

CAPPS ANALYSIS OF CSG REPORT

June 2, 2014

The research findings in CSG's May 2014 report and the presentations that preceded it are enormously important, well-presented and rich in details. They will be useful in pursuing a variety reforms, including those not expressly recommended in this report.

However, CSG's recommendations for change could take years to implement. None would impact the current prisoner population. As a result, neither the size of the prisoner population nor the cost of corrections would be reduced in the immediate future. Nor would any current prisoners receive relief from the disparities and inconsistencies that CSG has so effectively identified.

General Observations

The emphasis on disparities and uncertainties in both sentencing and parole is critical and should be of interest to many state and local policymakers, judges, defense attorneys, prosecutors and advocates. CSG has painted a very clear picture of a system in which:

- Wide sentencing guidelines ranges leave room for substantial judicial discretion in selecting both the type and length of sentence,
- The discretion of prosecutors to bring habitual offender charges allows prior convictions that are scored by the sentencing guidelines to be counted twice,
- Large disparities in sentencing exist among counties and
- The enormous gap between minimum and maximum sentences leaves enormous discretion to the parole board.

CSG stresses that these characteristics have two consequences:

- Similar offenders who have committed similar offenses receive very different punishments.
- Neither offenders nor victims can rely on how much time a person will actually serve.

Through its analysis of rearrest data, CSG has reinforced existing research that shows that additional time in prison does not improve recidivism rates. On average, keeping people incarcerated past their earliest dates:

- Produces no significant gain in public safety,
- Costs hundreds of millions of dollars a year.

The focus of the report is primarily on low end offenses, such as those that fall on the E grid where the maximum minimum for non-habitual sentences is two years. Close examination of both this group's sentencing patterns and the adequacy of community-based supervision are very important since:

- 89% of felony sentences score in lockout (62%) or straddle cells (27%),
- 60% of new commitments to prison are for two years or less,
- More than half of the new admissions are people who violated parole or probation.

The report does not explicitly address the sentencing and parole disparities among sentences for more serious offenses. The impact of these disparities on corrections costs and the affected prisoners is equally significant because of the lengthy sentences involved:

- 15,175 people -- 35% of all prisoners -- are serving for offenses that carry life or any term, with minimums and maximums set by the sentencing judge,
- 24% of prisoners are serving an indeterminate sentence with a minimum greater than 10 years,
- More than 4,000 people (9.4% of prisoners) are serving minimum sentences longer than 20 years,
- Another 3.5% are serving parolable life,
- People who have committed assaultive and sex offenses are the most likely to be incarcerated long after they have become eligible for parole, although CSG's findings show they are the least likely to be rearrested after release.

The basic findings regarding disparities among counties, the width of guidelines ranges, the discretion left to the parole board, the use of habitual charges and the negligible impact of longer prison stays on public safety all apply with even more force to the much larger guidelines ranges applicable to the most serious offenses.

In assessing the effectiveness of the guidelines in improving proportionality in sentencing, CSG has focused only on whether people with more serious prior records received longer sentences than people with less serious prior records for similar crimes. However, that result is built into the guidelines by awarding more points for more prior convictions.

CSG has not addressed whether the lengths of minimum sentences (or the ultimate lengths of stay) are proportional punishments for both the offense and the offender.

- For instance, it did not reference the conclusions of a report by the Pew Center on the States that, as of 2009, Michigan prisoners in general serve nearly 17 months more than a 35-state average and those convicted of assaultive offenses serve 30 months longer.
- It did not assess the risk that sentences might be made consistent by making them extremely long for everyone with similar prior records.
- CSG does note that the average length of minimum sentences increased by 2.7 months in just the five-year period from 2008-2012 that it examined. It finds no explanation for this other than the wide range of possible sentences built into the guidelines. It does not discuss the impact of plea negotiations on the choice of sentence within the guidelines range.
- Because CSG looked only at data from the last five years, it did not review longer-term increases in the length of minimum sentences and the policies that caused them. The Pew Center reported that from 1990-2009, Michigan's average length of stay increased 79% for all offenses and 97% for assaultive offenses.

