



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: MICHIGAN

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Prison-Release Discretion and Prison Population Size

State Report: Michigan

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This report is part of a larger *Prison Release: Degrees of Indeterminacy Project* funded by Arnold Ventures. For other publications from the project, including additional state-specific reports, go to the Robina Institute of Criminal Law and Criminal Justice’s website at <https://robinainstitute.umn.edu>.



Definitions and Concepts

“Indeterminacy” means “unpredictability of time served.” Once we know the terms of a particular judicial sentence, can we say with confidence how much time the defendant will actually serve before the sentence’s expiration? If actual time-that-will-be-served is highly unpredictable based on the pronounced judicial sentence, then the sentence is highly indeterminate. If actual time-to-be-served is knowable within a relatively small range of possibility, then the sentence has a low degree of indeterminacy—or, we might say—it has a high degree of determinacy. “Determinacy” means “predictability of time served” at the time of judicial sentencing.

Scaling up to the systemwide level, the project explores the degree to which prison population size in each state is placed under the jurisdiction of decision makers who exercise time-served discretion after judicial sentences have been finalized. Higher degrees of indeterminacy across hundreds and thousands of individual sentences add up to greater control over prison population size by “back-end” agencies such as parole boards and departments of correction. These structural features vary enormously across U.S. jurisdictions.

Note on the project’s rankings of “degrees of indeterminacy”

To compare the degrees of indeterminacy in individual prison sentences or across the prison-sentencing systems of different jurisdictions, we use a qualitative ranking framework based on our cumulative learning while preparing the project’s 52 jurisdiction-specific reports. To avoid false precision, we place all systems within one of five categories (see table below).

Each of the five categories can be expressed in alternative terms: either the *degree of indeterminacy* or *degree of determinacy* thought to be present.

The ranking scale is subjective, although the reasoning that supports our judgments is laid out in each report. Ultimately, the rankings indicate only the rough position of specific prison-sentencing systems vis-à-vis each other. No two American prison-release systems are alike and all are highly complex, so nuanced comparative analysis requires closer inspection.

Rankings of “Degrees of Indeterminacy”

Ranking	Alternative terminology	
1	Extremely-high indeterminacy	Extremely-low determinacy
2	High indeterminacy	Low determinacy
3	Moderate indeterminacy	Moderate determinacy
4	Low indeterminacy	High determinacy
5	Extremely-low indeterminacy	Extremely-high determinacy

For individual classes of sentences, we use the following benchmarks for our classifications of higher versus lower degrees of indeterminacy:

Benchmarks for rankings of “degrees of indeterminacy”

- *Extremely high indeterminacy:* >80-100 percent indeterminacy (first prospect of release at 0-19.99 percent of judicial maximum)
- *High indeterminacy:* >60-80 percent indeterminacy (first prospect of release at 20-39.99 percent of judicial maximum)
- *Moderate indeterminacy:* >40-60 percent indeterminacy (first prospect of release at 40-59.99 percent of judicial maximum)
- *Low indeterminacy:* >20-40 percent indeterminacy (first prospect of release at 60-79.99 percent of judicial maximum)
- *Extremely low indeterminacy:* 0-20 percent indeterminacy (first prospect of release at 80-100 percent of judicial maximum)

Classifying entire sentencing systems on our five-point scale is an imprecise exercise largely because all jurisdictions have multiple different sentence classes with varying degrees of indeterminacy attached to each class. Prisoners who are present within a system at any moment in time represent a broad mixture of sentence classes, and this mixture is constantly changing with releases and new admissions. Thus, our systemwide rankings cannot reflect mathematical precision.

In this project, we use the term “population-multiplier potential” (or PMP) to express the amount of influence over prison population size that is ceded by law to back-end decision makers such as parole boards and prison officials. To give a simplified example, if all prisoners in a hypothetical jurisdiction were eligible for parole release after serving 25 percent of their maximum sentences, then the PMP attached to the parole board’s release decisions would be 4:1. That is, if the parole board were to deny release to all prisoners for as long as legally possible (a *longest-time-served scenario*), the resulting prison population would be four times as large as it would be if the board were to release all prisoners at their earliest allowable release dates (a *shortest-time-served scenario*).

