

# TOO MANY PRISONERS

## UNDOING THE LEGACY OF GETTING TOO TOUGH

By Barbara R. Levine



*This Sinking Feeling* by Scribbles

There has been much discussion at the national and state levels regarding mass incarceration—the enormous growth in the prison system that occurred over the last several decades. Michigan has been part of that trend, growing from fewer than 8,000 prisoners in 1973 to roughly 41,000 today, an increase of more than 400 percent. The state's entire population grew by just 9 percent in the same period.<sup>1</sup>

Like jurisdictions around the country, Michigan is grappling with the high fiscal cost of this growth. The state's general fund appropriation for corrections for fiscal year 2017 was \$1.95 billion—19 percent of the entire general fund budget.<sup>2</sup> This much spending on prisons leaves less funding available for other public priorities, including improvements in education, job training, and addiction and mental health treatment that could ultimately reduce crime.

Big picture: the news from Michigan is relatively good. Our prisoner population peaked at 51,500 in 2006 and has declined by more than 10,000 over the last decade. Although this has not translated into a comparable decline in prison spending, it has at least prevented further increases.

Still, these numbers raise several questions. What is the relationship between the size of the prison population and public safety? What causes the Michigan population to rise and decline? Who is in our prisons and for what offenses? What strategies could be used to reduce the population further?

### Mass incarceration and public safety

Although the “tough on crime” movement that caused prison populations to explode was touted as necessary for crime reduction, research has found little relationship between prison growth and public safety. Crime rates have increased in states where incarceration rates have also increased, and fallen in states where prison populations have declined.<sup>3</sup> In Michigan, crime rates have shown a steady downward trend for more than three decades. From 1983 to 2013, the index crime rate fell by 59 percent while the incarceration rate nearly tripled.<sup>4</sup>

Likewise, researchers cannot find a connection between increased length of prison time and recidivism. There is simply no evidence that keeping people imprisoned for longer periods reduces re-offense rates.<sup>5</sup> Ironically, extremely long sentences are often imposed for the most serious offenses, particularly murder and criminal sexual conduct, not only because greater punishment is appropriate but out of fear that these offenses will be repeated. Yet research shows that homicide and sex offenders have extremely low re-offense rates.<sup>6</sup>

Policies about crime—often based more on high-profile cases and political calculations than on analysis of actual trends or evidence of effectiveness—are what drive the size of the prisoner population. To reduce the number of prisoners, we must recognize the specific policies that have increased incarceration rates and how they can safely be rolled back.

### The basic equation: population + intake – releases = new population

The size of a state’s prison population is a function of two factors: how many people enter prison and how long they stay.

#### Intake

People enter prison either with a sentence for a new crime or for violating conditions of probation or parole supervision. These “technical” violations may involve behavior that violates only oversight rules, e.g., failing to report, using alcohol, leaving a treatment program; a criminal conviction for which a jail or probation term has been imposed; or alleged criminal conduct that has not been prosecuted.

Unlike some jurisdictions, including the federal system, Michigan’s prisons are not filled with low-level drug offenders. Fewer than 8 percent of prisoners are serving sentences for possessing or delivering drugs. However, roughly 20 percent are serving for other nonassaultive offenses such as larceny, breaking and entering, and drunk driving. Often, their minimum sentences are relatively short. More than 8,700 Michigan prisoners are serving minimums of two years or less. Many of these are nonviolent offenders who have failed on probation; some have served numerous short prison terms over many years. Multiple strategies could reduce intake at this end of the spectrum:

- Impose fewer prison sentences upon initial conviction. Adjust sentencing guidelines to steer judges toward community-based sanctions in more cases and provide additional community resources that encourage judges to see alternatives to prison as feasible. For example, increased use of therapeutic or problem-solving courts designed to confront underlying behaviors that lead to crime has been proven to reduce costs and motivate significant improvement in offenders’ lives.
- Eliminate the mandatory two-year consecutive sentence for possessing a firearm while committing another felony. Give judges the discretion to impose an appropriate sentence under the guidelines as with any other offense. In 2015, there were nearly 1,000 prisoners whose longest minimum sentence was for a felony-firearm conviction. Many had received probation for the underlying felony, but because the prosecutor had chosen

