

## STRATEGIES FOR SAFELY REDUCING THE PRISONER POPULATION

Barbara Levine  
Citizens Alliance on Prisons & Public Spending  
March 17, 2011

When the prison population has been reduced by 7,500 and the budget is still at \$2 billion, it is apparent that reducing corrections spending will involve multiple approaches. Nonetheless, while continuing to reduce the population may not, standing alone, be sufficient, it certainly is necessary. If we choose to stop here, we'll be placing a huge constraint on how much farther we will reasonably be able to go in shrinking the corrections budget.

- We'll risk being stuck in a morass of constantly making small cuts to try and hold the line. or
- we'll make drastic cuts that worsen conditions inside the institutions and jeopardize the health and safety of both prisoners and staff.

So the questions are:

- Can we reduce the prisoner population further?
- Can we do it while protecting public safety?
- And, if so, what means can we use?

### CAN WE REDUCE THE PRISONER POPULATION FURTHER?

Prison population results from:

- how many people come in
- how many are released
- how many return.

The recent drop in population reflects changes in all three factors. There is nothing inevitable about the changes that have occurred or that could occur in the future. Most are the product of policy choices and discretionary decision-making at multiple points.

For instance, at the front door, while we cannot control the quantity of crime, we decide how we choose to respond to it. Thus, new court commitments have been down recently because:

- both violent and non-violent crime rates have dropped for the last several years, and
- we changed the penalty scheme for offenses and the number of prisoners serving for drug offenses from nearly 5,500 in 2002 to roughly 3,400 in 2009.

We certainly control how many people leave prison. People can be released in two ways.

- Paroled on or any time after they have served their minimum sentence.
- "Max out", that is, discharge by operation of law when they have served their maximum sentence.

Contrary to frequent loose use of the term, Michigan has no "early parole."

The statutory mandate to the parole board has not changed in decades. It says the board shall not grant parole unless it has reasonable assurance that the person will not become a menace to public safety. But the composition of the board changed from civil servants to appointees in 1992 and the actual membership changed repeatedly. As a consequence:

- The parole approval rate fluctuated from a high of 68.2% in 1990 to a low of 47.3% in 2000 to 56.1% in 2010.
- The number of prisoners held to discharge on their maximums peaked at 1,929 in 2005 and fell to 1,188 in 2010.

Today, there are 10,172 prisoners who are eligible for parole -- 23% of the population. They include people who are:

- past their earliest release date, or ERD, and are being denied parole,
- who have been approved by the parole board but not yet released,
- who have been paroled and returned as technical violators
- parolable lifers who have served the time required by statute.

There is still a lot of room to make choices about parole policies.

Finally, we control the number of people who return to prison as technical parole violators. The drop in this number probably results from two policy choices:

- The implementation of MPRI may cause people to actually commit fewer violations.
- The MDOC may have changed its practices about when technical violations justify parole revocation.

We must view the drop in population from its 2006 peak of over 51,000 in historical context.

- 1980, state population = < 9.3 million, prison population = > 15,000.
- 1990, state population = < 9.3 million, prison population = > 34,000.
- 2010, state population = < 9.9 million, prison population = 44,000.

Overall, in the last 40 years, our state population has grown by 6.7% and our prisoner population has grown by 191%.

It is not at all unreasonable to use returning to 34,000 as a target. We can choose policies that will get us there. But first we must feel confident that we can get there safely. The evidence suggests we can.

## **CAN WE REDUCE THE POPULATION AND PROTECT PUBLIC SAFETY?**

CAPPS analyzed MDOC data regarding nearly 77,000 prisoners released for the first time between 1986 and 1999. The research had three primary goals:

- determine whether keeping people incarcerated for an extra year or two, after they had served their minimum, improved recidivism rates
- examine relationship of offense type to recidivism rates
- examine relationship of length of stay to recidivism rates.

The entire report is on our website and the executive summary is in the handout material, but the key findings are these.

Overall success rates:

- did not return to prison for any reason – about 63%
- returned for technical parole violations – nearly 20%;
- returned for new crimes -- nearly 18%.

