

The JFA Institute
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Conducting Justice and Corrections Research for Effective Policy Making

**Exploring the Diminishing Effects of More Incarceration:
Virginia's Experiment in Sentencing Reform**

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Abstract

In our last report, we highlighted the “diminishing returns” of further increasing prison populations and provided suggestions on how a state can address this problem through risk assessment. In this report we examine the experience of Virginia, which first attempted to significantly expand the use of imprisonment and is now seeking options to reduce the size and costs of that rapidly expanding system with no relief in sight.

The Commonwealth was one of the first states to adopt voluntary sentencing guidelines, and later, to abolish parole and institute a rigid truth-in-sentencing (85%) sentencing structure. At the same time it has attempted to divert non-violent offenders from prison by developing and using risk assessment to assist judges in identifying low-risk offenders. These divergent sentencing goals (longer terms for persons convicted of violent crimes and alternative sanctions for those convicted of property and drug crimes) are still having the net result of an expanding and expensive prison system.

One possible solution for Virginia and other states is to reduce the incarceration rate of persons failing probation and parole supervision. It is currently estimated that as many as two of every three persons admitted to prison in the United States are incarcerated because they have failed either probation or parole supervision. A large proportion of these parole and probation revocations are situations where the person has failed the conditions of supervision (a positive drug test, absconding from supervision, failure to maintain employment, failure to remain in drug treatment). Any efforts that would reduce these rates of parole and probation revocation would have a substantial impact on the size of the prison population, as well as enhance public safety.

Two important tools which states should use before implementing any major shift in correctional policy -- risk assessment and population simulation models -- are highlighted in this report. Virginia has a long tradition of applying such research methods to develop a sentencing system with a degree of rationality not often seen in many states.

The report also presents a forecast developed by *The JFA Institute* researchers of the impact on the projected growth of the Virginia prison population if the technical violator risk assessment instrument was adopted. As such, it provides some practical examples of how research can be used to better understand the impact of sentencing practices on a state’s correctional system, as well as the best way to reduce disparity in the sentencing and revocation decisions, and, ultimately, reduce the number of probation revocations being returned to prison.

Finally, we note that prior to the sentencing reforms initiated in 1995, the Commonwealth already enjoyed a crime rate that was below the national average and still declining. Since 1995, the crime rate has continued to decline, but so too has the crime rate in other states whether they increased or reduced their prison populations. As has been suggested by other scholars, whatever the contribution of Virginia’s sentencing reforms to public safety, they seem to have run their course. Nevertheless, there is no

doubt that in terms of punishment and retribution, violent offenders in Virginia are being punished more severely.

Regardless of how one evaluates the overall benefit of the state's sentencing reforms, the process that Virginia has undertaken to assess sentencing practices and the possible impact of reforms serves as a model for other states. In this case, research and the adoption of a risk-assessment policy to identify certain nonviolent offenders for diversion from prison have contributed to the moderation in the prison population growth.

Virginia's methodical approach to managing sentencing and risk is backed by key policy elements that states need to consider if they are to successfully support a similar policy. These elements include the availability of data to support analyses, a well respected independent professional research staff, opening the doors to outside validation of the research work, a culture of decision-makers respecting research, and legislative support of long-term research and policy development.

The History of Sentencing Reform in Virginia

Over the past two decades, the Commonwealth of Virginia has implemented a number of major reforms that have increased its use of incarceration and altered its sentencing structure. It was one of the first states to implement sentencing guidelines, abolish parole and later adopt a rigid truth-in-sentencing policy. As will be shown in this report, these reforms have been guided in part by the adoption of voluntary sentencing guidelines supported by the judiciary, and a long-term research agenda directed at policy development. While some may differ over the desirability of these reforms, the state's ability to assess sentencing trends and the impact of proposed sentencing reforms is instructive for other states considering such reforms. As summarized by the National Center for State Courts in 1999:

“Sentencing reform did not just happen in Virginia. Reform occurred through a ten to twelve year process that included all three branches of government and was supported by periodic analyses and evaluations. Regardless of one’s philosophical belief about the purpose and goals of sentencing, the process worked in that it achieved a significant measure of predictability in sentencing, reduced disparity in large measure, and, responding to public demand, increased prison time for violent and repeat offenders.”¹

The Early Sentencing Guideline Reforms

Like most states, the Commonwealth of Virginia had traditionally used an indeterminate sentencing structure where both the courts and the parole board enjoyed broad discretion in who was sent to prison and how long they remained. In response to a growing concern at both the national and state level over unchecked disparity in sentencing decision-making, the Governor’s Task Force on Sentencing recommended in 1983 the adoption of sentencing guidelines. This recommendation was not adopted by the judiciary, however, due to suspicions that the studies were not statistically rigorous enough to justify such a shift in sentencing policy. Instead, a number of initiatives were funded that would permit a more complete analysis of sentencing, with a special emphasis on improving the quality of pre-sentence investigation (PSI) reports.²

In 1986, a study of judicial sentencing practices was conducted under the auspices of the Virginia Supreme Court that used the more comprehensive PSI database. The study confirmed that sentencing disparity did in fact exist. Based on the new evidence, the judiciary decided to implement voluntary sentencing guidelines.³ These guidelines were developed between 1987 and 1988, and included a pilot program that was conducted among judges in six of the 31 judicial circuits to test the utilization and support for the guidelines. After examining the results of the pilot, the new guidelines were finally adopted statewide in 1991. A follow-up analysis found that by 1993, the courts were complying with the guidelines in 76% of the sentencing decisions.⁴

A Move to Abolish Discretionary Parole and Adopt Truth in Sentencing

In 1994, newly elected Virginia Governor George Allen created the Commission on Parole Abolition and Sentencing Reform and charged them with developing a plan to abolish parole and adopt “truth-in-sentencing” guidelines. This was one of the earliest and most visible national efforts to develop such a policy. The Virginia Assembly was also studying the issue, and after a series of negotiations between executive and legislative groups adopted a reform package. It included policies to abolish discretionary parole release, curtail good time, establish an 85% threshold of sentence time that must be served, increase time served for violent offenders, and required a period of post-release supervision. The sentencing guidelines remained voluntary. Equally important was the creation of the Virginia Criminal Sentencing Commission (VCSC) to administer and redesign the guidelines under the new truth-in-sentencing reform.⁵

