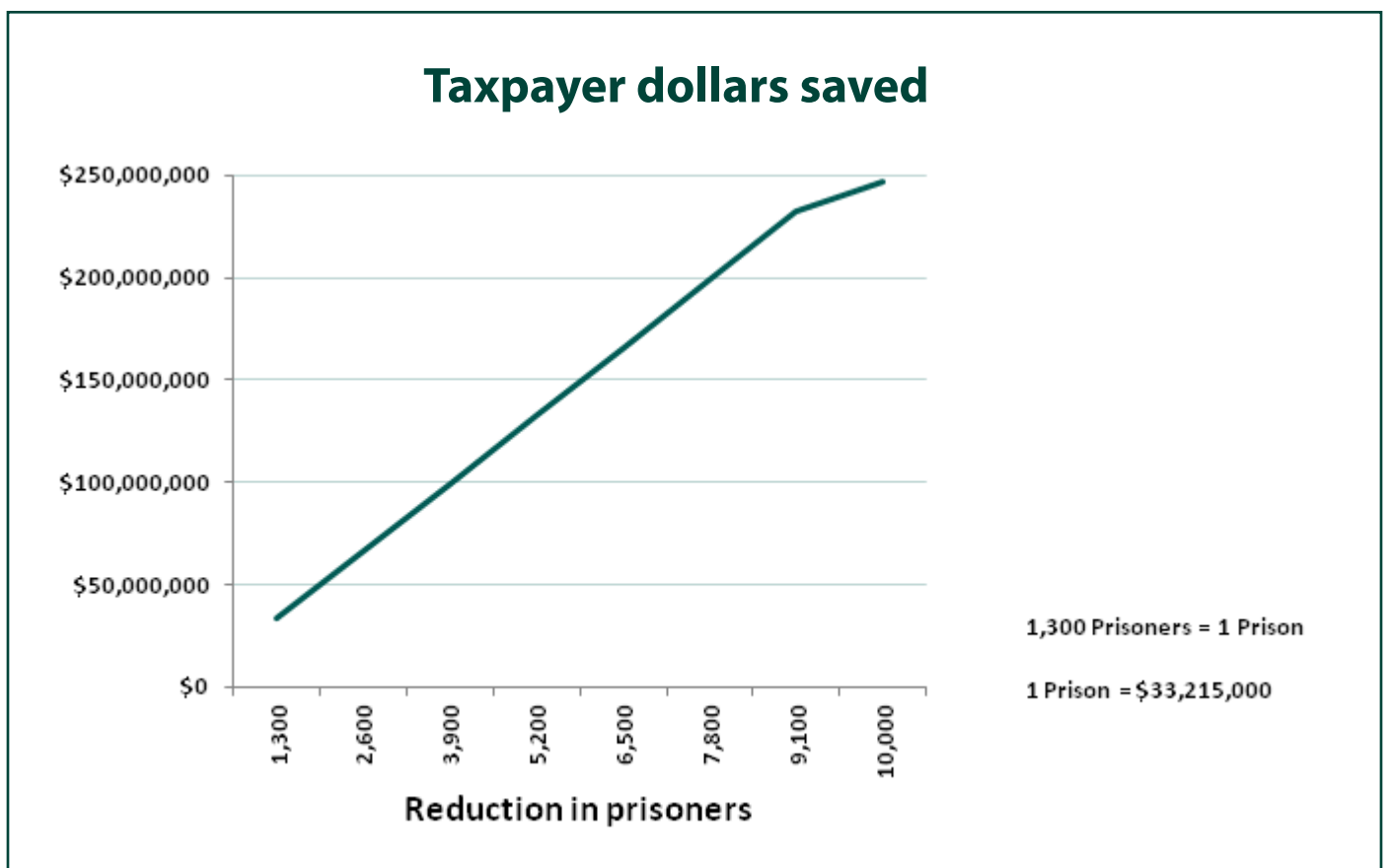

10,000 fewer Michigan prisoners: Strategies to reach the goal



A report by the Citizens Alliance on Prisons and Public Spending
June 2015

Acknowledgements

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Laura Sager, executive director, was primarily responsible for editing and design. Dena Anderson, executive assistant, and Mary Rose Naoum, communications volunteer, assisted in editing and proofreading. Anderson also provided supplementary research material.

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Executive summary

The context

Michigan's prisoner population has grown from fewer than 7,900 in 1973 to over 43,000. Corrections has gone from 1.6 percent of General Fund spending to nearly 20 percent. Today the budget of the Michigan Department of Corrections (MDOC) is roughly \$2 billion.

This growth is not the inevitable product of increases in the size of the general population or of increased crime. On the contrary, Michigan's population growth has been modest and index crime rates have been declining steadily for the last three decades.

Prison expansion resulted from specific changes in law, policy and practice that caused the state's incarceration rate to rise from 160 per 100,000 residents in 1983 to 442 today.

Reexamining policies in light of current research could allow Michigan, in the next five years, to:

- ◆ Have 10,000 fewer prisoners.
- ◆ Reduce the prisoner population to 33,704 (about the same amount as in 1990 and 35 percent below the high point in 2006).
- ◆ Close seven entire prisons and six additional housing units.
- ◆ Avoid the need to train 2,000 new corrections officers to replace retirees.
- ◆ Save nearly \$250 million annually.

And it could do all this without affecting public safety

This is a relatively modest initial target. Savings would grow over time and as cost estimates for some strategies are better developed. Substantial additional reductions will occur if issues beyond the scope of this report are addressed, including the over-representation among prisoners of people of color and the mentally ill.

This report:

- ◆ Provides policymakers with a comprehensive analysis of how and why Michigan's prisoner population has changed over the last 25 years.
- ◆ Identifies all strategies for reducing the population that are logically connected to the reasons for growth, regardless of their immediate likelihood of adoption.
- ◆ Establishes credible estimates of how many prison beds could be saved by adopting each strategy. Policymakers can choose a combination of strategies to reach a population target that is achievable in the short term.

The size of the prisoner population is determined by how many people enter the system and how many leave. In years when intake exceeds releases, the population grows. When releases exceed intake, the population drops. Therefore we must understand how to impact the various factors that drive both admissions and releases. More fundamentally, we must reconsider who we really want to incarcerate and for how long.

Intake

Admissions reflect our policies about who should go to prison, often called the “in/out” decision. There are five basic categories of entries to prison, four of which are people already under criminal justice supervision.

1. **New court commitments** are people who have been convicted of a felony and are being sentenced for that offense for the first time. In the early 1990s, there were 7,000 of them a year and they constituted more than 55 percent of total intake. Today there are about 5,100 new commitments and they account for only 46 percent of total intake.

The volume of new court commitments is affected by:

- Crime rates.
- Law enforcement strategies and resources.
- The redefinition of felonies and creation of new ones.
- Mandatory prison sentences.
- Defendants’ eligibility for non-prison sanctions under the sentencing guidelines.
- The availability of community-based alternatives.

2. **Technical probation violators** were convicted of a felony and sentenced to probation but were resented to prison because they violated the terms of their supervision. The violation may have involved such noncriminal conduct as changing a residence without permission or criminal behavior that was not prosecuted.

3. **Probation violators with new sentences** committed a new criminal offense while under supervision. The decision to revoke probation is made by the sentencing judge.

In 2013, a total of 2,708 probation violators entered prison (total includes technical violators and those with new sentences).

4. **Technical parole violators (PVT)** were released from prison after serving at least their minimum sentences but were returned for violating terms of their supervision.

There were 2,029 PVTs in 2,013.

5. **Parole violators with new sentences (PVNS)** were convicted of committing a new felony while on parole. Parole revocation decisions are made by the parole board.

There were 1,387 PVNSs in 2013.

The admission to prison of probation and parole violators is affected by:

- The intensity, conditions, quality and length of supervision.
- The availability of community-based supportive resources.
- The standards for revocation:
 - Parole board revocation criteria have varied dramatically over the years.
 - Probation revocation criteria vary according to the views of individual judges.

Releases

Releases reflect our policies about how long people should stay in prison. Average length of stay is the key driver of prison population size.

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The Pew Center on the States found that in 2009:

- Michigan had the longest average length of stay of 35 states studied.
 - Overall, Michigan prisoners served nearly 17 months more than the average.
 - Assaultive offenders served 30 months longer than assaultive offenders nationally.
- Michigan's 20-year rate of increase in length of stay far exceeded the growth rate of other states.

Researchers can make no connection between increased length of stay and recidivism.

Length of stay has three components:

1. The minimum sentence length, which determines when the parole board gains the authority to grant release.
2. The parole board's decision about whether to grant parole once the person is eligible.
3. The availability of credits for in-prison conduct to reduce the minimum sentence, so the earliest release date (ERD) arrives sooner.

Minimum sentence length. The average length of minimum prison sentences imposed from 2008 to 2012 increased by 2.7 months. The Council of State Governments (CSG) says this requires an additional 1,971 prison beds at a yearly cost of \$70 million.

The average minimum sentence of people who enter prison in a given year is much shorter than the average minimum being served by the total prisoner population. People with short sentences are released while people with long sentences build up in the prison population. In 2013:

- People with minimums of two years or less were 59 percent of the commitments but only about 24 percent of the total population.
- People with minimums of over 25 years or life were only two percent of commitments but 18 percent of the total population.

Approximately 10,400 people are serving sentences of 24 months or less, raising questions about how prisons are used and what such sentences can really accomplish.

Minimum sentences for the total prison population have been steadily increasing:

- From 1989-2003, average minimum sentences increased from 6.5 to 9.0 years (excluding nearly 5,200 people serving life terms).
- The increase in sentence length for offenses that carry life or any term, such as second-degree murder and first-degree criminal sexual conduct, is especially marked. In the 1970s, a large majority of sentences (including parolable life terms) resulted in parole eligibility in 10 years or less. By the 2000s, that proportion had plummeted.

The shift in our concept of appropriate punishment is reflected in the sentencing guidelines enacted by the legislature in 1998. The guidelines shortened sentences for less serious offenders and kept more of them out of prison, but lengthened minimum sentences for more serious offenses. Very broad guidelines ranges allow for terms that are very long and very disparate. Both length and disparity are enhanced by selective prosecution use of habitual offender statutes to increase people's sentences based on their prior records.

Without a sentencing commission to provide consistency, the legislature has made many adjustments to the guidelines on an ad hoc basis that have increased sentence lengths. It has also redefined crimes, increased maximum penalties, enacted harsh mandatory minimum sentences and permitted greater use of consecutive terms, all of which have contributed to Michigan's above average length of prison stay.

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Parole board decisions. The minimum sentence establishes the earliest release date (ERD) but does not determine how long a person will actually be incarcerated. Either a statute or the judge sets a maximum sentence that dictates when release is required. Between the minimum and maximum, the parole board has absolute discretion to grant or deny release. The period of time controlled by the parole board is usually 300-400 percent longer than the minimum imposed by the court.

In 1992, at the same time that parole board members were changed from corrections professionals with civil service protection to appointees, the legislature required the use of parole guidelines to “govern the exercise of the parole board’s discretion.” The guidelines measure a person’s risk of reoffending. When someone scores “high probability of release”, the board is only permitted to deny release for “substantial and compelling reasons.”

The parole guidelines are meant to constrain the exercise of discretion, increase objectivity, reduce disparity and promote transparency. However prisoners cannot appeal parole denials, so there is no method of enforcing the parole guidelines.

People with favorable scores are routinely kept long past their ERD:

- In Feb. 2012, more than 1,500 people who scored high probability had been denied release. On average, they had been eligible for 2.6 years.
- The reason given is typically a subjective assessment by a single board member that the person lacks sufficient insight, empathy or remorse.

For the past several years, about 13 percent of the total prisoner population (about 5,500 people) were past their ERD and had never been released. This costs taxpayers roughly \$150 million a year.

Release is often denied based on the nature of the offense. Drug and other non-violent offenders stand a high chance of being paroled; homicide and sex offenders have much lower parole grant rates, regardless of their guidelines scores.

Parole denials based on the nature of the offense are problematic for three reasons:

1. The offense was the primary factor on which the minimum sentence was based.
2. Selected offense factors are already scored in the parole guidelines.
3. A wealth of research shows that the assaultive and sex offenders who are most likely to be denied parole actually have the lowest reoffense rates. Keeping them incarcerated for additional years does virtually nothing to protect public safety.

Since, on average, there is no correlation between keeping people incarcerated past their ERDs and public safety, it is important to understand what drives parole decisions. Factors that have caused great volatility in parole grant rates over the last 25 years include:

- Changes in the membership of the board.
- The mandate given to the board by the governor.
- Publicity about a serious offense committed by an individual parolee.
- The availability of risk assessment tools.
- Administrative backlogs, as in psychological evaluations or required programs.

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Former Governor Granholm expanded the parole board from 10 to 15 members in 2009, so that the large pool of people who had been denied parole could be reviewed. Although 1,000 additional people serving for homicide and sex offenses were released, reoffense rates declined.

Of all the homicide and sex offenders who were paroled from 2007 through the first quarter of 2010, more than 99 percent did not return to prison within three years with a new sentence for a similar offense.

One strategy for increasing parole grants would be a statutory mandate known as “presumptive parole.” This would require the board to parole people on their ERD unless:

- There is objective evidence, not already scored in the parole guidelines, that the person would present a high risk to public safety or
- The person has a recent history of serious institutional misconduct.¹

Presumptive parole would:

- ◆ Reduce the prisoner population and save taxpayer money.
- ◆ Preserve the board’s discretion to deny release when the evidence indicates risk to the public.
- ◆ Give more deference to the minimum sentence imposed by the court.
- ◆ Increase transparency and certainty for victims and prisoners.
- ◆ Help insulate the board from public pressure and promote consistency.

Sentence reduction credits. Release also depends on whether and how much a person’s earliest release date is advanced by the availability of credits for good institutional conduct and/or “earned credits” for participation in productive activities like work, school and treatment programs. Historically, sentence reduction credits of various types and in varying amounts have been common nationwide. In Michigan:

- Generous good time was ended in 1978 by a ballot initiative.
- It was replaced by a more modest system of “disciplinary credits” in 1982.
- 1998 statutory provisions known as “truth-in-sentencing” eliminated disciplinary credits and prospectively required all prisoners to serve 100 percent of their minimum terms.

Truth-in-sentencing lengthened the time served by everyone whose good conduct in prison would have earned him or her modest amounts of credit. For example, a five-year minimum term that could have been served in four years and one month with disciplinary credits requires service of the full five years. The difference costs roughly \$32,000.

Proponents of truth-in-sentencing intended to ensure that victims and the general public understand what a sentence actually means. There is no evidence that people who are allowed to earn good conduct credits re-offend at a higher rate than those who are not.

Michigan is out of sync with most other jurisdictions. The federal system permits sentence reductions of up to 15 percent. Some states have increased the availability of credit as a way to control spiraling prison populations. Even in Michigan, sheriffs still award credits to help control jail populations and promote compliance with jail regulations.

¹ Release would also have to be denied if the person had pending felony charges or a detainer from another jurisdiction and could be delayed for up to a few months if necessary to complete a treatment program.

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Because the original elimination of good time resulted from a ballot initiative, restoring any form of sentence reduction credits would require a three-quarter vote of the legislature.

Special populations

Within the prisoner population are distinct subgroups that raise fundamental questions about who we choose to incarcerate. Our prisons are filled with people who:

- Made bad decisions to commit crimes as teenagers.
- Are middle-aged or elderly and unlikely to ever commit another crime.
- Are in such poor health they could not commit a crime if they wanted to.
- Have served far longer than their sentencing judges intended.
- Were returned to prison from parole for technical rule violations.

Targeted strategies addressing these groups could reduce the population substantially.

Juveniles. Beginning in 1988, Michigan moved away from having juvenile court judges conduct waiver hearings to consider juveniles' prior history, culpability and amenability to treatment before transferring to adult court for prosecution.

- Today, 14-, 15- and 16-year olds are waived automatically if the prosecutor chooses to file charges directly in the adult system for any of 18 specified offenses. Twelve of the offenses require an adult sentence.
- From 2008-2012, there were 604 teenagers sentenced to prison as adults who were between the ages of 14 and 16 when they committed their offenses.
- In 60 percent of the cases, minimum sentences were five years or less, suggesting that these teens were not viewed as especially dangerous. Hundreds may return home while still teenagers.

Prosecutors do not need a waiver process to treat 17-year-olds as adults. Michigan is one of only nine states that set the age of criminal responsibility below 18. Thus a 17-year-old who is legally too young to vote, marry, join the military or even get a tattoo without parental permission can be convicted in adult court and sentenced to adult prison for any felony, not just those specified as particularly dangerous. Even the large majority of 17-year-olds who receive probation or jail time will carry with them the lifelong consequences of an adult conviction.

From 2008-2012, there were 2,106 people sent to prison for offenses they committed at age 17:

- Half were convicted of non-assaultive crimes.
- Fifty-seven percent of the minimum sentences were for two years or less.

Sophisticated research on brain development shows that areas of the brain that affect judgment, foresight and impulse control continue to develop into the early and mid-20s.

- Impulsivity, susceptibility to peer pressure and inability to anticipate consequences all contribute to criminal behavior by juveniles.
- Conversely, the process of psychosocial maturation leads the vast majority of juvenile offenders, even those who committed serious crimes, to grow out of antisocial activity as they transition to adulthood.

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Keeping most children under 18 within the jurisdiction of the juvenile court and providing them with age-appropriate programming would reduce the adult prison population and give hundreds and hundreds of young people a better chance to mature into law-abiding, productive adults.

The elderly, the ill, the disabled. Three decades after the “tough on crime” policies of the 1990s, Michigan prisons house an increasing number of aging prisoners, with the resulting increased medical costs. This population is highly unlikely to reoffend. Yet, in 2013:

- There were 8,457 prisoners age 50 and older – 19 percent of the population.
- Nearly 1,200 of these were 65 or older; 151 were 75 or older.

Since Michigan has thousands of prisoners serving life or very long terms, the proportion of inmates who are elderly will continue to grow.

Of course, prisoners of any age can and do develop life-threatening illnesses or injuries. In addition, people are regularly committed to prison who already suffer from mental illness, intellectual and developmental disabilities and chronic medical issues.

To cope with the diverse groups of people with special needs, the MDOC has established various special housing units. Nearly 1,700 people are in prison beds reserved for people needing:

- Geriatric care, dialysis or other forms of chronic medical care.
- Mental health stabilization or residential treatment and adaptive skills support for chronic brain disorder or developmental disability.
- Dementia care –in some cases for people who do not know they are in prison or why.

This total does not include many hundreds of people housed in general population who:

- Can ambulate only with the assistance of wheelchairs, walkers or portable oxygen.
- Are treated in chronic care clinics for disabling illnesses like COPD and Parkinson’s.
- Require the daily administration of psychotropic drugs to treat mental illness.

One means of caring for aging and medically fragile prisoners is developing more long-term care units within the MDOC. While this may be unavoidable, there are at least three other options:

1. Grant parole to those who are eligible.
2. Use the medical parole statute to release people who are physically or mentally incapacitated.
3. Use the medical transfer statute to place “mentally or physically disabled” prisoners in outside medical facilities, like nursing homes.

Once people are out of MDOC facilities there are no longer security costs and the cost of their medical care may be covered by Medicare, Medicaid, Veterans Benefits, private pensions or other family resources.

The absence of risk to the public and the futility of further efforts at rehabilitation make releasing elderly and medically fragile prisoners a particularly appropriate means of reducing the prisoner population.

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Life and long indeterminate sentences. Three kinds of sentences keep prisoners behind bars for decades, driving up the population and costs:

1. Life without parole is mandatory for first-degree murder. The only possibility of release is a commutation granted by a governor.
2. “Parolable life” is an alternative to a term of years for such serious offenses as second-degree murder, first-degree criminal sexual conduct and armed robbery:
 - The judge can choose which penalty to impose.
 - “Parolable lifers” become eligible for parole in 10 or 15 years, depending on the date of the offense.
3. Long indeterminate sentences (LIDS) have very lengthy minimums and maximums:
 - Before the 1990s, people serving LIDS were eligible for parole after 10 years, just like parolable lifers.
 - Prisoners also earned “good time” – so much that a 50-year minimum sentence could be served in 18.5 years.
 - Today, due to truth-in-sentencing, prisoners must serve every day of these lengthy minimums.

Parolable lifers. About 850 parolable lifers are currently eligible for parole. Most were sentenced when judges treated parolable life and long indeterminate sentences as essentially interchangeable. Lifers were commonly paroled in 12, 14 or 16 years.

However, parole board practices changed dramatically. By the mid-90s, the board had adopted the position that “life means life”. The review process for lifers was changed:

- The frequency of parole reviews was reduced from every two years to every five.
- Parole interviews are not required. One board member can review a prisoner’s file.
- The board does not score parole guidelines to assess a lifer’s risk.

From 1992-2006, the board paroled fewer than three lifers a year. Thousands of prisoners, with similar records and similar crimes who had indeterminate sentences, were released while parolable lifers remained behind bars – often decades longer than their sentencing judges intended.

Since 2005, the parole board has resumed paroling lifers, but the pace is slow – just 164 in 10 years. In addition, either sentencing judges or successor judges who had no involvement in a case can stop a lifer parole by simply objecting. There have been 57 vetoes since 2007.

The parolable lifers are an aging and extremely low-risk group:

- More than half are older than 55.
- Nearly 200 were teenagers when they committed their offenses.
- Two-thirds are serving their first prison term.
- Most have not had a misconduct citation in decades.
- Most would score high probability of release if the parole guidelines were calculated.

Even if annual lifer paroles increased to 50, it would take ten years to release 500 of them.

Long indeterminate sentences. In 2013, more than 15 percent of prisoners (6,600) were serving minimum terms over 15 years. More than 2,300 of these were serving over 25 years.

To slow the growth of this population, sentence lengths for serious offenses will have to be reduced. That will require changes in the sentencing guidelines.

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There are four ways to reduce the length of time current prisoners must serve:

1. Restore the opportunity for prisoners to earn sentencing credits.
2. Restore the authority of the board to parole people with long minimums at the same time as parolable lifers, that is, when they have served 15 calendar years.
3. Provide earlier parole eligibility for people who were younger than 18 at the time of offense.
4. Ensure prisoners are paroled at their ERDs, if they do not pose a high risk to public safety.

Life without parole. In 2013, 8.5 percent of prisoners (3,703) were serving life without parole for first-degree murder. Because they are not released, their number will inevitably continue to grow. Commutations were once relatively common, but that is no longer true.

The actual culpability of people serving life without parole varies enormously. For instance, some were aiders and abettors with peripheral roles. However, the mandatory penalty means judges and the parole board cannot consider any mitigating factors. Possible solutions:

- ◆ Adopt the practice of states that impose a minimum number of years to life for these offenses, such as 25 to life, reserving life without parole for certain circumstances. The parole board determines if and when these prisoners can safely be released.
- ◆ Amend the corrections code to create parole eligibility for prisoners currently serving nonparolable life, as was done in 2003 for “650 drug lifers”. Criteria could be added to guide the parole decision-making process.
- ◆ Apply the 1980 Michigan Supreme Court decision in *People v Aaron* retroactively. This would allow courts to resentence dozens of people who could not have been found guilty, had their trials been held after the decision changed the definition of “felony murder.”

Technical parole violators. In June 2014, the prisoner population included 2,455 people who had been returned to prison for violating conditions of parole. Technical violators serve, on average, 13.9 months before being released again. Technical violations fall broadly into four categories, including conduct:

- That could have been prosecuted as a felony but was not.
- For which the person was convicted of a misdemeanor and received probation, a fine or jail.
- That could have been prosecuted as a misdemeanor but was not.
- That was a noncriminal violation of a condition of parole.

It is unclear how many technical violators fall into each of these categories, but they all raise difficult questions about how much punishment is proportional to the violations, including:

- ◆ To what extent should parole revocation be used as substitute for prosecution?
- ◆ Why should a 90-day misdemeanor bring a longer prison sentence because the person is a parolee?
- ◆ Why are we using scarce and expensive prison beds to sanction noncriminal conduct?
- ◆ Could violations be reduced by more support for parolees and more non-prison sanctions?
- ◆ Should there be a limit on how long technical parole violators can be re-incarcerated?

A more detailed picture of the technical violators would make it possible to statutorily reduce length of stay for this group while still imposing significant penalties when warranted.

Conclusion

Much has changed since Michigan's prison system began expanding in the 1980s:

- ◆ Crime rates have fallen dramatically and barely rank among voter concerns.
- ◆ We have learned the fiscal and human cost of our policies.
- ◆ We have the benefit of a wealth of research that tells which policies are – and are not – effective.

Above all, we have recognized that we have a wide range of choices. We can protect public safety in ways that are practical, cost-effective, fair to prisoners and respectful of victims.

Just as we adopted strategies that seemed appropriate in the 1980s and 1990s, we can respond to the changes of the last 35 years and adopt new strategies in 2015.

Summary of recommendations and estimated savings

The bed savings presented here are not precise. They are credible estimates rooted in MDOC data but they are not mathematically sophisticated projections. They are intended to suggest a range of possibilities and stimulate discussion.

The goal is to estimate the total population reduction that could be achieved by the end of Year Five. The number of beds and dollars saved in each intervening year would depend on when each strategy was implemented and how many people could be affected at that time. Savings would continue to increase past Year Five as prospective changes begin to affect people serving minimum sentences longer than five years.

The largest estimated total reduction in prisoners is 12,646. This assumes the broadest application of presumptive parole. With a narrower application of that single strategy, the estimated total reduction would be 11,378.

However, since all strategies are not mutually exclusive, there is redundancy. That is, some prisoners could be affected by more than one change. For instance, a person could enter with a shorter minimum sentence due to revised sentencing guidelines ranges, have that sentence reduced by earned credit, and then be released promptly on the minimum because of presumptive parole. Moreover, if sentencing changes resulted in that person not entering prison, other strategies that might have affected him or her would be moot. **Because of this potential for overlap, it is assumed that an actual reduction of roughly 10,000 prisoners is realistic.**

On the other hand, this estimate does not include an additional 1,037 beds that could be saved without actually changing people's current status as prisoners or parolees. **Overall, the number of beds saved could be as high as 11,000.**

These estimates are also conservative in a number of ways. The data was not available to estimate the impact of some strategies. Nor do these estimates include the potentially large savings that could be realized by fundamental changes in areas that are beyond the scope of this report. These include the incarceration of thousands of people who are mentally ill, policing practices that have a disproportionate impact on low-income communities and broad disparities in prosecutors' charging policies from county to county.

I. Recommendations to reduce intake

The following reforms could help reduce entries to prison:

- Increase the use of appropriately targeted community-based sanctions for the roughly 6,000 people who enter prison each year with sentences of two years or less, for such crimes as driving under the influence (3rd offense), delivering marijuana or small quantities of narcotics, and retail fraud. The means could include:
 - Adjust sentencing guidelines scores to move people from “straddle cells” to “intermediate sanction” cells.
 - Increase support for therapeutic courts and community corrections programs.
 - Eliminate the mandatory two-year sentence for possessing a firearm while committing a felony or, at least, allow judges to depart below it.

Estimated beds saved: 900

- Reduce the number of technical probation and parole violators who enter prison:
 - Ensure that the length, conditions and quality of supervision are appropriate to individuals’ needs and risk of reoffending.
 - Increase the availability of cost-effective community-based reentry support for parolees.
 - Standardize permissible sanctions for technical violations of probation and parole supervision so that revocation and admission to prison occurs only for the most serious or persistent violators.

[Estimates adopted from CSG]

*Estimated beds saved: 1,234
(Probationers = 990, Parolees = 244)*

- Change the age of criminal responsibility to 18; require judicial determination for all juvenile waivers.

*Estimated beds saved:
Elimination of automatic waiver – 197
Increase age of criminal responsibility to 18 – 977*

II. Recommendations to reduce minimum sentence length

Several reforms could help reduce the average length of cumulative minimum sentences for new admissions from 4.2 years to 3.5 years:

- Adjust the sentencing guidelines to:
 - Narrow the breadth of guidelines ranges.
 - Start each range at a somewhat lower number of months.
 - Modestly change the scoring of offense and prior record variables to shift some defendants into lower ranges.
- Revise the treatment of habitual offenders:
 - Do not count the same prior offenses in multiple ways.
 - Redefine “habitual” to mean multiple unrelated convictions and sentences over a period of time, not multiple convictions arising from a single criminal incident.