Success rates vary greatly by offense type.

- Homicide and sex offenders re-offended the least.
- Those whose crimes were financially motivated returned to prison the most.

New crimes against people were rare.

- Of 2,558 homicide offenders, fewer than 3% were returned for any new crime against a person.
- Of 6,673 sex offenders, only 3% were returned for a new sex offense.

Although these findings run counter to popular preconceptions, they are corroborated by numerous studies from other jurisdictions. They also correlate with the fact that 60% of sex offenders currently incarcerated in Michigan score low risk of reoffending on widely used sex offender risk assessment instruments.

Sheer length of time served bears no relationship to success.

- Serving more time does not improve success upon release.
- Within offense categories, there is little difference in the amount of time served by those who succeed and those who fail.

These findings are also corroborated by numerous other studies.

In about 61% of the cases, people were released on their ERD.

- In nearly 30%, release occurred one or two years past the ERD.
- Motor vehicle and drug offenders were the most likely to be released on their minimums; sex offenders were the least likely by far.

Incarcerating people who had served their minimum sentences for an additional year or two had very little impact on success rates in general and on returns with new sentences in particular.

- When assaultive and sex offenders who were released on their ERD were compared to those who were kept up to four years past it, the proportion who returned for any new crime against a person rose from 4.5% to 6.9%.
- To avoid this 2.4 point increase, nearly 9,700 people who would not have returned with any new offense were denied parole for years after serving their minimum.

If everyone denied parole for up to two years had been released when first eligible, the consequences would have been:

- Beds saved -- nearly 33,000 over 14 years, more than 2,300 a year, on average.
- Costs saved, in today's dollars -- more than \$1 billion for the entire period, nearly \$74 million a year, on average.
- Increase in overall rate of returns with new sentences -- 1.7 points
- Increase in annual arrests -- less than 0.4%.

These findings, and the similar results of many other studies, suggest three things.

- First, **more people can be released from prison sooner without any significant impact on public safety.** The ultimate confirmation of this fact is that we have had a large increase in the number of paroles over the last few years and the number of people returning for new crimes has still continued to decline.
- Second, **lengthy incarceration is not a cost-effective crime control strategy.** While the facts of some crimes may justify very long sentences purely for punishment, it is an expensive mistake to base sentencing and parole policies on the assumption that more time served means less recidivism.
- Third **we are paying a great deal to extend people's incarceration based on how we feel about the offense, rather than on their actual risk of reoffending.**

In 2006, of 6,700 people who scored high probability of release on the department's own parole guidelines, nearly 3,000 were denied parole. Within the last year, more than 30% of the people who were past their ERD scored high probability of release. The vast majority of those who are denied despite favorable guidelines scores are homicide and sex offenders.

## **WHAT STRATEGIES MIGHT BE MOST COST-EFFECTIVE?**

Since we're not buying much public safety with the extra hundreds of millions we're spending to keep more people locked up for longer periods, there are a number of strategies we might consider for reducing the population. There will, of course, be opposition to each. I would suggest that in weighing any proposal, we don't look just at who supports and who opposes it, but why. Ask both supporters and opponents of every potential strategy for the evidence that supports their positions.

### **Sentencing commission**

At the front end, we can restore the sentencing commission. Many years of effort were put into developing a cohesive set of sentencing guidelines that reflected the best estimate at the time of their effectiveness and their impact on prison capacity. But that work was done more than 13 years ago and the scheme always contemplated ongoing monitoring and periodic adjustments. By abolishing the commission shortly after the guidelines were enacted, we:

- lost the opportunity to see how they are actually working
- returned to a time when every new offense and every change in penalty is done by the legislature on an ad hoc basis.

Many things have changed over the years:

- our knowledge about what does and doesn't work,
- public attitudes toward crime,
- the availability of community-based alternatives to incarceration,
- the availability of state dollars to support corrections.

There is no way to predict what the impact of a new sentencing commission would be. That would depend on its mandate, its membership and, ultimately, the acceptance of its recommendations by the legislature. However, we have seen the impact of revising our sentencing scheme for drug offenses and it would certainly be rational to systematically assess whether revising the penalties for other offenses might also have a positive effect.