## Fast Facts

1. It is not crime rates but policies about crime that have driven up the size of the prisoner population. Those policies can be safely rolled back.
2. Since the size of the prisoner population reflects both how many people enter prison and how long they stay, we must reexamine sentencing practices at the front end and parole practices at the back.
3. Substantial savings can be achieved by focusing on several unique prisoner subgroups: parolable lifers, those who were juveniles at the time of offense, the mentally ill, and those who are aging or medically fragile.

to charge for felony-firearm, the court had no choice but to impose the two-year prison term regardless of circumstances.

- Reduce the admission of technical parole and probation violators. More access to community-based programs that are effective in reducing addiction, promoting employment, and addressing mental health issues could help prevent some technical violations from occurring. In addition, statutory and administrative rules that standardize the criteria for revoking probation and parole on technical grounds could reduce inconsistencies and avoid unnecessarily harsh exercises of discretion.

### Length of stay

The key driver of prison population size is average length of stay. The Pew Center on the States found that in 2009, Michigan had the longest average length of stay of the 35 states it studied. Overall, Michigan prisoners served nearly 17 months more than the national norm. The disparity is even greater when comparing only assaultive offenders; these Michigan prisoners served 31 months more than the national norm.<sup>7</sup>

How long a person stays in prison is determined by three factors: the sentence imposed by the court, any reduction in the sentence based on credit for institutional conduct, and the release decision made by the parole board.

### Sentencing

Except for a few terms mandated by statute, judges decide when someone will first become eligible for release by setting the minimum sentence.

Sentencing guidelines adopted by the state legislature in 1998 were intended to decrease disparity in sentencing and ensure that sentences are proportional to the seriousness of the offense. Point scores based on the defendant's prior record and the facts of the offense determine the range within which the minimum sentence is supposed to fall. The idea was that departures above or below the guidelines range were to be made only for substantial and compelling reasons subject to appellate review.

In *People v Lockridge*,<sup>8</sup> the Michigan Supreme Court held that the guidelines are merely advisory. The effect of *Lockridge* on proportionality and disparity has yet to be seen, but even when they were mandatory, the guidelines were only partially successful in meeting their goals.

- For the most serious offenses, the ranges are so broad that judges can impose minimum sentences differing by as much as 10 years on defendants with similar prior records and similar offense facts.
- The guidelines for the most serious offenses have also allowed sentences to continually increase over the last

several decades.<sup>9</sup> More than 7,000 people are serving minimum sentences of more than 15 years. An additional 1,400 are serving life with eligibility for parole.

- A defendant's prior record can be counted twice over—once to determine the guidelines range and again to increase the range if the prosecutor chooses to charge the defendant as a habitual offender.

Adjusting the sentencing guidelines could substantially affect the size of the prisoner population. Even a decrease of a few months in the average minimum sentence—when multiplied by thousands of prisoners—makes a big difference.<sup>10</sup> In addition, the Michigan Department of Corrections (MDOC) estimates that treating the possession of a weapon during a felony like any other offense by placing the penalty choice within the guidelines and allowing the sentence to run concurrently could save as many as 2,500 beds.



### “Good time”

Like most jurisdictions, Michigan historically granted generous amounts of “good time.” Prisoners routinely had their minimum sentences reduced for good in-prison conduct, meaning an individual could serve a 40-year minimum in 16 years. Michigan ended good time by ballot initiative in 1978, then replaced it with disciplinary credits of up to seven days a month in 1982. However, in 1998, the state adopted its unique version of “truth in sentencing” that eliminated all sentence credit for offenses committed later. Today, a person who receives a 40-year minimum sentence must serve every day of 40 years. This complete elimination of sentencing credits contributed substantially to the growth of the prisoner population and removed an important incentive for prisoners. Permitting prisoners to earn credit for participation in

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work, treatment, academic, and vocational programs could be doubly beneficial.