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- Eliminate the use of mandatory minimum sentences, especially for felony-firearm.
- Reassess the expansion of discretionary consecutive sentencing, which increases both sentence lengths and disparate sentences for similar offenders.

Estimated beds saved: 2,121

III. Recommendations to increase paroles

Average length of stay could be greatly reduced by multiple strategies for increasing the number and timing of releases on parole:

- Revise the statutory mandate to establish a presumption that parole will be granted upon service of the minimum sentence, unless there is objective and verifiable evidence that the prisoner would present a high current risk to public safety if released. The evidence must be of post-sentencing conduct not already scored in the parole guidelines or a high reoffense score on another validated risk assessment instrument:
 - Ensure that the mandate is enforceable by doing one or both of the following:
 - Reinstate prisoner appeals from parole denials for those who score high probability of release on the parole guidelines.
 - Establish an administrative oversight mechanism, such as reporting to the Criminal Justice Policy Commission, to permit independent tracking of cases that depart from the presumption.
 - Improve the ability of the board to make timely decisions. Amend the rule requiring psychological evaluations to exclude sex offenders who score low risk on relevant assessment instruments or increase the capacity to complete evaluations before prisoners reach their ERD.
[Assumes application to all current prisoners]

Estimated beds saved:

Application to high and average probability cases – 3,978

Application to high probability cases only – 2,710

- Parolable lifers – expedite and improve the review of roughly 850 parolable lifers who have served more than 15 years:
 - Expand the parole board to include a five-member special review panel.
 - Apply the same criteria used to review other parole-eligible prisoners.
 - Improve the review process (increase frequency, eliminate file reviews, require explanation of “no interest” decisions).
 - Eliminate the authority of successor sentencing judges to veto.

Estimated beds saved: 500

- Pre-Aaron felony murder cases – create judicial authority to review instructions and afford relief where appropriate; provide for representation by the State Appellate Defender Office.

Estimated beds saved: 40

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- Juveniles sentenced to long indeterminate terms – create parole eligibility after service of 15 years or half of judicially imposed minimum.

Estimated beds saved: 113

- Medical paroles – grant paroles to physically or mentally incapacitated prisoners who have not reached their ERD pursuant to MCL 791.235(10).

Estimated beds saved: 300

- Reduce the average length of stay for technical parole violators from 13.9 to nine months.

Estimated beds saved: 807

- Parole 298 more people nine months before they discharge on their maximum sentence.

Estimated beds saved: 224

IV. Recommendation to establish earned sentencing credits

- Permit prisoners to receive up to four days per month in earned credit for participation in work, academic, vocational, treatment or productive activities, so long as they have not received a Class I misconduct in that month.

Implementation issues:

- This would require a three-quarters majority vote of the Legislature because good time was eliminated by a ballot proposal in 1978.
- The MDOC would have to provide sufficient access to productive activities to enable prisoners to earn the credits.

[Assumes the number and distribution of minimum sentences of 2013 new commitments is constant for five years; reduces the number of sentences by 9.9 percent to account for additional sentences imposed; assumes 60 percent of prisoners receive maximum credits and are paroled on their ERD.]

Estimated beds saved: 1,255

Total estimated beds saved from fewer prisoners:

With presumptive parole for high and average probability cases – 12,646

With presumptive parole for high probability cases only – 11,378

V. Recommendations that reduce beds but not the number of prisoners

- Permit 1,000 prisoners who have had paroles granted to enter community placements up to four months before their ERD.

Estimated beds saved: 333

- Place medically or physically disabled prisoners in private medical institutions using the medical transfer statute, MCL 791.265.

Estimated beds saved: 200

- Eliminate the placement of selected parolees at the Detroit Reentry Center.

Estimated beds saved: 880

Parolees needing treatment programs = 688

IDRP parolees = 192

- Eliminate the placement of prisoners in county jails.

Additional beds needed: 357

Net additional estimated beds saved: 1,037

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10,000 fewer Michigan prisoners: Strategies to reach the goal

Part One: Setting the context

In Dec. 2014, Michigan’s prisoner population was 43,359. The 2015 Michigan Department of Corrections (MDOC) budget for 2015 is over \$2 billion. The MDOC consumes almost 20 percent of the state’s General Fund. This is a far cry from 1973, when the prisoner population was under 7,900 and spending on corrections was \$38 million – 1.6 percent of the General Fund.

Table 1 provides an overview of how Michigan’s prisoner population has changed. It also suggests what did and did not cause changes to occur.

Table 1. 40 years of change in Michigan’s prisoner population

	1973	1983	1993	2003	2013
Prisoner population	7,874	14,508	38,942	49,357	43,704
State population	9,061,000	9,050,282	9,529,240	10,065,881	9,895,622
Incarceration rate	86.9	160.3	417.1	490.3	441.6
Index crimes - number	496,459	601,832	505,497	384,162	272,870
Index crime rate	5,479.1	6,649.9	5,333.4	3,816.5	2,757.5

After peaking at 51,515 in 2006, the prisoner population declined by 8,600 then rebounded by a modest 455. There were 35,485 more people behind bars in 2013 than in 1973 – a stunning 450 percent increase.

The state population also fluctuated during these years, but far less dramatically. It increased by only 9.2 percent. Thus the prisoner population rose 49 times faster than the total state population.

The incarceration rate is the number of prisoners per 100,000 people in the state population. It provides a way to measure fluctuations in the prisoner population while taking the size of the total population into account. The fact that the incarceration rate was five times higher in 2013 than it was in 1973 is further evidence that prison growth was not the product of growth in the state population.

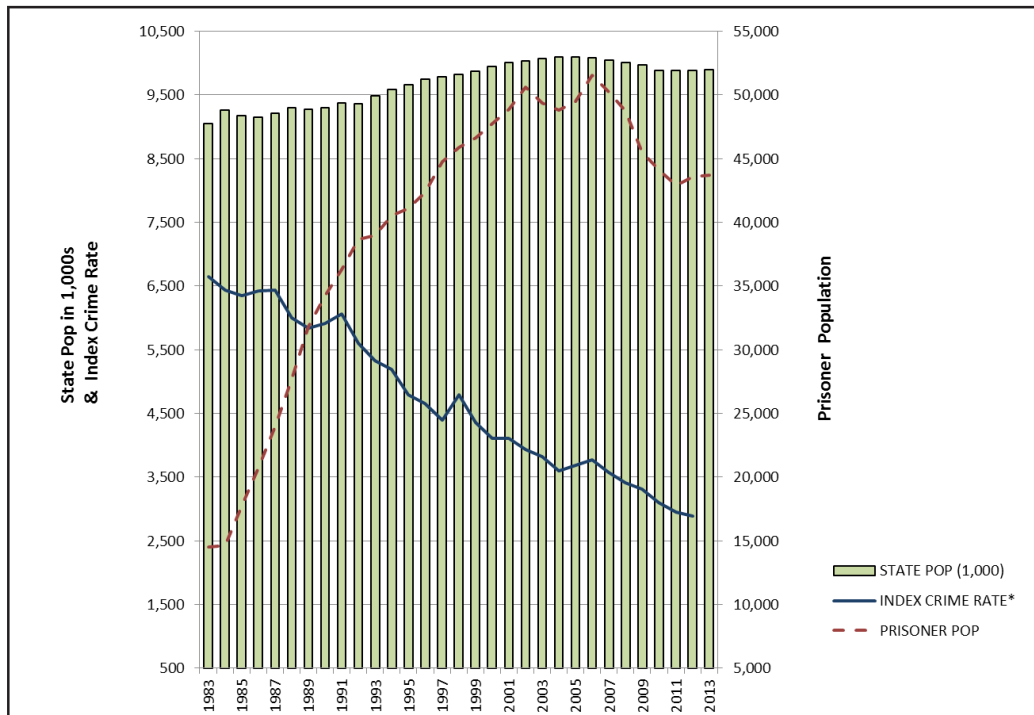
Although increased crime was one factor that sparked the “tough-on-crime movement” of the 1970s, the number of index crimes has fallen steadily since 1983.² The index crime rate, that is, the number of index crimes per 100,000 people in the state population, fell by 58.5 percent between 1983 and 2013. Thus, prison growth over the last 30 years was also not the product of increased crime. On the contrary, it occurred despite a steep crime decline.

² Index crimes are: murder, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, arson.

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Graph 1 illustrates how the prisoner population has fluctuated over the last three decades quite independently of the relatively small changes in the state's population and the steep decline in the crime rate. (See Appendix, Table A for full details.)

Graph 1. State population, prisoner population and crime rates: 1983-2013



Nor is the decline in crime a result of prison growth. An empirical analysis by the Brennan Center for Justice concludes that increased incarceration from 1990-2013 had a minimal impact on declines in property crime and no effect on the drop in violent crime. Moreover there is a point of diminishing returns past which there is virtually no gain in crime reduction from increases in the prisoner population.³

Sentencing and parole policies, drug law enforcement, the availability of “good time”, the use of alternatives to incarceration, methods of sanctioning probation and parole violators – all these are policy choices that affect the size of prison populations.

A recent infographic from The PEW Charitable Trusts illustrates that states can reduce crime and their prison populations at the same time. A state-by-state comparison of incarceration rates and crime rates from 2008-2013 shows that in the 33 states where imprisonment rates decreased, crime rates fell an average of 13 percent. In the 17 states where imprisonment rates increased, crime rates fell an average of 11 percent.⁴

So if prison growth is largely unrelated to population changes or crime rates, how does it occur? It is widely understood that “tough on crime” policies caused prison populations around the country to swell. But the mechanics of growth – that is, the specific criminal justice practices that cause prison populations to rise and fall – vary among jurisdictions. Sentencing and parole policies, drug law enforcement, the availability of

³ Oliver Roeder, Lauren-Brooke Eisen, and Julia Bowling, *What Caused the Crime Decline?*, Brennan Center for Justice (New York: 2015).

⁴ <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/imprisonment-and-crime>.

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“good time”, the use of problem-solving courts and other alternatives to incarceration, methods of sanctioning probation and parole violators – all these are policy choices that affect the size of prison populations.

In Michigan, the 1970s saw an increased use of habitual offender sentences, the elimination of good time, the adoption of onerous drug laws, revised penalties for sex offenders and a mandatory two-year consecutive sentence for possessing a firearm while committing a felony. As the prisons grew increasingly crowded, the state initially coped by adopting the Prison Overcrowding Emergency Powers Act (EPA) in 1980. When overcrowding reached a certain trigger point, the Governor was authorized to reduce prisoners’ sentences across the board by 90 days, thereby causing people to become eligible for parole more quickly. From 1978 through 1984, the population stayed steady at roughly 15,000.

Then, in 1984, a parolee who had been released early and his accomplice killed an East Lansing police officer and a housewife. The EPA ended and the prison construction boom began. From 1985 to 1992, Michigan built 23 prisons. The prisoner population rose by 164 percent to 38,628. A second wave of prison building from 1993 to 2000 resulted in 11 more state prisons (as well as an ill-fated privately run youth prison). The population peaked at 51,515 in 2006, then began to decline. (See Appendix, Table A for details.) From 2007 to 2012, a net of six prisons and nine prison camps were closed.⁵

While numerous reports have analyzed Michigan’s prison growth and made suggestions for containing it,⁶ none is sufficiently current and comprehensive to give policymakers – especially those who are new to corrections – a thorough understanding of their options.

The purpose of the current report is three-fold:

- ◆ Provide policymakers with a comprehensive analysis of how and why Michigan’s prisoner population has changed over the last 25 years.
- ◆ Identify all strategies for reducing the population that are logically connected to the reasons for growth, regardless of their immediate likelihood of adoption.
- ◆ Establish credible estimates of how many prison beds could be saved by adopting each strategy so that policymakers can choose which strategies to combine to reach a population reduction target that is achievable within five years.

5 Riverside was closed in 2007 but the Michigan Reformatory was reopened at the same time to replace it. Deerfield, Hiawatha, Scott and Standish were closed in 2009. Also in 2009, Woodland was opened and Huron Valley was converted from a men’s to a women’s facility. In 2011, Florence Crane and Mound were closed. In 2012 Ryan was closed. Both Mound and Ryan have been “repurposed.” Ryan is now the Detroit Reentry Center, primarily housing parolees. Mound is now the Detroit Detention Center housing City of Detroit detainees awaiting arraignment. Muskegon was closed in 2010, reopened to house Pennsylvania prisoners, closed again and reopened to house Michigan prisoners in 2012. The camps closed were Branch, Brighton, Cusino, Kitwen, Lehman, Manistique, Ottawa, Valley and White Lake.

6 See, e.g., Warren C. Gregory, *The Crisis in the Michigan Criminal Justice System: Causes, Consequences, and Options* (Lansing: House Fiscal Agency, 1989); Sandra Shirley James, *Crime and Public Policy in Michigan: A Profile of the Criminal Justice Crisis* (Lansing: Public Sector Consultants, Inc. 1992); Marilyn Peterson and Karen Firestone, *FY 1998-99 Boilerplate Report: A Summary of Trends Affecting the Use of Prison* (Lansing: House Fiscal Agency, 1999); Karen Firestone, *An Analysis of Sentencing and Factors Affecting Crime in Michigan’s 83 Counties* (Lansing, Senate Fiscal Agency: 2001); *Citizens Alliance on Prisons and Public Spending, Recommendations for Reducing Excessive Incarceration*, CONSENSUS (Lansing: Citizens Alliance on Prisons and Public Spending, Summer 2003); Barbara Levine, *The high cost of denying parole: an analysis of prisoners eligible for release* (Lansing: Citizens Alliance on Prisons and Public Spending, 2003); *Justice Reinvestment in Michigan: Policy Options to Deter Crime, Lower Recidivism, and Reduce Spending on Corrections* (N.p: Council of State Governments Justice Center, 2009); *Final Report: Michigan Task Force on Jail and Prison Overcrowding*, (Lansing, 2005); *Growth in Michigan’s Corrections System: Historical and Comparative Perspectives* (Livonia, Mich.: Citizens Research Council of Michigan, 2008); *Applying a Justice Reinvestment Approach to Improve Michigan’s Sentencing System: Summary Report of Analyses and Policy Options* (N.p: Council of State Governments Justice Center, 2014).

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We begin by suggesting a relatively modest initial target. Michigan's 2013 incarceration rate of 441 is among the highest of the Great Lakes States.⁷

Indiana	454	Illinois	377
Ohio	446	Wisconsin	370
Michigan	441	New York	271
Pennsylvania	391	Minnesota	189

Michigan's rate was 345 in 1989 and 369 in 1990. The prisoner population in those years was 31,834 and 34,309, respectively. If Michigan today achieved an incarceration rate of 341, **the prisoner population would be 33,704, a reduction of 22.8 percent or 10,000 prisoners.** This could allow for the closing of seven entire prisons and six additional housing units, for an annual savings of nearly \$250 million once the goal was reached.⁸

This would be an overall decline of 35 percent from the high point in 2006. While a rate of 341 is still higher than that of 17 other states, it is comparable to the rates of California (353), Connecticut (338), Maryland (353) and North Carolina (356) and is a reasonable initial target.

Having 10,000 fewer prisoners would mean operating 7 fewer prisons and spending \$250 million fewer taxpayer dollars a year.

Returning to the population size of 1990 means we must fundamentally reconsider who we incarcerate and for how long. It also requires carefully examining the impact of specific changes in law, policy and practice:

- ◆ Did some changes fail to achieve their purpose?
- ◆ Should some be reconsidered in light of current circumstances or recent research?
- ◆ Have some had unintended consequences, such as increasing health care costs, undermining crime prevention efforts or disproportionately affecting particular communities?
- ◆ Are available tools for safely reducing the population being adequately used?
- ◆ Are strategies used by other jurisdictions being adequately considered?
- ◆ Might restoring former practices be the most effective way to address some issues?

There is no question that Michigan's prison growth was spurred by policy choices. It can be reversed by making different policy choices.

7 E. Ann Carson, Prisoners in 2013 (Washington, D.C., Bureau of Justice Statistics, U.S. Department of Justice, Sept. 30, 2014), p. 7.

8 The MDOC estimates the elimination of 1,300 beds permits the closing of a prison at a cost savings of \$33,215,000. Every 160 beds eliminated permits the closing of a housing unit at a cost savings of \$2,628,000. Information provided by Kyle Kaminski, MDOC Legislative Liaison, April 29, 2015. These savings are from prisoner custody, health care and programs. They also include some of the cost of training new officers.

The MDOC currently estimates it will need to hire 3,000 new officers over the next three years because of the large number of retiring officers who must be replaced. Each corrections academy trains about 300 new recruits at a cost of \$8.4 million. Kathleen Gray, "300 new recruits begin prison training," Detroit Free Press Lansing Bureau, April 1, 2015, <http://www.freep.com/story/news/local/michigan/2015/04/01/michigan-trains-corrections-officers/70774954/>. The closing of 7.7 prisons would eliminate the need for 2,300 officers. The amount of additional savings from fewer academies would depend, in part, on the continuing need to replace retirees at the remaining facilities.

Characteristics of Michigan prisoners that affect population reduction strategies*

AGE

- Under 17 at time of offense – 1,108
- 17 at time of offense – 2,229
- Currently over 50 – 8,700
- Currently over 60 – 2,600

GENDER

- Male – 41,645
- Female – 2,059

RACE/ETHNICITY

- White – 19,147
- Non-white – 24,205**

OFFENSE TYPE

- Non-assaultive – 9,600
- Drug – 3,350
- Assaultive – 30,200

SENTENCE LENGTH

- Minimum two years or less – 10,500
- Minimum over 15 years – 6,600
- Life without possibility of parole – 3,700

CURRENTLY ELIGIBLE FOR PAROLE

- Past earliest release date – 5,500
- Parole-eligible lifers – 850
- Technical parole violators – 2,500

UNDER SUPERVISION PRIOR TO COMMITMENT OR RETURN

- Probation violator – 6,902
- Parole violator – 8,372

HEALTH

- Medically and elderly fragile – 700
- History of serious mental illness – 8,700
- History of substance abuse – 33,000

TIMES TO PRISON

- First – 26,224
- Second – 10,052
- Third or more – 7,428

SECURITY CLASSIFICATION (FROM LOWEST TO HIGHEST – THERE IS NO LEVEL 3)

- Level 1 – 20,541
- Level 2 – 14,859
- Level 4 – 6,556
- Level 5 – 1,748

*Figures are 2013

**Hispanics cannot be separately counted because ethnicity is not a required MDOC data field

The basic equation

The size of the prisoner population is determined by how many people enter the system and how many leave. If more people are admitted than leave, the population will grow. If more prisoners are released than added, the population will shrink.

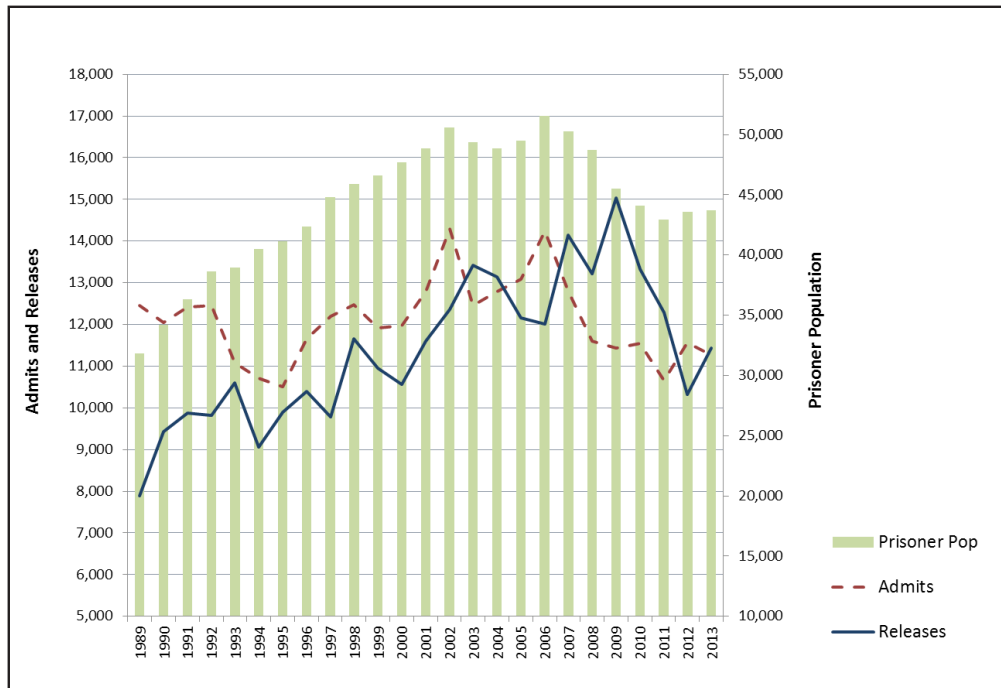
Graph 2 illustrates this effect over a 25-year period. In every year from 1989 through 2002, admissions exceeded releases. Since the effect is cumulative, the population grew by 18,755, nearly 59 percent, to reach 50,591.

In 2003 and 2004, the ratio was reversed. With releases exceeding admissions, the population dipped.

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Admissions predominated again until the population peaked in 2006 at 51,515. A shift in the balance to more releases for the next five years led to a substantial population decline by 2011, with a modest rebound thereafter. At the end of 2013, the population was 43,704, about where it was in mid-1997. (See Appendix, Table B, for details.)

Graph 2. Population growth as function of admits and exits, 1989-2013



The MDOC publishes annual population projections based on the preceding year's trends. The "Prison Population Projection Report" released in Feb. 2015 explains the factors that affected population changes from 2013 to 2014. It defines the assumptions being made for future years and forecasts modest annual growth for each of the next five years, culminating in a projected population of 44,502 in Dec. 2018.

The projection report is descriptive, not prescriptive. It does not take a position on the desirability of a particular population size or recommend steps to reach that outcome. Rather it is a management tool designed to anticipate the need for prison beds. Its predictions are highly accurate, *so long as no changes in law or policy cause substantial fluctuations in the components of either admissions or releases.*

Since the basic equation is so clear – **starting population + intake – releases = new population** – the solution to reducing the prisoner population seems obvious. Decrease admissions and/or increase releases. Inevitably, it's not quite that simple. Each piece of the equation has multiple **components**.

Part Two: Intake

Entries reflect our policies about who should go to prison. This is often called "the in/out decision." While a prison sentence may be mandated by statute, the in/out decision is typically made by a judge who is influenced, but not wholly controlled, by statutory sentencing guidelines. The decision can be made quite differently by different decision-makers. That is, a judge in County A may send a person to jail while a judge in County B (or a different judge in County A) might send the very same person to prison.

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The in/out decision is also applied differently to various categories of offenders. For instance, the same crime may bring probation when a defendant is first sentenced but result in a prison sentence if he or she violates the terms of probation. Similarly, a parolee who has not committed a new crime may be returned to prison for violating the terms of parole.

It is possible for entries of one type to fall while another type increases, causing total admissions to appear relatively stable. Affecting the intake variable of the basic equation depends on recognizing the contribution of each entry component.

I. The components of intake

People entering prison fall into five basic categories. Notably, four consist of people under corrections supervision:

1. **New court commitments** are people who have been convicted of a felony and are being sentenced for that offense for the first time.
2. **Technical probation violators** are people who were convicted of a felony and initially sentenced to probation but who have been resented to prison because they violated terms of their supervision. The violation may involve noncriminal behavior that is forbidden only by their status as probationers, such as a failure to report, unauthorized residence change or drug test failure. Or it may involve more or less serious criminal behavior that was not prosecuted, either because of insufficient evidence or administrative convenience.
3. **Probation violators with new sentences** are people who were convicted of a felony and initially sentenced to probation but who have been resented to prison because they committed a new criminal offense while on probation.
4. **Technical parole violators (PVT)** are people who served at least their minimum sentences on the felony of conviction and were released on parole but were returned to prison because they violated terms of their supervision. As with probationers, the violation may involve noncriminal behavior that is forbidden only by their status as parolees or it may involve unprosecuted criminal conduct.⁹
5. **Parole violators with new sentences (PVNS)** are people who served at least their minimum sentences on the felony of conviction and were released on parole but were convicted of committing a new felony while under supervision and sent back to prison with a new sentence.

Graph 3 shows the 25-year trends in each of these categories.

Most noticeable is the 39 percent drop in new commitments from 7,103 in 1989 to 4,355 in 2000. Since then there has been a roller coaster effect, with changes of more than 900 between 2000 and 2002 and again between 2004 and 2006. While new commitments have not reached 5,500 again since 1994, they were back up to 5,135 in 2013.

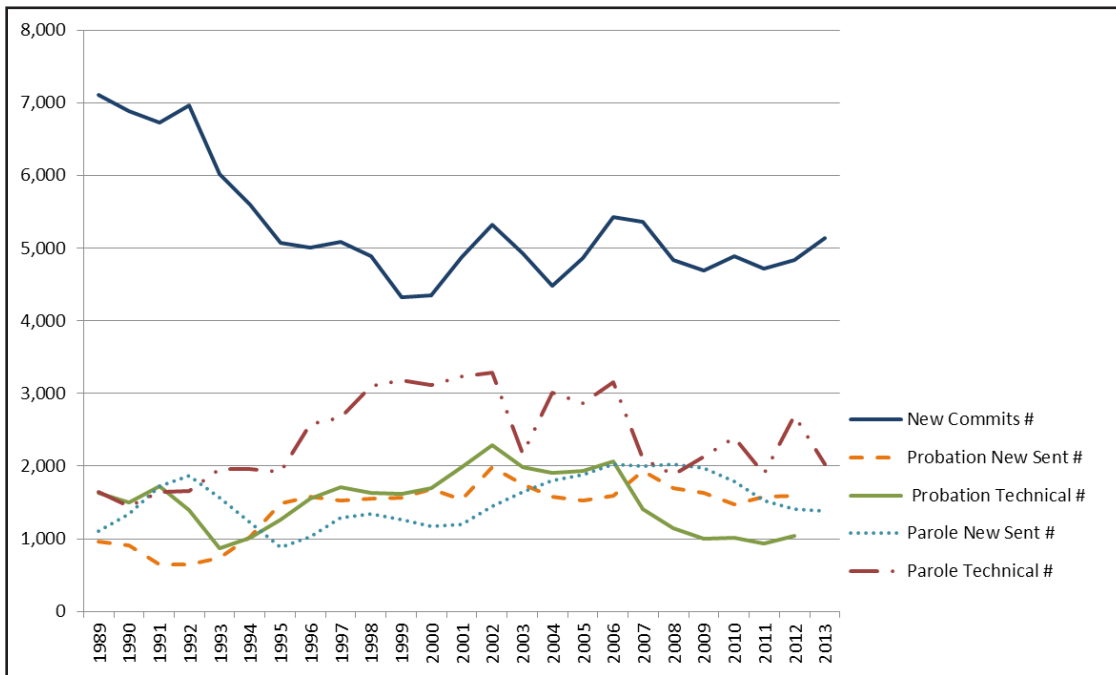
Also striking are the high degree of fluctuation in technical parole violators, the large decline in technical probation violators after 2006 and the substantial decline in parole violators with new sentences since 2009.¹⁰

⁹ When a parolee is suspected of having committed a new crime, it is typically quite easy to find that a parole condition has been violated. Judicial proceedings are much more complex than revocation hearings and the standard of proof for conviction of a new crime is higher. Thus prosecutors may find it easier to simply allow the MDOC to reincarcerate the parolee as a technical violator.

¹⁰ According to the MDOC's Feb. 2015 "Prison Population Projection Report," parole violators with new sentences decreased for the sixth consecutive year in 2014, this time by nine percent. Other 2014 decreases were five percent for all probation violators and two percent for technical parole violators.