### **Presumptive parole**

At the back end, there are a number of options to consider. The single highest impact would be from presumptive parole. That is, change the statutory mandate to the parole board so it must grant parole to someone who has served the minimum sentence unless the person has:

- a serious history of institutional misconduct or
- there is objective, verifiable evidence that the person poses a current threat to the community. Such evidence may be scoring high risk on a reliable risk assessment instrument or it may be something unique to the person, like writing threatening letters to the victim. But it would not be a subjective reaction to the crime or a subjective assessment during a parole interview of whether the person shows adequate remorse.

We estimate that, given those criteria, parole grant rates on the ERD would be about 80%. The annual cost savings would be about **\$243 million**.

Presumptive parole has a lot to recommend it besides these potential savings. It would:

- give real meaning to the minimum sentence, which has been imposed by a judge, in accordance with legislative sentencing guidelines and, frequently, in accordance with plea negotiations between the defense and prosecution. Enforcing the minimum unless there is a concrete reason not to would restore the roles of every actor in the criminal justice system.
- create transparency and certainty for both defendants and victims. It is the ultimate form of truth in sentencing.
- help depoliticize the parole process by mandating a certain outcome unless specified criteria are met.
- preserve a role for the parole board in identifying people who are truly high risk. It constrains parole board discretion but is not as extreme as determinate or flat sentencing, which eliminates all discretionary decision-making by a parole board and simply requires release when a specified term of years has been served.
- not conflict with current laws on “truth in sentencing.” Because presumptive parole just involves enforcing the existing minimum sentence, not changing it in any way, it can begin having an effect immediately.

It’s important to understand that the concept of presumptive parole was recommended for Michigan by the Council of State Governments. CSG has emphasized that our parole board has extraordinarily broad discretion compared to national norms and that this has resulted in our long average length of stay. However, the CSG proposal anticipated savings of only 515 beds in the first three years after adoption because it included several elements that greatly limited its effectiveness.

First, the CSG proposal would only apply prospectively.

- It would take effect gradually as people sentenced in the future began to reach their earliest release dates.
- It would have no impact on the 44,000 people who are currently incarcerated.

Second, CSG would not apply the presumption to the thousands of people who are serving for offenses that carry a statutory maximum sentence of life or any term of years.

- Our penal code allows judges to impose life or any terms for all the most serious offenses short of first-degree murder. These include second-degree murder, first degree criminal sexual conduct, armed robbery and assault with intent to murder. Under the CSG proposal, a first offender who was serving 5-15 years for an armed robbery would not be entitled to parole after serving his minimum because the statutory maximum for his offense is life.
- There is no rationale offered for treating these offenders differently except the nature of the offense.
- In these cases, the parole board would have total discretion to react to the very same facts the judge took into account in setting the minimum in the first place.

Third, the CSG proposal would allow the board to continue people who are entitled to the presumption for up to 120% of their minimum sentence in order to complete required programs.

- That could mean an additional two months for some people and an additional two years for others.
- The inability of the MDOC to get people into and through required treatment programs before they reach their ERD has been a longstanding problem. Currently, there are 947 people who are already past or within one year of their ERD who are waiting to get into assaultive or sex offender programs that take at least 44 weeks to complete.
- It is unclear why any additional time needed for program completion should be a percentage of the person's sentence, rather than a set number of months.

While presumptive parole can be implemented in various ways, the concept clearly holds promise as an on-going strategy for reducing the prison population.

### **Lifer paroles**

A separate parole strategy would be to focus on the backlog of parole-eligible lifers. People sentenced to "parolable" life terms become eligible for release after serving either 10 or 15 calendar years, depending on when the crime occurred. As I mentioned, for the most serious offenses short of first-degree murder, Michigan judges retain the discretion to impose either parolable life or a term of years for which the judge sets both the minimum and the maximum.