Most states have several different classes of sentences, each with their own rules of prison release. Each sentence class carries its own PMP. Application of the PMP measure to entire prison systems is, at best, an approximation that requires the proration of multiple classes of sentences and their PMPs according to the numbers and percentages of prisoners who have received those different classes of sentence.

Prison-Release Discretion and Prison Population Size

State Report: Michigan¹

Executive Summary

We characterize the Michigan prison-sentencing system as one with a *high degree of indeterminacy* (see pp. iv-v), but it is a difficult system to describe with precision. Michigan judges have considerably less power than judges in other states to select judicial maximum sentences, which are fixed at high severity levels for first offenders, with allowances to go up but not down for some repeat offenders. On the other hand, Michigan judges have an unusual degree of authority to set minimum terms, which normally can be placed at very low levels. Therefore, the degree of indeterminacy that carries over from the “front end” to the “back end” of the prison-sentencing system is within judicial control to an unusual degree.

There is no system of good-time, earned-time, or similar credits that may be accumulated by prisoners as a discount against their judicially pronounced sentences in Michigan. Because of this vacuum, the parole board holds unilateral release and release-denial authority within the range of possibilities framed by judicial sentences.

Compared with most states, judges have little power to place hard limits on prison population size through restraint in the selection of maximum terms. The system actor with greatest power to push the prison-sentencing system in the direction of lenity is the parole board.

Terminology note

This report will refer to the Michigan Parole Board as the “parole board.” The Michigan Department of Corrections will be referred to as the “department of corrections” or “DOC.”

¹ This report was prepared with support from Arnold Ventures. The views expressed are the authors’ and do not necessarily reflect the views of Arnold Ventures. For a broad overview of the law of parole release and supervision in Nebraska, see Alexis Lee Watts, Edward R. Rhine, Catherine A. McDonough, & Mike McBride, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Michigan* (Robina Institute of Criminal Law and Criminal Justice, 2017) (including surveys of parole-release criteria, procedures for release decisions, laws relating to parole supervision and revocation, and the institutional attributes of the parole board).

Introduction

Michigan's prison-rate history, 1972 to 2020

At yearend 2020, Michigan's prison rate was 337 per 100,000 general population, with a prison population of 33,617.² Michigan's prison rate was 21st largest among all states.

Figure 1. Prison Rate Change in Michigan and (Unweighted) Average Among All States, 1972 to 2020

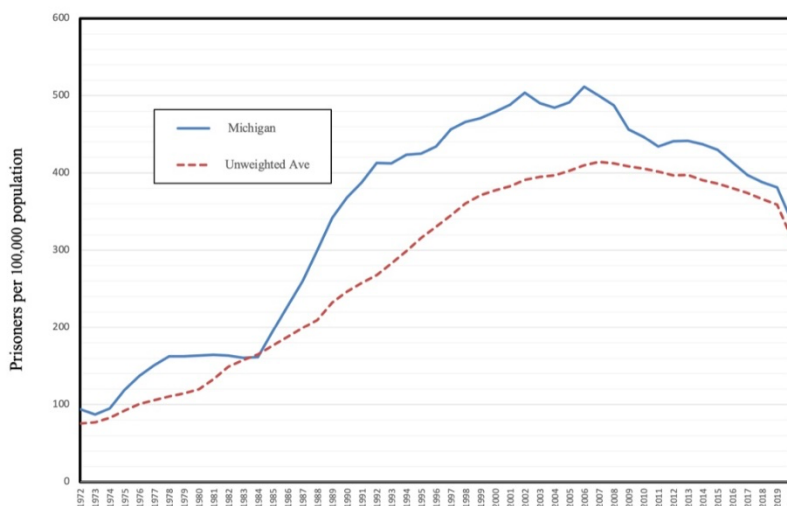
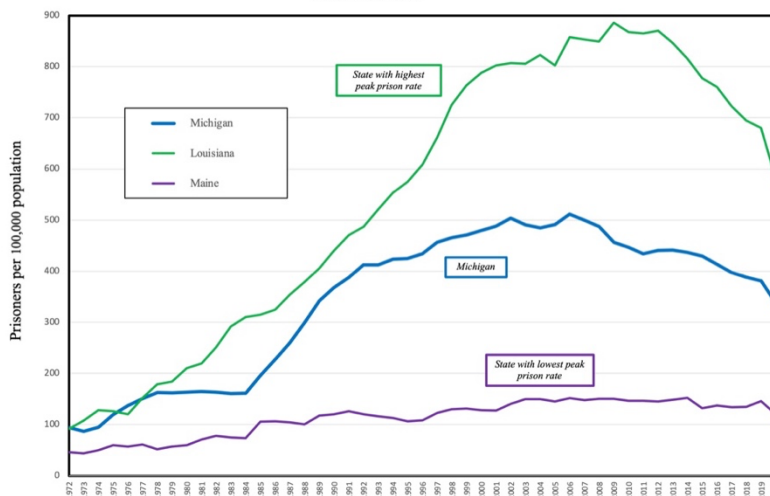