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Graph 3. Frequency of entries by category



Graph 4 shows the percentage each category constitutes of the total entries to prison. While new commitments are always the single largest group, they dropped below 50 percent in 1995, reaching a low of 35 percent in 2004 before climbing back to nearly 46 percent in 2013. Of course, this percentage reflects changes not only in the number of new commitments but in probation and parole failures as well. That is, as one or more types of supervision failures increases, the proportion of total entries attributable to new commitments declines. *The bottom line is that more than half of all new entries to prison are people who were under supervision.*

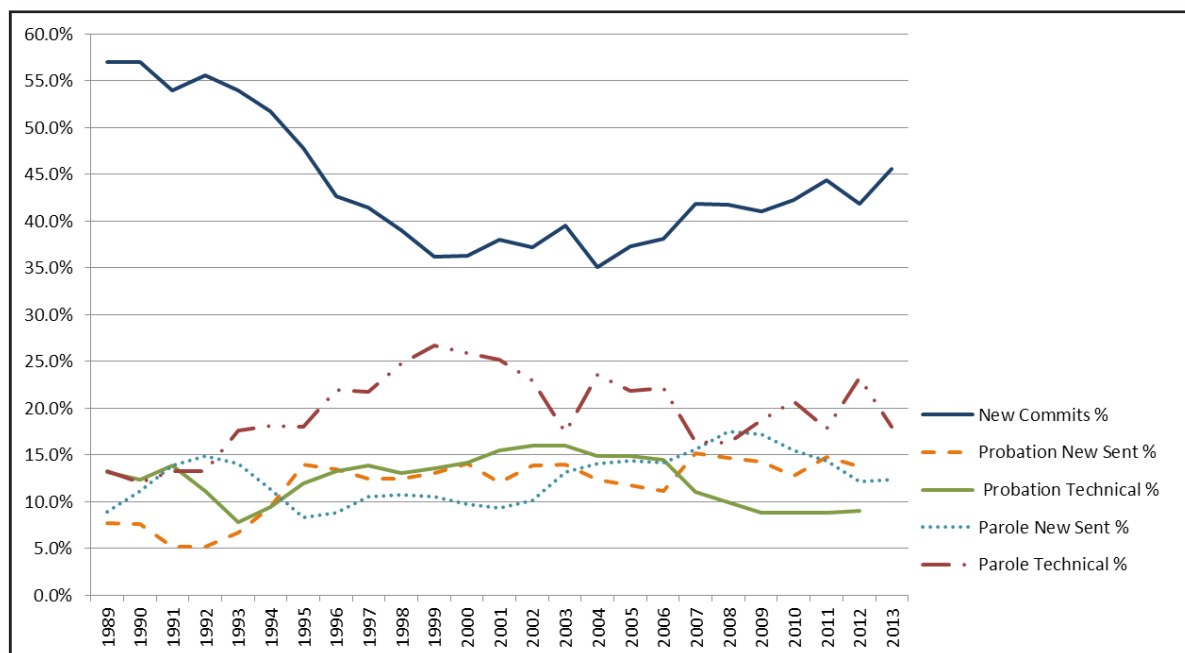
Although there are far more people on probation than on parole, among entries to prison total parole violators have always outnumbered total probation violators:

- For instance, in 2013, the average number of probationers was 47,526 and the average number of parolees was 14,521. Yet in the same year, the number of probationers who went to prison was 2,708 while the number of parolees who were returned to prison was 3,416.¹¹
- The percentage of new entries who were probation violators ranged from a low of 14.5 percent in 1993 to a high of 30 percent in 2003. The percentage of parole violators ranged from a low of 22.1 percent in 1989 to 37.6 percent in 2003.
- From 1996 on, parole violators' share of new entries never fell below 30 percent.

¹¹ The Council of State Governments Justice Center (CSG) examined rearrest rates for probationers and parolees from 2008-2011. It found that the rate for parolees had declined from 30 to 24 percent, while the rate for probationers had remained essentially static at 23 percent. CSG estimated that if probation rearrest rates had fallen like parole rates, there would have been almost 1,500 fewer arrests of probationers in 2012.

The number of placements on probation in 2011 was 2.7 times the number of prisoners released to parole. Therefore the number of felony arrests of probationers in 2011 was 2.4 times greater and the number of misdemeanor arrests was 2.7 times greater. *REPORT TECHNICAL APPENDIX: Compilation of Michigan Sentencing and Justice Reinvestment Analyses* (N.p: Council of State Governments Justice Center, May 2014), pp. 46-49. [hereinafter: CSG, *Appendix*]

Graph 4. Categories of entries as proportion of total



II. Factors that affect each category of admission

A. New court commitments

The number of new court commitments is directly affected by crime rates, particularly the amount of violent crime, i.e., the crimes for which people are most likely to be incarcerated. There are also important associated factors.

Law enforcement strategies and resources determine the extent to which criminal statutes are enforced and crimes are solved. For instance, a local police department may decide to crack down on drug offenses or a reduction in the number of officers may lead to fewer crimes being investigated. Research suggests that police use of data-driven management procedures, such as CompStat, to identify crime patterns and target resources reduced crime by five to 15 percent, depending on the city.¹² Policing strategies may be heavily influenced by federal or state incentives to concentrate enforcement on particular crimes or in particular neighborhoods.

New felonies are sometimes created. Entirely new crimes may be defined, as when the felony firearm statute was enacted in 1977 and the crime of carjacking was created in 1994. The level of an offense may be changed from a misdemeanor to a felony, as occurred when fleeing and eluding a police officer became a felony in 1988. Felonies may also be reduced to misdemeanors, as when the dollar amount separating misdemeanor from felony property offenses was raised from \$100 to \$1,000 in 1998.

State and local sentencing policies determine the **proportion of felony convictions that result in prison** as opposed to diversion, probation or jail.

Statutory sentencing guidelines determine whether a specific case falls in one of three groups: intermediate sanction (presumptive non-prison), presumptive prison, or an in-between “straddle cell” group that allows judges

¹² Roeder, Eisen and Bowling, *What Caused...?* (see note 3).

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to choose. Changes in the guidelines may shift more people into or out of the intermediate sanction group. How judges exercise their discretion in straddle cell cases and the extent to which they choose to depart from guidelines recommendations also affects the volume of prison commitments.

The legislature may also affect prison commitments through the adoption or elimination of *mandatory prison sentences*. For instance, conviction of possessing a firearm while committing another felony requires two years in prison even if the sentence on the associated felony is probation. In 2013, there were 1,275 prisoners whose longest minimum sentence was for a felony firearm conviction. On the other hand, the elimination of mandatory minimum sentences for major controlled substance violations in 2003 helped reduce the proportion of new prison sentences for drug convictions from 23 percent in 1990 to 13.4 percent in 2013.

The *availability of local resources* also affects prison commitments. These resources include diversion programs, drug and other specialty courts, community-based treatment, residential services and jail beds. When these alternatives are available and appropriate, judges have less incentive to impose a prison term. When local jails are overcrowded or community-based services are overburdened or not well regarded, judges may see prison as their only option. Thus, someone who could have served nine months in the county jail or three months in an intensive residential substance abuse program may instead receive one to four years in prison.

When local jails are overcrowded or community-based services are overburdened or not well-regarded, judges may see prison as their only option.

The state uses financial incentives to induce communities to keep people convicted of less serious offenses locally. In 1988 the Legislature established the Office of Community Corrections which provides grants to operate community corrections programs. The state also reimburses counties for the cost of residential treatment beds and of jailing defendants who would otherwise be prison bound. Nonetheless, high quality community-based programs are not equally available or equally utilized in every county.

A concentrated effort to ensure that effective programs are accessible to probationers in every county and that judges appreciate their usefulness is an important part of the effort to reduce the use of prison beds.

From 2003-2013, the percentage of total felony offenders who received prison sentences was between 19.3 and 21.9. Percentages reported from 1989 through 2002 are substantially higher, appearing to decline from a high of 34.7 percent. However, the accuracy of this figure is uncertain.¹³

B. Probation and parole violators

Both probation and parole violators who commit new felonies may be sentenced to prison for those offenses. Both may be sentenced to jail for misdemeanor convictions.

Technical probation and parole violators may have their supervision in the community continued with additional conditions or they may be incarcerated. On average, 78 percent of technical probation violators who are incarcerated are sent to jail rather than prison.¹⁴

¹³ MDOC revised its methodology for counting dispositions to achieve greater accuracy. The revised figures it released in Dec. 2013 go back only to 2003. Thus while it appears that the proportion of all felony offenders sentenced to prison has declined, it cannot be said by precisely how much.

¹⁴ CSG, *Appendix*, p. 52 (see note 11).

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In lieu of revoking parole, technical parole violators may be placed in one of two MDOC-operated detention programs.¹⁵ In 2013, 2,029 technical parole violators were returned to prison for an average of 13.9 months; 6,063 entered a detention program lasting, on average, either 30 or 85 days.

Probation and parole officers are all Corrections employees who operate under MDOC guidelines. However the decision to revoke probation is ultimately made by a judge while the decision to revoke parole is made by the parole board. While the statewide probation revocation rate in 2012 was 17 percent, there is wide variance across counties.¹⁶

Like people categorized as new court commitments, people on probation or parole who commit new offenses are also affected by factors like the creation of new crimes and penalties, the structure of the sentencing guidelines and the availability of community-based sanctions for lower level offenses. However, community supervision presents three additional issues:

1. The intensity, conditions, quality and length of supervision.
2. The availability of community-based supportive resources.
3. The standards for revocation.

Supervision. Probation and parole supervision are most effective when tailored to the individual's risk of reoffending and what he or she needs to be independent and productive. Research shows that people at high risk need more intensive programming and services for a longer time while those at low risk can actually be harmed if over-supervised and over-treated.¹⁷

A key CSG finding was that Michigan pays too little attention to distinguishing between high and low risk probationers, and thus fails to concentrate services appropriately. For parolees, the MDOC attempts to address this problem by placing individuals at higher risk of reoffending into Prisoner Reentry, where they receive some community-based support. The parole board has also shortened the length of supervision for some parolees.

A related issue for probationers and parolees is the imposition of conditions of supervision that may be counter-productive because they set the person up for failure. Simple examples are requiring someone who has no car to report to an office not readily accessible by public transportation or requiring someone to report during working hours, forcing a choice between losing a job and risking revocation. Placing people serving for sex offenses on GPS monitoring with highly restrictive conditions, regardless of their actual risk of reoffending, makes it very difficult for them to find jobs or engage in routine daily activities.

Availability of community support. Participation in treatment programs may be made a condition of probation or parole. However, people under supervision often need other forms of support, such as housing, job training and placement, medical or mental health care, and help obtaining identification or government benefits. Such needs can be particularly acute for parolees who have been away from the community for years and may have little or no support system left.

Providing this sort of practical assistance as well as mentoring and reliable community ties is what community-based prisoner reentry was designed to do. The Michigan Prisoner Reentry model has gained substantial national recognition. The MDOC credits the success of reentry as a primary reason why recidivism rates have dropped

15 See discussion of Intensive Detention Reentry Program and Residential Reentry Program below at p. 81.

16 CSG, *Appendix*, p. 35 (see note 11).

17 Council of State Governments Justice Center, **Sentencing and Justice Reinvestment Initiative** (presentation to Michigan Law Revision Commission, Feb. 13, 2014), slide 30.

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dramatically. Nonetheless, total General Fund expenditures on reentry have also dropped dramatically, from \$51.6 million in FY 2010 to \$25.6 million in FY 2014. The portion spent on comprehensive community plans declined from \$25.6 million to \$13.6 million during the same period.

The spending decline has multiple causes. Strong pressure to cut overall corrections spending combined with controversy over the optimal level of both funding for and local control over the services to be provided. A 2012 report by the Auditor General found that the MDOC did not have adequate procedures to monitor and evaluate reentry services or sufficient internal controls to implement the program effectively.¹⁸ There were also allegations of waste and criticism of how some local programs were operated.

The extent to which prison entries for technical violations of probation or parole conditions rise or fall depends substantially on policy decisions about when probation or parole should be revoked.

The MDOC says it shifted funds from community-based reentry programs to prison-based reentry programs. However it has also expanded the definition of “reentry” to include various pre-existing programs that had their own budget lines, such as prisoner education, substance abuse treatment and felony drunk driver reduction.

In addition to funding cuts of more than 40 percent, local reentry coordinators now face strict limits on the services they can provide. Many contend that stronger financial control and better oversight could have been instituted without so severely limiting their ability to tailor services to local needs and resources. It is unclear what impact the cuts have had on the number of parolees who receive services, the nature of the services provided and recidivism rates overall.

Revocation standards. The extent to which prison entries for technical violations of probation or parole conditions rise or fall depends substantially on policy decisions about when probation or parole should be revoked. “Get tough” or “zero tolerance” approaches can result in far more new entries than combining progressive sanctions with more attention to what caused an individual’s failure to comply.

The volatility of technical parole violator entries is apparent in Graph 5, which shows these entries as a percentage of the average number of people on parole each year:¹⁹

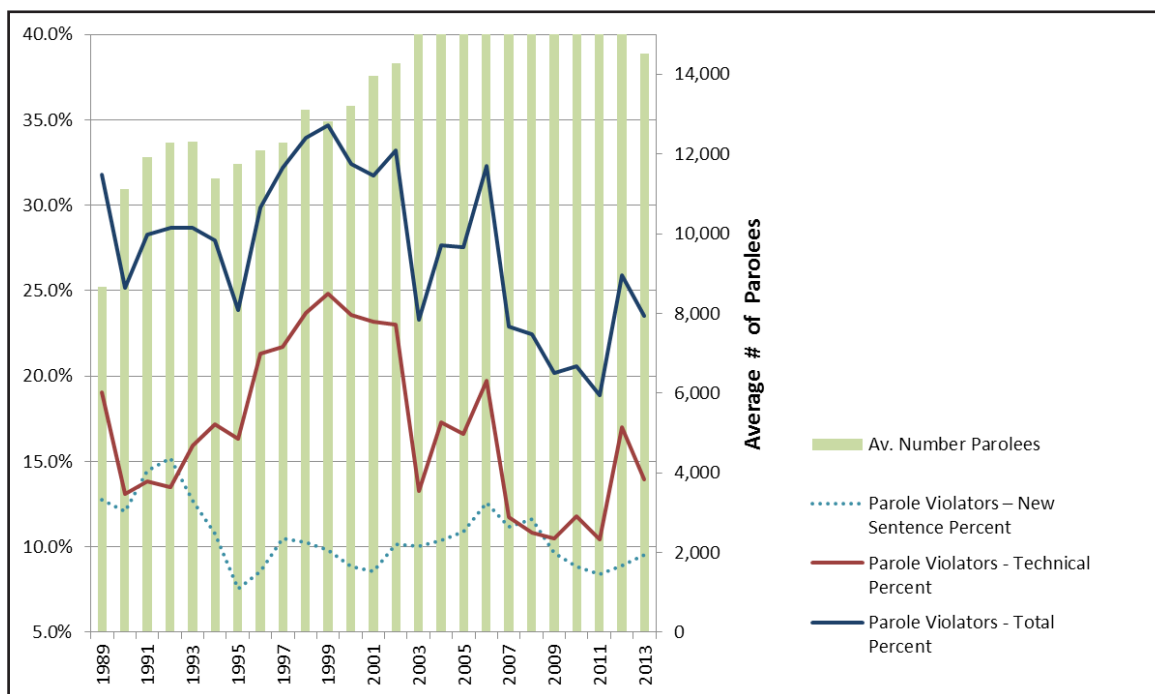
- From 1989-1995, the percentage of technical violators ranged from 13.1 to 19.0, with a median of 15.9 percent. As will be discussed below, this period spans the last years of the “old” civil service parole board and the first years of the “new” board.
- From 1996-2002, the percentage of technical violators ranged from 21.3 to 24.8; the median had increased to 23.2 percent. These were the years when the board was at its “toughest” and parole officers tended to see their jobs as “trail ‘em, nail ‘em and jail ‘em.”
- From 2003-2013, the percentage of technical violators ranged from 10.5 to 19.7; the median dropped to 13.3 percent. This dramatic change reflects the policy shift begun in the Granholm administration from a wholly punitive approach to one designed to decrease reoffending by promoting offender success.

18 *Performance Audit, Michigan Prisoner ReEntry Initiative, Department of Corrections* (Lansing: Michigan Office of the Auditor General, Feb. 2012).

19 This is not a strictly accurate measure since the total number of people who were on parole at some point during any given year will be greater than the average number for the year. Thus the pool of people who might have been returned to prison will be greater and the percentage of the pool that actually did return will be lower. However, the average number of parolees, which is the only figure available, provides a consistent basis for year-to-year comparisons.

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Graph 5. Parole violators as percentage of average number of parolees



The multiple factors that affect supervision violations are difficult to disentangle. For instance, absent carefully designed research, it is impossible to say how much the reduction in technical parole violators is due to changes in offender behavior brought about by better targeted supervision or supportive community services and how much is simply the result of less punitive parole revocation policies. Notably:

- Technical parole violator returns plummeted in the first year of the Granholm administration, even though the community support aspect of re-entry was not pilot-tested until 2005 and was not fully implemented until 2007.
- Technical violations spiked in 2006, after a parolee committed several high profile murders, and again in 2012, after a Detroit Free Press series in Oct. 2011 called attention to murders committed by probationers and parolees.
- The proportion of parole violators with new sentences seems to vary independently of technical violators.²⁰

Until research proves otherwise, it is reasonable to assume that all these factors have contributed to the substantial decline in total parole violator returns to prison since 2002.

A CSG recommendation was to place in statute graduated sanctions, short of imprisonment, for both technical probation and parole violations. A majority of stakeholders agreed to a cap of 30 days in jail for any probation violation not involving an offense against a person. Revocation and the possibility of prison would be reserved for “major risk” violations. Legislation embodying these concepts failed to pass in the 2013-2014 session.

²⁰ If the two categories varied together, it would strongly suggest that parolee behavior was being affected. If the relationship was inverse, it would suggest that increasing parole revocations for technical violations prevents some convictions for new offenses.

Alternative measures of success

The MDOC provides another approach to measuring parolee success rates. Called “cohort analysis”, this method tracks the success and failure of all the parolees released each year for a three-year period. Using 1998 as the base year and having 2010 as the last cohort for which full information is available, the rates appear in Table 2.

Table 2. Percentage of parolee returns within three years, by year of release¹

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
PVNS*	16.1	14.8	16.4	17.3	18.2	18.7	19.9	21.1	21.3	19.7	17.9	15.6	13.5
PVT**	29.7	30.1	27.1	24.6	21.1	20.4	20.9	19.6	15.2	13.6	13.6	15.0	15.5
Total	45.8	44.9	43.5	41.9	39.3	39.1	40.8	40.7	36.5	33.3	31.5	30.6	29.0

*Parole Violator New Sentence **Parole Violator Technical

Parolees who fail are most likely to do so in the first year after release. The cohort analysis shows that new sentence returns rise steadily after 1999, peak in 2006 and fall steadily thereafter, generally following the pattern shown in Graph 5. Notably the 2009 and 2010 cohorts have new sentence rates quite similar to the 1998 and 1999 cohorts.

The technical violators show a steadier decline than appears on Graph 5. Although rates began to tick up again for the 2009 and 2010 cohorts, they were still about half of the peak rates of the 1998 and 1999 cohorts and much closer to the rates shown on Graph 5 for the early 1990s.

It should be noted that in the years since reentry programming was initiated, not all parolees go through it. Neither method of calculating return to prison rates identifies which prisoners received reentry services.²

1 MDOC 2013 Statistical Report, Table D3.

2 The D1a tables from the relevant MDOC Statistical Reports show reentry participation as:

	Regular Parole	Prisoner Reentry	Total	Percent Reentry
2007	3,836	6,190	10,026	61.7
2008	3,610	7,307	10,917	66.9
2009	2,995	10,868	13,863	78.4
2010	3,905	5,915	9,820	60.2
2011	5,127	3,803	8,930	42.6
2012	4,460	3,492	7,952	43.9
2013	5,540	3,230	8,770	36.8

A 2011 MDOC report states: “From the inception of Michigan Prisoner Reentry in 2005, through December 2011, nearly **33,000** prisoners were paroled from standard Reentry in-reach facilities.” (2008 releases were the most recent cohort that had completed a full three-year follow-up period at that point.) The report concluded that the return rate for those cases was 38 percent lower than the 1998 rate, “controlling for time at risk and history of prior parole failure.” There is no indication of the rate for non-reentry cases during the same period. “Michigan Prisoner Reentry: A Success Story”, http://mich.gov/documents/corrections/The_Michigan_Prisoner_Reentry_Initiative_A_Success_Story_334863_7.pdf. (orig. emph.)

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C. Recommendations to reduce intake

The following reforms could help reduce entries to prison:

- Increase the use of appropriately targeted community-based sanctions for the roughly 6,000 people who enter prison each year with sentences of two years or less for such crimes as driving under the influence (3rd offense), delivering marijuana or small quantities of narcotics, and retail fraud. The means could include:
 - Adjust sentencing guidelines scores to move people from “straddle cells” to “intermediate sanction” cells.
 - Increase support for therapeutic courts and community corrections programs.
 - Eliminate the mandatory two-year sentence for possessing a firearm while committing a felony or, at least, allow judges to depart below it.

Estimated beds saved: 900

- Reduce the number of technical probation and parole violators who enter prison:
 - Ensure that the length, conditions and quality of supervision are appropriate to individuals’ needs and risk of reoffending.
 - Increase the availability of cost-effective community-based reentry support for parolees.
 - Standardize permissible sanctions for technical violations of probation and parole supervision so that revocation and admission to prison only occurs for the most serious or persistent violators.

[Estimates adopted from CSG]

Estimated beds saved: 1,234

(Probationers = 990, Parolees = 244)

See also the discussion of reducing the intake of juveniles at p. 55.

Part Three: Releases

I. Release policies determine length of stay

Michigan’s prison population is driven more by prison release rates than prison commitments.²¹ Releases reflect our policies about how long people should stay in prison. Average length of stay is the key driver of prison population size. The longer the average, the less the population turns over and the more it grows.

The Pew Center on the States found that in 2009 Michigan had the longest average length of stay of the 35 states Pew studied. Overall, Michigan prisoners served nearly 17 months more than the national norm.

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Some suggest that this is because Michigan sends fewer property and drug offenders to prison. As a result, a larger portion of the population is serving for assaultive offenses that tend to have longer sentences. However, as Table 3 shows, Pew compared just assaultive offenders in all 35 states and found the disparity between Michigan and the national average was *even greater* for this group. Michigan’s assaultive offenders served 31 months longer.²²

²¹ CSG, *Appendix*, p. 11 (see note 11).

²² Pew Center on the States, *Time Served: The High Cost, Low Return of Longer Prisoner Terms* (June 2012). Similarly, the Citizens

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Not only is Michigan's length of stay exceptionally long, it has been steadily growing. Pew found that the rate at which Michigan's length of stay had increased over 20 years far exceeded the growth rate of other states. Thus, while Michigan was close to the national norm in 1990, by 2009 the gap had widened enormously.²³

Table 3. Pew findings on average length of stay

	All Offenders			Assaultive Offenders ²⁴		
	1990 Avg. Years	2009 Avg. Years	Percent Change	1990 Avg. Years	2009 Avg. Years	Percent Change
35 states	2.1	2.9	36%	3.7	5.0	37%
Michigan	2.4	4.3	79%	3.9	7.6	97%

Pew emphasized that despite years of effort, researchers cannot make a connection between increased length of stay and less recidivism. The authors noted that even recent “more methodologically sophisticated studies still find no significant effect, positive or negative, of longer prison terms on recidivism rates.”²⁵

Length of stay, that is, the time people actually serve, has three components:

1. The minimum sentence imposed by the court. Until the minimum sentence has been served, the parole board lacks authority to grant release.
2. The parole board's decision whether to grant release once someone has become eligible.
3. The extent to which credits for in-prison conduct are available and are applied to reduce the minimum sentence, making the person eligible for parole sooner.

Affecting the release variable of the basic equation depends on addressing the way both sentencing judges and parole board members exercise their discretion. It also requires Michigan to consider the ways in which its sentencing, parole and sentence credit policies differ dramatically from other states. Are those policies that increase prisoner length of stay justified by increased public safety or are we wasting resources for the sake of appearing tough?

Are those policies that increase prisoner length of stay justified by increased public safety or are we wasting resources for the sake of appearing tough?

Research Council of Michigan [CRC] found that Michigan had an average length of stay that was at least one year longer than the national and Great Lakes states averages each year from 1990 to 2005. CRC estimated that if Michigan's average prisoner length of stay had consistently been one year shorter, in 2005 the State would have incarcerated roughly 14,000 fewer prisoners, spent about \$403 million less and employed approximately 4,700 fewer Corrections employees. *Growth in Michigan's Corrections System: Historical and Comparative Perspectives* (Livonia: Citizens Research Council of Michigan, June 2008).

23 CRC noted that Michigan's average prisoner length of stay had increased from 28.4 months in 1981 to 43.5 months in 2005.

24 Note that Pew measured the actual time served by people who were released from 1990-2009. Since nearly 8,000 Michigan prisoners are serving life terms or minimum sentences greater than 25 years, the actual time served by assaultive offenders is understated.

25 Pew Center on the States, *Time Served*, p. 34 (see note 22).

II. Minimum sentence length

A. How much sentence lengths have grown

Recently, CSG observed that the average length of minimum prison sentences imposed in Michigan had grown significantly in just five years. It explained:

- The 8,881 individuals sentenced to prison in 2012 will serve on average at least 2.7 months longer compared to the 2008 average.
- [This] translates to an additional 1,971 prison beds occupied on any given day.
- At \$98 per day, cost to Michigan is an additional \$70 million each year.²⁶

The average minimum sentence of people who enter prison in a given year is very different from the average minimum being served by the entire prisoner population. A large percentage of the minimum sentences imposed each year are relatively short. The people serving them tend to be released and replaced, so their share of the prisoner population turns over fairly quickly. At the other extreme, a very small number of people receive very long minimum or life sentences each year. But these people do not get released for decades, if at all. As their numbers increase, they constitute an ever-increasing share of the prisoner population and drive up the average length of stay.

Table 4 compares the distribution of minimum sentences among people committed to prison in 2013 and the total 2013 prisoner population. Nearly 60 percent of the new commitments are for two years or less, compared to roughly 24 percent of the population. For sentences between two and five years, the proportions are about equal. But as the sentences get longer, the ratios flip. While people serving more than 25-year minimums or life constituted only 2.2 percent of the 2013 commitments, they were 18.1 percent of the prisoner population – nearly 8,000 people.

Table 4. 2013 Distribution of minimum sentences (percentage)*

	0-2	>2-5	>5-10	>10-15	>15-25	>25	Life
Commitments	59.4	23.4	8.8	3.2	2.7	1.1	1.1
Population	23.9	21.9	16.9	9.2	9.9	5.3	11.8

*Percentages may not equal 100 because of missing data.

²⁶ CSG, *Appendix*, p. 25 (see note 11).

The challenge of short prison terms

Apart from its impact on population growth, the distribution of minimum sentences raises fundamental questions about the purpose and operation of our prison system. The 10,445 people serving short minimum sentences in 2013 included 253 serving six months, 1,994 serving 12 months, 2,993 serving 18 months and 5,205 serving 24 months.

Referring to these short-termers, MDOC Director Daniel Heys has observed: “We don’t have a whole lot of time to do a lot of correction. It calls into question, what are we really accomplishing with these people? It’s a huge cost.” Gary Heinlein, *Justice goes to prison to weigh Mich. sentencing system*, Detroit News, (March 19, 2015.)

With 24 percent of the population serving sentences of two years or less and 27 percent serving more than 15 years, and with a roughly 70-30 split between assaultive and other offenders, it is fair to wonder whether the same system can appropriately manage the very different needs and behaviors of such a diverse population. As noted above, many people currently serving relatively short prison terms could more appropriately and cost-effectively be sentenced to community residential or other community-based treatment programs.

Minimum sentence length is, of course, directly related to the seriousness of the offense. As Table 5 indicates, the larger proportion of very lengthy sentences within the total prisoner population reflects the fact that more than two-thirds of the population is serving for an assaultive offense even though assaultive offenses constitute only about two-fifths of the new commitments.

