

The Justice Center’s Policy Options for Michigan: An Analysis by the Citizens Alliance on Prisons and Public Spending

SUMMARY

Justice Center Proposal	CAPPS Alternative
Applies only to people sentenced after April 1, 2009	Apply to current prisoners
Presumes release on minimum, except for people whose offenses carry a maximum of life or any term	Apply to all offenses
Release may be delayed up to 120% of the minimum for “failure to complete required programs”	Apply only if failure to complete is willful on prisoner’s part, not result of program unavailability
Release may be delayed up to 120% of the minimum for institutional misconduct	Establish amount of delay justified by each type of misconduct; limit age of citations
Requires release of everyone not serving for a life-maximum offense at 120% of the minimum, unless they are at very high risk of re-offending	Use set time periods for permissible delay in release beyond minimum; percentage makes actual amount of additional time served vary with length of minimum.
Limits to 9 months the time that can be served for first parole revocation for a technical violation	Only return technical parole violators who pose a demonstrated threat to public safety
Prohibit “max outs.” Require even high risk offenders to be released at least 9 months before completing their maximum sentence so they get a period of parole supervision	Agree
Continue current parole board efforts to increase parole grant rate	Agree
Not mentioned	Restore opportunity for prisoners to earn modest amounts of sentence credit for program participation and institutional conduct
Not mentioned	Restore Michigan’s Sentencing Commission so the impact of sentencing guidelines can be monitored and appropriate adjustments can be made



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On January 22, 2009, the Council of State Governments Justice Center presented a series of policy options for Michigan criminal justice, including several designed to reduce spending on corrections. While the Justice Center options provide a useful starting point for discussion, they are modest in their vision and their impact. Significant concerns exist about how some of the options are structured and about additional options that have not been addressed. The Citizens Alliance on Prisons and Public Spending (CAPPS) suggests that variations on these options could produce much greater savings in a much shorter time without jeopardizing public safety.

Analysis

Justice Center Option 3A – Release at the Minimum

The first option for reducing corrections spending is summarized as:

“Ensure that offenders in prison serve 100-120% of their court-imposed minimum sentence. (*Effective for those sentenced after April 1, 2009.*)”

However, everyone whose crime was committed since truth-in-sentencing became fully effective *already* serves at least 100% of their minimum. Moreover, mandatory release after service of 120% of the minimum would not apply to a substantial proportion of prisoners. In more detail, this option is:

Apply a presumption of release after service of the minimum sentence to prisoners sentenced after April 1, 2009, with two exceptions. The presumption would not apply to people serving for crimes with statutory maximum penalties of life or any term, or to people who score very high risk of re-offending on a validated risk assessment instrument.

In cases subject to the presumption, release may be delayed for failure to complete required programs or for institutional misconduct, but would be mandatory at 120% of the minimum.

The parole board would retain complete discretion to deny parole up to the maximum sentence to people serving for life-maximum offenses (regardless of their actual sentence, program participation, lack of institutional misconduct or low re-offense risk) and to those who score very high risk of re-offending.

Option 3A takes two critical steps forward. It recognizes the need to place statutory limits on the parole board's exercise of discretion. It also begins to recognize that the court-imposed minimum sentence should determine the time a person serves unless there is post-sentencing conduct that reasonably justifies denying release. However, this option raises a number of questions and concerns.

1. There is no apparent justification for applying this option only to people sentenced after April 1, 2009.

Since the option involves only the parole of people who have served their minimum terms and in no way changes the court-imposed sentence, there is no legal impediment to implementing it immediately. The projections indicate that in nearly three years, this option would produce a population reduction of only 515 people. There are currently 9,000 people who have served their court-imposed minimum sentences but been denied parole. Applying option 3A to all prisoners who are now parole-eligible would presumably produce a significant immediate impact.

In addition, the purpose of this option is to constrain the exercise of inordinately broad parole board discretion. If these constraints are in fact needed, they should be implemented sooner rather than later. No explanation for failing to apply option 3A to current prisoners appears in The Justice Center report.

2. The exclusion of people serving for life-maximum offenses, regardless of their actual sentences, is unwarranted.

Before assessing this proposal, three key points should be clarified.

