted on an outmoded, ineffectual approach to prosecution, and fuel is added to the mass incarceration machine.

[As we've discussed elsewhere](#), there is a growing consensus that [mass incarceration is the result of prosecutors declining to use their discretion in favor of leniency, and instead reflexively prosecuting criminal cases to the fullest possible extent](#). Prosecutors have so much more power than they did 30 or 40 years ago; [in many instances they can virtually dictate the outcome of a case](#).

But the mere granting of power to a prosecutor isn't a mandate to exploit it. In fact, just the opposite is true: a prosecutor's constitutional duty "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78 (1935). If prosecutors are to remain the most powerful individuals in any local system of justice—and there's nothing to suggest they aren't—we need prosecutors who are as committed to justice as fairness and rehabilitation as they are to justice as retribution and punishment.

## FOOTNOTES:

[Link to permanent page for this article.](#)

\*In order to determine conviction rates, we needed to know the total number of felony convictions as well as a reliable measure of the crime rate for each jurisdiction. Fortunately, each Commonwealth's Attorney's Office self-reports their own felony conviction totals to the SCB. [We used the most recent Commonwealth's Attorney Workload Data \(2017\)](#) available on the State Compensation Board website. We verified those totals using data on felony convictions from the Virginia Criminal Sentencing Commission. As for the crime rate, [the Virginia State Police track crime rates and release data every year, broken down by City, County and Town](#). For these purposes we used arrest totals for what are known as "Group A" offenses; "serious offenses" that are the most likely to be punished as felonies.

By dividing the number of felony convictions by the number of Group A arrests, we were able to determine the felony conviction rate in each jurisdiction, or how likely it is that each Commonwealth's Attorney will insist on felony punishment, rather than using their discretion to offer leniency (e.g. by reducing or dismissing charges).

\*\* The Loudoun County felony conviction rate omits Group A arrests for the City of Leesburg. It is estimated that if those arrests were included, the conviction rate in Loudoun County would be closer to 14%. Similarly, the Fairfax County conviction rate omits Group A arrests from Herndon and Vienna, but if included they would only marginally affect the felony conviction rate (7.1% rather than 7.5%).

\*\*\* Although the felony conviction rate for Group A violent offenses is higher for all jurisdictions, Fairfax County shows the greatest disparity, confirming anecdotal reports that aggressive felony prosecution is mostly limited to cases involving allegations of violence, drug trafficking, etc.

*The foregoing is based on statistics calculated using the methods described above, in reliance on the source materials cited. If you believe we have made errors in our calculations or descriptions of the law and regulations, please contact us immediately at [cadifference@cadifference.org](mailto:cadifference@cadifference.org) so we can make any necessary changes.*