Although the report reflects the deep knowledge of Michigan's system that CSG gained by talking to a wide variety of stakeholders, its recommendations ultimately reflect the political weight of prosecutors. Moderate strategies that could be readily implemented and save hundreds of millions of dollars but have been opposed by prosecutors in the past have simply remained off the table. These include:

- Requiring parole upon service of the minimum sentence absent objective evidence of high current risk or a recent history of serious institutional misconducts ["presumptive parole"],
- Increasing releases of parolable lifers,
- Restoring sentencing credits for good behavior and/or program participation ["good time" or "disciplinary credits"],

- Restoring community transition programs for people who are nearing their earliest release date.

The process of seeking consensus on specific reforms that logically follow from the research findings would benefit from first reaching agreement on a set of governing principles. Developing such principles would promote thoughtful debate. Once adopted, their existence would help ensure that a comprehensive set of reforms is tested for consistency with agreed upon guidelines, not against the prospect of political opposition to one proposal or another. A sample set of principles is attached.

Responses to Specific Recommendations

1. *Restructure the guidelines to eliminate straddle cells and assign only one sentence type (probation, jail, prison) to each cell, with probation the presumptive sentence for people with little or no prior record who commit less serious crimes.*

Eliminating the range of penalties allowable for less serious offenses would promote consistency and reduce disparity. It would help eliminate the tendency for sentences to vary among counties depending on resources rather than effective corrections practices. However, the CSG proposal would eliminate two possibilities that would seem to be appropriate in some cases: fines only and the combination of probation with a short jail sentence.

- Eliminating fines only could force some people to be placed on probation unnecessarily. It would also effectively change the penal code by eliminating fines as a sanction. While fines are not a fair or effective remedy for the large number of defendants who cannot afford to pay them, community service could be substituted as an alternative for those defendants without subjecting them to jail or extended supervision.
 - The elimination of probation and jail in combination could push some people into longer jail sentences and eliminate opportunities for people who could benefit from continuing supervision after experiencing a brief jail term.
 - Straddle cells, a compromise designed to preserve judicial discretion, contribute substantially to inconsistencies in sentencing. Eliminating them is desirable. However, it could result in more people going to prison, depending on how the cells are redrawn. At a minimum it could result in a great many more departures as judges who gave prison terms as a straddle cell option continue to give them as a departure from a “jail only” cell. These departures would be subject to appellate review and would presumably decline as a body of law evolves.
2. *Reduce the amount of overlap in sentencing ranges between cells on the same grids*
 - Michigan’s guidelines are apparently much more complicated than those of other states. Simplifying the guidelines structure and reducing the number of cells makes sense since so many of them lead to the same result.
 - The one caveat is that the current complexity results, at least in part, from an attempt to balance the importance of prior record and offense characteristics. If points decrease for one but increase for the other, the recommended sentence may fall in the same range, causing that range to be repeated within in the grid to account for the variety of point combinations. To reduce the total number of cells, this underlying premise may have to be reexamined.

3. *Reduce the wide ranges in guidelines cells for prison sentences.*
 - This is absolutely critical to reducing disparity in minimum sentences and improving proportionality. Every range should be narrowed so that the high end is no more than a relatively small fixed percentage (e.g. 25%) greater than the low end.
 - It may well produce more departures, at least initially, but, again, those departures will be subject to judicial review and should subside as a body of appellate decisions is developed.
 - The primary concern is that in narrowing ranges, sentences could actually get longer. Depending on the compromises struck in defining the high and low end of each range, sentences could end up being more consistent because they all cluster around a higher average.

4. *Eliminate the practice of double-counting the same prior convictions in both scoring the prior record variables and in bringing habitual offender charges that increase the sentencing ranges.*
 - This is also critical to decreasing disparity since prosecutors vary widely in their use of habitual offender charges both to increase sentences or as leverage in plea negotiations.
 - It is also a basic principle of fairness not to enhance punishment twice for the same conduct.
 - The recommendation could be implemented simply by adding a requirement to the guidelines statute that says that prior record points cannot be scored for any offense that is used as the basis for an habitual offender charge.
 - Note: this would not solve the problem created by the *Gardner* decision which allows multiple counts arising from a single transaction to be counted separately for purposes of charging someone as a third or fourth offender.
 - Note: CSG did not address the fact that unprosecuted charges, such as those dismissed in plea bargaining, and even charges that resulted in acquittal can still be scored under OV 12 (Contemporaneous Felonious Criminal Acts) and OV 13 (Continuing Pattern of Criminal Behavior).