The fact that a judge chose life does not necessarily indicate that the particular crime was even worse than others of its type. What it reflects is the judge's understanding of what a life sentence meant. In the late '60s, throughout the '70s and well into the '80s, judges generally thought it meant a high likelihood of parole in 14 or 16 years. Thus 18-year olds were routinely told to do their time well and they would be out while they were still young men.

After the parole board was revamped in 1992, parole policies changed. Until 2007, the board operated on the theory that "life means life" and released almost no lifers. Today, the board's policies have loosened up some, but some lifers the board has been interested in releasing have come up against yet another barrier – objections by the successor to the original sentencing judge.

About 850 lifers are currently eligible for release. Their cases only have to be reviewed once every five years. The department doesn't even count them as people who are past their earliest release date because technically they don't have minimum sentences.

The parolable lifers share a number of characteristics.

- They are much older than the average prisoner. Their median age is now about 55. As a consequence, costs for their medical care are increasing.
- The 700 or so who became parole-eligible in 10 years have now served, on average, nearly 30 -- far longer than thousands of other people who committed comparable crimes.
- They are typically at very low risk for re-offending; two-thirds are their serving first prison term, often for highly situational offenses
- Most have excellent institutional records – commonly haven't had a misconduct citation in 20 years
- They were all sentenced before legislative guidelines took effect – some could not even receive life if sentenced today.

The parolable lifers are a unique population that has been whipsawed by changes in policy, practice and personnel. Their files have grown large over the years and the parole requirements for lifers include a time-consuming public hearing process. The most efficient way to address their situation might be to have a special review board, subject to a sunset provision, focus just on these cases. Whatever the means, releasing just half of them would save about **\$12 million a year**.

### **Medical paroles**

As the population has grown and aged, and as health care costs have relentlessly increased, the care of medically fragile prisoners has become a significant issue in Michigan as it has nationally.

- The costs for one chronically ill person with multiple needs or for end of life care for one person who is terminally ill can be astronomical.
- On average, the cost of housing and caring for medically fragile prisoners is two to three times that of healthy prisoners.
- Certainly, people who are bedridden or wheelchair bound or hooked to medical equipment are not a major threat to public safety.
- So the challenge is to find alternative placements that address people's medical needs appropriately, without all the additional cost for prison security, and that can take full advantage of alternative sources of payment, like Medicare, Medicaid or veterans' benefits.

When we looked at the figures in May 2006, there were 359 people housed at a prison medical facility, prison geriatric unit or in an off-site hospital. Even if we use a conservative cost estimate of \$70,000 per person, if 200 people were released, it would save **\$14 million**.

You are going to hear more about this issue in a few minutes from Phil Weaver. I just want to make a point about the release process.

- Of the people we looked at in 2006, nearly 37% had passed their first release date and were eligible for parole. The rest had either not reached their ERD or were serving non-parolable life terms and could only be released by commutation.
- Commutation is a long, complicated process. It includes a series of steps, each with its own time period, as well as a public hearing. Currently, we hold public hearings for people who can't speak because they are on ventilators or curled up in the fetal position or for those who can only ask to be allowed to go home so they can die among family.
- Because commutations must be granted by the governor in the full glare of press coverage, it is also highly politicized.
- In the last 26 months of her administration, Gov. Granholm considered commutations in 83 cases that had been referred to her on medical grounds. She granted commutation in 40 cases, denied it in 36 and seven people died waiting for a decision.
- Streamlining the process for releasing medically fragile prisoners would be both humane and cost-effective.
- Currently have legislation being introduced that would expedite the public hearing process for seriously ill prisoners and eliminate the requirement for those who are terminally ill bill designed to expedite.

- Even more fundamentally, we have a statute on the books that gives the parole board the authority to “grant a medical parole for a prisoner determined to be physically or mentally incapacitated.”
  - Employing this statute would obviate the need for commutation altogether.
  - It is not used because it was enacted prior to the passage of truth in sentencing legislation that prohibits releasing people who have not served their minimum term.
  - Resuscitating the medical parole statute would allow us to increase the number of medical releases and greatly shorten the time it takes to process them.

### **“Truth in sentencing”/ sentencing credits and community transition program**

Finally, we can’t discuss reducing the prison population without addressing Michigan’s version of “truth in sentencing.”