Figure 2. Prison Rate Change in Michigan, Louisiana, and Maine, 1972 to 2020



Sources: Timothy J. Flanagan, Kathleen Maguire & Michael J. Hindelang, *Sourcebook of Criminal Justice Statistics, 1990*, at 605 table 6.56, Rate (per 100,000 resident population) of sentenced prisoners under jurisdiction of State and Federal correctional authorities on December 31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991) (for 1972-1977); E. Ann Carson, *Imprisonment rate of sentenced prisoners under the jurisdiction of state or federal correctional authorities per 100,000 U.S. residents, December 31, 1978-2016* (Bureau of Justice Statistics, Corrections

² E. Ann Carson, *Prisoners in 2020-Statistical Tables* (Bureau of Justice Statistics, 2021), at 11 table 4, 15 table 7.

Statistical Analysis Tool) (for 1978-2016), at <https://www.bjs.gov/index.cfm?ty=nps>; E. Ann Carson, *Prisoners in 2018* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2017); E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2018); E. Ann Carson, *Prisoners in 2020-Statistical Tables* (Bureau of Justice Statistics, 2021), at 15-16 table 7 (for 2019-2020).

Michigan's peak prison rate during the national prison buildup period was 512 per 100,000 in at yearend 2006. From 2006 to 2020, Michigan's prison rate fell to 337 per 100,000, for a net reduction of -175 per 100,000. Among all 50 states, this was the 13th largest prison-rate drop, measured from each state's peak rate (in varying years) through 2020.

As shown in Figure 1, Michigan's prison-rate growth outpaced the average state from 1984 through 1992. During this period, Michigan was in the very "top" tier of high-growth jurisdictions. By yearend 1992, Michigan's prison rate was 5th highest among all states. At the time, Michigan's prison rate was higher than in Alabama, Florida, Mississippi, and Texas.

From 1992 through 2006, Michigan's prison rate continued to climb in most years, but the state's overall growth trajectory slowed to a pace that roughly equaled the average state's year-by-year growth over the same period.³

Figures 1 and 2 span two important periods in American criminal-justice history. From 1972-2007, the United States saw 35 years of uninterrupted growth in the nationwide aggregated prison rate. This might be called the Great Prison Buildup. Since 2007, national prison rates have been falling. From 2007 through yearend 2019 (prior to the COVID pandemic), the average drop in states' prison rates was about 1.2 percent per year, with much variation across individual states.

The COVID period

We view American prison rates following the arrival of the COVID pandemic in March 2020 as discontinuous with earlier rates and trends. Whatever factors were at work to determine state prison rates in the "before times," the pandemic introduced a major new causal force that, at least temporarily, diverted the course of prison-rate change nationwide. As of this writing, it is unclear how long COVID's effects on American prison rates will last.