Table 5. 2013 Distribution of sentences by offense type (percentage)*

	Non-assaultive	Drug	Assaultive
Commitments	44.6	13.4	42.0
Population	21.9	7.7	69.2

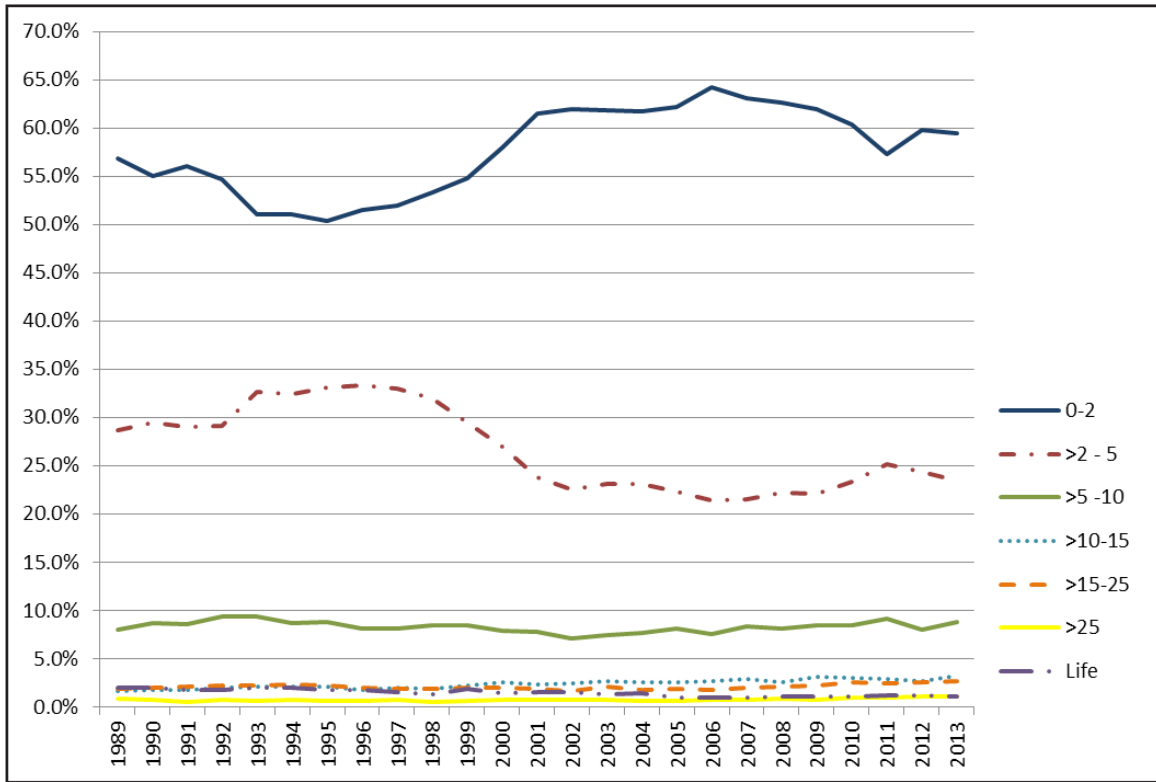
*Percentages may not equal 100 because of missing data.

Graph 6 shows how the distribution of minimum sentences among new commitments has changed over time. Most noticeable is how minimums of two years or less climbed steadily from 50.5 percent in 1995 to 64.2 percent in 2006 before trending back down modestly. During the same time, minimums over two and up to five years declined from roughly 33 percent to 21.5 percent before trending back up modestly.

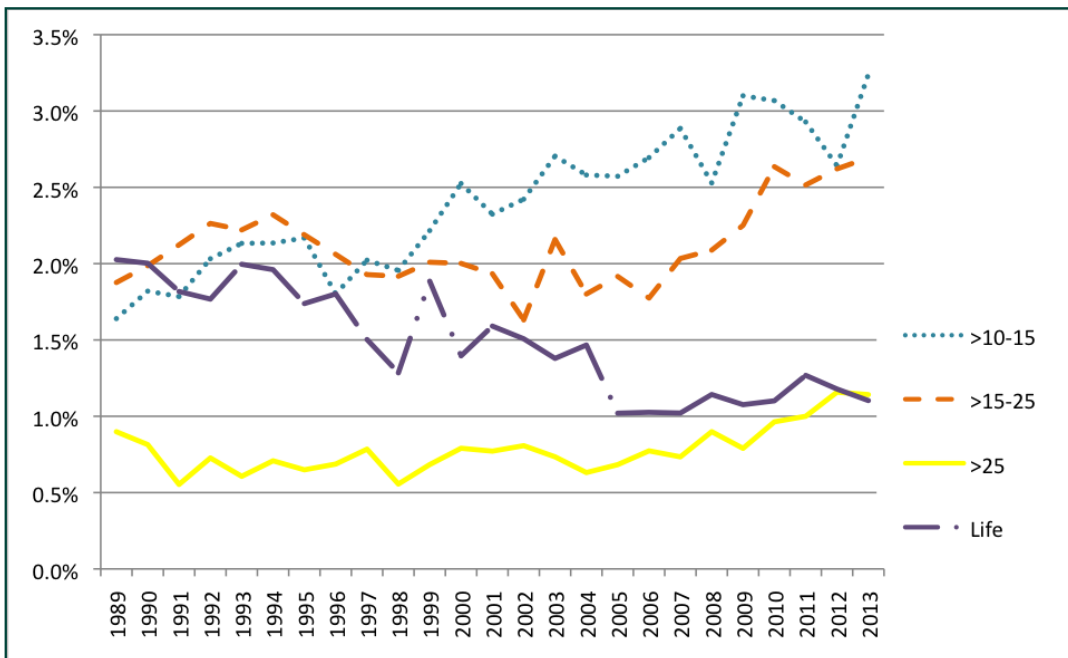
As Graph 6a shows more clearly, the proportion of minimums over ten years up to 15 doubled from 1.6 percent in 1989 to 3.2 percent in 2013. The proportion of life sentences fell from 2.0 percent to 1.1. This may reflect both a decline in the imposition of parolable life sentences and a decline in murder rates.

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Graph 6. Distribution of minimum sentences among new commitments



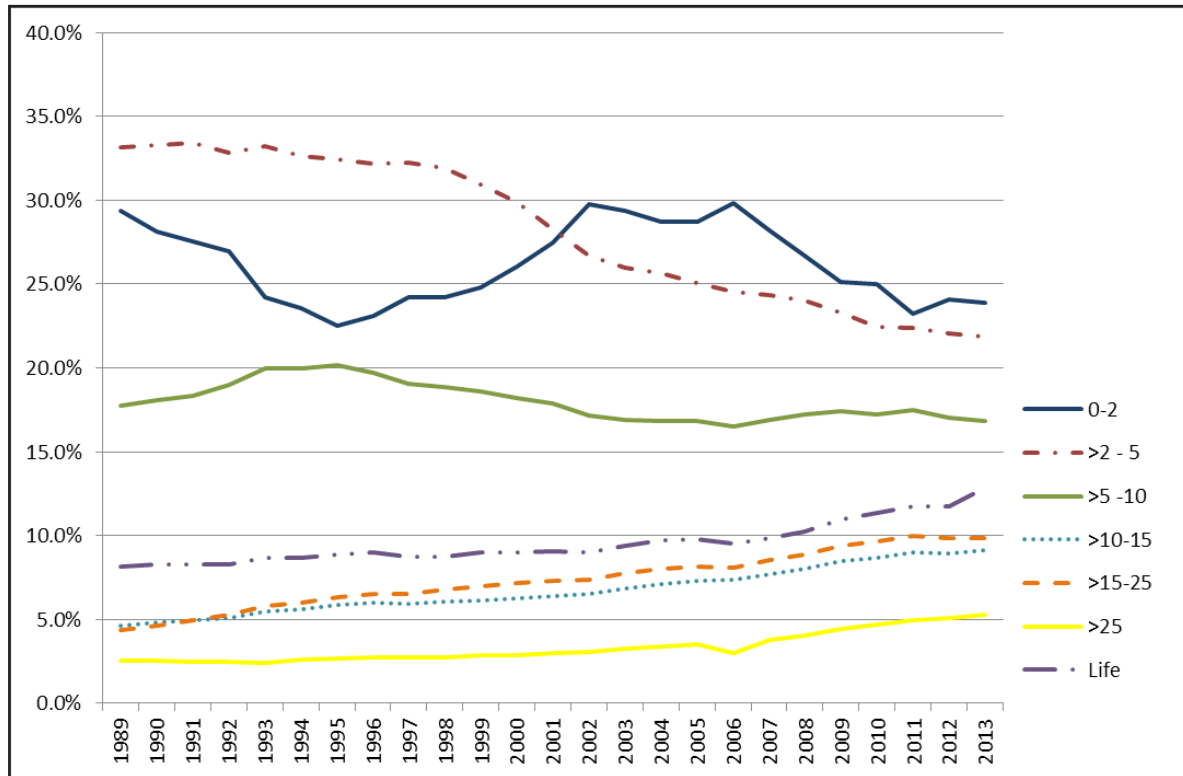
Graph 6a. Distribution of minimum sentences longer than 10 years



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Graph 7 shows the much more dramatic changes in the distribution of minimum sentences for the entire population. As the proportion of people serving minimum sentences longer than ten years has steadily grown, the proportion of the population serving shorter sentences has declined.

Graph 7. Distribution of minimum sentences among total prisoner population



Graph 8 shows the impact of these shifts on the average minimum sentences of both new commitments and the total prisoner population. While the average for new commitments fluctuated within a narrow range from 3.2 to 3.7 years, the average minimum sentence for the prisoner population as a whole marched steadily upward over the 25-year period from 6.5 to 9.0 years.²⁷

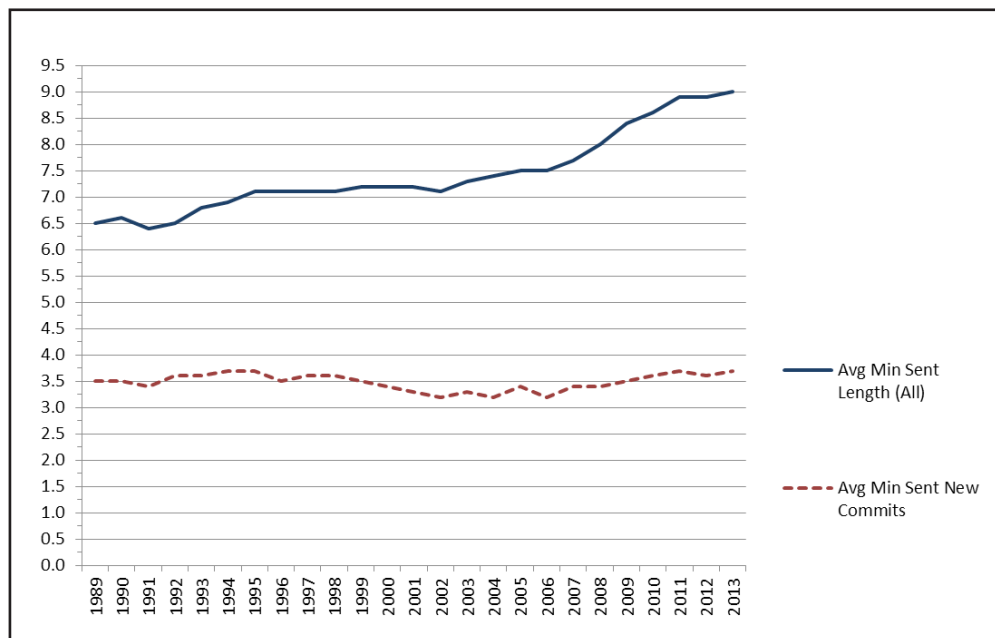
These averages are based on the longest minimum sentence imposed on each individual. They do not account for whether multiple sentences imposed on the same person are to be served concurrently or consecutively. When the effect of consecutive sentencing is considered, the average minimum for new commitments is 4.2 years and for the entire population it is 9.7 years.

Note: None of these averages include nearly 5,200 people who are serving parolable or nonparolable life terms.

²⁷ Michigan Department of Corrections, *Trends in Key Indicators, Through Full Calendar Year 2013* (presentation, Lansing, 2/25/2014), slides 18 and 20. When sentences are consecutive, the minimums of each sentence are added together and the maximums of each sentence are added together to determine how much time the person will actually have to serve. Consecutive sentencing occurs only when specified in statute, such as when one of the sentences is for felony firearm or the second offense was committed while the person was in prison or on parole for the first one.

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Graph 8. Average minimum sentences: new commitments and prisoner population



Life or any term offenses. The increase in minimum sentences for offenses that carry life or any term is both a reflection of the trend toward harsher punishments and a significant contributor to Michigan’s ever-greater length of stay. The most common of these offenses are second-degree murder, first-degree criminal sexual conduct (CSC 1st) and armed robbery. In these cases, the sentencing judge may set both the minimum and maximum or impose a sentence of parolable life.

In decades past, ten years in prison was considered to be a substantial penalty. Until 1992, Michigan’s “lifer law”, MCL 791.234, said that lifers not sentenced for first-degree murder become eligible for parole after serving 10 calendar years. The statute also said that any prisoner who had served 10 calendar years on a long indeterminate sentence could be considered for parole. Thus life terms and long terms of years were viewed similarly.²⁸

CAPPS examined the changes over a period of four decades in the proportion of people eligible for release in 10 years.²⁹ It found that our concept of appropriate punishment has shifted remarkably.

Table 6 shows that in the 1970s, a large majority of people sentenced for these three offenses received a sentence that made them eligible for parole in 10 years or less. Fewer than five percent had minimums greater than 20 years.

By the 2000s, the percentage eligible for parole after 10 years had plummeted for people convicted of CSC 1st and murder. Conversely, the proportion of people required to serve more than 20 years for criminal sexual conduct had quadrupled and the proportion required to serve more than 20 years for second-degree murder had increased ten-fold.

²⁸ In 1992 the eligibility date for lifers was increased to 15 years. In 1998, “truth-in-sentencing” was enacted requiring that prisoners serve every day of their minimum sentences before being eligible for release. This had the effect of prohibiting parole for people serving long indeterminate sentences under the lifer law, as well as eliminating the availability of “good time” or “disciplinary credits” to reduce the minimum based on in-prison conduct.

²⁹ “Length of Stay Drives Prison Costs”, *Consensus* (Lansing: Citizens Alliance on Prisons and Public Spending, Fall 2012), p 4.

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Table 6. Summary of parole eligibility trends over four decades

Parole Eligibility	1970-1979	1980-1989	1990-1999	2000-2009
Murder, 2nd Degree				
10 years or less*	73%	50%	20%	12%
> 20 years	4%	19%	31%	46%
Criminal Sexual Conduct, 1st Degree				
10 years or less*	84%	69%	54%	48%
> 20 years	4%	11%	15%	16%
Armed Robbery				
10 years or less*	87%	88%	87%	77%
> 20 years	2%	3%	2%	5%

*Includes parolable life terms from 1970 through 1989.

B. Why sentence lengths have grown

Several factors have contributed to the steady lengthening of minimum sentences over the last few decades.³⁰ Sentencing guidelines were first developed by the Michigan Supreme Court in 1983. The goal was to ensure that sentences were proportional to the offense and the offender and to reduce disparity in sentencing among similarly situated offenders. In 1998 the judicially devised sentencing guidelines were replaced by legislatively enacted guidelines. The new guidelines were designed to shorten sentences in less serious cases and to keep more people out of prison altogether. However they also lengthened minimum sentences for more serious offenses.

Under the guidelines, a complex system of points is used to give the defendant a “prior record” score and an “offense variable” score. The intersection of these two scores on a grid places the defendant in a range of months. The court must select a minimum sentence from within that range unless “substantial and compelling reasons” for departure are articulated in writing. Departures are subject to appeal. The Supreme Court has adopted standards that define when departures are warranted.³¹

The guidelines ranges are very broad. Minimum sentences at the high end of the range are usually from 100-300 percent of those at the low end.³² The rate of departures by judges is relatively low because they can exercise a great deal of discretion and remain in compliance. Yet sentences are, as CSG has noted, “all over the map.”³³

For less serious crimes, people with similar prior records who committed similar offenses may have outcomes that range from a few months in jail to five years’ probation to a minimum prison term of two or three years.³⁴ For the most serious offenses short of murder, the difference in the minimum prison sentence among similar

³⁰ These are explained in detail in an excellent article by Anne Yantus, an attorney with the State Appellate Defender Office who specializes in sentencing issues. See Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 University of Michigan Journal of Law Reform 645 (Spring 2014).

³¹ *People v Babcock*, 469 Mich 247 (2003).

³² CSG, *Appendix*, p. 23 (see note 11).

³³ CSG, *Appendix*, p. 24.

³⁴ CSG, *Appendix*, p. 16-17.

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defendants can easily be six or seven years, depending on whether they were sentenced at the low or the high end of the guidelines range. Among people with similar prior records convicted of second-degree murder, the difference can be 10 or 12 years. Wide disparities exist among judges on the same bench and across counties.

CSG observed: “Greater consistency in sentencing will achieve two of the key purposes of the guidelines: proportionality and less disparity.” To produce more consistent sentences, CSG recommended reducing the wide ranges within the guidelines cells for prison-bound defendants.³⁵

Habitual offender sentences: More length, more disparity

Sentence lengths may be further enhanced if the prosecutor chooses to charge the defendant as a habitual offender. In addition to scoring every person’s prior criminal record, the sentencing guidelines contain an adjustment factor that increases the minimum sentence range depending on whether the person is being treated as a second, third or fourth felony offender.¹

Although habitual offender statutes were on the books for decades, their use became more common in the 1970s when the federal government began funding “career criminal” units in local prosecutors’ offices. Today, habitual offender sentencing is used selectively but is increasing. In 2012, 42 percent of eligible defendants were “habitualized.” Use of the statutes varies widely across counties.² Because it depends wholly on the exercise of prosecutorial discretion, the cost of habitual sentencing is “unpredictable and potentially huge.”³

There is also question about the fairness of how habitual sentence enhancements are calculated. The same prior crimes may be double-counted by using them to calculate the prior record score, which determines the applicable guidelines range, *and* as the basis for a habitual offender notice, which increases the high end of that guidelines range.⁴ CSG recommended amending the habitual offender statutes⁵ to prohibit using a prior conviction to enhance a sentence if the same conviction is being used to calculate the prior record score on the sentencing guidelines grid.

A separate problem arises from a change by the Michigan Supreme Court in the interpretation of the habitual offender statute. Now people may be charged as fourth offenders based on their first criminal transaction. Instead of requiring a history of three distinct prior criminal incidents, with time for reflection between them, the Court now permits habitualization on the basis of convictions for three crimes arising out of the same incident.⁶ A proposal that was considered but not adopted in the 2013-2014 legislative session would have amended the habitual offender statutes to: a) define a prior conviction as one that occurred before the commission of the subsequent felony and b) require that multiple felonies arising from the same criminal incident or transaction be considered a single felony for purposes of establishing the number of prior convictions.

1 The applicable statutes are MCL 769.10, 769.11 and 769.12.

2 In 2012, among the ten largest counties, Washtenaw used habitual offender sentencing in 10 percent of eligible cases while Oakland used it in 89 percent. CSG Appendix, p. 20.

3 CSG, *Appendix*, p. 21.

4 CSG, *Appendix*, p. 19.

5 MCL 769.10, .11 and .12.

6 *People v Gardner*, 482 Mich 41 (2008).

35 *Applying a Justice Reinvestment Approach to Improve Michigan’s Sentencing System: Summary Report of Analyses and Policy Options* (N.p: Council of State Governments Justice Center, May 2014), p. 8.

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When the legislative sentencing guidelines were enacted, their impact could only be estimated. Much depended on how judges would exercise the broad discretion the guidelines still afforded. The intent was to have the Michigan Sentencing Guidelines Commission monitor how the guidelines were being used, with what effect, and to recommend refinements.

This plan went awry when the Commission was abolished in 2002. The Legislature began adjusting the guidelines on an ad hoc basis, changing the scoring of offense variables and reclassifying crimes so they would be subject to higher recommended penalties. Beyond tinkering with the guidelines, the Legislature also redefined crimes, increased maximum penalties and enacted harsh mandatory minimum sentences. It also permitted greater use of consecutive terms, which increases both sentence lengths and disparities in sentences for similar offenders.³⁶

The Criminal Justice Policy Commission established in 2014 by PA 465 is expressly mandated to recommend modifications to the sentencing guidelines for adoption by the legislature. However its mandate is broad enough to include any law, rule or policy that affects sentencing or the use and length of incarceration or supervision. Thus it will be in a position to assess all the factors that have resulted in the lengthening of minimum sentences and to recommend solutions.

C. Recommendations to reduce minimum sentence length

Several reforms could help reduce the average length of cumulative minimum sentences for new admissions from 4.2 years to 3.5 years:³⁷

- Adjust the sentencing guidelines to:
 - Narrow the breadth of guidelines ranges.
 - Start each range at a somewhat lower number of months.
 - Modestly change the scoring of offense and prior record variables to shift some defendants into lower ranges.
- Revise the treatment of habitual offenders:
 - Do not count the same prior offenses in multiple ways.
 - Redefine “habitual” to mean multiple unrelated convictions and sentences over a period of time, not multiple convictions arising from a single criminal incident.
- Eliminate the use of mandatory minimum sentences, especially for felony firearm.
- Reassess the expansion of discretionary consecutive sentencing, which increases both sentence lengths and disparate sentences for similar offenders.

Estimated beds saved: 2,121

³⁶ See Yantus, *Increasing Penalties* (see note 29).

³⁷ Assumes the number and distribution of minimum sentences of 2014 new commitments is constant for five years; reduces the number of sentences by 9.9 percent to account for additional sentences imposed; assumes 80 percent of prisoners are paroled on their earliest release dates (ERD).

III. Parole board decisions

A. *The decision-making process*

Under Michigan's scheme of indeterminate sentencing, the minimum sentence is just the starting point. It establishes the person's earliest release date (ERD), but it does not determine how long the person will actually be incarcerated. Either a statute or the judge sets a maximum sentence that dictates the point at which the person must be released as a matter of law. Between the minimum and the maximum (a period often referred to as the "tail" of the sentence) the parole board has total discretion to grant or deny release (referred to as "continuing" incarceration). The period of time controlled by the parole board is usually 300-400 percent longer than the minimum sentence imposed by the court.³⁸

If, for instance, a judge sets a minimum sentence of five years for an unarmed robbery and the statute sets a maximum of 15, the tail would be 10 years. The parole board could choose to release the person on the ERD, that is, as soon as he or she has served five years, or it could require the person to "max out" after serving 15.

The statutory standard that governs the board's discretion is not an affirmative directive but a prohibition:

A prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety. [MCL 791.233.]

Until the statute was changed in Oct. 1992, parole board members were corrections professionals with civil service protection. Now the 10 board members are appointed by the MDOC director. At least four must have no history of MDOC employment. They are appointed for four-year terms but can be removed by the director for "incompetency, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office." [MCL 791.231a.]

For most cases, the board sits in panels of three. Typically one member of the panel interviews the prisoner via video conference. A second panel member reviews the file. If the two members agree on whether to grant release, the third panel member need not vote. People serving parolable life terms must have a majority vote in favor of release from the entire board. (See further discussion of lifers, p.66.)

B. *The number and nature of parole denials*

Also in 1992, the legislature enacted MCL 791.233e, which required the MDOC to develop parole guidelines that "shall govern the exercise of the parole board's discretion." The parole guidelines measure a person's risk of reoffending.³⁹ Points are awarded for seven different factors⁴⁰, with a number of factors weighted by the amount of time served. When someone scores "high probability of release" on these guidelines, the parole board is only permitted to deny release for "substantial and compelling reasons." Yet even people with favorable parole guidelines scores are routinely kept for an extra year or two and, in many cases, much longer.

38 CSG, *Appendix*, p. 37 (see note 11).

39 The parole guidelines literally measure the likelihood that the board will grant release. Thus the scoring reflects parole board predispositions as well as factors proven to predict reoffending. For instance, all sex offenders receive a negative five points regardless of their actual re-offense risk. However by administrative rule the guidelines are designed so that prisoners who score high probability of parole do not exceed an assaultive felony recidivism rate of five percent [R 791.7716 (2)].

40 These are current age, selected offense characteristics, institutional conduct, prior record, program participation, statistical risk and mental status.

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The intent was for the parole guidelines to mirror the sentencing guidelines. They are meant to constrain the exercise of discretion, increase objectivity, reduce disparity and promote transparency. Both sets of guidelines have the same standard for permitting departures. However, the sentencing guidelines permit the parties to appeal judicial decisions to impose sentences above or below the recommended ranges. Prisoners lost the right to appeal parole denials in 1998 and they have no way to seek administrative review.⁴¹

Without a mechanism for enforcement, the parole guidelines have been treated by the parole board as merely advisory. People with excellent institutional records and a statistically low risk of reoffending often have their incarceration “continued.” The substantial and compelling reason given is typically that the person lacks sufficient insight, empathy or remorse, based on a subjective assessment made by a single board member at a 10-minute video interview. These assessments often conflict with those of institutional treatment personnel who have observed the person far longer.

Without a mechanism for enforcement, the parole guidelines have been treated by the parole board as merely advisory.

In February 2012, nearly 5,500 people had served their minimums and never been granted a parole.

Within that group, 1,555 (29 percent) scored high probability of release on the parole guidelines. They were, on average, 2.6 years past their first release date. Another 2,576 (47 percent) scored average probability of release and were 2.8 years past their earliest release date.⁴² Only 1,300 (24 percent) scored low probability of release, indicating they were at high risk of reoffending.

The number of post-ERD prisoners seems to have plateaued over the last several years. As of May 2013, there were 5,648 prisoners who were past their earliest release date and had never been paroled. In June 2014 there were 5,540. This is about 13 percent of the total population. It is the equivalent of several prisons and costs taxpayers roughly \$150 million a year.⁴³

The sheer number of people past their ERD does not reveal for how long they have been continued. CSG reported that currently Michigan prisoners serve, on average, 125 percent of their judicially imposed minimum sentences.⁴⁴ Looking at all the people who were paroled for the first time in 2012, it found the following relationship between ERD and release date:

Within one month	54%
1- six months past	15%
7-12 months past	13%
13-24 months past	8%
25+ months past	11%

41 Prosecutors and victims have the right to appeal board decisions to grant parole [MCL 791.234 (11)].

42 Data provided by MDOC in response to CAPPs Freedom of Information Act Request. As will be discussed below, the board does not calculate the parole guidelines for parole-eligible lifers. The majority would score high probability of release. Thus there are actually hundreds more low-risk prisoners being denied release, many of whom have been eligible for decades.

43 These figures do not include technical parole violators who had been paroled once and returned or parolable lifers who do not have what the MDOC considers to be an earliest release date.

44 CSG, *Appendix*, p. 43 (see note 11).

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A total of 1,711 people were released more than six months past their ERD, serving an average of 2.6 years longer in prison. CSG estimated the additional cost at \$61 million annually.⁴⁵

Examining the post-ERD population clearly reveals that average prisoner length of stay is not simply a function of sentencing policies. On the contrary, it is heavily determined by parole policies.