A. The exclusion is not only of people who are serving life sentences but of everyone whose offense carries a statutory maximum penalty up to life. Because Michigan did not revise its penal code as many states did, it still permits the judge to impose life or any term of years for many serious offenses.

- Life-maximum offenses include second-degree murder, assault with intent to murder, first-degree criminal sexual conduct, armed robbery, kidnapping and drug offenses involving 1,000 grams.
- The fact that a statute authorizes any penalty up to life in prison does not require the judge to impose a life term. In 2005, more than 15,000 people were serving for these offenses. Only 1,673 were actually serving parolable life terms. Thousands were serving minimum sentences of 10 years or less.
- Life-maximum offenses also include convictions for being an habitual offender.

- The prosecutor can choose to charge a defendant as a fourth-time habitual offender if the person's current offense carries a maximum penalty of at least five years and the person has three or more prior convictions. The judge can then impose a sentence of life or any term.
- There are no limits on the age or nature of the prior offenses.
- Under a recent Michigan Supreme Court ruling, the three prior convictions can all have arisen from the same criminal transaction. For example, a 17-year old is placed on probation for a series of criminal acts: stealing a lawn mower from his neighbor's open garage, taking the neighbor's car for a joyride and being in possession of drugs when arrested. Decades later, he is convicted of carrying a concealed weapon, which carries a maximum penalty of five years. If the prosecutor chooses to add an habitual offender charge, all three prior convictions will count, making the defendant a fourth offender. The statutory maximum sentence will be life in prison, even though the court might only impose another term of probation.

B. Because most offenses subject to life or any term of years are crimes against people and the parole board is reluctant to grant release in those cases, a large share of the prisoners currently being denied parole are serving for life-maximum offenses.

- Parole grant rates vary widely by offense, ranging from a high of 79.7% for drug offenders to a low of 15.4% for sex offenders.
- Under current parole guidelines, people who score low risk for reoffending (less than five percent chance of arrest for an assaultive offense if released) are supposed to be released unless the board has "substantial and compelling reasons to deny parole."
 - Nonetheless, in 2006, the board denied parole to nearly 45 percent of all the low risk cases they considered – almost 3,000 people.
 - Of the low risk people denied, 90 percent had committed a sex offense or other crime against a person.
- No other state gives a parole board such broad discretion in determining the length of time to be served. Prisoners cannot appeal parole board decisions and there is no other mechanism for enforcing constraints on the board's exercise of discretion.

C. Excluding life-maximum offenses from the presumption of release at the minimum is unnecessary for public safety because many of the people serving for life maximum offenses present the lowest risk for reoffending.

- Recidivism rates also vary widely by offense, but not in the manner people often believe. National and Michigan data show that reoffense rates are highest for crimes that are economically motivated and lowest for some crimes against persons.

- Fewer than eight percent of Michigan sex and homicide offenders return to prison within four years with a new sentence for any offense. They rarely return for a new sex offense or homicide.
- The rate of returns with new sentences for people convicted of burglary and larceny exceeds 24 percent.
- Length of time served bears no relationship to recidivism rates. A substantial body of research indicates that keeping people incarcerated longer does not reduce their likelihood of re-offending. It may actually decrease chances for a successful transition back to communities and families.

As proposed, this option would perpetuate the current situation in which the parole board has complete discretion to deny release, for many years and without recourse, to thousands of low-risk people based on their offense. *

There is no functional reason for enforcing the court-imposed minimum for some offenses and not others. Regardless of the offense, the minimum sentence is selected in accordance with legislative sentencing guidelines that take into account the nature and details of the offense and the offender's prior record. Victims have an opportunity to give input at the sentencing and prosecutors can appeal sentences that depart from the guidelines. Denying parole is not necessary to ensure that assaultive and sex offenders are punished more severely than drug and property offenders. Releasing people who have served their minimum terms is not an "early release" provision that is logically related to the offense.

Moreover, the charge and/or the minimum sentence often reflect plea negotiations. For example, armed robbery carries a statutory maximum of life or any term. In a case where the prosecutor believes a 5-15 year sentence is appropriate, the plea may be to unarmed robbery, which has a 15-year maximum, or to armed robbery with a sentence agreement for 5-15 years. Option 3A would presume release at five years or permit parole denial until 14 years and three months, depending on how the plea was negotiated.