5. *Establish a maximum sentence specific to each individual at sentencing rather than default to the statutory maximum. Require the difference between the minimum and maximum to be narrow enough to provide greater predictability about time served while still allowing for consideration of institutional behavior in final release decisions.*
 - These recommendations would bring Michigan quite close to the effect of determinate or flat sentencing schemes common in about 17 states without actually abandoning indeterminate sentencing. By reducing the range within which the parole board can act, they would substantially reduce disparities in release decisions as well as promote the kind of certainty about the meaning of the minimum on which truth in sentencing is premised.
 - Leaving the parole board room to consider only institutional behavior would:
 - encourage prisoners to avoid misconduct,
 - preclude speculative decisions that amount to preventive detention based on statistical probabilities, and

- avoid double-counting prior convictions as part of a risk assessment that has already occurred during sentencing.
- This scheme would not preclude a period of post-release supervision, as currently occurs in determinate sentencing jurisdictions. People known to be high risk based on objective evidence of recent behavior could be placed on more intensive supervision.
- As with narrowing the ranges within which minimum sentences are set, the gap between the minimum and maximum could be reduced simply by requiring the maximum to be no greater than X percentage of the minimum. Judicial selection of the minimum would, in effect, define the maximum as well. (This would be the obverse of the judicially created “*Tanner*” rule that requires the minimum to be no more than two-thirds of the maximum precisely in order to preserve room for parole discretion.)
- Despite total agreement with the goals of these recommendations, CAPPs has several reservations about how they would work in reality.
 - As noted above, these changes would be prospective only and would have no effect on current prisoners or the thousands more who will be sentenced in the time it will take to enact them.
 - Also as noted above in regard to narrowing the cell ranges for minimum sentences, the effort to increase consistency and predictability could lead to even greater time served.
 - Knowing that the minimum and maximum will be close would raise the stakes on developing sentencing guidelines ranges and could induce policymakers to make those ranges higher.
 - Judges given the responsibility of setting maximum sentences might set the minimums as high as allowable under revised guidelines in order to boost the maximums. The manner in which judges currently set individualized maximum sentences for offenses that carry “life or any term” should be carefully examined.
 - The desire to increase maximums may also increase the number of upward departures from the guidelines minimums.

Note: It will require substantial public and policymaker education about the guidelines process and monitoring of proposed changes to ensure that sentences lengths don’t actually increase even as they become more consistent and predictable. Michigan should carefully examine the experiences of states that transitioned to determinate sentences to see if this problem arose.

6. *Probation sentences should specify a maximum period of incarceration in jail or prison that can be applied as a sanction in response to probation violations.*

- This recommendation correctly recognizes that probation was an appropriate sentence for the offense and offender and that revocation is a response to violation of the terms of supervision. Thus the penalty imposed should be appropriate to the probation violation, not a resentencing for the original offense. Specifying that penalty in advance has the value of:
 - Avoiding both disparity and excessively harsh reactions to violations at the time they are committed,
 - Giving the probationer fair and firm notice of the consequences of violations.

- As is recommended later in the CSG report, a similar method of setting the appropriate sanction for violations of parole supervision would also be needed.
7. *Utilize the defendant's level of risk, as demonstrated by the prior record score calculated in the sentencing guidelines, to set at sentencing the length and intensity of probation and post-release supervision.*
- As a general proposition, the notion that supervision requirements should be tailored to risk makes undeniable sense.
 - Excessive supervision of low risk probationers and parolees is expensive, diverts resources from the supervision of those who need it more, is unduly punitive and may ultimately be counter-productive in the way it affects the behavior and opportunities of the person under supervision.
 - A prime example is the automatic intensive supervision of paroled sex offenders, including GPS monitoring, although they have by far the lowest recidivism rates.
 - Using prior record as the measurement of risk is rough but probably the best available.
 - Prior record is already built into the sentencing guidelines to determine the type of sentence and length of prison sentences, so it is consistent to extend that use to the length and nature of community supervision.
 - It is objectively verifiable, unique to the individual and avoids the more controversial, redundant and expensive proposal to use the COMPAS risk assessment as a tool for determining the sentence.
 - However, prior record is a wholly static one-dimensional factor. Some mechanism for departures is needed in order to account for situations where:
 - Objective, verifiable information about the background of a first offender placed on probation or the institutional history of a parolee suggests the need for closer supervision or more intensive services,
 - Someone with a substantial prior record may no longer need a high level of post-release supervision for reasons such as age, health or the success of in-prison programs.
 - The experience of jurisdictions in which judges set the period and nature of post-release supervision at sentencing should be reviewed.
8. *Use swift and certain sanctions for probation violations while setting clear parameters at sentencing on use of incarceration as response to probation and parole revocation.*
- It makes sense that the likelihood of immediate sanctions, coupled with appropriate adjustments to probation conditions, would reduce probation violations and, ultimately, incarceration as the result of probation revocation.
 - Potential concerns include whether sanctions are proportional to the violation, adequate procedural protections exist to enable probationers to respond to allegations and the scope of probation officers' discretion to act unilaterally.
 - While CSG refers to granting probation officers "authority" as well as "resources" to do this, MCL 771A.1 et seq does not seem to expand the authority of probation officers or permit sanctions not already available. Probation officers must have a show cause order signed by a judge before a probationer can be arrested for a technical violation. MCL 771A.5 requires an appearance before a judge within 72 hours.