For decades, Michigan, like other states, awarded prisoners generous amounts of “time off for good behavior” or “good time.” The old good time system was progressive. The longer you served, the more time you earned. That meant that nominally very long sentences could actually be served in far less time. It also meant that calculating the amount of good time an individual could earn was a complex exercise. Sentencing judges routinely used charts to decide what sentence to impose in order to have the person serve the desired number of years.

A 1978 initiative petition prohibited the award of good time completely. In 1982, faced with dangerous overcrowding, the legislature adopted a more modest system of “disciplinary credits.” That system was much more straightforward. Every eligible prisoner could earn up to seven days of credit per month.

In the 1990s, a movement called “truth in sentencing” swept through state legislators. It was aimed at reining in generous good time systems that were still very common in other states. The federal government stimulated this movement with prison building funding under VOI/TIS, which stood for Violent Offender Initiative/Truth in Sentencing. To be eligible for this funding, states had to ensure that assaultive offenders served at least 85% of their sentences.

Michigan met the federal standard and received VOI/TIS funds. Nonetheless, in 1998, we adopted our own version of “truth in sentencing”, which requires that every prisoner serve every day of his or her minimum sentence in a secure facility. This had two consequences. It eliminated disciplinary credits for everyone sentenced after it took effect. And it eliminated community residential programs for people nearing parole. At its peak, in 1992, CRP had nearly 3,500 people in the community in corrections centers or on tether who would otherwise have occupied prison beds.

In assessing whether to restore sentencing credits, there are a number of factors to consider.

- The justification for eliminating all credit is transparency in sentencing. However, transparency can be achieved just by stating at sentencing how much credit the defendant might earn.
- Michigan is at odds with most other jurisdictions.
  - Federal prisoners can receive 15% off their sentences.

- Most states, including such big ones as CA, TX, FL and NY, give some amount of credit for good conduct. Many give an additional amount, typically called “earned credit,” for participation in work, educational or treatment programs.
- By statute, Michigan counties use “sheriffs’ good time” to control the size of jail populations and manage inmate behavior.
- The American Correctional Association has a formal policy that supports the use of both good time and earned credits.
- The nature and amount of credit available and the eligibility of prisoners to receive it can be in any combination the state chooses. Other Great Lakes states vary widely. For instance, while MN gives no credits and OH gives very little, IL and IN give generous amounts and WI recently adopted a scheme of “positive adjustment time”.
- Since, under any system, accumulated credits can be lost, prisoners have a strong incentive to follow the rules.
- Credits just make people eligible for parole consideration sooner; they do not require that anyone be released.
- Sentencing credits can have a positive effect.
  - While prisons have various ways of punishing misconduct, there are very few rewards for doing right. People who have failed to meet societal expectations, often despite receiving plenty of punishment, need opportunities for positive reinforcement.
  - Sentence credits can encourage prisoners to behave in ways that will ultimately benefit not only them but the communities to which they will return.

If sentencing credits of up to 15% of the minimum sentence resulted in the average years served at release being reduced by 9.6 months for 9,000 prisoners, the cost savings would be **\$40.5 million a year**.

There are also multiple factors to consider regarding the restoration of community transition programs for people nearing parole:

- They are highly valued by prisoners and provide a strong incentive for positive institutional conduct.
- They allow the parole board to see how someone is adjusting to the community before making a final parole decision.
- They are common in other jurisdictions.
- Eligibility criteria can be defined in many different ways.
- People who don’t perform well can be immediately returned to prison without the formality of a parole revocation hearing.
- If a community transition program were restored, it could be integrated with MPRI; existing supportive services could simply be provided several months earlier.

If 800 people were in a community transition program at any given time, the cost savings would be about **\$22 million a year**.

Changing truth in sentencing would require a vote by three-quarters of the members of each legislative chamber.

Not even counting the sentencing commission, together these strategies could save an estimated **\$331.5 million**. Each strategy could be designed in various ways. But the evidence is clear that none would jeopardize public safety and, collectively, they would put us well on the path to a \$1.5 billion corrections budget.