Excluding life-maximum offenses from the enforcement of the minimum sentence allows the parole board to continue to usurp the roles of legislators, judges, prosecutors and defense attorneys in thousands of cases. It could ultimately affect conviction patterns by adding another complex consideration to plea negotiations. For one-third of all prisoners serving indeterminate sentences, it negates the promise that they can earn their release through good institutional conduct and program participation. It would also perpetuate the large disparity in length of stay for assaultive and sex offenders between the Michigan and national averages.

* The option does not discuss the application of current parole guidelines or any means of enforcing the existing presumption of parole for people who score low risk, absent "substantial and compelling reasons" to deny release.

Finally, failing to apply this option to life-maximum offenses misses an opportunity to substantially reduce the prisoner population and, therefore, corrections costs. With 70 percent of prisoners already being released when first eligible, it is the people currently being held beyond their minimums who must be affected for significant savings to occur. A disproportionate share of these people are serving for life-maximum offenses. It is likely that the largest pool of people whose length of stay is out of sync with national norms are the very people excluded from option 3a.

3. The selection of 20 percent as the permissible “mark-up” beyond the minimum sentence raises several questions.

Use of percentage. Employing a percentage rather than a fixed amount of time means that there could be substantial variations depending on the length of the minimum sentence. Twenty percent of a one-year minimum is 2.4 months; twenty percent of a ten-year minimum is two years. If specific behavior justifies delay in release, it should justify the same amount of delay in every case, to the extent possible.

Failure to complete treatment. Because the options are stated in general terms, the details are unclear. Option 3A states that people can be held up to 120 percent of their minimum if “there is a failure to complete required programs that are determined to reduce an offender’s risk to public safety.” The vast majority of such “failures” are currently attributable to the Department of Corrections’ inability to provide timely access to treatment programs. Some prisoners are unable to participate because of language barriers, mental illness or developmental disability. Substantial reforms in the delivery of treatment programs have been made. However, there are still nearly 500 people on waiting lists who are within six months of their earliest release dates.

Prisoners who are willing to complete programs should not be penalized for circumstances beyond their control. Treatment can, of course, be required as a condition of parole. This exception should be limited to people who willfully refuse to complete treatment or who are in treatment at the time they reach their first eligibility date and need fewer than six months to complete it. If the definition of required programs is expanded to include academic or vocational programs proven to reduce risk, care must be taken to ensure timely access to these programs as well.

Institutional misconduct. The lack of detail also leaves unclear the number, nature and age of misconducts that might cause a 20 percent increase in time served past the minimum. An administrative rule currently gives guidance to the parole board about the amount of “disciplinary time” to be added to the minimum sentence for prison rule infractions. The amounts vary, depending on the infraction, but the most common ones carry from seven to 35 days. The consequences of the Justice Center proposal may vary widely, depending on whether if the board is required to apply the “disciplinary time” amounts spelled out in the administrative rule or is free to use any misconduct history, no matter how old or how minor, as a reason to deny release.

It should be noted that the most common misconducts are simply rule infractions like being out of place, disobeying a direct order or insolence. It is not uncommon for people to accumulate misconducts early in their sentence, before they adjust to institutional living. A broad range of punishments may be imposed at the time of the misconduct. Serious or numerous misconducts may increase a person's security classification. Thus, misconduct is penalized independently of parole denial. Also, the number and nature of misconducts are scored in risk assessment instruments. To the extent that misconduct predicts re-offense risk, it is considered by the board in that context.

Justice Center Option 3B – 9-Month Limit on Parole Revocation

The second option would limit to nine months the amount of time a technical parole violator can be required to serve the first time parole is revoked. This is a positive step. CAPPs has made similar proposals in the past. However, although there are currently 3,000 people in prison who were returned for technical parole violations, this option reduces the population by less than 300 in any given year. This may be because the option only applies to paroles revoked after April 1, 2009, and to people serving time for their first revocation and/or because only a small proportion of technical violators are kept much longer than nine months.

More to the point, this option does not confront the fundamental question of whether people should be returned to prison at all for non-criminal violations of supervision rules or for conduct that does not present a danger to the public. While graduated responses to violations are appropriate, returning someone to prison is expensive, disruptive and highly punitive. It is unclear what is gained from a nine-month prison stay as opposed to a five-month stay as opposed to weekends in jail or other unpleasant consequences. Conversely, if a parolee is truly dangerous, an automatic release at nine months may be inappropriate.