The primary goal of the new guidelines was to retain current periods of time being served for nonviolent offenders while substantially increasing time served for violent offenders. As with the early guidelines, the VCSC was able to study the relationship between judge-imposed sentences and time served by offense types.⁶ This was used to design the guidelines for nonviolent offenders and to design the “normative enhancements” for violent offenders required by law (enhancement of up to six times their actual time served). The VCSC also studied the relationship between offender characteristics and recidivism, and developed forecasting models to estimate the impact of the new law and to plan for prison capacity.⁷

Based on these efforts, the truth-in-sentencing reforms made effective in Virginia in 1995 abolished parole and required that offenders sentenced to prison serve at least 85% of their sentences. The law also directed the VCSC to implement policies to divert 25% of prison-bound offenders to alternative sanctions.

The Merits and Limitations of Risk Assessment

To put in perspective Virginia’s efforts to apply risk assessment to sentencing decisions, it must be understood what is meant by risk assessment, how such instruments are developed and their inherent limitations.

Criminal justice officials make risk assessments every time they make a decision to grant pretrial release, to sentence an offender to probation or release them on parole. In making these decisions, criminal justice officials must assess the risk of an offender committing another crime or engaging in some other harmful conduct to society.

It has been shown that these decisions can be improved through a properly developed risk-assessment instrument. As the same time, the integrity of such decisions can also be compromised if such instruments are improperly designed, implemented or are used for purposes that they were not intended for.

In general terms, risk instruments include a list of factors “scored” based on some statistical weight that correlates with the risk behavior. These risk scores are derived from empirical research correlating individual factors to the propensity of an individual to engage in the risk behaviors. Most risk-assessment instruments include age as a risk factor (the younger the offender, the higher the risk of recidivism) and elements related to their prior criminal history, under the assumption that the more severe the criminal history, the higher the likelihood of recidivism.

The design of a risk-assessment instrument and the validation process typically involves the following steps:

- Identify a group to be studied (i.e. offenders considered for parole, revocation, mental health community corrections programs, etc.).
- Select a sample of individuals already subjected to the decision, usually two or three years in the past.
- Extract the records of the individuals in the sample to code information that could relate to the risk (i.e. demographic information, criminal history, offense type, institutional behavior, etc.)
- Collect follow-up outcome information (i.e. re-arrests, recidivism, program failure).
- Use statistical analyses to identify the factors that correlate to the outcome, assigning them statistical weights and dividing the populations by risk groups based on these factors.
- Design the risk-assessment instrument based on the results.

Once the instrument is developed and adopted for decision-making, its use is monitored. Over time, a database develops that includes the record of each individual, their risk-assessment score and the decision made. This information is used to do longitudinal follow-up studies that validate the instrument. For example, individuals who were classified by the instrument in the “high risk” group should, in fact, be the most likely to engage in the behavior at risk. Validation also examines how decision-makers have used the instrument to guide their clinical decisions. They should be acting based on the statistical distinctions built into the instrument. For example, they should be more likely to revoke prison offenders in a high-risk group than offenders in a low-risk group.

While risk-assessment instruments can improve decision-making by supplementing clinical decisions, there are limits to their use since it is impossible to predict the behavior of an individual within the risk groups. This is known as the false positive problem, where persons belonging to a high-risk class were expected to recidivate but did not. A false negative is a person who belonged to a low-risk class and did recidivate. More importantly, there are several legal scholars who believe that

sentencing decisions should not be based on what the court thinks a person will do in the future but only on what he or she has done. This is known as the “just deserts” model of sentencing. Virginia is unique in that it explicitly uses measures of risk to influence the courts’ decision to either divert an individual from prison or to set their prison term.

There are also limits to the reliability of risk-assessment instruments due to data quality issues, and the ability of staff to measure different risk behaviors and consistently make assessments.⁸ Therefore, “risk assessment instruments should allow for modification and the addition of supplemental information that is not incorporated into the actual scoring system.”⁹

A state interested in adopting a risk assessment instrument can rely on an “off-the-shelf” instrument that has been used in another jurisdiction for an apparently similar population. However, such a course could prove problematic since the jurisdiction would not know if the instrument is both reliable and valid for its population. A community revocation risk-assessment instrument from one jurisdiction may not be valid in another if the characteristics of the population eligible for revocation are not similar. The jurisdiction may not be able to easily structure the instrument to fit the particular decision-making style of their officials or to take advantage of the jurisdiction’s particular program options (program options may reduce certain risks for similar populations in different jurisdictions). Reliability is also an issue of concern, as each jurisdiction should structure procedures to guarantee that the instrument yields the same score for individuals with similar characteristics. Faulty training of personnel, or weak procedures and monitoring mechanisms, may reduce the reliability of a risk-assessment instrument.

Ideally, a jurisdiction will commission or develop its own risk assessment. Virginia has done exactly this and followed a methodical process to test, validate, modify and integrate risk assessment into sentencing policy. In doing so, Virginia provides an interesting model for other jurisdictions trying to manage their growth in prison populations while maintaining public safety and tough punishment.

The Use of Risk Assessment in Virginia’s Sentencing Guidelines

One of the more controversial aspects of the Virginia guidelines is the use of risk assessment as part of the formal sentencing guidelines. Most sentencing guideline systems only formally consider two factors – the current offense and prior criminal record. The Virginia guidelines explicitly permit an assessment of the likelihood of continued involvement in criminal activities to help identify those offenders who should be diverted from prison under the new guidelines as well as determining the length of incarceration for those sentenced to prison.

The *New York Times Magazine* quoted those who opposed this policy as saying that it does not reflect a “just deserts” system: It considers age and sex, which are “immutable characteristics” that influence risk, and therefore penalizes offenders differently for the same crimes for reasons that have nothing to do with moral culpability.

¹⁰ Virginia claims that the discretionary use of the risk assessment allows judges to appropriately make decisions considering all factors involved.