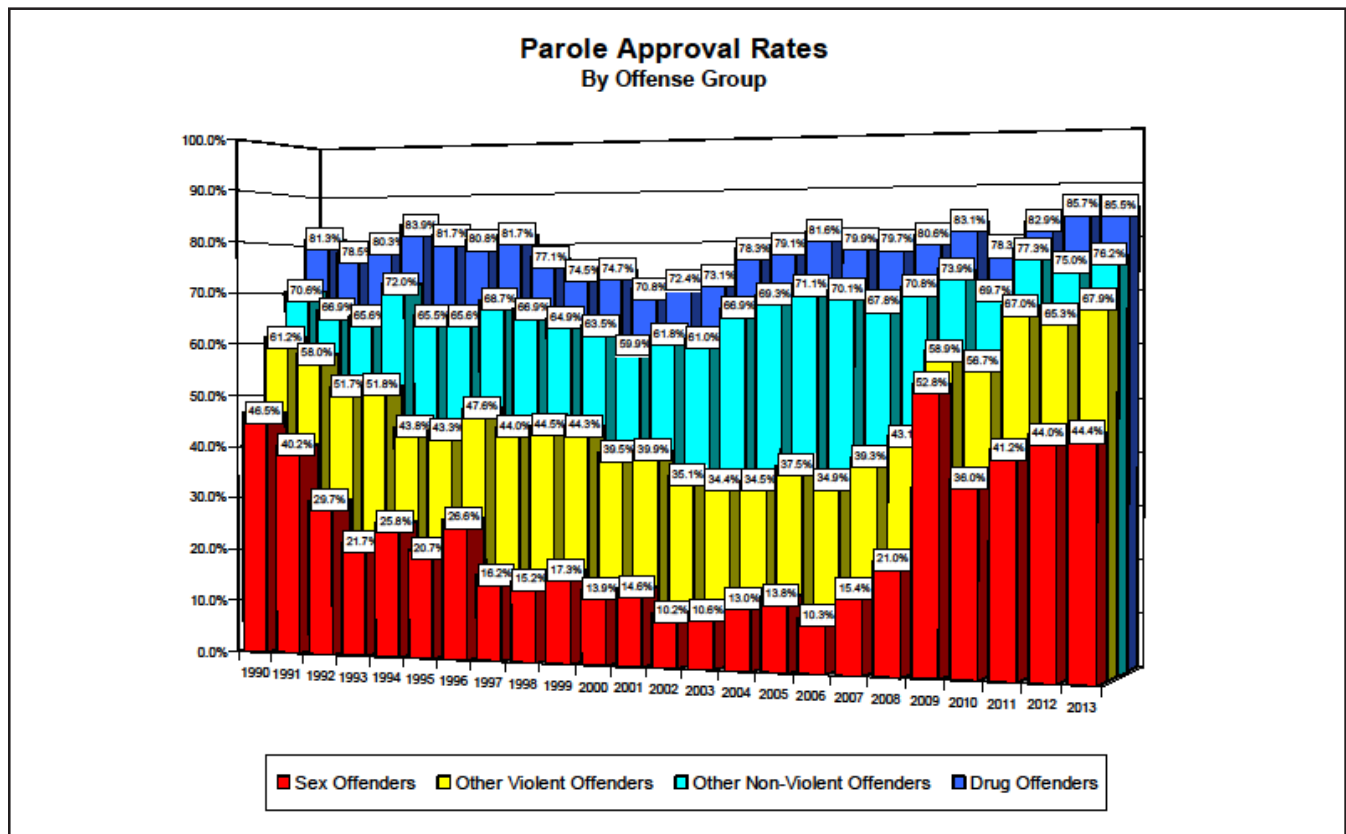
C. Denying release based on the offense

The purpose of broad parole board discretion is to prevent someone who poses a danger to the community from being automatically released. However, despite a declared commitment to evidence-based decisions and substantial investment in assessment tools, a great many continuances are actually based on the nature of the offense, not demonstrated current risk.

There is no doubt that the nature of the offense is a critical factor in parole board decisions. Graph 9, taken from the MDOC's website, shows that parole grant rates vary dramatically depending on the crime. They are typically over 80 percent for drug offenders and over 70 percent for other non-violent offenders, but substantially lower for assaultive offenders and rarely over 45 percent for sex offenders.

These differences do not result from a proven correlation between the conviction offense and the likelihood of reoffending. On the contrary, of the 1,555 people who had been denied parole as of 2012 despite high probability parole guidelines scores, 45 percent (693) had committed sex offenses and 31 percent (478) had committed assaultive crimes.

Graph 9. Parole approval rates by offense group, 1990-2013



⁴⁵ CSG, *Appendix*, p. 40.

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Parole denials based on the nature of the offense are problematic for three reasons:

1. The offense was the primary factor on which the minimum sentence was based. That is, the appropriate punishment has already been determined by the court, pursuant to legislative guidelines. For the parole board to deny release based on its view of the offense is to effectively engage in resentencing.
2. Selected offense factors are already scored in the parole guidelines. Negative points are given for use of a weapon, causing injury or death and extreme brutality. Sex offenders automatically receive a -1 under the “active sentence” section and a -5 under the “mental health” section. Those assaultive and sex offenders who score high probability of release do so despite having had substantial negative points weighed against them.
3. The assaultive and sex offenses that are most likely to result in continuances actually have the lowest reoffense rates of any type of crime. A wealth of evidence from Michigan and other states, going back for decades, consistently shows that released homicide and sex offenders have low rates of conviction for any new crime and very rarely commit new offenses of the same type.⁴⁶ Keeping them incarcerated for additional years does virtually nothing to protect public safety.

In 2009, Michigan created the ideal natural experiment for measuring the relationship between offense type and recidivism when then-Gov. Granholm expanded the parole board from 10 to 15 members.⁴⁷ With the increased capacity, the board reviewed thousands of prisoners who had served their minimum sentences and were eligible for parole but had previously been continued. Many of these denials had occurred despite favorable parole guidelines scores and were based primarily on the seriousness of the offense.

By the end of 2009, the total number of people paroled had reached 13,508, an increase of 2,020 over the year before. The number of homicide offenders paroled more than doubled from 197 to 409. The number of sex offenders also doubled from 906 to 1,855. For people convicted of sex offenses, the trend toward more releases continued into 2010, when 742 were paroled in the first three months.

In 2014, CAPPS examined the reoffense rates of homicide and sex offenders paroled from 2007 through the first quarter of 2010.⁴⁸ ***More than 99 percent did not return to prison within three years with a new sentence for a similar offense:***

- Of 820 people who had been serving for murder or manslaughter, two (0.2 percent) returned to prison for a new homicide.
- Of 4,109 people who had been serving for a sex offense, 32 (0.8 percent) returned to prison for a new sex offense.

⁴⁶ MDOC data on prisoners released from 1960 through 2004 shows that people convicted of crimes against persons consistently have the lowest reoffense rates and those convicted of property crimes have the highest. Overall, 85-90 percent of the “person” offenders were not sent back to prison within three years of release for a new offense of any kind. Crimes against other people are often impulsive and situational.

⁴⁷ Executive Order 2009-05, as amended by Executive Order 2009-20. The purpose of the initial order was summarized as: “WHEREAS, expansion and reorganization of the Michigan Parole Board will lead to more effective implementation of corrections policy, greater administrative efficiencies in the Department of Corrections, enhanced accountability to elected officials, increased consideration of parole and commutation requests, and reductions in corrections expenditures;”

⁴⁸ Barbara Levine and Elsie Kettunen, *Paroling people who committed serious crimes: What is the actual risk?* (Lansing: Citizens Alliance on Prisons and Public Spending, Dec. 2014).

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A study published by CAPPs in 2009 examined nearly 77,000 cases of people first paroled from 1986-1999. Overall, 18 percent returned with new offenses within four years. Citizens Alliance on Prisons and Public Spending, *Denying parole at first eligibility: How much public safety does it actually buy? A study of prisoner release and recidivism in Michigan* (Lansing, Aug. 2009). However, homicide and sex offenders had return rates below eight percent. And all of the most serious offenses showed extremely low rates of repeating the offense of conviction. During this 14-year period:

- a) Of 6,673 sex offenders, 204 (3.1 percent) returned with a new sex offense.
- b) Of 2,448 homicide offenders, 14 (0.5 percent) returned for a new homicide.

These findings are confirmed by studies from other jurisdictions. Eight of nine that looked at recidivism rates for sex offenders found that the rate for returning to prison for a new sex offense was 3.5 percent or less. *Id.* at pp. 23-27.

In fact, in 2009 and 2010, returns to prison with new sentences actually decreased, despite the release of more than 1,000 additional people serving for homicide and sex offenses as a result of the parole board's continuance review process. These outcomes raise obvious questions about what had been gained by repeatedly continuing so many of these prisoners:

- Fewer than half of the people serving for homicides had been released on their ERD or continued only once. Nearly a quarter had been continued four or more times.
- Roughly a third of the people serving for sex offenses had been released on their ERD or continued only once. Another third had been continued four or more times.

In still another study, CSG examined the rearrest rates of people first released in 2010. It found the rates were similar regardless of whether people had been released within six months of their ERD or seven or more months later. Notably, in both groups the sex offenders had by far the lowest rearrest rates of any offense groups.⁴⁹

The data reveal two critical points:

- 1. There is little correlation between how long people are kept past their ERDs and recidivism rates. Therefore, continuing to incarcerate people who are not at high risk for reoffending after they have become eligible for parole has no public safety benefit.**
- 2. A conviction for a serious offense does not necessarily indicate current risk. On the contrary, people convicted of homicide and sex offenses are the least likely to repeat their crimes.**

⁴⁹ CSG, *Appendix*, p. 41 (see note 11).

The 2009 study by CAPPs described above also examined the impact of continuances. At 57.6 percent, the overall success rate of people released one year after their ERD was 8.5 points lower than the success rate of people released on their earliest date (66.1 percent). However, after that initial decline, the success rates stayed remarkably constant. That is, nothing was gained from continuing people for an additional two, three or four years. Although there were variations among offense groups, this pattern suggests two things: that the parole board was only modestly adept at predicting who was likely to succeed upon release and that keeping people incarcerated for two, three or four additional years had no impact on public safety at all.

The results were particularly striking when the offense groups involving crimes against a person (homicide, assault, sex, robbery) were examined to see the impact of continuing incarceration on returns to prison for new crimes against people. Over the 14-year study period, 9,664 people from four offense groups who apparently would have committed no new offense of any kind were incarcerated up to four years after they became eligible for release. This only avoided increasing returns for new crimes against people from 4.5 percent to 6.9 percent. Levine and Kettunen, *What is the actual risk?*, pp. 50-61 (see note 48).

What parole grant rates really measure

The exercise of parole board discretion has caused major fluctuations in the extent to which prisoners are released when they first become eligible and for how long past their eligibility dates those not released are kept. However discerning the full extent of the variation from published MDOC data is difficult.

The MDOC reports parole grant rates, which it defines as the percentage of decisions made to either grant or deny release that are positive. As Graph 9 shows, grant rates have varied widely over the last two and a half decades. Overall they ranged from a high of 68.2 percent in 1990 to a low of 47.3 in 2000 and then back up to 67.6 percent in 2013.

Before looking at the causes of this variation, it is important to understand that grant rates, while a useful indicator of trends, do not measure the percentage of all eligible prisoners who are released each year.

Part of the problem lies in the definition of “decision.” A parole board action is reported as a decision only if there has been a vote to either grant parole or continue incarceration. But each year there are typically thousands of cases in which the disposition is deferred. From 1989-1995, the number of deferrals ranged from a low of 7,541 to a high of 10,627. From 1996-2003, deferrals did not exceed 950. But in 2004, the number began to climb again. In 2013, there were 4,727.¹

The reasons for deferrals vary. In the earlier period, the primary reason given was “further discussion.” The board was heavily backlogged and this could simply indicate it had not yet been able to reach the case. It is unclear whether it also included the many cases in which prisoners had been unable to access required programs before their first eligibility date.² In recent years the most common reason is “current psychiatric report”, reflecting the backlog in pre-parole psychological evaluations required by administrative rule, primarily for sex offenders.³ There are also a significant number of deferrals of mentally ill prisoners awaiting placement through a specially targeted reentry plan.

The available data counts parole board actions, not people. A person may be deferred (perhaps more than once) and then have parole either granted or denied in the same year. It is impossible for the public to disentangle the double counting and see how many cases remained undecided. It is clear,

1 This data is reported in the MDOC’s Annual Statistical Report at Table D1a.

2 The MDOC has made substantial progress in reducing the number of people who are denied parole because they have been unable to complete required programs. This progress has been achieved by multiple means: changing the nature of the programs and who can deliver them, changing the criteria for requiring program participation so that it is based on individual reoffense risk rather than offense type and increasing the availability of programs. For further discussion, see “Prison treatment programs: rehabilitating the system,” Consensus (Lansing: Citizens Alliance on Prisons and Public Spending, Spring 2011), p. 1. However, see also discussion at p. 82 regarding people who have been granted paroles but not released because they are still waiting to complete programs.

3 2011 AC, R 791.7715 (5) states:

A prisoner being considered for parole shall receive psychological or psychiatric evaluation before the release decision is made if the prisoner has a history of any of the following:

- (a) Hospitalization for mental illness within the past 2 years.
- (b) Predatory or assaultive sexual offenses.
- (c) Serious or persistent assaultiveness within the institution.

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however, that the parole grant rate is not a percentage of the total number of cases considered by the board.

Moreover, the cases considered do not include all the people who are eligible for release. People who are denied parole are continued for anywhere from several months to five years. The typical continuance is for 12, 18 or 24 months. Thus everyone who is eligible for parole does not get considered in a given year. It is also impossible to tell from the board's summary figures which of the paroles granted are on the person's first eligibility date or how many times and for how long people were previously denied release.

The matter is further complicated by a number of other factors:

- SAI (Special Alternative Incarceration) paroles are included among the grants even though the release of people who successfully complete SAI in 90 days is statutorily mandated and not subject to parole board review.
- The small number of parolable lifers who are released may be included among the grants, but the majority of lifers in whom the board has "no interest" are not considered denials.
- Paroles that have been granted may be suspended if negative information comes to the board's attention prior to the person's release. It is impossible to discern how many of these paroles are reinstated within the same year and how many become denials. There are typically 600-700 suspended paroles each year.
- There are categories for paroles that have been rescinded and for technical violations that have been sustained. It is unclear to what extent these figures count the initial return of a technical parole violator to prison or the continuance of a technical violator who has been re-incarcerated for a period of time and whose re-parole was being considered.

In sum, while parole grant rates can be compared to show differences over time and across categories of offenses, they cannot be taken as an accurate measure of the percentage of parole-eligible prisoners who are granted release by the exercise of parole board discretion. That number would be substantially lower.⁴

However to see shifts over time in how the sheer number of releases has affected the size of the prisoner population, we need only two numbers: movements to parole and discharges on the maximum.

4 Until 1989, the parole board reported its decisions in substantially more detail. First offenders were separated from repeat offenders. Each group was divided between those being considered for the first time and those who had been continued previously. The data included how many people were paroled at their minimum, how many were paroled after their minimum and how many were continued. Having such detailed information again would make the parole process more transparent and allow for a much more nuanced analysis of release decisions.

Ultimately the clearest single indicator of how the board exercises its discretion would be the percentage of *all* parole-eligible prisoners whose release the board voted to grant, adjusted to exclude paroles that were suspended or rescinded and not restored in the same year. This could then be broken down in various ways, e.g., by such separate categories as technical parole violators, parolable lifers and those diagnosed as mentally ill, and by such factors as offense type, parole guidelines score and institutional security level. Continuances could be similarly broken down and could include the length and number of prior continuances, as could the number of deferrals resulting in no decision and the number of people not considered in a given year because of prior continuances. However the starting point would be all the prisoners on whom the board could have voted, not just those on whom they did vote.

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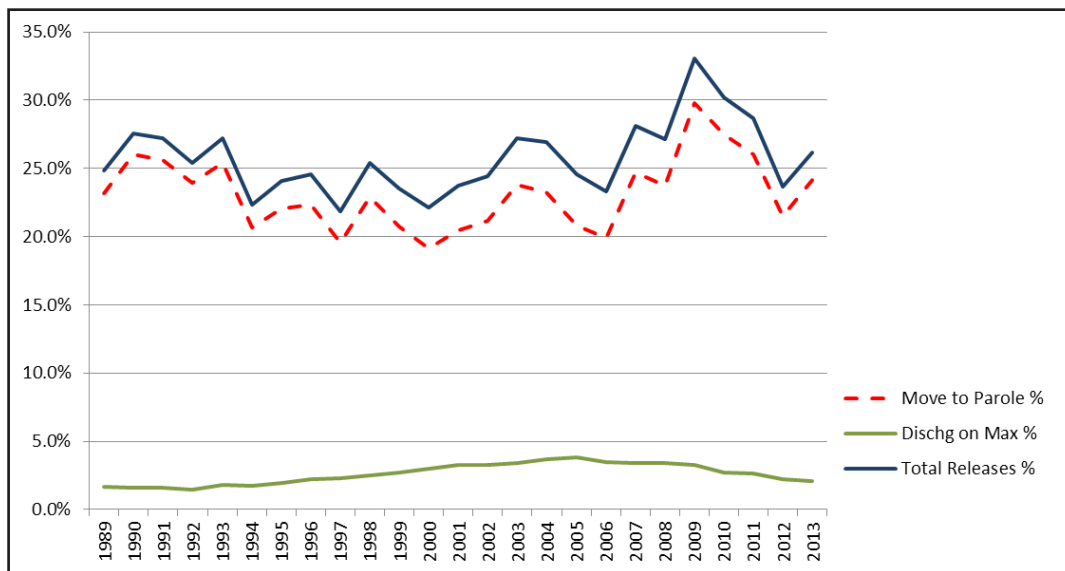
D. A history of volatility

Graph 10 illustrates this fluctuation by showing both movements to parole and “max outs” as a percentage of the total prisoner population. The roller coaster effect reveals that the percentage of total releases ranged from a low of 21.9 in 1997 to a high of 33.1 in 2009. Notably the total prisoner population only differed by about 700 in these two years (44,771 in 1997 and 45,478 in 2009) but in 2009 there were nearly 5,300 more releases.

Fluctuations in parole numbers reflect, in part, the number of people who have served their minimums and become eligible for release in a given year. However, the situation is far more complex than that. A closer look at Graph 10 reveals that releases can be divided into three groups:

- From 1989-1993, releases are relatively steady.
- From 1994-2002 there is a substantial drop.
- Over the last 13 years, releases generally trend upward but fluctuate greatly. They begin to climb in 2003, then drop in 2006, then climb to a major peak in 2009. They then drop again by 10 points until they bottom out in 2012 and go up again in 2013.

Graph 10. Releases as proportion of total prisoner population



Many of the reasons for this volatility become clear when the releases are placed in historical context.

From 1989 until October 1992, the “old” civil service board was still in place. The members were corrections professionals who rose through the ranks. Their civil service status protected their independence and provided insulation when a parolee, whose release was reasonable based on the facts known to the board, committed a high-profile crime.

In 1991 just such an event occurred. A parolee named Leslie Williams, who had been incarcerated for sex offenses, raped and murdered four young girls. By the end of 1992, the civil service board had been replaced. New board members were appointed by the MDOC director.⁵⁰ Release rates in 1993 were consistent with those of the old board, probably in part because old board decisions were still being implemented.

⁵⁰ The new board was appointed on Oct. 1, 1992. After a period of transition and training, it assumed its duties on Nov. 15, 1992 [MCL 791.231a].

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By 1994, the harsher approach of the “new” board became apparent when release rates dipped to 22.4 percent. They hit their lowest point in 1997 when a new chair was appointed.

Also in 1997, the MDOC issued a report entitled “*Five Years After: An analysis of the Michigan Parole Board since 1992*” in which then-Director Kenneth McGinnis stated:

“The intent of the overhaul was to make Michigan’s communities safer by making more criminals serve more time and keeping many more locked up for as long as possible.”

He further explained that the new board was “much less willing to release criminals who complete their minimum sentences—and much less willing to release criminals at all, forcing many to serve their maximum sentences.”

Graphs in the report illustrated that over the previous five years:

- Parole approval rates had dropped.
- More people (especially those convicted of assaultive and sex offenses) were serving beyond their court-imposed minimum sentences.
- More people were being required to max out.
- More parole violators were being returned to prison “at the first sign of trouble.”

As a further sign of progress, the report noted that the percentage of prisoners serving past their ERD had gone from 16.5 in 1991 to 28.0 in 1997.⁵¹

The third period began in 2003. Changes included a new governor, a new parole board chair, and the implementation of drug law reforms that made hundreds of prisoners eligible for parole sooner. More than 400 became eligible immediately; as many as 1,200 ultimately had their release dates accelerated.

The civil service status of “old” board members protected their independence and provided insulation when a parolee... committed a high-profile crime.

Not surprisingly, the percentage of releases dropped again in 2006 after parolee Patrick Selepak committed three especially brutal murders. Such high profile events typically cause the entire system to “tighten up” for a period, with fewer releases on parole and more parole revocations.

Paroles began to trend upward again in 2007. A new board chair was appointed and the Michigan Prisoner Reentry Initiative (MPRI), which had been in development for several years, was implemented statewide. Reentry went beyond transition programming a few months before release and support services for parolees in the community. The larger vision included the adoption of a new risk and needs assessment instrument (COMPAS) and an effort to tailor programming to individualized assessments earlier in each prisoner’s sentence. The use of COMPAS and the availability of reentry support increased the board’s willingness to grant paroles.

Releases peaked dramatically in 2009 after Gov. Granholm’s Executive Order expanded the board. As noted above, the reconsideration of thousands of prisoners previously denied parole led to the release of 2,000 more people in 2009 than in 2008, including many who were serving for assaultive and sex offenses. While the surge in the total release rate to 33.1 percent was a one-time event, Graph 9 at p. 43 shows that paroles for these prisoners have returned to “old board” norms.

⁵¹ The report also observed that “a useful by-product” of keeping more violent offenders past their ERD was an increase in federal funding for housing assaultive offenders.

Discharges on the maximum

Although the pattern of total releases closely tracks the pattern of movements to parole, it is important also to consider fluctuations in the number of people discharged on their maximum sentences. Discharges on the maximum typically reflect repeated parole denials during preceding years. They also include some technical parole violators who reach their maximums after being returned to prison. The percentage of the population that “maxes out” in any given year is small, but the trends are significant:

- From 1989 through 1994, between 1.5 and 1.8 percent of the population max out.
- The proportion then rises steadily, peaking in 2005 at 3.8 percent.
- The trend then reverses, declining to 2.1 percent by 2013.

In raw numbers this is:

1989 – 521 max outs

2005 – 1,881 max outs

2013 – 898 max outs

(See Appendix, Table B.)

Discharges on the maximum clearly increase the average length of stay. It is impossible to calculate by how much without knowing the lengths of both the minimum and maximum sentences involved, i.e., the average length of the “tail”.

The max outs are also important for another reason. People are held to their maximums because the parole board perceives them to be too dangerous to release. While this may be based on the offense, often the assessment is based on the person’s institutional record. People with histories of serious assaultive behavior, possibly connected to mental illness, have been released to the community straight from maximum security facilities, sometimes even directly from segregation where they were locked in a cell 23 hours a day. Because they have served their entire sentence, they are not subject to supervision by a parole officer. Nor do they receive reentry support services.

The adjustment can be overwhelming. This presents issues of both public safety and humane treatment of former prisoners. CSG has recommended that no prisoners be required to max out and that people instead be released on parole no fewer than nine months before their discharge date so that they can be placed on intensive supervision while they transition to the community.¹ The parole board has made substantial progress in reducing the number of max outs. However it has not yet returned to pre-1993 levels. Paroling 298 more people nine months before they discharge on their maximum sentence should be an achievable goal.

Estimated beds saved: 224

¹ *Justice Reinvestment in Michigan: Policy Options to Deter Crime, Lower Recidivism, and Reduce Spending on Corrections* (New York: Council of State Governments Justice Center, 2009) p. 3.

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The last noticeable dip in releases occurred in 2012. This is likely related to two events that occurred in the last quarter of 2011. A front-page series of articles about murders committed by probationers and parolees appeared in the Detroit Free Press between Sept. 30 and Oct. 2, 2011. On Nov. 1, the Court of Appeals resolved a prosecutor's appeal of a parole board decision to release a sex offender.⁵² It held that the board had violated the applicable administrative rule by failing to obtain a psychological or psychiatric evaluation before making its decision. From 2011 to 2012, the number of decisions deferred for evaluations increased from 1,741 to 3,084.

E. Presumptive parole

CAPPS has long advocated for a statutory mandate requiring the board to parole prisoners when they have served their minimum sentences unless there is objective evidence that they would pose a demonstrable risk to public safety or they have a recent history of serious institutional misconduct. Such a mandate is warranted by:

- ◆ The legislative intent expressed in the parole guidelines statute to promote the release of people who do not present a risk to public safety.
- ◆ The cost of continuing people beyond their ERD.
- ◆ The lack of evidence that continuing low and average risk prisoners increases public safety.
- ◆ The lack of an enforceable objective standard to constrain the exercise of parole board discretion.

CSG has also endorsed the concept of “presumptive parole.”⁵³

Proposed language has included:

The parole board shall release a prisoner who scores high or average probability of release on the parole guidelines, upon service of the prisoner's minimum sentence unless:

(A) The prisoner has an institutional misconduct score lower than -1

(B) There is objective and verifiable evidence of post-sentencing conduct not already scored in the parole guidelines that demonstrates that the prisoner would present a high risk to public safety if released.

(C) The prisoner has a pending felony charge or detainer, or

(D) Release would otherwise be barred by law.⁵⁴

Under this proposal, prisoners with high or average probability scores who are denied released would be reviewed annually thereafter. Prisoners with low probability scores would be reviewed every two years until they attained an average score.

Release at first eligibility could be deferred for up to four months to allow for completion of a treatment program.

52 *People v Raymond Haeger and Parole Board*, 294 Mich App 549 (2011).

53 *Michigan Justice Reinvestment Recommendations, Second Draft* (N.p: Council of State Governments Justice Center, Oct. 7, 2014), pp. 23-24.

54 Another possible reason for not applying the presumption might be a high reoffense score on another validated risk assessment instrument. Of course, even in cases where the presumption did not require parole, the board would always have the discretion to grant it.

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In addition to reducing the prisoner population and saving money, presumptive parole would:

- ◆ Preserve the board's discretion to deny release when the evidence indicates the person is currently a risk to the public.
- ◆ Give more deference to the minimum sentences imposed by judges pursuant to sentencing guidelines and, frequently, in accordance with the terms of negotiated guilty pleas.
- ◆ Increase transparency and certainty for victims and prisoners. By ensuring release when the minimum has been served, barring good cause for parole denial, presumptive parole also provides "truth-in-sentencing."
- ◆ Rely on evidence-based practices. Research shows that release decisions based on validated risk assessment instruments are more accurate than those based on the subjective judgments of individual parole board members.
- ◆ Depoliticize the parole process. An affirmative statutory mandate with objective criteria would help insulate the board from public pressure and promote consistency.
- ◆ Enhance the accuracy of population projections and budget decisions.

To implement presumptive parole effectively, the MDOC would need to avoid the two most common causes of deferrals. As noted above, the failure to give prisoners timely access to required programs has been largely addressed over the last several years. With the four-month grace period included in the proposed statute, programming delays should not be a problem.

The problem of deferrals while awaiting psychological evaluation could also be solved. Administrative rule 791.7715 (5) requires a psychological evaluation of everyone who was convicted of a predatory or assaultive sexual offense. Those terms tend to be defined to include virtually all sex offenses. No distinctions are made based on the prisoner's risk. Yet the MDOC currently relies on risk assessment instruments, including those specifically designed for sex offenders, to determine which prisoners actually need programs like sex offender treatment. If the administrative rule was amended so that these instruments could be used to prescreen the cases

Since presumptive parole only involves enforcing the existing minimum sentence, it could be applied to the current population immediately.

in which a psychological evaluation was warranted, the number of evaluations required would be substantially reduced. In the alternative, the MDOC would have to hire or contract with more psychologists and/or start the evaluation process earlier in the prisoner's sentence.

A method of enforcing the new standard would be needed. This could be the restoration of appeals of parole denials by prisoners. It could also include a system of reporting parole denials to the Criminal Justice Policy Commission which could, in turn, request an audit by the Office of the Auditor General if warranted by the volume of denials. The number of prisoner appeals would presumably be minimal if the board complies with stated criteria, explains the reasons for denial clearly and limits the length of continuances to one year. The cost of responding to appeals would be far less than the cost of incarcerating people who could be safely released.

Since presumptive parole only involves enforcing the existing minimum sentence, it could be applied to the current population immediately. It would simply expand the number of prisoners who are already released when they first become eligible.

Estimating the potential population reduction that presumptive parole might generate is a complex task. People with pending felony charges or active detainees must be excluded, as must people with institutional misconduct scores below -1 on the parole guidelines. A reasonable estimate must be made of the number of those remaining

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for whom the board would find objective evidence of a high current risk to public safety. Also to be considered is the fact that the average length of continuances is 2.6 years.