Justice Center Option 3C – Preventing “Max Outs”

This option would prohibit the board from denying release until the person has completed every day of his or her maximum sentence, then release the person into the community without any support or supervision. It would require at least nine months of community supervision on parole. More than 1,000 people released in 2007 were “maxed out.” This would be a very positive change.

Justice Center Option 3D – Continuing Current Parole Board Measures

This option would simply continue current parole board actions designed to reduce the number of prisoners who are serving past their earliest release date. Clearly, any steps the board takes on its own should be encouraged. However, this option would presumably be superseded if option 3A was given immediate effect.

Since at least 2004, the parole board has periodically engaged in a continuance review project that involves reconsidering people who have been denied parole, ahead of their scheduled “next action” date, in order to alleviate the pressure on bedspace. Notably, every aspect of

options 3A, B or C could be implemented by the parole board at any time, as a matter of practice, without statutory authorization.

The Failure to Address Other Cost-Saving Options

Restore Earned Credits. Nearly every state permits prisoners to earn some amount of credit against their sentences for good conduct, satisfactory work performance, and/or participation in academic, vocational and treatment programs. Some states have increased the amount of credits they award as a method of controlling their prison populations. If 10,000 Michigan prisoners earned five days of credit per month and were then released on their minimums, the time saved for each year served would equal 1,644 beds.

Michigan used to permit prisoners to earn up to seven days a month in disciplinary credits, but that was eliminated in 1998 under the guise of “truth-in-sentencing”. Everyone sentenced since then serves every day of their minimum sentence. People in Michigan’s 83 county jails still earn “sheriffs’ good time” (one day of credit for each six days served), which is an important means of controlling jail populations.

Earned credits reinforce positive achievements, but they only make someone eligible for parole sooner; they do not require release. Awarding modest amounts of earned credit does not make sentences any less honest, especially if the possibility of earning credit is stated on the record at the sentencing hearing. The primary effect of eliminating disciplinary credits for state prisoners was to increase the length of time served without any demonstrated benefit to public safety.

Restore Sentencing Commission. When the sentencing guidelines were adopted in 1998, the statute required the sentencing commission to periodically review their impact. With the abolition of that commission in 2002, no systematic assessments occur. Restoration of the sentencing commission would permit a comprehensive examination of the cost-effectiveness of both community-based and prison sentences. It could help ensure that drug and property offenders are not incarcerated unnecessarily and that sentences for crimes against people are proportionate to the offense.

Improve Indigent Defense Funding. The chronic underfunding of Michigan’s public defense system has a direct impact on prison costs. Indigent defense counsel who are inadequately trained, lack critical resources and have inordinately high caseloads cannot provide the representation necessary to ensure that the right people are convicted and that sentences are appropriate. Convicting the wrong person is not only unjust to the defendant and a threat to public safety, it can mean spending tens of thousands of dollars on unwarranted incarceration and millions on lawsuits. Convictions on unduly high charges are less dramatic but also costly and unjust. Perhaps most common is the inability to advocate effectively for community-based alternatives to prison or for prison sentences at the lower end of the sentencing guidelines range.

Justice Center Strategies 1 and 2 – Deterring Crime and Lowering Recidivism

These strategies address deterring crime and lower recidivism. While no attempt will be made to comment on them in detail, several observations may be useful.

In regard to deterring crime, The Justice Center notes that, despite having the highest violent crime rate in the Great Lakes region, Michigan has the fewest local law enforcement personnel. The Michigan Commission on Law Enforcement Standards reports a loss of 1,587 law enforcement positions from 2001-2007. This is a direct result of a decline in state revenue sharing at the same time that Corrections' share of General Fund spending increased. CAPPs estimates that it would require virtually all of the \$90.7 million to be saved on corrections spending in 2015 just to bring the number of police officers to the 2001 level.

In regard to lowering recidivism, The Justice Center fails to address several critical needs. These include:

- the availability of community-based treatment services for mental health and substance abuse,
- the need to maintain and increase treatment programs, academic and vocational education, and family support for prisoners,
- the need to increase potential job opportunities for probationers and parolees by eliminating legal barriers to the employment of people with felony records that do not contribute to public safety.



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