A specific risk-assessment instrument was developed by the VCSC to assist the courts in identifying the best candidates for diversion among nonviolent felony offenders. The goal was to divert from prison 25% of the eligible offenders. Decisions about diversion were “to be guided by the score obtained from a risk-assessment instrument, prepared at the time of the pre-sentence investigation report for use by the sentencing judge. Nonviolent offenders were defined as those committing fraud, larceny and drug offenders. Offenders with any convictions for violent felonies and offenders who sell an ounce or more of cocaine are excluded from risk assessment considerations.”¹¹

Virginia's policy was designed to divert enough offenders to reduce the potential growth impact on the prison population created by the new truth-in-sentencing policy.

“At the time sentencing reforms were being debated, policymakers were concerned about the rising prison population and that a significant share of the state budget was being spent on corrections.”¹²

The use of the instrument began in pilot sites in 1997. Validation studies were conducted between 1998 and 2001, and in July 2002 the instrument was implemented statewide.¹³

In 1999, the Virginia Assembly expanded the use of risk assessments, directing the VCSC develop a sex offender instrument. The goal was to identify the group of offenders with the highest risk for committing a new offense upon release, and present this information to the judges at sentencing.

In this case, the risk assessment was not for identifying potential diversion cases but to identify high-risk cases that merited longer sentences. Judges were expected to consider sentencing above the midpoint sentence recommended by the guidelines if the offenders were in the high-risk group. The recommendations are discretionary and judges have used the higher sentence range in 12% to 21% of cases, depending on the risk level, with those at the highest risk level more likely to receive an extended sentence. This instrument was implemented as part of the statewide guidelines in July 2001.¹⁴

The Impact of Guidelines and Risk Assessment on Prison Growth

The impact of Virginia's correctional reforms on its prison system has been dramatic. The size of the state's prison population has grown 53% over ten years, to 35,067 by 2003 from 22,850 in 1993, the year prior to the adoption of the truth-in-sentencing guidelines. The state has already added 6,400 prison beds to its correctional system at a cost of close to \$300 million.¹⁵ Operational expenditures have increased by 85% over ten years, to \$809.5 million in 2004 from \$436.5 million in 1994.¹⁶ Moreover, the 1994 reform package will continue having a significant impact. It is estimated that the

prison population will continue to rise and peak at 42,000 offenders by 2010. To meet this demand, the state will need to construct another 10,000 prison beds. This represented a population growth from under 32,400 in June 2003 to almost 42,000 inmates by 2010. Facing this potential capacity shortage, and despite a budget shortfall, the Virginia legislature in 2004 approved 3,448 new prison beds at a cost of \$196.6 million.¹⁷

A major reason for the increase has been the impact of increasing time served for all inmates, and in particular, for violent offenders. Inmates are serving approximately 91% of their sentences in actual time, up from approximately 30% to 35% of sentences served under the previous parole system.¹⁸ With the guidelines, the judges are imposing significantly longer sentences for violent offenders. For first-degree murderers with any violent record, the effective sentence increased to 44 years from an average of 15 years.¹⁹ Robbers who committed their crimes with firearms but who had no prior record of violence spent less than three years in prison under the prior parole system, compared to about seven years after the reform.²⁰

The composition of the Virginia prison population is changing as a result of the penal reforms since 1994, with a higher proportion of the population being persons convicted of violent crimes.

It is noteworthy that the reforms did not initially have as dramatic an impact on the prison population as some had originally feared. According to a Virginia Senate Finance Committee report, the prison population was estimated to rise to 46,729 offenders by June 2003. In actuality, the number was 35,429 or nearly 25% lower than projected. The ten-year capital plan for 1995–2005 submitted by Governor Allen in 1994 recommended \$900 million for 19,000 prison beds, plus 3,000 more private prison beds (for a total of 22,000). During this period, DOC actually built 6,400 new beds at a capital cost of \$273 million.²¹ Because the population was a lot lower than what was originally projected, the state initially ended up with a large surplus of prison beds. This prompted the state to rent its surplus beds to a number of jurisdictions, including Connecticut and Washington, D.C., in order to cover the costs of the then-unneeded prison bed capacity.

At the same time, VCSC studies show some impact in achieving some of the prison diversion goals. The nonviolent risk-assessment instrument was implemented statewide in July 2002. Of 6,062 eligible nonviolent offense cases, 36% were recommended for an alternative non-incarceration sanction. However, over half did not receive the recommended alternative due to judges exercising their discretion to override the recommendations of the risk assessment. Of the 64% not recommended for an alternative sanction by the instrument, one-fourth of these offenders (24%) were recommended by judges. Therefore, of the 6,062 offenders eligible, approximately 2,120, or 35%, were diverted from prison. Over 80% of the alternative sanctions imposed were to supervised probation.²²

In 2003, the Virginia Assembly once again directed the VSCS to determine if “a portion of offenders not currently recommended for alternative sanctions by risk assessment do not pose a significant risk of recidivism,” and if so, to adjust the risk

instrument accordingly.²³ In response, the VCSC conducted a new analysis of available data from the first year of the risk assessment, and concluded that the threshold of 35 points for an offender to be recommended for an alternative sanction could be increased to 38 points without a significant impact on recidivism. The analysis revealed that an additional 654 offenders would have been recommended to alternative sanctions under the new threshold. The change in threshold became effective Jul. 1, 2004 and should have an added impact in diverting nonviolent offenders from prison.

The Impact on Crime Rates

One would be remiss not to examine the impact of these significant reforms on the state's crime rate since the effort to increase incarceration was predicated on the goal that it would reduce crime rates -- particularly for violent criminals. We should note that with the significant reductions in crime rates since 1993, many policy makers are taking credit for the declines. Unfortunately, unless one compares crime rate reductions across states, there is no scientific basis for such claims. In this section we select two other states (Texas and New York) to in part illustrate the dangers of making such claims. Texas is selected since it also increased its prisons population but without the benefit of risk assessment or sentencing guidelines. New York is selected as it has *reduced* its incarceration rate. Hypothetically, according to advocates of incarceration, New York's crime rate should have increased and Texas' should be one of the lowest in the country as Texas has the third highest incarceration rate in the country.