In a Nov. 2014 memo, CSG reported the impact pending draft bills would have on the prison population.⁵⁵ It projected that by 2020, presumptive parole would reduce the population by 3,653. However, this estimate assumed that the change would be applied prospectively, only affecting the people entering prison after the bill's effective date.

Since it would take time for even people with short sentences to become parole-eligible, the presumption would have very little impact for the first few years. CAPPs estimates that the reduction would be 1,989 in the first year and 3,978 in Year 5 if presumptive parole were applied to current as well as future prisoners who score high or average probability of release on the parole guidelines.⁵⁶

Restricting the presumption of parole to people who score high probability of release on the guidelines would provide a more modest, but still substantial, reduction. It would enforce the indisputable intent of MCL 791.233e by substituting express statutory exclusions for the “substantial and compelling” departure standard that has been used to deny parole to so many people with high probability scores. Prisoner appeals of denials would also then be limited to people who scored high probability of release. CAPPs estimates that limiting the presumption to high probability cases would reduce the population by 1,355 in the first year and 2,710 in Year 5.⁵⁷

Estimated beds saved:

Application to high and average probability cases – 3,978

Application to high probability cases only – 2,710

Part Four: Targeted solutions for special populations

Within the prisoner population are a number of distinct subgroups that each raise fundamental questions about who we choose to incarcerate. Addressing these groups individually brings the questions into focus and permits the development of targeted strategies that, taken together, can reduce the overall population substantially.

Two of the most obvious groups present the most difficult issues and are beyond the scope of this report. The vastly disproportionate incarceration of people of color, primarily African American males, is rooted in complex social issues. By the time they enter the criminal justice system, poverty, poor education, inadequate health care, high exposure to traumatic events and self-medication through addiction have already left their mark.

Changes in sentencing and parole practices will necessarily affect African Americans the most because they are the majority of prisoners. Daily news reports from around the country demonstrate that police and prosecution decisions about whom to arrest and what to charge warrant close examination for their racial impact. Reducing racial inequality in the criminal justice system will ultimately require far-reaching changes in social values that manifest themselves in all our public systems.

55 *Memorandum to the Michigan Law Revision Commission Regarding Draft Legislation* (N.p: Council of State Governments Justice Center, Nov. 5, 2014).

56 The CAPPs estimate was calculated as follows: total denials in 2012 = 4,191, reduced by 30.2% for active detainers or pending charges = 2,925, reduced by 20% for misconduct score lower than -1 = 2,340, reduced by 15% for evidence of current risk = 1,989.

57 The CAPPs estimate was calculated as follows: total denials in 2012 = 1,747, reduced by 15% for active detainers or pending charges = 1,485, reduced by 4% for misconduct score lower than -1 = 1,426, reduced by 5% for evidence of current risk = 1,355.

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The mentally ill is the second group vastly over-represented in the prison population. The well-intentioned de-institutionalization of people with serious mental health issues was not followed by adequate funding for community-based treatment and support. The flood of people whose mental illness brings them into the criminal justice system is overwhelming county jails. It has also contributed to the growth of the prison population. At least 20 percent of prisoners have a history of serious mental illness.

Sadly, people who were released from mental hospitals have been re-institutionalized in prisons that are ill equipped to meet their needs. This was epitomized by the prisoner at Lakeland Correctional Facility who greeted a corrections officer with an enthusiastic: “Hi, do you remember me?” He had been on her ward when the prison was Coldwater State Hospital, the officer was a mental health aide and the prisoner was a patient.

We have special housing units for 15- and 16- year old children, for 70- and 80- year-olds using walkers and wheelchairs, for people who are developmentally disabled or suffering from brain damage, for people with dementia or acute psychosis, and for those being treated for terminal illnesses.

In addition to those with diagnosable mental illnesses there are thousands of prisoners whose offenses were related to a history of significant trauma. Therefore the solution must include:

- ◆ Providing adequate resources to community mental health to help more mentally ill clients avoid involvement with the criminal justice system.
- ◆ Meeting the need for trauma-related services for people, especially children, who have been victimized by or exposed to violence or other abuse in their families or communities.
- ◆ Promoting coordination among the criminal justice, mental health and public school systems.

In February 2013, the Governor created the Mental Health Diversion Council within the Department of Community Health to begin addressing the problem.⁵⁸

Beyond these and other pervasive societal problems, many of which are driven by poverty, are the matters that can be addressed solely within the parameters of criminal justice policy. Our prisons are filled with people who:

- Made bad decisions to commit crimes as teenagers but could have benefitted from age-appropriate programs.
- Are middle-aged or elderly and unlikely to ever commit another crime.
- Are in such poor health they could not commit a crime if they wanted to.
- Have served far more years than their sentencing judges believed to be proportional punishment for their crimes.
- Have been returned to prison from parole even though they have not committed a new felony crime.

Collectively we are spending hundreds of millions of dollars to incarcerate thousands of people who fit in one or more of these groups. We have special housing units for 15- and 16- year old children, for 70- and 80- year-olds using walkers and wheelchairs, for people who are developmentally disabled or suffering from brain damage, for people with dementia or acute psychosis, and for those being treated for terminal illnesses. We must at least consider the alternatives.

⁵⁸ EO 2013-7. The charge to the 14-member commission includes adopting and implementing a plan to divert individuals with mental illness, intellectual and developmental disabilities (including co-morbid substance abuse disorders) from the criminal justice system to appropriate treatment.

I. Juveniles

Juvenile courts reflect the common sense understanding that children and teenagers are both less mature and more malleable than adults. Their purpose is to focus less on punishing young offenders than on helping them to address the causes of their behavior. The goal is to give them the chance to put youthful mistakes behind them and regain the opportunity for a productive future.

The “tough on crime” movement of the 1970s was also tough on juveniles. The rehabilitative approach gave way to a philosophy that “if you do an adult crime you should do adult time.” Fear of a wave of “super-predators” led to new laws allowing youth to be tried in the adult criminal justice system and incarcerated in adult prisons. The prediction never materialized. However, its legacy remains in the form of children incarcerated in adult facilities for years, decades or even their entire lives.⁵⁹

With the advent of sophisticated research on brain development, the criminal law is starting to return to the understanding that parents, teachers and juvenile justice reformers have long shared. This research shows that areas of the brain that affect judgment, foresight and impulse control continue to develop into the early and mid-20s.

As a result, impulsivity, susceptibility to peer pressure and inability to anticipate consequences all contribute to criminal behavior by juveniles. Conversely, the process of psychosocial maturation leads the vast majority of juvenile offenders, even those who committed serious crimes, to grow out of antisocial activity as they transition to adulthood.⁶⁰ Such research led the United States Supreme Court to render a series of decisions that prohibit executing people who were under 18 at the time of offense,⁶¹ sentencing them to life without parole for a non-homicide offense⁶² or automatically sentencing them to life without parole for a homicide without considering age-related characteristics.⁶³

There are two avenues into the adult corrections system for Michigan youth who were under the age of 18 when they committed their offenses. If they were 14, 15 or 16, they can be waived from the juvenile justice to the adult system by one of two methods, depending on the offense. If they were 17, they are considered to be adults and are treated as such from the point of arrest.

59 Michigan has another legacy. The Michigan Youth Correctional Facility was built by a private corporation in Baldwin to house juveniles committed to the MDOC. After a troubled history and a demonstrated lack of need for what was known as the “punk prison”, the MDOC ended the contract in 2005. GEO Corporation, the new owners of the property, expanded the size of the facility but was unable until recently to secure contracts to house prisoners from other jurisdictions. Charlie Lapastora, “Prison plans to re-open this summer”, UpNorthLive.com, March 26, 2015, accessed April 19, 2015, <http://www.upnorthlive.com/news/story.aspx?id=1183225#.VTAMiHl0zIU>.

60 Lawrence Steinberg, Elizabeth Cauffman and Kathryn C. Monahan, “Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders”, *Juvenile Justice Bulletin* (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, March 2015).

61 *Roper v Simmons*, 543 U.S. 551 (2005).

62 *Graham v Florida*, 560 U.S. 48 (2010).

63 *Miller v Alabama*, 567 U.S. ____ (2012).

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A. Juvenile waivers

Traditionally the decision to transfer a youth from the jurisdiction of the juvenile court to that of the adult court system is made by a juvenile court judge. The factors considered are the seriousness of the offense, the juvenile's role in it, his or her prior behavioral history and current amenability to treatment, and the availability of options within and outside of the juvenile justice system [MCL 712A.4(4)].

Beginning in 1988, Michigan's treatment of juveniles changed dramatically. Under MCL712A.2 (a)(1), prosecutors can choose to file charges directly in the adult system against anyone aged 14, 15 or 16 for any of 18 specified offenses. This "automatic waiver" process bypasses the juvenile justice system altogether. No judicial determination of the teenager's amenability to treatment or the suitability of potential options is made. The waiver is not even based on the youth's prior history or culpability for the current offense. The only thing that counts is the crime the prosecution has chosen to charge.

An automatically waived juvenile who is found guilty must receive an adult conviction, even if he or she is ultimately convicted of a lesser, non-specified offense. Twelve of the specified offenses also require an adult sentence. These are:

MCL 750.72A	Arson of a dwelling
MCL 750.83	Assault with intent to murder
MCL 750.86	Assault with intent to maim
MCL 750.91	Attempted murder
MCL 750.157a	Conspiracy to commit murder
MCL 750.157b	Solicitation to commit murder
MCL 750.316	First-degree murder
MCL 750.317	Second-degree murder
MCL 750.359	Kidnapping
MCL 750.520B	Criminal sexual conduct, 1 st degree
MCL 750.529	Armed robbery
MCL 750.529A	Carjacking

For the remaining six specified offenses, either adult or juvenile sentencing is permitted. These offenses are:

MCL 750.89	Assault with intent to rob while armed
MCL 750.84	Assault with intent to commit great bodily harm
MCL 750.531A	Bank/safe robbery
MCL 750.186A	Escape from a juvenile facility
MCL 750.110A2	Home invasion, 1 st degree
MCL 333.7401(2)(a)(i)/ 333.7403(2)(a)(i)	Possession or delivery of narcotics >1,000 grams

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A third option is a designated proceeding, in which the juvenile is tried in juvenile court by the rules that govern adult proceedings. The juvenile who is found guilty has an adult conviction but the court can choose to impose either an adult or juvenile sentence.⁶⁴

The key feature of this complex scheme is the control exercised by the prosecutor regarding specified offenses. While many prosecutors choose to take multiple factors into account and continue to treat most teenagers as juveniles, the determination is theirs, not the court's. The prosecutor's discretion is informally exercised and unreviewable.

As Table 7 shows, in the five years from 2008 through 2012, there were 604 teenagers who were between the ages of 14 and 16 when they committed their offenses sentenced to prison as adults—an average of 121 per year:

- 64 were age 14.
- 152 were age 15.
- 388 were age 16.

Of the total, 382 teens were actually convicted of specified offense, including 54 murders and 177 armed robberies and carjackings. It cannot be discerned from summary figures whether the remaining cases involved charges of specified offenses that resulted in convictions for non-specified offenses (such as a guilty plea down from armed robbery to unarmed robbery or from first-degree CSC to a lower degree), and how many involved traditional waivers for non-specified offenses.⁶⁵

What is clear is the length of the sentences these young people received. In 160 cases, the minimum sentence was two years or less; in 210 cases it was over two years up to five. This suggests that in more than 60 percent of the cases, the teen was not viewed as such a danger to the community as to require extremely long incarceration.

⁶⁴ A clear and detailed description of the various procedures may be found in *Juvenile Justice Benchbook, Delinquency and Criminal Proceedings (Third Edition)*, chapter 16 (Lansing: Michigan Judicial Institute, 2015), which is available online at <http://courts.mi.gov/education/mji/Publications/Documents/Juvenile-Justice.pdf>.

⁶⁵ A handful of convictions were for such less serious offenses as entering without breaking (2), felony firearm (13), larceny from a person (4) and delivering less than 50 grams of narcotics (4). Thirteen were for third-degree CSC with a person aged 13-15, suggesting there may have been sexual experimentation between teenagers close in age rather than coercion.

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Table 7. Commitments to prison, ages 14-16 at offense, 2008-2012

Offense type	Minimum sentence length							TOTAL
	0-2	>2 and <=5	>5 and <=10	>10 and <=15	>15 and <=25	+25	Life	
Murder 1							13	13
Murder 2			4	14	15	7	1	41
Manslaughter	1	4	1					6
Assault	22	14	13	4	2			55
Robbery	20	110	69	30	6			235
CSC	29	39	23	12	3			106
Child abuse								---
Kidnapping		4	1		1			6
Explosives		1						1
Weapons	23	1						24
Arson		1	1					2
Burglary	43	33	13					89
Theft	14							14
Drugs	4							4
Vehicle code		1						1
Crim Just Sys*	1							1
Other	3	2	1					6
TOTAL	160	210	126	60	27	7	14	604

*Includes offenses directed at the criminal justice system, such as resisting arrest, fleeing from police and escaping from a juvenile facility.

Several hundred may return home while still teenagers, with all the associated characteristics of immaturity. What will be the consequences of their experience?

Young males are housed in a special unit at the Thumb Correctional Facility until they turn 17. They are then moved into general population with adult prisoners. The youngest, with the shortest sentences, may never leave the special unit, raising the question of what point there was in sending them to prison instead of a juvenile facility. The rest will eventually experience the full impact of incarceration as an adult. They all will carry the self-image and the stigma of being ex-convicts. It is difficult to imagine they will reenter their communities better prepared for a productive future than if they had been engaged in more age-appropriate programs through the juvenile justice system.

If Michigan eliminated automatic waivers and returned to the traditional system of judicial waivers based on consideration of multiple factors, undoubtedly some of these teenagers would still be incarcerated as adults. One

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can only speculate how many prison beds would be saved. Given that there were 216 who were only 14 or 15 when they committed their offenses, 222 who were convicted of non-specified offenses and 370 cases in which the minimum sentence was no more than five years, it seems reasonable to estimate that at least one-third would not be waived.

Estimated beds saved: 197

B. Treating 17 year-olds as adults

In Michigan, like most states, the age of majority is 18.⁶⁶ Anyone younger than 18 cannot vote at all and cannot marry⁶⁷, join the military⁶⁸ or even get a tattoo⁶⁹ without their parents' permission. Parents are legally obligated to support their children until the age of 18. Nonetheless, Michigan treats 17-year-olds as adults for purposes of criminal responsibility.⁷⁰ It is one of only nine states that maintain this anomaly. Currently there are active campaigns to raise the age in N. Carolina, New York, Wisconsin and Texas. This leaves Michigan in the company of Georgia, Missouri, South Carolina and Louisiana.⁷¹

The large majority of 17-year-olds tried as adults are sentenced to probation and/or jail time, just like the majority of all criminal defendants. Like older defendants, these teens get to carry with them for the rest of their lives all the collateral consequences of an adult felony conviction, which will make it harder for them to get employment, occupational licenses, housing and education. They may be unable even to engage in such routine activities as crossing the border to Canada.⁷²

For some the consequences are even greater. From 2008-2012, there were 2,106 people sentenced to prison for offenses they committed at age 17, an average of 421 a year.

It is tempting to assume these must be particularly dangerous teenagers. Table 8 indicates that is not the case. While half were convicted of an offense involving a death, assault, robbery or criminal sexual conduct, the other half were convicted of offenses like larceny, breaking and entering, and drug or weapons possession.

The whole range of offenses includes degrees of seriousness. For instance, more than a quarter of the victims in the CSC cases were between the ages of 13 and 15, suggesting that many involved teenaged sexual experimentation, not assaultive behavior. Nearly a quarter of the robberies were unarmed. Of 178 weapons offenses, 100 were felony firearm. Of 92 drug offenses, 75 involved either marijuana or the possession or delivery of less than 50 grams of narcotics. Overall, only one-third of the convictions were for specified offenses that would qualify for automatic waiver of a juvenile.

It is especially striking that 57 percent of the minimum sentences are two years or less. Like the waived juveniles, many of these defendants will not only be in but out of prison while they are still teenagers. They will have

66 MCL 722.52

67 MCL 551.103

68 10 U.S.C. 505

69 MCL 333.13102

70 MCL 712A.2

71 Maurice Chammah, "The 17-Year-Old Adults", *The Marshall Project*, March 3, 2015. www.themarshallproject.org/2015/03/03/the-17-year-old-adults.

72 The exception is if they are sentenced under the Holmes Youthful Trainee Act, which allows courts to assign people aged 17-20 who plead guilty to the status of "youthful trainee". They may be sentenced to probation, a year in jail or up to three years in prison but once the punishment is successfully completed there is no conviction on their record. Youthful trainee status cannot be granted for sex offenses, major controlled substance offenses or any crime that carries a maximum penalty of life [MCL 762.11 et seq.].

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experienced incarceration with adults while they still lack mature judgment and are still highly susceptible to peer pressure and the influence of adults they may wish to emulate. It is doubtful that they will return to their communities in better shape than if they had been engaged in more age-appropriate programs through the juvenile justice system.⁷³

Another 28 percent of the minimum sentences were for more than two and up to five years. Thus a total of 85 percent of the 17-year-olds – 1,177 youths in five years – received sentences that suggest they were by no means exceptionally dangerous kids.

Table 8. Prison commitments, age 17 at offense, 2008-2012

Offense Type	Minimum Sentence Length							TOTAL
	0-2	>2 and <=5	>5 and <=10	>10 and <=15	>15 and <=25	+25	Life	
Murder 1							19	19
Murder 2			5	4	20	10	2	41
Manslaughter		8	5					13
Assault	80	27	15	7	3			132
Robbery	134	244	109	45	11		1	544
CSC	93	67	25	6	5	3		199
Child abuse	4	2	2	2				10
Kidnap		3	2	2	1			8
Explosives	3	1		2				6
Weapons	175	3						178
Arson	6	5						11
Burglary	356	173	22	2				553
Theft	209	23						232
Drugs	79	13						92
Vehicle code	23	5	1	1				29
Crim Just Sys*	18	2	2	2				22
Other	12	3	2	2				17
TOTAL	1,192	579	190	70	40	13	22	2,106

*Includes offenses directed at the criminal justice system, such as resisting arrest, fleeing from police and escaping from a juvenile facility.

73 A recent report by The PEW Charitable Trusts summarized research on the effect of lengthy out-of-home placements for juveniles in secure corrections or other residential facilities designed for youth. In general, juvenile incarceration even in these settings fails to reduce recidivism. Outcomes are better for those who remain in community-based programs. There is no consistent relationship between the length of out-of-home placements and recidivism. Public Safety Performance Project, *Issue Brief: Re-Examining Juvenile Incarceration* (N.p: The Pew Charitable Trusts, April 20, 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/04/reexamining-juvenile-incarceration>.

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If the age of criminal responsibility were changed to 18, many of these teenagers would not be incarcerated as adults. This would not only give them a better a chance of growing up to be law-abiding adults, it would also reduce the need for beds in adult prisons. How many beds would be saved would depend to some extent on whether changes were also made in the juvenile waiver laws.

If automatic waivers remained, 705 of the 17-year-olds could still end up in prison based solely on their having committed specified offenses, although prosecutors would not necessarily charge all of them as adults. Some additional number might be waived by the traditional method based on their prior juvenile histories. If the traditional waiver system was fully restored, it is likely that judges would waive fewer of those with the more serious offenses but still would waive some with less serious offenses based on their juvenile records. In either case, from what we know of their crimes and minimum sentences, it is reasonable to estimate that a third of the 17-year-olds would be waived.

The average minimum sentence for 17-year-olds, excluding life sentences, is 3.6 years. If two-thirds of the 2,084 non-lifers were not incarcerated as adults, the prison beds saved in five years would be 977.

Estimated beds saved: 977

C. Juveniles with long indeterminate sentences

A small portion of juveniles receive very long sentences. As of May 1, 2013, 416 people who were younger than 18 at the time of their offenses were serving minimum terms longer than 15 years.⁷⁴ Table 9 shows that 106 of these teenagers were sentenced to more than 25 years; 21 of them have minimum sentences exceeding 45 years. Ten actually have minimums of 60 years or more.

Table 9. Juveniles serving long indeterminate sentences

Age at offense	>15 up to 20	>20 up to 25	>25 up to 35	>35 up to 45	>45	Total
Below 17	81	48	19	14	9	171
17	97	84	36	16	12	245
Total	178	132	55	30	21	416

These long sentences generally reflect extremely serious, even brutal crimes. However, they also reflect a determination that these teenagers are so beyond redemption that they cannot be safely returned to society until they are middle-aged, if at all. Such decisions wholly belie the fact that these defendants are still teenagers with all the characteristics associated with their age. They fail to account for what the United States Supreme Court has recognized as children's lesser culpability and greater capacity for change. Since the majority of these sentences were imposed on 17-year-olds or resulted from automatic waivers, it is unlikely that these factors were even considered.

As with any very long indeterminate sentence, the very long minimums imposed on the juveniles are essentially designed as an end-around the lifer law to prevent parole consideration in 15 years. (See discussion at pp. 70-71.) The longest of them effectively amount to the imposition of life without parole for crimes other than first-degree murder, a result held unconstitutional in *Graham v Florida*.

While the elimination of automatic waivers and changing the age of criminal responsibility would solve the problem prospectively, it is also possible to address the situation of the people who are currently serving these

⁷⁴ The number serving either parolable or nonparolable life was 474.

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sentences for offenses they committed as juveniles. The legislature could create earlier parole eligibility for those who were under 18 and have minimum sentences longer than 15 years. For instance, they could become eligible after serving 15 years or half their judicially-imposed minimum sentence, whichever is greater. This would have several advantages:

- ◆ Those juveniles who matured in prison would have the opportunity to get at least some of their life back.
- ◆ Taxpayers would be spared the cost of paying for their incarceration long after these juveniles became old and low-risk.
- ◆ These juveniles would still have to serve at least as long as people sentenced to parolable life and could be denied parole, despite earlier eligibility, if they were demonstrably still a risk to the community.
- ◆ Bed savings could begin to accrue immediately.

Although 416 prisoners would qualify for earlier parole eligibility, 62 of them have already served past their earliest release date and would have no years to save. The remaining 354 prisoners could, over time, serve as many as 2,861 fewer years if the proposal became effective on June 1, 2015.

The number of beds saved in any given year would depend on the length of each person's minimum sentence, the number of years he or she has already served, and other factors that may affect whether parole is actually granted at first eligibility. The number of beds that might be saved in the first five years is 113.

Estimated beds saved: 113

II. The elderly, the ill, the disabled

The “tough on crime” attitudes of the 1980s and ‘90s that brought much longer sentences and a massive expansion of prison systems around the country has inevitably resulted, three decades later, in an ever-increasing number of older prisoners. An older population has more medical problems (including dementia) and thus raises the cost of health care. At the same time, there is no debate that this population is highly unlikely to reoffend. Numerous recent national reports⁷⁵ and Michigan press accounts have addressed the anomaly.⁷⁶ Consider that:

- The number of Michigan prisoners aged 50 and older grew from 5,777 in 2003 to 8,457 in 2013, going from 12 percent of the total population to 19 percent in just one decade.
- Nearly 1,200 were 65 or older, including 151 who were at least 75.
- Spending on prisoner medical and mental health care increased nearly 47 percent from 2000 to 2014, growing from \$200 million to \$293 million.
- Because Michigan has thousands of prisoners serving life or very long terms, the proportion of inmates who are elderly will continue to grow.

75 See, e.g., , *The High Costs of Low Risk: The Crisis of America's Aging Prison Population* (N.p: Osborne Association, July 2014); Jamie Fellner, *Old Behind Bars: The Aging Prison Population in the United States* (N.p: Human Rights Watch Jan. 2012); Brie A. Williams, MD, Rebecca L. Sudore, MD, Robert Greifinger, MD and R. Sean Morrison, MD, “Balancing Punishment and Compassion for Seriously Ill Prisoners,” *Annals of Internal Medicine*, Vol 155, No. 3, p. 122 (July 19, 2011), p. 122, doi:10.7326/0003-4819-155-2-201107190-00348; Tina Chiu, *It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release*. (New York: Vera Institute of Justice, 2010).

76 Steve Friess, Old age in the big house, Al Jazeera America, Jan. 6, 2015, <http://america.aljazeera.com/articles/2015/1/6/older-prisoners.html>; Ted Roelofs, Michigan gets serious about high cost of prisons, *Bridge*, April 15, 2014, <http://bridgemi.com/2014/04/the-price-of-prisons/>; Pat Shellenbarger, Getting Old, going nowhere, The Grand Rapids Press, Sept. 25, 2006; Francis X. Donnelly, Medical care saps Mich. prisons: Should aging inmates be freed?, The Detroit News, Dec. 28, 2005, <http://www.detroitnews.com/article/20051228/METRO/512280332>.

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Older prisoners are not, of course, the only ones with serious health issues. Prisoners of any age can and do develop cancer or other life-threatening illnesses or injuries that require extensive treatment at off-site medical facilities. In addition to those with mental illness, people with intellectual, developmental and physical disabilities are regularly committed to prison upon conviction.

To cope with the diverse groups of people with special needs, the MDOC has established various special housing units. Most are units within prisons; a few are separate facilities. They include:

Purpose	Beds
Chronic care for people requiring medical care short of hospitalization	176
Dialysis	84
Infirmery	27
Geriatric	80
Mental health crisis stabilization	218
Mental health residential treatment	438
Adaptive skills residential program (for people with chronic brain disorder or developmental disability who require a supportive environment)	635
TOTAL	1,658

The total does not include 112 beds at the Duane Waters Hospital for in-patient acute, surgical and long-term hospital care. Nor does it include many hundreds of prisoners housed in general population who can ambulate only with the assistance of wheelchairs, walkers or canes, or who are treated in chronic care clinics for disabling illnesses like COPD, Parkinson’s and cardiomyopathy, or whose mental health is maintained by the daily administration of psychotropic drugs.

In Feb. 5, 2015 testimony before the House Appropriations Subcommittee on Corrections, MDOC Director Daniel Heyns said that 100 prisoners currently meet the requirements for nursing home eligibility under Medicaid. Another 600 are “somewhat ambulatory”, meaning they are dependent on assistive devices such as wheelchairs or portable oxygen.

The MDOC has been considering two options for addressing the burgeoning population of older and medically fragile prisoners.⁷⁷ One is increasing the availability of long-term care beds in special housing units operated by the MDOC itself, either within existing prisons or by reopening currently closed state properties.

The other involves placing prisoners in private long-term care facilities in the community. This would allow for the use of federal Medicaid dollars for eligible services and for a reduction in security costs. (See discussion at p. 80.)

A third option that is not often discussed is release. Hundreds of the older prisoners, particularly parolable lifers (see discussion at p. 66) and sex offenders (see discussion at p. 40), are presently eligible for parole. For those who do not pose a current risk to public safety, the solution is straightforward: grant parole.

⁷⁷ Older Adult Planning Workgroup, *Recommendations for the Older and Medically Fragile Prison Population* (Lansing: Michigan Department of Corrections, 2013).

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For those not eligible for parole, the only avenue for release that is currently used is commutation. The commutation process is long and complex; because it involves a very visible decision by the governor, it is also highly politicized. In over four years, Gov. Snyder has granted only a handful.

There is, however, an alternative to commutation that would allow the parole board to act without the governor's intervention.

MCL 791.235 (10) says:

The parole board may grant a medical parole for a prisoner determined to be physically or mentally incapacitated. A decision to grant a medical parole shall be initiated upon the recommendation of the bureau of health care services and shall be reached only after a review of the medical, institutional, and criminal records of the prisoner.

The clear intent of the statute is to give the board the jurisdiction to place on parole prisoners who would otherwise not be eligible. Once the prisoner is eligible, the board has the total discretion to act based on any reasons it considers relevant, including the person's health.⁷⁸ Thus the medical parole provision is only necessary for those cases in which the board could not otherwise act.