### Parole

Michigan’s 10-member parole board is appointed by the MDOC director. Once a prisoner has served the requisite time to become parole-eligible, the board has unreviewable discretion to grant release or continue incarceration up to the maximum term.

Since 1992, Michigan has had parole guidelines that are meant to predict the probability of release based on multiple factors, including offense, prior record, age, and institutional conduct. Most of these factors are statistically related to recidivism risk. The board is supposed to grant parole in “high probability” cases absent “substantial and compelling” reasons not to do so.<sup>11</sup> However, the board has routinely used boilerplate reasons to deny release in high-probability cases, primarily to homicide and sex offenders, effectively engaging in resentencing based on its own reaction to the crime.

Recent efforts have focused on creating a narrow statutory definition of what constitutes substantial and compelling reasons to effectuate the presumption of parole on the minimum for prisoners with high-probability scores. MDOC estimated this proposal could save 3,200 prison beds within five years. Although the parole board has significantly improved its grant rates for these prisoners in the last few years, contributing to the population decline, statutory definitions would ensure the revised practice will continue under future administrations.

### Targeting prisoner subgroups

Additional strategies focus on particular groups of prisoners.

#### Parolable lifers

After-the-fact changes in the treatment of parolable lifers caused their number to swell. Hundreds of people sentenced in the 1970s and ’80s by judges who expected them to serve 12 or 14 years have now served three and four decades. Beginning in the 1990s, almost no lifers were paroled. The review process was changed so that they only have to be considered every five years, and even then one board member can merely conduct a file review. Parole guidelines are not calculated, so lifers are not reviewed based on their risk but on the nature

of their sentences. Although the board began increasing the number of lifer releases in 2007, more than 900 remain who are currently eligible. This aging, low-risk population is increasingly expensive to keep. Reforming the review process would expedite their release.

#### Juveniles

Michigan law allows children younger than 17 who have committed the most serious offenses to be automatically waived to adult court. For another group of offenses, teenagers can be sentenced as either juveniles or adults. In addition, Michigan is one of only seven states that treat 17-year-olds as adults for purposes of criminal responsibility without any determination of the effect of their age on their behavior. From 2008 to 2012, 2,700 youth who were under the age of 18 when they committed their offenses entered Michigan’s prisons.<sup>12</sup>

The United States Supreme Court has recognized that juveniles have lesser culpability than adults because of their impulsiveness, lack of foresight, and susceptibility to peer pressure, and that they have greater capacity to change. In seminal recent decisions, the Court prohibited the imposition of certain punishments on youths who were younger than 18 at the time of offense.<sup>13</sup> As a result, more than 300 Michigan prisoners sentenced to life without parole for first-degree murders committed when they were under 18 are having their sentences reviewed. However, hundreds of prisoners who committed other crimes as juveniles are serving parolable life terms or have lengthy minimum sentences. Fairness to these prisoners and future juveniles as well as the desire to reduce the prisoner population suggest a number of strategies:

- Require judges to consider youth-related factors whenever they sentence someone who was under 18 when the offense was committed.
- Require the parole board to review those factors when considering these offenders for release.
- Make juveniles sentenced to lengthy indeterminate sentences eligible for parole after serving 15 calendar years as they would be if sentenced to parolable life.
- Eliminate the automatic waiver of juveniles to adult court based solely on the offense and restore judicial discretion to consider all relevant age-related factors.



## Aging and ill

Keeping people imprisoned into old age has foreseeable consequences. More than 9,000 Michigan prisoners are older than 50.<sup>14</sup> Nationally and in Michigan, legislators are learning what corrections officials have known for years: regardless of what they may have done in their youth, aging prisoners are the lowest risk and highest cost group in the system. The House Fiscal Agency reports that the aging of the population is a major factor in the rise of per-prisoner healthcare costs.<sup>15</sup> Older prisoners may also have trouble physically navigating the prison setting and may be preyed on by younger inmates. Legislation that would grant to the parole board the authority to release medically frail prisoners to nursing homes where the cost of their care would be covered by Medicaid is currently pending.<sup>16</sup>