As seen in Table 1, the incarceration rate in Virginia increased 14% since the reforms were adopted in 1995. As a point of comparison, the incarceration rate increased nationally by 18%, and increased in Texas by 7% while decreasing in New York by 10%. The incarceration rate in Texas increased significantly in the 1990's but the most significant increase occurred before 1995.

Table 2 and Figure 1 show the change in violent crime rates during this period. Its interesting to note that Virginia had lower violent crime rates to begin with in 1995 and the violent crime rate declined thereafter but not has much as New York, which was lowering its incarceration rate. The violent crime rate in Virginia decreased by 24%, less than the decrease in violent crime nationally of 44%, and well below the decrease in New York of 45%. However, the decrease in Virginia was steeper than the 17% decrease in the violent crime rate in Texas. In terms of state rankings in violent crime, Virginia's ranking has remained the same while Texas's ranking has actually increased. Here again, New York has vastly improved its ranking.

Table 1: Incarceration Rates, US, Texas, New York and Virginia, 1995-2003

State	Incarceration Rate		Percent Change 1995-2003
	1995	2003	Incarceration. Rate
US	409	482	+18%
Texas	653	702	+7%
New York	378	339	-10%
Virginia	414	472	+14%

Source: Incarceration rate per 100,000 population from the U.S. Department of Justice Bureau of Justice Statistics, *Prisoners and Jail Inmates 1995*; *Prisoners in US 2003*.

Table 2: Violent Crime Rates, US, Texas, New York and Virginia, 1995-2003

State	Violent Crime Rate		Percent Change in Violent Crime Rate	Violent Crime Rate National Ranking (1 = Highest in Nation)	
	1995	2003		1995	2003
US	685	475	-44%	n/a	n/a
Texas	664	552	-17%	17	13
New York	842	465	- 45%	8	19
Virginia	361	276	- 24%	37	37

Crime rate per 100,000 population, FBI, *Crime in the US 1995 and 2003*.

Figure 1: Violent Crime Rate Trends per 100,000 Population: US, Texas, New York and Virginia, 1995-2003

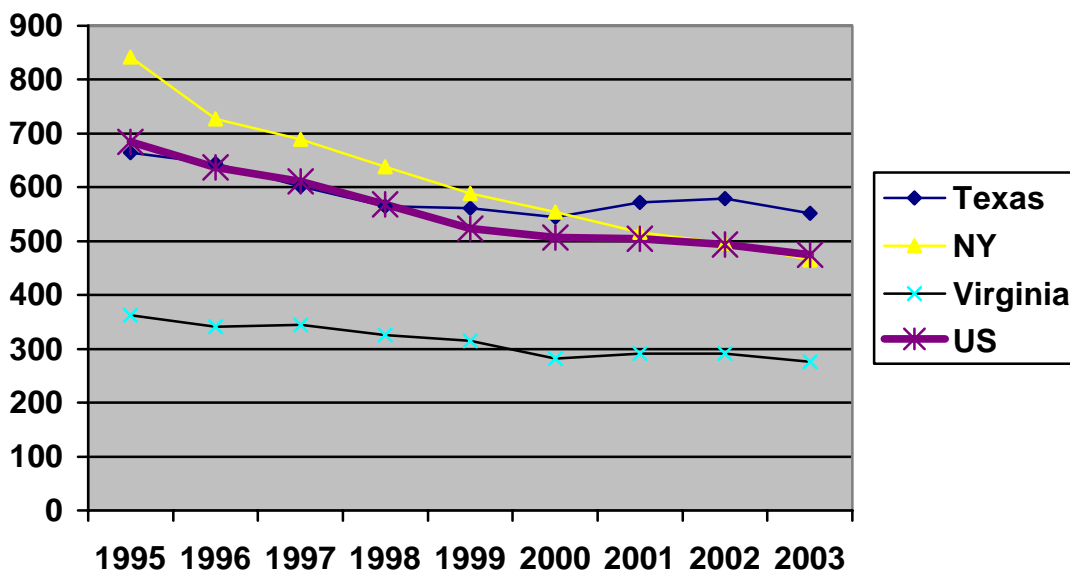


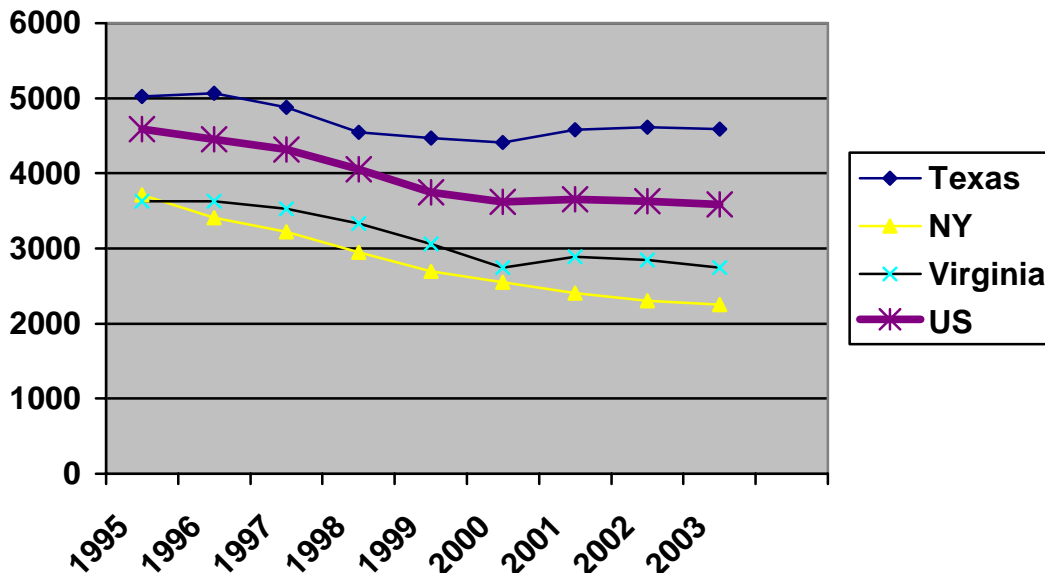
Table 3 and Figure 2 show the same information for property crime rates. The property crime rate declined in the nation and in all comparison states. Virginia had a lower property crime rate to begin with and remained below the other jurisdictions during this period. The property crime rate in Virginia decreased by 25%, more than the national average of 22% and the decline in Texas of 8% but less than 39% decrease in New York. In terms of national rankings, Virginia had a lower property crime rate in 1995 than Texas and New York. However, in 2003 New York had a lower property crime rate than Virginia. Like violent crime, the Texas property crime rate ranking actually increased.