The medical parole statute is elegant in its simplicity. It is not burdened by definitions or exceptions that limit its usefulness. It leaves the initial screening to health professionals, then gives the parole board the discretion it needs to make individualized decisions. It makes reoffense risk the central criterion but also requires the board to consider the offense and the person's institutional history. It would have allowed the board to parole:

- Brandon, who was in his early 20s when he developed bone cancer and had to be regularly transported to Karmanos Cancer Center in Detroit for treatment. It took nearly a year for Brandon to obtain a commutation so that he could finally be moved to Karmanos, where he died ten days later.
- Jason, who was stabbed in the yard of a Level II prison in Nov. 2013 and is now quadriplegic. He depends on staff for feeding, colostomy maintenance, bed turning by a nurse at two-hour intervals, bathing and dressing changes. The only thing Jason can do on his own is change TV channels with a stick he holds in his mouth. He is housed at Duane Waters Hospital waiting for action on a commutation request so that he can be released to the care of his family.
- Larry, who is 72 and being housed at Woodland Correctional Facility because of his severe dementia. He has served 17 years of a life sentence for murder and is eligible for parole under the "lifer law." Because of Larry's mental state, the parole board was willing to proceed to public hearing but the sentencing judge objected based on the offense. (See discussion of judicial objections at p. 68.) Woodland is the most expensive facility in the system. The MDOC reports a daily cost per prisoner of \$289.97 compared to an overall average for all prisoners of \$96.30 per day. Consideration under the medical parole statute would not be limited by judicial vetoes.

The medical parole statute is not currently used in the belief that since truth-in-sentencing requires people to serve their entire minimum sentences, medical paroles are no longer permitted. Although this conclusion is debatable, to resolve any doubts and avoid litigation, the legislature need only reenact the statute with the addition of a single phrase: "the requirements of truth-in-sentencing notwithstanding."

⁷⁸ In fact, MCL 791.235 (7)(c) requires that routine parole eligibility reports include the results of any physical, mental or psychiatric examinations that may have been performed precisely so that the board can consider that information.

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Certainly not everyone who is elderly, medically fragile or mentally disabled can simply be released. Some may still pose a risk to the public; for some finding suitable placements will be difficult.⁷⁹ But others, who could be cared for in the community, by family, by the Veterans Administration or in a Medicaid-funded nursing home, lack the capacity to commit a new offense or, in some cases, even to appreciate that they are continuing to be punished. In such situations, one can only wonder what purpose is served by continuing incarceration. Is public safety being enhanced? Are taxpayer dollars being maximized? Do the prisoners need more rehabilitation or deserve more punishment?

The medical parole statute leaves the initial screening to health professionals, then gives the parole board the discretion it needs to make individualized decisions.

One can only speculate how many beds might be saved by a robust use of the medical parole statute. However, given the sheer number of prisoners already in special housing units and the continual aging of the population, several hundred would seem to be a modest estimate.

Estimated beds saved: 300

III. Life and long indeterminate sentences

There are three kinds of sentences in Michigan that result in people being incarcerated for decades: life without parole, parolable life and long indeterminate terms. Table 10 shows that in 2013, 27 percent of the prisoner population was serving a life term or a minimum sentence greater than 15 years.

Table 10. Frequency of life and long indeterminate sentences

	>15	>20	>25	Parolable life	Life without parole
Number	2,430	1,886	2,306	1,457	3,703
Percent	5.6	4.3	5.3	3.3	8.5

Because these people are being left to age in place, their proportion of the total prisoner population will continue to grow, as will the cost of their medical care. Their risk to the public will continue to decline, raising inevitable questions about the utility of their continued incarceration.

Each group presents its own opportunities and challenges. Before addressing these separately, it is useful to review the basic framework.

Michigan law mandates a sentence of **life without parole** (LWOP) for first-degree murder. Nonparolable lifers can only be released if their sentences are commuted by the governor.

For a long list of “capital crimes”, Michigan law allows the court to impose a sentence of “**life or any term.**” The most common of these offenses are second-degree murder, first-degree criminal sexual conduct, assault with intent to murder, armed robbery, carjacking and kidnapping. Before the enactment of sentencing guidelines,

79 Reports to the Legislature on Prisoner Reentry Expenditures and Allocations show that in a period of five years, more than \$38 million in reentry funds was spent to find placements for mentally ill prisoners who the board would otherwise be reluctant to parole. Specifically the amounts were FY 10: \$8.9 million, FY 11: \$8.9 million, FY 12: \$7.7 million, FY 13: \$7.6 million, FY 14: \$6.4 million.

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nothing prevented one judge from giving 10-20 years, another from giving 20-40 years and a third from giving parolable life to virtually identical defendants who had committed virtually identical crimes:⁸⁰

- **If the court selects life**, the person becomes eligible for parole when he or she has served the minimum years required by “the lifer law”, MCL 791.234(7). For offenses committed before Oct. 1, 1992, parole eligibility occurs after service of 10 calendar years. Offenses committed after that date require service of 15 calendar years.⁸¹ (Lifers have never earned sentence reduction credits, whether good time or disciplinary credits.) The parole board retains the discretion to keep the person incarcerated until they die.
- **If the court imposes an indeterminate term**, it selects both the minimum and maximum sentence. The person becomes eligible for parole after serving the minimum minus any sentencing credits he or she may have earned. As with cases where the maximum is set by statute, the board has the discretion to grant release at any point between the minimum and maximum.

Before the voters adopted Ballot Proposal B in 1978, the lifer law also applied to people serving **long indeterminate sentences** (LIDS). Anyone who served 10 calendar years came within the parole board’s jurisdiction:

- An additional statutory provision gave the board the authority to grant “**special paroles**,” based on the recommendation of institutional staff, to people who had shown exceptional change.
- At the same time, generous sentence reduction credits were available. Under the old **good time** system, a 50-year sentence could be served in 18.5 years. Since people serving very long sentences could already become eligible for parole long before reaching their calendar minimum just by earning good time, they were not often released based on application of the lifer law.
- **Proposal B** had two provisions that applied to a list of crimes involving violence or injury to people or property:
 - It prohibited the granting of parole until completion of the minimum sentence.
 - It prohibited reducing the minimum sentence by granting good time, special good time or a special parole.

With the lifer law, special paroles and sentence reduction credits no longer available, someone who receives a 50-year minimum sentence must serve every day of 50 years before becoming eligible for parole.

A. Parolable Lifers

Since more than half of the parolable lifers are currently eligible for release, this group presents the greatest prospect for saving hundreds of prison beds. For decades, both the law and sentencing judges viewed parolable life and long indeterminate terms as essentially interchangeable. Well into the 1980s, lifers were commonly paroled in 12, 14 or 16 years. Judges chose sentences that they believed, based on past parole board practice,

⁸⁰ Under the current sentencing guidelines, life does not become an available alternative to a term of years until the scores for prior record and offense characteristics combine to produce a recommended minimum sentencing range that is quite substantial. In murder cases, life becomes an option when the low end of the sentencing guidelines range would be 22.5 years. It becomes an option for other life offenses when the low end of the guidelines range would be at least 31.25 years.

⁸¹ Although the purpose of both the lifer law and of a judicially imposed minimum sentence is the same, that is, to define when the parole board first gains the authority to grant release, the MDOC does not treat the lifer law as establishing the equivalent of a minimum sentence and thus does not treat lifers as having an earliest release date. When the MDOC provides data about the number of prisoners who are serving past their ERD, it does not include the eligible lifers.

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would result in the prisoner serving an appropriate amount of time. They often told defendants that, with good behavior, they would be out in 10 or 12 years.

However board practices changed substantially in the ensuing years. About 580 current parolable lifers were sentenced prior to 1990. Another 275 were sentenced in the 1990s. Thousands of people sentenced to terms of years during the same decades for similar offenses have served their time and been released.

The parolable lifers were not the “worst of the worst.” They were generally similar to thousands of people convicted of the same offenses who have been paroled over the last several decades. Their sentences reflect the understanding and the predilections of their sentencing judges. Their continued incarceration reflects changes in policy that occurred long after their sentences were imposed.

These changes included:

- Decreasing the frequency of review from every two years to every five years, after an initial interview at 10 years.
- Permitting the board to conduct “file reviews” instead of personal interviews.
- Changing the review criteria from an assumption that, once eligible, lifers would be evaluated like any other prisoner serving a long sentence to an assumption that “life means life”.
- Declining to assess lifers’ risk by calculating parole guidelines scores.
- Redefining the meaning of a parole denial so that board decisions of “no interest” in proceeding in lifer cases require no explanation.

The cumulative effect is that lifers can be left for 10 or 15 years at a time without anyone from the parole board seeing them, no matter how low their risk of reoffending or how good their institutional record or how much time they have already served, and without ever being told why they are being denied release.

For 14 years from 1992-2006, on average the board paroled fewer than three lifers a year.⁸² Beginning in 2007, a combination of personnel changes and federal litigation caused attitudes about lifers to begin to change. In 2009, Gov. Granholm expanded the parole board from 10 members to 15. With increased capacity, the number of non-drug lifers released in a single year peaked at 65 in 2009.

The sentences of hundreds of parolable lifers convicted in the 1960s, '70s and '80s reflect the understanding of their sentencing judges about how much time they would actually serve. Their continued incarceration reflects changes in policy that occurred long after their sentences were imposed.

The numbers have fallen off substantially since. The highest in any succeeding year was 31 and in 2014 only 14 non-drug lifers were released. Gov. Snyder returned the size of the board to 10 in April 2011.

The backlog of eligible lifers continues to be about 850:

- More than half are older than 55.
- Nearly 200 were teenagers when they committed their offenses.
- Two-thirds are serving their first prison term.

⁸² This figure does not include people convicted of delivering more than 650 grams of drugs whose life sentences were changed from nonparolable to parolable in 1998 and who had relatively high rates of release when they became eligible after serving 15, 17.5 or 20 years, depending on criteria specific to drug cases.

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- About half are serving for second-degree murder.
- Most would score high probability of release if their parole guidelines scores were calculated.

Most have not had a misconduct citation in decades. Over 90 percent are housed at Level II facilities because the MDOC's policy is to not place lifers at Level I.

Fewer lifers are released than even the parole board would choose. By statute, the board must conduct a public hearing before making a final decision whether to parole a lifer. The board is also required to give notice of the hearing to the sentencing judge or that judge's successor in office, the prosecutor of the county of conviction and any registered victims. Objections from prosecutors and victims can be influential. Objections by judges are binding.

Initially, only objections by the original sentencing judge had the effect of preventing the board from granting parole. However in 1953 this veto power was extended to successor judges. As a result, a judge who has no personal knowledge of the case and has never seen the prisoner need only write "I object" within 30 days of receiving notice and the parole board loses its authority to act. The judge is not required to hold a hearing or provide any reasons and the decision is not subject to review. Since 2007, judicial objections stopped the parole process for 56 people. Only five objections came from the original sentencing judge.⁸³

Hundreds of people whom judges thought would be released in 12 or 14 years have now served 30 or 40. If 500 lifers would present virtually no risk to public safety – a conservative estimate, and if 50 were paroled each year – a generous estimate, it would take ten years to release them.

Expediting the releases of parolable lifers is a matter of equity as well as cost. It is also a finite problem that will diminish once the current backlog of long eligible prisoners has been reduced. Four steps could resolve the situation. They would not require the release of any particular lifer or affect in any way the opportunity of victims to provide input:

1. Expand the parole board to allow for a five-member special review panel that would focus on the more complex and time-consuming cases, including parolable lifers, commutation applications and medical paroles, then make recommendations to the full board.
2. Restore prior practices for reviewing lifers, including more frequent personal interviews, applying the same review criteria to lifers as to people serving long minimum sentences for similar crimes, calculating the parole guidelines scores and treating "no interest" decisions as denials for which reasons must be articulated.⁸⁴
3. Eliminate the authority of successor sentencing judges to veto parole.⁸⁵
4. Amend the lifer law to clarify that the 10 or 15-year point at which the parole board obtains jurisdiction is a minimum sentence set by the legislature that is to be treated the same as a minimum sentence imposed by a court.

Estimated beds saved: 500

83 For an in-depth discussion of the parolable lifers, including additional history and sample cases, see Barbara Levine, *Parolable Lifers in Michigan: Paying the price of unchecked discretion* (Lansing: Citizens Alliance on Prisons and Public Spending, Feb. 2014).

84 HB 4809, introduced in the 2013-2014 legislative session, included all these changes.

85 HB 4189, introduced in the 2013-2014 legislative session would have permitted successor judges to receive notice of public hearings and offer objections but only an objection by the original sentencing judge would have the effect of prohibiting parole. The bill was supported by the Michigan Judges Association.

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B. Long indeterminate sentences (LIDS)

Parolable life and long indeterminate sentences were once quite similar in their effect on first parole eligibility but that is no longer the case. Today anyone who receives a minimum sentence longer than 15 years is actually worse off than a lifer, at least theoretically.⁸⁶ The lifer becomes eligible for parole after 15 years, but the parole board can only release an LID before the minimum sentence has been served if there are grounds for a medical parole. (See discussion at pp. 63-64.) Depending on the prisoner's age at offense, minimum sentences of 25, 35 or 50 years effectively become terms of life without parole.

The impact on the total prisoner population is equally marked:

- In 1989, 7.1 percent of prisoners were serving minimum sentences greater than 15 years.
- In 1998, it was 9.6 percent.
- By 2013, 15.2 percent of prisoners – 6,622 individuals – were serving LIDS.
- Of these, more than 2,300 have minimums greater than 25 years.

Three statutory changes affected this growth. The legislative sentencing guidelines increased the length of minimum sentences for the most serious offenses. The opportunity to earn sentence reduction credits was ended prospectively by truth-in-sentencing. And the ability of the parole board to release LIDS under the lifer law was eliminated.

At the front end, sentence lengths shifted upward. Overall, commitments with minimums over 15 years grew 40 percent from 1989 to 2013. (The percentage of new commitments with minimum sentences over 15 and up to 20 years actually declined. But the percentage of sentences over 20 years and over 25 years each increased.)

The fact that the proportion of LIDS in the population grew by 114 percent during the same period suggests that an even larger cause was the growing proportion of people required to serve decades-long minimums with no mechanism for earlier release. There is no question that most extremely long sentences are imposed for especially harmful crimes against people. In some cases judicial efforts to prevent the defendant from ever being released may be appropriate.

But in considering the LIDS, several other factors must be remembered:

- Sentencing disparities become increasingly pronounced with the most serious offenses. The breadth of the sentencing guidelines ranges means that similarly situated prisoners will be required to serve very different amounts of time.
- Preventing parole eligibility for decades is a purely punitive response that prevents the parole board from assessing the person's risk many years later. Extremely lengthy sentences imposed on young people, in particular, belie their capacity for maturation and change. (See discussion at p. 61.)
- The absence of an opportunity for review forces the continued incarceration of people, at taxpayer expense, who pose virtually no threat to public safety.
- Allowing people to become eligible for parole sooner does not mean that they have to be released.
- The combination of extremely long minimums and no sentencing credits makes Michigan's length of stay longer than that of other states and its sentencing scheme much harsher.

⁸⁶ See *People v Johnson*, 421 Mich 494, 500 (1984) (Boyle, J., dissenting).

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The solutions are straightforward:

- Narrow the sentencing guidelines ranges and reduce their lower ends.
- Restore the opportunity for prisoners to earn sentencing credits (see discussion at p. 77).
- Restore the authority of the board to parole LIDS at the same time as parolable lifers, that is, when they have served 15 calendar years.

Mandatory consecutive drug sentences: applying pre-2003 reforms

Prior to March 1, 2003, Michigan was infamous for its “harshest in the nation” drug laws. In addition to long mandatory minimum sentences for possessing or delivering various quantities of drugs, these laws required that a sentence for a major controlled substance offense violation be served consecutively to a sentence for any other felony [MCL 333.7401(2)(A)3].

Consecutive sentencing would apply, for instance, if someone possessed the requisite quantity of drugs while committing a breaking and entering or sold drugs and stolen property at the same time. It would also apply to successive drug sales to the same undercover police officer and to charges of conspiring to deliver and delivering the exact same drugs. Depending on police investigative tactics and the county prosecutor’s charging policies, some people received multiple consecutive sentences that added up to shockingly long minimum terms.

Following a multi-year campaign by Families Against Mandatory Minimums (FAMM), then-Governor John Engler signed bills enacting sweeping reforms of drug mandatory minimum [MCL 333.7401(2) A(i-iv) and 7403(2)(A)(i-iv)].* In addition to changing penalties prospectively, the reforms accelerated the earliest release dates for individuals whose drug offenses were committed prior to March 1, 2003.

While the sentences already being served were not changed, the MDOC was required to recalculate each individual’s ERD via a formula specified in statute. Depending on the circumstances, the time to parole eligibility on each drug sentence was cut by as much as 50 percent. Many people became eligible for release immediately; others had their release dates advanced by years. The reforms significantly reduced the percentage of Michigan prisoners who are incarcerated for drug offenses.

The 2003 reforms also addressed consecutive sentencing, making it discretionary for delivery offenses and eliminating it altogether for possession offenses. However, the change in consecutive sentencing was not applied retroactively. People whose offenses were committed prior to March 1, 2003 did not have their sentences recalculated to be concurrent.

CAPPS estimates that as of June 1, 2015, there will still be 257 people serving consecutive sentences as a result of the former drug laws. Of these, 41 have a life term as one of their sentences. This number does not indicate how many beds could be saved if these drug sentences were made concurrent. That determination would require the same type of case-by-case ERD calculations the MDOC used to implement the 2003 drug law reforms, which is beyond CAPPS’s capacity.

Public norms about appropriate sentences for drug offenses have continued to evolve. This change would apply only to that limited group of people still serving consecutive drug sentences 12 years after Michigan changed its rules. It is a reform well worth implementing on the grounds of both cost-savings and fairness.

* Public Acts 665, 666 and 670 took effect March 1, 2003.

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C. Life without parole

There are three basic categories of first-degree murder: premeditated, murder of a peace officer or corrections officer in the course of their duties and felony murder. The latter is a murder committed in the course of a felony listed in MCL 750.316, such as a robbery, home invasion or kidnapping.

Since life without the possibility of parole is mandated by statute, there is no discretion at either end of the process. The trial judge has no discretion to impose a lesser sentence; the parole board has no discretion to grant release at any point. The only way out of prison, other than death, is for the governor to commute the sentence.

Commutations were once relatively common:

- Of 1,059 people sentenced for first-degree murder between 1900 and 1969, nearly 57 percent were released through commutation after serving an average of 23.6 years.⁸⁷
- The four governors who served from 1949-1982 granted a total of 421 commutations.⁸⁸
- When the total number of nonparolable lifers was much smaller, regular commutations helped keep that number under control.

As crime became increasingly politicized, things changed drastically. Gov. Blanchard granted only eight commutations from 1983-90. Gov. Engler granted 34 from 1991-2002, most of them to drug offenders.

Gov. Granholm picked up the pace of commutations substantially during her last years in office, granting 179. However the overwhelming majority went to people serving for drug offenses or who were seriously ill. Gov. Snyder has granted very few. It is clear that commutations cannot be relied on to keep the ever-growing population of nonparolable lifers in check.

The actual culpability of people serving life without parole varies enormously. Some were aiders and abettors whose role in the crime was small or who acted at the direction of someone older or more dominant. Others were convicted of premeditated murder even though their time for “deliberation” consisted of seconds when they made a decision to act in the course of a heated confrontation. Because the penalty is mandatory, judges have no ability to consider any mitigating factors.⁸⁹

The long-term solution would be to follow states that impose terms with a minimum number of years and a maximum of life. New York, for instance, requires a sentence of 15 years to life for what we call second-degree murder and 25 years to life for first-degree murder. Only cases with special circumstances, like the killing of a police officer, bring life without the possibility of parole. In this scheme, the parole board has the authority to treat lifers like any other parole-eligible prisoners once their minimums have been served yet can deny release indefinitely in any particular case.

87 Barbara Levine, *When ‘life’ did not mean life: A historical analysis of life sentences imposed in Michigan since 1900*, (Lansing: Citizens Alliance on Prisons and Public Spending, Sept. 2006), p. 12.

88 Gov. Williams (1949-60) granted 143, Gov. Swainson (1961-62) granted 76, Gov. Romney (1963-68) granted 107 and Gov. Milliken (1969-82) granted 95.

89 Until the United States Supreme Court decided *Miller v Alabama*, 567 U.S. ___ (2012), life without parole was mandatory even for defendants who were under 18 at the time of the killing. *Miller* now prohibits the automatic imposition of nonparolable life on teenagers without consideration of their age. Whether *Miller* will ultimately be applied retroactively to more than 300 Michigan prisoners serving life without parole for murders they committed as teenagers has yet to be determined. If the Supreme Court does require retroactive application, each of these prisoners will be entitled to a resentencing at which the court could reimpose a sentence of life without parole or select an indeterminate term with a minimum of no less than 25 and no more than 40 years and a maximum of 60 years [MCL 769.25a].

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For people currently serving nonparolable life terms, there is another possibility. Until 1998, the penalty for delivery of more than 650 grams of drugs was also mandatory life without parole. In response to public concern about the extreme harshness of the punishment, the legislature not only changed the penalty scheme prospectively, it created parole eligibility for nearly 300 people who had been sentenced to die in prison.

This change could be achieved without impacting the judicial sentencing power because the penalty for the offense was simply life. The availability of parole is not part of the sentence; it is determined by the corrections code. An amendment to the “lifer law,” 791.234, deleted the exclusion of 650 drug lifers from parole eligibility and established their eligibility under specified circumstances.

The courts found that the change did not encroach on the Governor’s commutation power because it did not interfere with the Governor’s discretion to grant clemency to any individual. The amendment reflected a proper legislative purpose to lessen prison overcrowding and save taxpayer dollars. [See *People v Matelic*, 249 Mich App 1 (2001).]

As a matter of law, the same reasoning could be applied to create parole eligibility for people convicted of first-degree murder. The political hurdles would obviously be great, but not necessarily insurmountable. Criteria

The actual culpability of people serving life without parole varies enormously. Some were aiders and abettors whose role in the crime was small or who acted at the direction of someone older or more dominant. Others were convicted of premeditated murder even though their time for “deliberation” consisted of seconds when they made a decision to act in the course of a heated confrontation. Because the penalty is mandatory, judges have no ability to consider any mitigating factors.

could be added that would allow eligibility only after the person was a certain age or had served a certain number of years. The parole board could be directed to give weight to mitigating factors the sentencing judge was not permitted to consider, such as the person’s young age, marginal involvement or lack of prior record. It could also be directed to give weight to such relevant current factors as the person’s poor health or exceptional accomplishments while incarcerated. With nearly 4,000 nonparolable lifers in the system, it is an avenue worth exploring.

Pre-Aaron felony murder cases. One group of felony murder cases presents a unique problem – one that the Michigan Supreme Court created when it clarified the definition of the crime.

Every crime includes specific elements that must be proven for the accused to be found guilty. Murder requires a state of mind called “malice”, which may be an actual intent to kill, an intent to do great bodily harm or a reckless disregard for the likelihood that death or great bodily harm would be the result of one’s behavior.

Although the first-degree murder statute refers to a “murder” committed in the course of a listed felony, the common law “felony murder rule” allowed the element of malice to be supplied by the defendant’s intent to participate in the underlying felony. The rule punished all homicides committed in the perpetration or attempted perpetration of certain felonies whether the killing was intentional, unintentional or accidental. For instance, a person who waited in the car while a co-defendant committed a burglary, with no knowledge that the co-defendant was armed, could be convicted of first-degree murder when the co-defendant panicked and shot a resident of the home.

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In 1980, the Michigan Supreme Court held in *People v Aaron*,⁹⁰ that the felony-murder rule “violates the basic premise of individual moral culpability upon which our criminal law is based.” In his concurring opinion, Justice Ryan said:

The basic infirmity of felony murder lies in its failure to correlate, to any degree, criminal liability with moral culpability. It permits one to be punished for a killing, usually with the most severe penalty in the law, without requiring proof of *any* mental state with respect to the killing. This incongruity is simply more than we are willing to permit our criminal jurisprudence to bear.
Aaron, supra at 744.

As a result of *Aaron*, the factfinder, whether judge or jury, must find that the accused had the requisite state of mind to commit murder, not just the intent to commit a felony during which a killing occurred. However, despite the Court’s strongly worded opinion about the injustice that the felony-murder rule could cause, it declined to apply its decision retroactively. Cases that were tried before *Aaron* was decided, including even those that had appeals pending when the decision was issued, were denied the benefit of the Court’s new rule.

Despite the Court’s strongly worded opinion in *People v Aaron* about the injustice that the felony-murder rule could cause, it declined to apply its decision retroactively.

In his dissent in *People v Lonchar*,⁹¹ Justice Levin argued vigorously in favor of retroactive application. He noted that approximately 30 cases had been held in abeyance by the Court itself pending its decision in *Aaron* and two companion cases, *People v Thompson* and *People v Wright*. Any of the abeyance cases could just as easily been chosen as the vehicle for announcing the new rule. Instead they were all denied relief, including some in which the Court of Appeals had reversed the defendant’s conviction and the Supreme Court reinstated it.

In *Lonchar*, Justice Levin reviewed the evidence and found its sufficiency to show Lonchar’s participation in the victim’s death “doubtful.” Lonchar had testified that he had tried to stop his co-defendant from shooting the victim and there was no evidence to the contrary.

In his dissent in *People v Terlisner*,⁹² Justice Levin described facts showing the defendant was acting as a look-out in what he believed to be an unarmed robbery while his two co-defendants entered the victim’s home and ended up killing him during a fight. In *People v Polick*,⁹³ Justice Levin described the lack of evidence that the defendant had any intent to kill although he was present when his brother beat the victim during a burglary.

Today, there are an estimated 159 surviving prisoners convicted of felony murder prior to the decision in *Aaron*. They range in age from their mid-fifties to their mid-seventies. They have all served at least 35 years. It is unknown how many of their juries had received correct instructions on the law and how many had not. It is also unknown in how many cases the evidence would have been sufficient to convict of felony murder if the proper standard was applied. It is clear, however, that some number, including Terlisner and Lonchar, have served decades in prison for murders of which they could not have been found guilty had their trials been conducted after 1980.

One remedy that Justice Levin proposed in *Lonchar* was to allow retroactive application of *Aaron* only in those

90 409 Mich 672 (1980)

91 411 Mich 923 (1981)

92 412 Mich 917 (1982)

93 412 Mich 920 (1982)

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cases where the felony-murder rule may have resulted in injustice, that is, where the record leaves doubt that the defendant, although a participant in the underlying felony, had the requisite intent to support a conviction for murder. If such a remedy were legislatively enacted today, the State Appellate Defender Office could be tasked with reviewing the transcripts and identifying those cases in which a motion for relief from judgment based on an injustice caused by the now discredited felony-murder rule would be warranted. The relatively small number of motions in various counties likely to result from this pre-screening would not be an undue burden on the trial courts. This would be an equitable solution to a non-recurring problem that could result in the release of dozens of aging prisoners.

Estimated beds saved: 40

IV. Technical parole violators

Despite the decline in technical parole violator returns, in June 2014 there were 2,455 technical violators in prison, comprising 5.6 percent of the total population. The ideal solution is to continue improving the ability of parolees to reenter the community successfully and to reevaluate supervision conditions and revocation standards. (See discussion at pp. 21-25.) For those technical violators who are sent back nonetheless, the issue is how long they are kept.

The parole violator has already served his or her minimum sentence in prison. The additional prison time may be viewed as necessary because the person presents a risk to the community after all or as punishment for not complying with the conditions of parole. Either way, the former parolee faces additional months or years in prison, with the possibility of being required to max out.

Technical violations fall broadly into four categories:

1. Conduct that could have been prosecuted as a felony but was not. Reasons for not prosecuting include the prosecutor's difficulty in securing a conviction (due, for instance, to insufficient evidence or uncooperative witnesses), the fact that the person could actually be made to serve as much or more time on the tail of the original conviction than on the new offense, or the sheer administrative ease and lower expense of the revocation process compared to a new prosecution.
2. Conduct for which the person was convicted of a misdemeanor and received probation, a fine or jail time.
3. Conduct that could have been prosecuted as a misdemeanor but was not.
4. Noncriminal conduct that violated a condition of parole, such as failing to report, changing a residence without permission or being in a prohibited location.

It is unclear how many technical violators fall into each of these categories. But they all raise difficult questions about how much punishment is proportional to the violation.