- So long as the main purpose of increased use of and funding for “swift and sure” sanctions is to enable better monitoring of high risk probationers through reduced caseloads, it would seem to be worth trying.
- Establishing the maximum length of re-incarceration for technical parole violations avoids disparate treatment of similar violations depending on the amount of time the parolee has left until reaching his or her maximum sentence.
- By focusing in advance on a proportional punishment for the violation, it avoids the mentality that the prisoner was given a second chance and spoiled it so s/he does not deserve another one. This reasoning has led to lifers and others with very long maximum sentences being left in prison for many years after being returned for a technical violation.

9. *Focus resources and measure performance based on the goals of reduced recidivism and improved public safety.*

- The idea of allocating resources in the way most likely to reduce recidivism has an obvious appeal from a public safety perspective. However, exclusive focus on recidivism risk as a basis for delivering programs has a downside.
 - Many people caught up in the criminal justice system, including prisoners who are serving long sentences for serious crimes, are at low risk for recidivism (especially as measured by prior record) but have high needs for education, psychological counseling, vocational skills and other programming. People labelled as felons, particularly those who have been incarcerated for long periods, face loss of social support networks, reduced prospects for employment and a host of other formal and informal barriers to normal functioning in the community.
 - Failing to provide people in state custody or under supervision with the programming and support they need because they don't pose a sufficient risk of reoffending has substantial ethical and policy implications.

10. *Establish a permanent, broadly representative criminal justice policy or sentencing commission to make recommendations about sentencing and other criminal justice policies to the legislature and to independently monitor the impact of changes to the state's sentencing practices.*

- CAPPS has long advocated restoration of the sentencing commission and strongly supports one with a mandate that goes beyond just recommending adjustments to the sentencing guidelines to include other laws, rules and policies that affect the use and length of incarceration.
- CAPPS strongly supports making the commission as representative as practicable. Notably, CSG has omitted legislators from commission membership. CAPPS recommends including members with expertise in both mental health and adolescent behavior.
- CSG has recommended that a permanent body be established “to monitor” sentencing and system performance, not to recommend needed reforms in the first instance. Apparently CSG is reserving for itself the immediate task of revising the guidelines ranges for minimum sentences and developing the permissible width between minimum and maximum sentences.

While the desire to have this work done promptly and efficiently is strong, having it done by consultants rather than by a diverse body of stakeholders with a statutory mandate is problematic.

- The normative judgments underlying the current guidelines about how much punishment is proportional were made by a sentencing commission. To the extent that the guidelines require reconsideration of these normative judgments as opposed to “technical fixes”, those judgments are most appropriately made by a representative body in a process that allows for ample public input.
- The commission process affords each appointed stakeholder an equal vote and requires substantial debate and compromise. While consultants may obtain extensive input from stakeholders, they do not engage in the negotiations necessary to produce a cohesive commission product. They are more likely to respond pragmatically to political “realities” and to pressure to get something passed in the short term.
- Once the consultant’s work is done, the appointed commission is left in the position of making recommendations after the fact about a system that it did not participate in designing.
- Ideally, a sentencing commission would be appointed promptly and given a deadline to complete its work utilizing the expertise of the consultants as technical advisers.

11. Collect more comprehensive information about victimization and track restitution collection.

- Having more information is always a good thing.
- It is unclear whether a state-based victimization survey is needed to supplement existing federal surveys.
- Using restitution collection as a performance measure will have to be adjusted for the ability of defendants to pay. For instance, courts in wealthier counties may have better success rates if the defendants sentenced there have higher average incomes.