Table 3: Property Crime Rate in the US, Texas, New York and Virginia, 1995-2003

State	Property Crime Rate		Percent Change in Property Crime Rate 1995 – 2003	Property Crime Rate National Ranking (1 =Highest in Nation)	
	1995	2003		1995	2003
US	4593	3588	-22%	n/a	n/a
Texas	5020	4595	-8%	14	5
New York	3718	2248	-39%	39	46
Virginia	3628	2704	- 25%	41	37

Crime rate per 100,000 population, FBI, Crime in the US 1995 and 2003.

Figure 2: Violent Crime Rate Trend per 100,000 Population in the US, Texas, New York and Virginia, 1995-2003



We can assume that some of the decline in crime can be attributed to the tougher incarceration policies, but we do not how much. Moreover, a relevant policy question

now is at what point does continuing to increase the incarceration rate in Virginia produce “diminishing returns” in terms of crime reduction. Diminishing returns refers to the point in which the prison system is costing the state more and more but is less effective in deterring crime or incapacitating offenders. Clearly the New York data show that one can reduce crime and reduce incarceration rates. For Virginia, because it has always had a low crime rate compared to most other states, it is more likely to have reached its point of diminishing returns if incarceration rates continue to increase.

The Texas data suggest that it is receiving a poor return on its incarceration investment largely because it has made no effort to implement guidelines or risk-based screening instruments to select who is incarcerated and for what period of time. Virginia’s policies of integrating risk assessment in sentencing may provide a more effective policy to identify for incarceration high-risk offenders, and in this way, help achieve better returns on the incarceration investment than states that have not used this approach.

Table 4 below shows the “crime returns” of increasing incarceration rates in Virginia, Texas and New York between 1991 and 2003 (1991 is used here because the significant increases in the Texas incarceration rate occurred during the early 1990s).

Table 4: Incarceration Rate, Crime Rate, Percent Change in Rates in Texas, New York and Virginia, 1995-2003

State	Incarceration Rate		Crime Rate		Percent Change 1991-2003	
	1991	2003	1991	2003	Incarceration. Rate	Crime Rate
Virginia	311	472	4,607	2,980	52%	-35%
Texas	297	702	7,819	5,148	136%	-34%
New York	320	339	6,245	2,713	6%	-56%

Source: Incarceration rate per 100,000 population from the U.S. Department of Justice Bureau of Justice Statistics, *Prisoners and Jail Inmates 1995*; *Prisoners in US 2003*. Crime rate per 100,000 population from the Federal Bureau of Investigation, *Crime in the US 1991* and 2003.

Virginia’s return on its incarceration investment has been better than Texas’, which increased its incarceration rate by 136% yet saw about the same decline in its crime rate as Virginia (34%). Because Texas does not use sentencing guidelines or risk assessments in sentencing, it probably incarcerates more low-risk offenders and thus produces marginal returns on its incarceration dollars. In Virginia, many of the Texas prisoners would not have been incarcerated or would have been safely diverted to alternative sanctions.

The Current Situation in Virginia

As noted, much of the growth in Virginia's prison population is the result of the lengthening of time served for violent offender as intended by the adoption of truth-in-

sentencing laws in 1994. Since then, a prisoner’s average length of stay in prison increased by almost one-third, to 47.6 months in 2005 from 36 months in 1995. This length of stay is more than a year longer than the national average of 30 months and is creating a “stacking effect” within the prison system.

However, a second reason for the growth is due to an increase in revocations to prison from community supervision, particularly for probation violations as seen in Table 5 below.²⁴

Table 5: Virginia Prison Admissions by Type of Admission

Calendar Year	Total Prison Admissions	Total Parole Violators	Total Probation Violators
1999	8,569	916	3,357
2000	9,183	963	3,548
2001	9,995	751	4,065
2002	10,751	641	4,597
2003	11,090	610	4,712
Numeric Change	2,521	-306	1,355
Percent Change 99-00	29%	-33%	40%

Source: Virginia Department of Corrections, Research and Forecast Unit

Facing a potential capacity shortage, the legislature recognized the need to better manage prison resources, and directed the VCSC to expand its risk-assessment guidelines to include new policies designed to reduce the number of revocations to prison from community supervision.²⁵ More directly, the Virginia Assembly mandated that the VCSC develop discretionary sentencing guidelines “for application to felony offenders who are determined by the court to be in technical violation of probation and post-release supervision.”²⁶ The VCSC was also directed to evaluate recidivism patterns for these offenders and determine the feasibility of integrating into the guidelines a risk-assessment instrument to apply to this population.

Developing a Risk Assessment Instrument for Technical Violators

The VCSC tackled this mandate in two phases. Phase I was directed at developing historically based sentencing guidelines for these offenders, while Phase II was to evaluate recidivism and design a risk-assessment tool for violators.