## Mental and behavioral health

The closing of state mental hospitals and the failure to provide adequate funding to community mental health programs has resulted in a shift of mental healthcare to the criminal justice system. Twenty-three percent of Michigan prisoners have been diagnosed as seriously mentally ill.<sup>17</sup> The percentage is even higher for jail inmates. A greater effort to divert the mentally ill from criminal justice processing is beginning.<sup>18</sup> But improved access to mental healthcare before a crime has been committed—including for young people who experienced trauma in their families and communities—is also critical. The issues are similar for the 75 percent of prisoners who struggle with drug or alcohol abuse:<sup>19</sup> more effective early interventions will lead to less crime, and more treatment-focused response to crime will reduce prison stays.

## Conclusion

In 1989, Michigan had 32,000 prisoners. We could readily reach that number again. No single magic strategy will solve the problem. We need a combination of approaches along the entire criminal justice path from crime prevention and diversion through sentencing, parole, and reentry. If policymakers look at the evidence and learn from history, they will see an achievable goal that will lead to safer communities, less cost to taxpayers, and hope for tens of thousands of people caught in the criminal justice system who could lead productive lives. ■



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## ENDNOTES

1. Unless otherwise indicated, prisoner population figures are drawn from MDOC, *2015 Statistical Report* (February 24, 2017) <[http://www.michigan.gov/documents/corrections/MDOC\\_2015\\_Statistical\\_Report\\_-\\_2016.08.23\\_532907\\_7.pdf](http://www.michigan.gov/documents/corrections/MDOC_2015_Statistical_Report_-_2016.08.23_532907_7.pdf)>. The December 2016 population of 41,122 is reported in MDOC, *Prison Population Projection Report* (March 2017) <[http://www.michigan.gov/documents/corrections/Section\\_401\\_554437\\_7.pdf](http://www.michigan.gov/documents/corrections/Section_401_554437_7.pdf)>. All websites cited in this article were accessed August 9, 2017.
2. Risko, *Budget Briefing: Corrections* (January 2017), slide 9 <[http://house.michigan.gov/hfa/PDF/Briefings/Corrections\\_BudgetBriefing\\_fy16-17.pdf](http://house.michigan.gov/hfa/PDF/Briefings/Corrections_BudgetBriefing_fy16-17.pdf)>.
3. Pew Charitable Trusts, *Most States Cut Imprisonment and Crime* (November 10, 2014) <<http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/imprisonment%20and%20crime>>.
4. Citizens Alliance on Prisons and Public Spending, *10,000 fewer Michigan prisoners: Strategies to reach the goal* (June 2015), p 18 <<http://2015capps.capps-mi.org/wp-content/uploads/2015/06/CAPPs-report-10000-fewer-prisoners.pdf>>.
5. Pew Center on the States, *Time Served: The High Cost, Low Return of Longer Prisoner Terms* (June 2012), p 34 <[http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/prison-timeserved.pdf](http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prison-timeserved.pdf)>.
6. *10,000 fewer Michigan prisoners*, pp 43–45.
7. *Time Served*, pp 13–15.
8. *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).
9. *10,000 fewer Michigan prisoners*, pp 33–38.
10. *Id.* at 33.
11. MCL 791.233e(6).
12. *10,000 fewer Michigan prisoners*, pp 55–62.
13. *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (capital punishment); *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (life without parole for nonhomicide offense); *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012) (mandatory life without parole for murder).
14. *Budget Briefing*, slide 32.
15. *Id.*
16. 2017 HB 4101 and 4102.
17. Gerstein & Oosting, *Growth of mentally ill inmates raises concern in Mich*, *Detroit News* (December 28, 2016) <<http://www.detroitnews.com/story/news/local/michigan/2016/12/28/growth-mentally-inmates-raises-concern-mich/95897544/>>.
18. Executive Order No. 2013-7 (creating Mental Health Diversion Council).
19. *10,000 fewer Michigan prisoners*, p 21.