The number of parolees who return to prison with new sentences shows that where the evidence is sufficient, particularly if the conduct is serious, prosecutors do not hesitate to convict parolees of new felonies. Absent an admission of guilt, using the parole revocation process as a substitute for prosecution presents issues of fairness.

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The risk is that the person will be punished for a crime the state could not prove beyond a reasonable doubt and/or for longer than a new conviction would allow.

Revoking parole for conduct that amounts to a misdemeanor presents similar problems. Classification as a misdemeanor represents society's determination that the behavior is less threatening to public safety than that which brought the person's original felony conviction. If the conduct only merits 90 days in jail for a non-parolee, why should it bring a much longer time in prison because someone is on parole? If the person has actually been convicted of the misdemeanor and received a sentence proportional to that conduct, why should there be additional punishment at all?

Incarcerating people for behavior that is otherwise legal but violates administratively imposed parole conditions is particularly problematic. It is easy to assert that parole is a matter of grace and parolees know they have to be on their best behavior. But expecting perfect rule compliance from parolees who face numerous barriers to surviving day-to-day is not always realistic. If most of us miss an appointment, we need only apologize and reschedule. If the parolee misses an appointment with a parole officer, perhaps for lack of transportation, he or she is risking a return to prison.

Parole conditions are applied with more flexibility than in times past and progressive community-based sanctions, such as intensifying or lengthening supervision, are used more frequently. Yet the parole board still retains broad discretion to use expensive prison beds to sanction noncriminal conduct. As a result, people can be re-incarcerated regardless of whether they pose an actual risk to the community.

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The current average length of stay for a technical parole violator is 13.9 months.⁹⁴ Some serve just a few months; others serve several years; parolable lifers brought back for technical violations may serve additional decades. If the board decides to revoke parole on grounds that it has chosen to classify as a technical violation, it is appropriate to limit the permissible length of stay.

One solution would be to cap the potential length of stay at nine months.⁹⁵ This bright line rule would be simple to administer. However it would prevent the parole board from extending incarceration in individual cases where the conduct on parole showed the person to be a serious risk to the community. It is also possible that the nine-month maximum would be applied routinely so that the length of stay for technical violators who currently serve less than that would actually increase. On the other hand, if shorter stays continue and the longer stays were reduced to nine months, the bed savings would be even more substantial.

Another approach is to allow longer stays in some cases but to reduce the average to nine months, perhaps by developing parole violator release guidelines. This would leave room for the parole board to exercise discretion. However it would also present the same issues of subjectivity and enforcement that arise with parole guidelines currently. A presumption of release at no more than nine months with stringent rules for upward departures and a reliable enforcement mechanism would be a possible compromise.

⁹⁴ MDOC, 2013 Statistical Report, p. H-1. CSG has noted that the average length of stay for technical probation violators is 25 months. CSG Appendix, p.53. However the probation violator has been resentenced to prison on the original conviction because he or she failed on the initial sentence of community supervision. Thus the prison term constitutes the punishment being imposed for the underlying offense, including consideration of the probation failure.

⁹⁵ This was recommended by the Council of State Governments, *Justice Reinvestment*, p. 3 (see note 6).

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Identifying the best approach would be easier if policymakers had a detailed picture of the current technical violators. Whatever method is used, reducing the average length of stay to no more than nine months could save prison beds without eliminating the availability of a significant penalty for technical parole violations when warranted.

Estimated beds saved: 807

Part Five: Sentence reduction credits

Whether and to what extent a prisoner's earliest release date is advanced depends on the availability of sentence reduction credits. In Michigan, some form of credit for good behavior (variously known as "good time" or "disciplinary credits") used to be subtracted from the minimum sentences of eligible prisoners who had earned it. However, people incarcerated for crimes committed after the enactment of "truth-in-sentencing" legislation in 1998 are not allowed to earn any good conduct credits. The change contributes substantially to Michigan's length of stay.

For decades, Michigan, like most states, granted prisoners generous amounts of credit for good behavior, commonly referred to as "good time." Regular good time was awarded on a progressive basis. The number of days per month increased with the number of calendar years served. By the 20th year, regular good time could equal 15 days a month. In addition, special good time could be awarded in amounts up to half the regular credit. Thus, a 40-year minimum sentence could be served in fewer than 16 years.

In 1978, the voters amended the Michigan Constitution to prohibit awarding good time to reduce the minimum sentence. By 1982, it became apparent that the elimination of good time was resulting in increasingly overcrowded prisons. Therefore, the legislature restored a limited amount of good conduct credit in the form of five regular and two special disciplinary credit days per month, or up to 84 days a year. Because some people were not eligible to earn disciplinary credits and others forfeited credits for misconduct, on average, Michigan prisoners served 88 percent of their judicially imposed minimum sentences.

In the 1990s, the federal government began encouraging "truth-in-sentencing" legislation by conditioning the award of federal prison construction funds to the states on the requirement that people convicted of violent offenses serve 85 percent of their sentences. The federal system itself permits sentence reductions of up to 15 percent. Because Michigan already met the standard, it was awarded \$33 million in federal Violent Offender Initiative/Truth-in-Sentencing (VOI/TIS) funds in 1997.

Nonetheless, in 1998, Michigan adopted its own version of truth-in-sentencing by prospectively eliminating disciplinary credits and requiring all prisoners to serve 100 percent of their minimum sentences. This lengthened the time served by everyone whose good conduct in prison would have allowed him or her to earn modest amounts of credit. A five-year minimum sentence that once could have been served in four years and one month with disciplinary credits now requires every day of five years. The difference of 11 months costs the taxpayer roughly \$32,000.

Truth-in-sentencing proponents do not claim that it increases public safety. There is no evidence that people who are allowed to earn disciplinary credits reoffend at a higher rate than those who are not.⁹⁶ Rather the stated purpose is to ensure that victims and the general public understand what the sentence imposed actually

⁹⁶ On the contrary, these are the people who score more favorably on the parole guidelines because they do not have institutional misconduct citations.

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means. However, this purpose could also be achieved by having the judge state on the record at sentencing the maximum amount of credit the defendant might be able to earn.

Notably, truth in sentencing did not end “sheriffs’ good time” for county jail inmates. Michigan’s sheriffs can award jail inmates one day of good time for each six days of their sentence [MCL 51.282]. Sheriffs routinely use that authority to help control county jail populations and promote compliance with jail regulations. As a result, a person convicted of felonious assault who receives one year in the county jail can earn 54 days of credit. If the person receives a prison term with a one-year minimum, he or she can earn no credit.

Most states have some form of sentencing credit and some have multiple types. Some states are very generous; some are more restrictive. “Earned credits” is an innovation that rewards not just good conduct but affirmative participation in productive activities, like work, school and treatment programs. In the last decade, a number of states have increased the availability of credit as a way to control spiraling prison populations.

Former MDOC Director Robert Brown, Jr., has noted that in contrast to most jurisdictions, “Michigan has allowed ‘truth-in-sentencing’ to increase the average length of stay for tens of thousands of its prisoners. It has also given up a widely accepted incentive system that can be used to reward good conduct...”

Former MDOC Director Robert Brown, Jr., has noted that in contrast to most jurisdictions, “Michigan has allowed ‘truth-in-sentencing’ to increase the average length of stay for tens of thousands of its prisoners. It has also given up a widely accepted incentive system that can be used to reward good conduct, productive work habits and participation in rehabilitative programs, leaving only the threats of punishment and parole denial as management tools.” Brown wonders: “If truth- in-sentencing doesn’t improve public safety, can’t we be honest for a lot less money?”⁹⁷

Since good time was originally eliminated by a ballot initiative, restoring any form of sentence reduction credits would require a three-quarters vote of the legislature. Options would include:

- ◆ Return to the old progressive good time system.
- ◆ Restore disciplinary credits as they existed when truth in sentencing was enacted.
- ◆ Adopt the federal standard of limiting sentencing credits to 15 percent for people convicted of assaultive offenses.
- ◆ Apply the formula for county jail good time formula to state prisoners.
- ◆ Adopt a system of earned credits.

In 2009, a bill was introduced that would have restored the old good time system. At the time, the prisoner population was about 45,000. A Legislative Analysis by the House Fiscal Agency contained an estimate that retroactive application of the bill would reduce the population by 5,650 beds within four to six months. The estimate assumed that, accounting for credits lost for misconduct, the average time served would be 85 percent of the minimum sentence and that 70 percent of people would be paroled when they first became eligible.⁹⁸

97 “Former MDOC director urges restoring earned credits, earlier entry to community programs”, *Consensus* (Lansing, Citizens Alliance on Prisons and Public Spending, Spring 2008).

98 Marilyn Peterson, “Legislative Analysis: Allow Good Time Credits and Community Placements for Prisoners, House Bills 4497-4499” (Lansing: House Fiscal Agency, November 17, 2009).

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Even the most modest of these options, earned credits, would eventually save thousands of beds. However, this would require the MDOC to ensure that prisoners have enough productive activities available to earn the credits.

Currently, idleness is a constant problem. Unemployment rates among prisoners are high and many of the jobs that do exist occupy only a few hours a day. Only a minority of prisoners are involved in academic and vocational education or treatment and behavioral change programs at any given time. Earned credits could be available for a wide variety of pro-social activities, including classes and self-help programs led by volunteers and peer-run groups in which prisoners share their skills with other prisoners. A new emphasis on encouraging and rewarding positive behavior would simultaneously improve institutional management, promote the kind of prisoner learning and self-confidence that is necessary for successful reentry, and safely reduce the prisoner population.

Recommendation to establish earned sentencing credits

- Permit prisoners to receive up to four days per month in earned credit for participation in work, academic, vocational, treatment or other productive activities, so long as they did not receive a Class I misconduct in that month.

Estimated beds saved: 1,255

Part Six: Alternative strategies: bed savings that do not affect the prisoner count

This report has focused on how to save prison beds by reducing the number of prisoners. However, it is important to recognize (and differentiate) other strategies that have been, are being or could be used to address bedspace and cost issues.

I. Community Residential Program (CRP)

In 1980, the MDOC implemented the Community Residential Program. CRP allowed selected prisoners to be placed in the community, either on tether or in an MDOC corrections center, from six months to two years before their ERD. Despite a host of eligibility criteria, at its peak in 1992, of nearly 39,000 total prisoners, nearly 3,500 were in CRP. This saved the equivalent of at least two prisons without actually reducing the prisoner population.

CRP had multiple advantages:

- ◆ Prisoners could work or attend school and reunite with family.
- ◆ The chance to enter CRP was so valued by prisoners that it provided a strong incentive for good institutional conduct.
- ◆ Since participants were still prisoners, those who did not do well could be transferred back to prison without the formalities of a parole revocation hearing.
- ◆ The parole board could assess someone's functioning in the community before making its decision. In 1994, nearly 3,900 movements to parole were directly from CRP.

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Because truth-in-sentencing requires all prisoners to serve every day of their minimum sentences in a secure facility, no one sentenced after 1998 was eligible for CRP. Over the next 10 years, the program gradually faded away. Similar pre-parole transition programs remain common in other states.

A limited version of CRP could be restored by amending those truth-in-sentencing provisions that require prisoners to serve their entire minimum sentences in a secure facility. However a super-majority vote of the legislature would not be required. The ballot initiative that eliminated good time addressed only when parole could be granted, not where prisoners could be housed prior to parole.

The parole board routinely begins reviewing people six to eight months before their first eligibility date. At any given time there are hundreds of prisoners whom the board has decided to parole who have not yet reached their ERD. Allowing 1,000 people a year to move into a version of community-based reentry programming four months before their ERD could save millions of dollars. It would also allow people to complete required programs in cost-effective community residential facilities before their ERD instead of keeping them incarcerated at the Detroit Reentry Center after they have technically been granted a parole. (See discussion at p. 81.)

Estimated beds saved: 333

II. County jails as “virtual prisons”

In 2012, when the population started to increase again, the MDOC began leasing unused beds in county jails. As of Jan. 1, 2015, there were 357 prisoners in 12 county jails located all over the state. None are in the largest counties from which the majority of prisoners are drawn. The budget for FY 2015 includes \$5,250,000 for leased beds as does the Executive’s proposed budget for FY 2016, even though Executive Order reductions to address the budget shortfall for FY 2015 includes a savings of \$1,500,000 “due to a short-term decreased need for some housing units.”⁹⁹

Prisoners placed in a county jail must screen as a true security Level I and not be serving for a sex offense. Initially they included only people serving flat two-year terms for felony firearm (whose release does not depend on a decision by the parole board). However a Dec. 23, 2014, Director’s Office Memorandum (DOM 2015-13) eliminated this restriction. Any Level I prisoner other than a sex offender can now be placed in a county jail for any period of time, so long as he is returned to a prison at least 12 months prior to his ERD to complete required programs.

While called “virtual prisons” by the MDOC, county jails are quite unlike MDOC facilities. They are far more restrictive than prisons that are designed for people to live in for many years, even decades.

While called “virtual prisons” by the MDOC, county jails are quite unlike MDOC facilities. Jails are designed for pretrial detainees and people serving sentences of less than one year – typically 30, 60 or 90 days. They are far more restrictive than prisons that are designed for people to live in for many years, even decades. These differences include:

⁹⁹ These housing units are at the Chippewa Correctional Facility in Kincheloe. While the intent is to reopen these units in Nov. 2015 when the nearby Kinross Correctional Facility is closed, it is unclear why the Chippewa beds are not being used instead of county jail beds in the interim.

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- Very limited access to any sort of activities, whether educational, vocational, treatment, work or recreation. There is little for people in jail to do but pass their time in a day room watching TV or playing cards.
- Very restricted access to the visits, mail and telephone calls that enable prisoners to maintain their relationships with family and friends. Most jails have only non-contact or video conference visits. Some place age or height restrictions on visits by children. Some allow inmates to receive only postcards, not letters. The price of telephone calls for jail inmates is higher.
- Access to medical care, law libraries and both indoor and outdoor recreation is much more restricted in jails.
- Possession of personal property is typically not allowed. The MDOC allows prisoners at minimum and medium security facilities to own small televisions, MP3 players, books, board games, musical instruments and craft or art supplies.

Ironically, it is those prisoners who present the fewest management problems and have earned their way down to the lowest security level within the MDOC who are required to live under these conditions.

The use of leased county jail beds reduces the need for prison beds but does not reduce the prisoner population. While the cost per jail bed is \$12,775 and the cost per prisoner at a Level I prison is about \$5,500 more, MDOC spending only changes substantially when whole housing units are closed and staff is reduced. Thus it is unclear what savings to the MDOC budget are actually realized.¹⁰⁰

The idea that it is appropriate to treat prisoners like short-term jail inmates is alarming for a number of reasons. It raises the possibility that more prisoners will be sent to jails as beds become available. There is a complete lack of transparency about how prisoners are selected for transfer and whether this could become a punitive mechanism, e.g., for people who write too many grievances. Finally, there is the danger of reverse logic setting in so that limitations common in jails are brought into the prisons and justified as cost-cutting measures or efficiencies.

Eliminating the placement of prisoners in leased county jail beds would modestly offset savings from other strategies.

Additional beds needed: 357

III. Medical transfers

As noted above (see p. 62), one alternative for addressing the needs of medically fragile inmates does not change the person's status as a prisoner but eliminates a prison bed. Medical transfers may be used when a medical parole or commutation is not feasible.

The MDOC director may transfer "a mentally or physically disabled prisoner" to an outside medical institution [MCL 791.265].¹⁰¹ A disabled prisoner is defined as someone "whose physical or mental health has deteriorated to a point which renders the prisoner a minimal threat to society." The transfer may be for the duration of the person's medical condition, up to the maximum term of his or her sentence.

¹⁰⁰ The MDOC estimates that removing an individual prisoner from the population altogether saves \$11 per day. (Information provided by Kyle Kaminski, MDOC Legislative Liaison, April 29, 2015.) However that cost model would not apply to prisoners transferred to county jails because of the offsetting cost of paying the county. For further discussion of this policy see Barbara Levine, *Corrections spending proposals reflect major policy choices: Examining the consequences* (Lansing: Citizens Alliance on Prisons and Public Spending, May 2014).

¹⁰¹ 400.106 (2) defines a medical institution as a state licensed or approved hospital, nursing home, medical care facility, psychiatric hospital, or other facility or identifiable unit of a listed institution certified as meeting established standards for a nursing home or hospital in accordance with the laws of this state.

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Medical transfers are not only humane for the prisoner and safe for the public, they present potentially very large cost-savings to the MDOC. Once a prisoner is receiving care outside an MDOC facility, he or she becomes eligible for Medicaid funding. Also saved are unnecessary security costs. In 2014, the House of Representatives began to explore the possibility of contracting with a private nursing home to take a sufficient number of prisoners to make the arrangement feasible. Transfers can also be ordered in individual cases where family members have the resources to arrange for private care or the prisoner is eligible for care through the Veterans Administration.

Like the medical parole statute, the medical transfer provision is not currently used in the belief that doing so would violate an aspect of truth-in-sentencing. In this case, as with restoring community residential programs, the barrier is the requirement that every day of the minimum sentence be served in a secure facility. Although the need to amend the transfer statute could be debated, as with the medical parole statute the matter could be settled simply by adding to the transfer provision the phrase: “truth-in-sentencing notwithstanding.”

Estimated beds saved: 200

IV. Residential reentry centers

Housing parolees in MDOC facilities means people not counted in the prisoner population are nonetheless filling prison beds. The Ryan Correctional Facility, a multi-level prison, became the Detroit Reentry Center (DRC) in 2013. It appears in the FY 2015 budget as a correctional facility with 1,044 beds, 216 FTEs and a budget of over \$26 million. According to DOM 2015-15:

DRC operates as a correctional facility. Therefore, all Department policies and procedures that applied to the Ryan Correctional Facility apply throughout DRC. For purposes of applicable policies and procedures, references to CFA Wardens include the DRC Warden, and references to prisoners include DRC parolees.

But on the prisoner census, DRC shows a capacity of only 84 prisoners – those who are housed in the dialysis unit that was left in place when the facility was repurposed. These are the only ones counted in the total prisoner population.

The remaining 978 people at DRC are designated as parolees in various stages of release. Figures provided by the MDOC in April 2015 show that these parolees in each category:

To complete Residential Substance Abuse Treatment (RSAT)	384
To complete domestic violence program (Bridges)	192
To complete Violence Prevention Programming (VPP)	92
Violators in Intensive Detention Reentry Program (IDRP)	192
Violators pending decisions	48
Violators (return cases)	48
Segregation beds	22

Notably, only 288 of the DRC beds are occupied by parolees who actually reentered the community and violated conditions of supervision. Most of these are serving an average of 30 days in IDRP, which the MDOC uses for parolees with compliance problems “before they become more serious parole violators.” IDRP was originally designed to be jail-based detention at a cost of \$35 per day. IDRP parolees are still housed in the

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Ingham County jail. A contract for beds at the Clinton County jail ended and those beds are at DRC instead.

The DRC was also initially meant to house parolees with supervision violations who are placed in the Residential Reentry Program (RRP) for an average of about 85 days. RRP was located at two sites, one in Lake County and one in Tuscola. The Tuscola site was closed in 2012 and the beds were transferred to DRC. The MDOC's March 2014 Report to the Legislature on Community Reentry Programs shows that 949 parolees participated in RRP at DRC in 2013.¹⁰² However it does not appear from the more recent figures that DRC is any longer a primary location for residential reentry.

Nearly two-thirds of the residents at DRC – a total of 688 – are people who have never reentered the community. Although granted a parole, they remain incarcerated so that they can complete a treatment program that was not provided before they reached their first parole eligibility date. Their time on parole has officially begun, but they are transferred to DRC to wait, sometimes for months, to enter a program that it then takes months to complete.

The unusual hybrid nature of the Detroit Reentry Center raises numerous questions. Chief among them are why these treatment programs cannot be provided before people reach their ERD or, in the alternative, why they are not being delivered in the community as a condition of actual release on parole. Must these residential programs be delivered in a secure facility to be successful? While the residents of the DRC are not technically prisoners, treating them like prisoners would not seem to be either fair or cost-effective. If these parolees were actually paroled to the community, perhaps the beds at DRC could be used for actual prisoners being housed in county jails. Also worth exploring is what is gained from housing IDRPs at DRC instead of less expensive county jails.¹⁰³

Estimated beds saved: 880
Parolees needing treatment programs – 688
IDRP parolees – 192

Net additional estimated beds saved: 1,037

¹⁰² A total of 1,162 were placed in Lake County.

¹⁰³ For further discussion, see Levine, *Corrections Spending Proposals*, note 95.

Conclusion

Much has changed since Michigan's prison system began expanding in the 1980s. And we have had time to learn the consequences of our choices.

Crime rates have fallen dramatically; crime barely registers on public opinion polls about voter concerns.

We have been paying the price for years in \$2 billion dollar corrections budgets; now we are paying the medical bills for aging prisoners who were incarcerated 30 years ago.

We are also paying the price for failing to provide adequate community-based services after closing most of our mental hospitals; prisons and jails are not suited for treating the mentally ill.

A wealth of empirical evidence has taught us about the effectiveness of what we have been doing.

Prison is not the only or even the most cost-effective way to hold many people accountable for their past behavior.

On average, long prison stays are not more effective than shorter stays in protecting public safety. Michigan is not safer because it locks people up for longer than other states.

Those who committed the assaultive and sexual crimes that anger us the most are also the people least likely to repeat their offenses.

Areas of the human brain that control judgment, foresight and impulse control are not fully developed until people are in their early to mid-twenties. Juveniles who receive age-appropriate programming will generally mature out of anti-social behavior; they do not have to be treated as adults, much less serve long prison sentences, to protect the public.

Above all, we have learned that we have other choices.

We can consider how and why Michigan's sentencing and parole policies changed; we can look at the practices of other jurisdictions; we can examine the findings of researchers; we can think realistically about the need to prioritize scarce resources.

We can define public safety by metrics other than how many people are incarcerated and for how long.

We can place a premium on having fewer prisoners and doing more to improve their chances of returning to the community successfully.

Then we can select strategies that are practical, cost-effective, fair to prisoners and respectful of victims. Nothing stopped us from adopting new policies in the 1980s and 1990s; nothing has to stop us from adopting different policies in 2015.

Appendix A.

Prisoner population, incarceration rates and index crime rates, 1983-2013

	TOTAL POP	STATE POP	INCARC RATE	INDEX CRIMES	INDEX CRIME
1983	14,508	9,050,282	160.3	601,832	6,649.9
1984	14,658	9,262,044	158.3	595,580	6,430.3
1985	17,744	9,170,000	193.5	582,270	6,349.7
1986	20,739	9,143,600	226.8	586,708	6,416.6
1987	23,977	9,205,800	260.5	591,913	6,429.8
1988	27,720	9,300,100	298.1	558,292	6,003.1
1989	31,834	9,273,300	343.3	541,210	5,836.2
1990	34,209	9,295,297	368.6	549,344	5,910.0
1991	36,293	9,368,000	389.1	568,194	6,065.3
1992	38,628	9,361,331	419.5	524,304	5,600.7
1993	38,942	9,478,000	417.1	505,497	5,333.4
1994	40,501	9,584,481	422.6	496,917	5,184.6
1995	41,112	9,659,871	425.6	463,378	4,796.9
1996	42,349	9,739,184	434.8	452,929	4,650.6
1997	44,771	9,785,450	457.5	429,537	4,389.5
1998	45,879	9,820,231	467.2	470,845	4,794.6
1999	46,617	9,863,775	472.6	429,638	4,355.7
2000	47,718	9,938,444	480.1	408,295	4,108.2
2001	48,849	10,004,341	488.3	411,078	4,109.0
2002	50,591	10,037,303	504.0	395,239	3,937.7
2003	49,357	10,065,881	490.3	384,162	3,816.5
2004	48,831	10,090,280	483.9	362,958	3,597.1
2005	49,493	10,093,266	490.4	371,345	3,679.1
2006	51,515	10,083,878	510.9	379,992	3,768.3
2007	50,233	10,049,790	499.8	359,479	3,577.0
2008	48,713	10,003,422	487.0	341,662	3,415.5
2009	45,478	9,969,727	456.2	329,556	3,305.6
2010	44,113	9,883,640	446.3	305,814	3,094.1
2011	42,904	9,876,187	434.4	291,480	2,951.3
2012	43,594	9,883,360	441.1	285,274	2,886.4
2013	43,704	9,895,622	441.6	272,870	2,757.5

*Index crimes are: murder, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, arson.

Appendix B.

Prison intake and releases, 1989-2013

	INTAKE					RELEASES			
	Pris.Pop.	New Commit.	Proba. Viola.	PVNS*	PVT**	Total Intake	Move to Parole	Dischg. on Max	Total Release
1989	31,834	7,103	2,600	1,108	1,651	12,462	7,378	521	7,899
1990	34,209	6,880	2,374	1,342	1,454	12,050	8,895	536	9,431
1991	36,293	6,728	2,327	1,724	1,647	12,426	9,300	575	9,875
1992	38,628	6,958	1,977	1,864	1,660	12,459	9,240	575	9,815
1993	38,942	6,012	1,552	1,563	1,961	11,088	9,881	711	10,592
1994	40,501	5,597	1,931	1,228	1,958	10,714	8,370	691	9,061
1995	41,112	5,077	2,617	888	1,919	10,501	9,078	811	9,889
1996	42,349	5,003	3,046	1,033	2,577	11,659	9,465	935	10,400
1997	44,771	5,083	3,147	1,288	2,668	12,186	8,758	1,025	9,783
1998	45,879	4,893	3,131	1,345	3,109	12,478	10,506	1,153	11,659
1999	46,617	4,328	3,136	1,259	3,186	11,909	9,682	1,270	10,952
2000	47,718	4,355	3,335	1,166	3,111	11,967	9,133	1,420	10,553
2001	48,849	4,879	3,480	1,195	3,236	12,790	10,001	1,600	11,601
2002	50,591	5,328	4,230	1,450	3,289	14,297	10,697	1,659	12,356
2003	49,357	4,928	3,707	1,641	2,174	12,450	11,752	1,671	13,423
2004	48,831	4,488	3,494	1,802	3,013	12,797	11,344	1,803	13,147
2005	49,493	4,869	3,480	1,875	2,860	13,084	10,284	1,881	12,165
2006	51,515	5,422	3,644	2,020	3,157	14,243	10,240	1,775	12,015
2007	50,233	5,358	3,357	1,995	2,100	12,810	12,429	1,710	14,139
2008	48,713	4,835	2,850	2,029	1,885	11,599	11,556	1,655	13,211
2009	45,478	4,691	2,632	1,968	2,137	11,428	13,541	1,501	15,042
2010	44,113	4,884	2,480	1,793	2,391	11,548	12,139	1,188	13,327
2011	42,904	4,721	2,507	1,525	1,895	10,648	11,162	1,126	12,288
2012	43,594	4,841	2,632	1,406	2,692	11,571	9,361	961	10,322
2013	43,704	5,135	2,708	1,387	2,029	11,259	10,540	898	11,438

*Parole violator new sentence

**Parole violator technical

Note: Intake and release totals reflect only major categories. Smaller categories, such as prisoner deaths, are not included. Therefore the total change in population from year to year does not precisely match the difference between intake and releases.

10,000 fewer Michigan prisoners: Strategies to reach the goal

Citizens Alliance on Prisons and Public Spending (CAPPS)

Mission Statement

The Citizens Alliance on Prisons and Public Spending (CAPPS) is a nonprofit, nonpartisan policy and advocacy organization that works to reduce the social and economic costs of prison expansion. Because policy choices, not crime rates, determine corrections spending, CAPPS advocates reexamining those policies and shifting resources to services proven to prevent crime, better prepare people for success after release, and improve the quality of life for all Michigan residents.

CAPPS's members

CAPPS's members are individuals and organizations concerned about corrections spending and Michigan's over-reliance on incarceration. They include policymakers; corrections, education, human service, and criminal justice professionals; leaders of civil rights, community, business and faith organizations; prisoners and their families.

What CAPPS does

CAPPS develops evidence-based proposals for safely reducing the prisoner population and corrections spending. It informs policymakers, advocacy groups, affected communities and the general public about the issues through research reports, legislative testimony, a website, newsletters, social media and public presentations. CAPPS collaborates with a wide range of organizations and coalitions.

Contact CAPPS

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