Phase I has been completed, following an extensive study of prior sentencing patterns for these offenders. The VSCS’s study revealed that:

- While 73% of all community supervision technical violations resulted in a return to prison, there were substantial differences among the judicial circuits, ranging from one circuit having a 46% re-incarceration rate to one having a 91% rate.²⁷
- Differences in these re-incarceration rates were attributed to different local philosophies toward re-sentencing, the availability of alternative punishment sentencing options, differences in the availability of substance abuse and sex offender treatment programs, and differences in the perception of the local drug problem.²⁸
- Noncompliance behavior occurred early in the probation period, with almost 74% of offenders committing their first noncompliance incident within six months of being placed under supervision.²⁹
- The most important legal factor determining the incarceration decision was whether the offender had absconded from supervision, followed by the type of original offense (repeat DWI offenders, offenders that committed weapons-related offenses, and crimes against persons being the most likely to be incarcerated), violating drug use prohibitions, and absconding for six months or more.³⁰

After considering the study's findings, the VSCS recommended using the guidelines, and the state legislature approved them for statewide use beginning in July 2004. The goal, as in prior efforts, was "to reduce unwarranted disparity in punishment of offenders who fail the conditions of community supervision."³¹

Guidelines were developed using the standard VSCS worksheet. A threshold of 31 points or more was agreed upon as requiring a recommendation for incarceration, with 27% of the offenders falling below this threshold and receiving a recommendation for a non-incarceration sanction. A sentence-length worksheet suggesting appropriate incarceration terms was also developed for revoked offenders, which significantly reduced the disparity between sentence lengths for this population.³²

Phase II evaluated recidivism and designed a risk-assessment tool for violators. The goal was "to identify low-risk offenders who could be safely recommended for sanctions other than traditional incarceration in jail or prison."³³ The risk-assessment instrument was developed using similar methodologies applied to prior development efforts. Recidivism was defined as an arrest for a new crime occurring during a minimum follow-up period of 18 months.³⁴ Only cases recommended by the guidelines for revocation were analyzed for the risk assessment.

The analysis showed the following factors as positively relating to recidivism, as defined as a re-arrest for a new crime: (a) the original felony offense or prior record offense for a crime against a person; (b) one or more codefendants were involved in the original felony offense; (c) offender was age 30 or younger; (d) offender had mental health problems resulting in treatment; (e) new arrests for crimes against a person; (f)

previous revocation requests; (g) the offender absconded from supervision or moved without permission; and, (h) substance abuse while under supervision.³⁵

These factors were statistically weighted and an assessment instrument was created for scoring cases. The instrument is depicted in Figure 3. Offenders scoring 53 points or less on the proposed risk scale are considered lower risk offenders eligible for alternative sanctions instead of incarceration. Less than 17% of these offenders were identified as recidivists, in contrast to 44% for the group not recommended in the scale.³⁶

Therefore, the VCSC recommended the incorporation of the risk assessment into the revocation guidelines, yet noted that for judges to comply with the risk assessment and be successful in diverting offenders, “new sentencing alternatives for this specific population of felons will need to be created, funded and made available to the circuit court judges.”³⁷

Estimating the Impact of the Revocation Risk Assessment

Working with the VCSC and the Virginia Department of Corrections (VDC), we developed a simulation of the potential impact of this risk assessment on the projected growth of the prison population. The initial step was to first project the prison population without taking into account the implementation of the revocation risk instrument.³⁸ The most recent baseline projection was completed in October 2004 and is shown in Table 6. The Virginia state prison population is projected to grow an average of 3.2% per year through 2010, from approximately 36,000 prisoners in 2004 to over 43,000 by 2010.

Population projections are based on modeling the expected admissions and length of stay for different groups of prisoners. In the case of Virginia, the current baseline projection is being driven by continued increases in the number of persons admitted to prison rather than a longer length of stay. This is shown in Table 7 where the four major types of admissions to prison are estimated for the forecasted timeframe.³⁹ With the exception of a decline in parole violators due to the elimination of parole, all admissions are expected to increase by over 30% through 2010. This includes a 34% for probation violators. Thus the historic increases in length of stay that resulted from the sentencing reforms adopted in the 1990s seem to have reached their peak. Short of reducing length-of-stay by some major policy changes, the only means to reduce the projected population is to reduce the number of new court commitments or probation violators.

The VDOC provided data files for all prison admissions from 1999 to 2002 which contained sentencing data on some 35,000 prisoners. An examination of the number of persons returned to prison after a probation indicates that some 31% of the sample was returned to prison for a technical probation violation.

Figure 3: Proposed Risk Assessment Instrument for Probation Violators Not Convicted of a New Crime

Probation Violator Risk Assessment

Complete this risk assessment instrument, ONLY if the offender was recommended for incarceration by the Probation Violation Sentencing Guidelines.

◆ **Original Felony Offense or Prior Record Offense was Crime against Person** ————— If YES, add 21 —————>

◆ **Number of Codefendants in Original Felony Offense(s)** —————>

None..... 0
 One..... 6
 More than one..... 22

◆ **Offender's Age at Revocation** —————>

Younger than 30 years..... 42
 30 to 37..... 28
 38 to 48..... 14
 Older than 48 years..... 0

◆ **Mental Health Treatment or Commitment** —————>

None..... 0
 Mental Health Voluntary Commitment..... 22
 Mental Health Treatment..... 27
 Mental Health Court Ordered Commitment..... 30
 Mental Health Involuntary Commitment..... 41

◆ **New Arrests for Crimes against Person** ————— If YES, add 14 —————>

◆ **Previous Capias/Revocation Requests** —————>

1..... 11
 2 or more..... 14

◆ **Absconded from Supervision or Moved without Permission** — If YES, add 19 —>

◆ **Substance Abuse while on Supervision** —————>

None..... 0
 Report of Alcohol Abuse/Positive Test/Admission..... 1
 Drug other than Alcohol or Cocaine, Positive Test/Admission..... 3
 Cocaine, Positive Test/Admission..... 16

Total Score —————>

52 or less, check Recommended for Alternative Punishment.
 53 or more, check NOT recommended for Alternative Punishment.
 Go to Cover Sheet and fill out Violator Risk Assessment Recommendation.

Source: Virginia Sentencing Criminal Sentencing Commission, 2005 Annual Report. Page 133.

Table 6: Forecasted Virginia State Prison Population

June Each Year	Prison Population	Percent Change
2004	35,875*	
2005	36,971	3.1%
2006	38,222	3.4%
2007	39,527	3.4%
2008	40,512	2.5%
2009	41,933	3.5%
2010	43,328	3.3%

*June 2004 figure represents an actual count

Table 7: Forecasted Virginia State Prison Admissions

Year	New Commitment	Parole Violator	Probation Violator New Charge	Probation Technical Violator	Total All Admissions
2003*	6,378	610	3,510	1,202	11,700
2004	6,720	632	3,698	1,266	12,316
2005	7,049	403	3,879	1,328	12,660
2006	7,352	285	4,046	1,386	13,069
2007	7,657	264	4,214	1,443	13,578
2008	7,962	234	4,382	1,500	14,078
2009	8,267	192	4,549	1,558	14,566
2010	8,569	165	4,716	1,615	15,064
% Change	+34%	-73%	+34%	+34%	+29%

*2003 figures represent actual admission counts for the year

Projected Impact and Assumptions

The mathematics behind a simulation of the impact of the proposed risk assessment instrument for violators is computed by the model following standard simulation procedures. However, in any simulation there remains a significant amount of uncertainty because it is hard to predict how the risk assessment instrument will really be used in practice. The risk assessment is only a recommendation to the sentencing judge to place an offender in alternative punishment instead of incarceration. The sentencing judge still retains final authority to place the offenders.

The VCSC has an excellent track record on judicial compliance with the guidelines but recent budget cuts in the state have eliminated some on an already short list of alternative programs while creating crowded conditions in those still available. For these reasons, two impacts were developed to estimate the bed space savings of the probation technical violator risk assessment -- a best- and worst-case scenario. Each scenario was based on the data provided by both the VDOC and the VCSC, as described

in the methodology section. The best case scenario assumes a high diversion rate from prison for technical violators.

General Assumptions:

- Of the entire pool of probation technical violators, approximately 32% would return to prison while the remaining 68% would either return to jail or be reinstated on probation.
- Approximately 47% of all cases scored on the risk assessment would qualify for a recommendation to alternative punishment.
- The estimated length of stay in prison for these offenders is 28 months. This is a markedly longer length of stay than the national average for technical revocations due to the sentencing guidelines system in Virginia.
- It is assumed that the risk assessment for probation technical violators would be implemented in June 2005.

Scenario #1 (Best Case) Assumptions:

- This scenario assumes that 65% of those offenders recommended for diversion would actually be diverted from prison and placed in alternative punishment. It is also assumed that approximately 20% of these offenders would fail alternative punishment and be returned to prison.
- The remaining 35% of offenders recommended for alternative punishment would be returned to prison.

Scenario #1 Impact:

- Annual diversions are estimated to average 425 persons per year from 2006 to 2010. Diversion admissions are assumed to increase at the rate of new admissions to prison.
- Bed savings in the prison system are projected to increase from 202 beds by the end of 2006 to more than 1,105 by 2010 as seen in Table 8 below.
- The prison population under this scenario is projected to grow by 14% in 2005-2010 compared to 17% under baseline.

Table 8: Scenario #1 (Best Case) Prison Impact

June Each Year	Baseline Prison Population	Prison Bed Savings	Adjusted Prison Population
2005	36,971	0	36,971
2006	38,222	202	38,020
2007	39,527	595	38,932
2008	40,512	836	39,676
2009	41,933	997	40,936
2010	43,328	1,105	42,223
% Change 05-10	17%		14%

Scenario #2 (Worst Case) Assumptions:

- This scenario assumes 35% (vs. 65% in best case scenario) of those offenders recommended for diversion would actually be diverted from prison and placed in alternative punishment. It is also assumed that approximately 20% of those offenders would fail alternative punishment and be returned to prison.
- The remaining 65% (vs. 35% in best case scenario) of offenders recommended for alternative punishment would be returned to prison.

Scenario #2 Impact:

- Annual diversions are estimated to average 230 persons per year from 2006 to 2010. Diversion admissions are assumed to increase at the rate of new admissions to prison.
- Bed savings in the prison system are projected to increase from just over 100 beds by the end of 2006 to over 600 beds by 2010 as seen in Table 9 below.
- The prison population under this scenario is projected to grow by 16% in 2005-2010 compared to 17% under baseline and 14% for the best case scenario.

Table 9: Scenario #2 (Worst Case) Prison Impact

June Each Year	Baseline Prison Population	Prison Bed Savings	Adjusted Prison Population
2005	36,971	0	36,971
2006	38,222	109	38,113
2007	39,527	317	39,210
2008	40,512	450	40,062
2009	41,933	528	41,405
2010	43,328	579	42,749
% Change 05-10	17%		16%

Summary

Over the past decade, Virginia fundamentally has altered its sentencing structure by abolishing parole and extending prison terms – especially for persons convicted of violent crimes. It has also sought to introduce risk-assessment methods to sentencing and revocation decisions to reduce disparity and ensure that lower risk offenders are more likely to be diverted from prison.

The most fundamental impact has been a dramatic increase in the prison population, with no relief in sight. With parole abolished and discretion limited to the courts, there is little the state can do but to continue to build and fill thousands of new prisons at considerable cost to the state. These costs will be tempered somewhat by the introduction of a risk system to divert technical probation violators. As the simulation of the impact done here shows, the prison population under the best case scenario assuming the high utilization of the diversion option still shows the prison population to grow by 14% in 2005-2010. This is better than the 17% population increase projected under the baseline scenario but, either way, significant prison cost will be incurred during this period.

At the end of day, it’s fair to ask what has been the impact on crime. As noted earlier, prior to the sentencing reforms initiated in 1995, the Commonwealth already enjoyed a crime rate that was below the national average and declining. Since 1995, the crime rate has continued to decline, but so too have crime rates in other states. As has been suggested by other scholars, whatever the contribution of Virginia’s sentencing reforms on public safety, they seem to have run their course. Nevertheless, there is no doubt that in terms of punishment and retribution, violent offenders in Virginia are being punished more severely.

Finally, regardless of how one evaluates the overall benefit of the state’s sentencing reforms, the process that Virginia has undertaken to assess sentencing practices and the possible impact of reforms serves as a model for other states. In this

case, research and the adoption of a risk-assessment policy to identify certain nonviolent offenders for diversion from prison have contributed to the moderation in the prison population growth.

Virginia's methodical approach to managing sentencing and risk is backed by key policy elements that states need to consider if they are to successfully support a similar policy. These elements include the availability of data to support analyses, a well respected independent professional research staff, opening the doors to outside validation of the research work, a culture of decision-makers respecting research, and legislative support of long-term research and policy development. These elements as applied in Virginia are summarized in the Appendix.

Appendix: Elements of Implementing Risk Based Systems in Criminal Justice

Availability of Data to Support Analyses

Developing historically based guidelines requires the availability of good data. States that do not have reliable case disposition, criminal record and recidivism data would face tremendous obstacles in replicating key elements of the Virginia policy. Or, like Virginia, they must engage in a long-term effort to develop the appropriate data sources.

Professional Research Staff

No data system will be very useful for policy analysis unless a professional research staff has been assembled to use it. The staff needs to have the experience and tools to translate data into policy and to do that with independence and credibility. Credibility includes the conduct of scientific analysis and political credibility based on non-partisan work. By these measures, the VCSC excels.

To develop the sentencing guidelines for offenders committing technical violations of their conditions for community supervision, the VCSC drew a sample of 600 cases from its SRR database. The Commission also collected supplemental information on each case and imposed strict quality controls for the analysis. For example, two researchers worked on similar analyses independent of each other and then worked to reconcile any differences in the analysis. Following their earlier methodology they used three statistical techniques (logistic regression, discriminate analysis and ordinary least squares) to determine which factors affected the in/out decision to incarcerate and which factors related to the sentence length decision.⁴⁰

Finally, to develop the risk-assessment tool for violators of community supervision, the researchers used logistic regression to determine factors impacting recidivism during the 18-month follow-up, used survival analysis to control for varying follow-up periods and used classification tree analysis to determine the relationship among the variables under analysis.⁴¹ The use of these techniques shows the sophistication of the research staff. As the 1999 National Center for State Courts report concluded:

“Researchers were well qualified to conduct the analyses, possessing advanced degrees in social science and criminal justice research and statistics, while also having various levels of previous applied research experience. Evaluators note that guideline development in Virginia benefited greatly from comprehensive data sources, adequate resources, and staff experience.”⁴²

Outside Validation Welcomed

Virginia has accepted and welcomed outside review of the research underlying its sentencing guidelines and risk-assessment system. The National Center for State Courts has conducted an evaluation of the sentencing guidelines in 1999 as well as the development of the nonviolent risk assessment instrument in 2002. In the former, conducted with funding from the National Institute of Justice, the evaluation team conducted a process evaluation, an empirical evaluation on how the judges were using the instrument, and a cost-benefit analysis regarding the impact of using the instrument. The process evaluation discovered that many judges found the instrument useful in making decisions and did not perceive it to be an infringement on their judicial discretion.⁴³ In 2001, the Commission also conducted its own validation study of the nonviolent offender risk assessment using data from the pilot sites. The Commission changed the scoring threshold and implemented the revised instrument in July 2002.⁴⁴

Culture by Decision-Makers of Respecting Research

Researchers cannot have a meaningful impact on policy development unless there is a decision-making culture that accepts open discussions based on research of complex areas like sentencing and risk management. The VCSC members have allowed open discussion of controversial findings in deliberating the best course of action. The best example of this is the Commission's open discussion regarding sentencing disparity among judicial circuits and the influence of race in sentencing. In the historical analysis of sentencing practices done for the development of the revocation guidelines, the researchers found that the location of the judicial circuit was the most significant factor statistically explaining the decision to incarcerate.⁴⁵ Race was also found to be statistically significant with white violators being more likely to be incarcerated than nonwhite offenders. Both of these findings were controversial as one impedes on a long tradition of local autonomy in sentencing while the other deals with the sensitive issue of potential racial bias affecting sentencing. In both cases, the VCSC reviewed the findings, discussed the issues, and reached decisions based on the information and policy perspectives.

The VCSC has also shown its sophistication by relying on different measures of recidivism based on different policy goals. For the non-violent risk assessment, they used as a measure any new arrest that led to a conviction within three years of release.⁴⁶ On the other hand, for the sex offender risk assessment, recidivism was defined as a new arrest for a sex or other crime against a person within a follow-up period of five years. The goal of this assessment was to identify sexual predators for longer incapacitation. Finally, for the technical revocation risk assessment, a follow-up period of 18 months was used for the initial study and recidivism was defined as arrest and reconviction. The goal was to identify offenders who could safely be given a non-incarceration sanction for a technical community corrections violation in lieu of a prison revocation.⁴⁷

Legislative Support of Long-Term Research and Policy Agenda

Virginia's experience would not have happened without executive, legislative and judicial supports for policies based on a long-term research agenda directed at monitoring and improving sentencing policies and the management of risk.

The original guidelines were developed through the initiative and oversight of the judiciary. Federal grants supported the early research needed to develop the guidelines, which were later replaced by state funds. The Commission was funded by the state at levels that provided for sufficient staff (relative to other sentencing guidelines states) for the research and support of the guideline work. The legislature also adopted resolutions to support the use of the guidelines. "Virginia provides one instance where federal seed or start-up money was used to initiate a long-term project, later supported by state revenue based on a proven need and commitment to the program."⁴⁸

About *The JFA Institute*

The *JFA Institute* conducts research into federal, state and local criminal justice issues to provide policymakers insight into how to improve the cost and public safety effectiveness of their juvenile and adult correctional systems. The Institute is actively involved in helping correctional agencies and policy makers develop risk assessment systems, correctional population simulation models, program evaluations, geo-mapping technologies, information system designs, staffing analysis and cost benefit assessments.

The JFA Institute has offices in Washington, D.C., and Austin, Texas. The organization's principals, Dr. James Austin and Wendy Naro in Washington and Dr. Tony Fabelo in Austin, have a combined 50 years of experience in the criminal justice field.

The organization receives funding from federal, state and local governmental agencies and from foundations interested in developing and evaluating new initiatives to assist state and local agencies in more effectively managing their justice, crime prevention and correctional policies. This publication was supported by a grant from the JEHT Foundation in New York.

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