In calendar year 2020, most states saw unusually large drops in their prison rates. Prison rates fell in 49 states, the District of Columbia, and the federal system. The aggregate 50-state prison rate for the U.S. dropped by about 15 percent in a single year. From yearend 2019 to yearend

³ For one study of this period, see Citizens Alliance on Prisons and Public Spending, *The high cost of denying parole: an analysis of prisoners eligible for release* (2003), at 5-6 (recounting change in composition of parole board in late 1992 that brought about a drop in release rates from 68 percent to 48 percent); *id.* at 1 (reporting that 16.5 percent of the total Michigan prison population in 1991 were people who were eligible for parole but had not been released—a group that had increased to 34.5 percent by 2003).

2020, the (unweighted) average state prison rate fell from 359 to 308 prisoners per 100,000 general population, for an average incremental downturn of -51 per 100,000.⁴ We believe this was the largest one-year decline in state prison rates in American history.⁵

In calendar year 2021, U.S. prison rates did not continue to descend at the same dramatic pace. Data collected by the Vera Institute indicate that the aggregate 50-state prison population fell by about 1.8 percent from January to December 2021. Prison populations actually rose in 19 states.⁶

Given the focus of this project and the unprecedented size of prison-rate change during COVID's first year, it is relevant to ask whether indeterminacy in American prison sentences played a consequential role in events. An adequate history cannot yet be written, but considerable data have already been assembled.

Nationwide, COVID-driven changes in prison-release practices were not the main driving force of prison population shrinkage from early 2020 through the end of 2021. This is not to say that there was no expansion of prison release during the pandemic. Thirty-six states and the federal government did at least *something* to expedite releases, each jurisdiction choosing from a grab bag of different strategies—e.g., expedited parole release, loosened release criteria, increased or restored credit awards, early release of prisoners already close to their mandatory release dates, expanded compassionate release for the elderly or medically infirm, increases in clemency grants, invocation of overcrowding emergency provisions, and court orders. Such steps did not yield large numbers of “COVID releases” in most states, however, and many COVID releases were only slightly earlier than normal.⁷

⁴ E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 1, 7 table 2. Across 2020, prison rates fell in every state except Alaska, where the rate increased by 1.2 percent.

⁵ Historical sources show no one-year decline in average state prison rates that approaches -51 per 100,000. See Margaret Werner Cahalan, *United States Historical Correctional Statistics, 1850-1984* (Bureau of Justice Statistics, 1986); Margaret Cahalan, *Trends in Incarceration in the United States since 1880: A Summary of Reported Rates and the Distribution of Offenses*, 25 Crime & Delinq. 9 (1979).

⁶ Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2 (reporting a decrease of 15.8 percent in the state prison population overall in 2020 followed by a decrease of 1.8 percent in 2021).

⁷ For a survey of state releasing practices in response to COVID, see Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022) (finding that 24 states released 0 to 150 prisoners in response to the pandemic from March 2020 through December 2021, while only five states and the federal system released more than 3,000 prisoners). The effects on annual imprisonment rates were even less than the absolute numbers of releases would suggest. Mitchell et al. found that one of the most common criteria applied by states for COVID release decisions was “short time left on sentence.” Thus, some of the accelerated COVID releases in 2020 and 2021 were of prisoners who would have been released in the same year anyway, albeit somewhat later.

The available data suggest that the 2020 plunge in state prison rates was primarily due to reduced *admissions* caused by a number of factors, including fewer arrests, fewer new court commitments, fewer revocations from community supervision, and some prisons' embargoes on receiving prisoners from local jails. The number of all state prison admissions in the U.S. dropped by an astonishing 40 percent in a single year from 2019 to 2020.⁸

The COVID period in Michigan

In a separate study, the Robina Institute reported 500 releases in Michigan from March 2020 through December 2021 that may have been accelerated in response to the pandemic.⁹ This number was the equivalent of about one percent of Michigan pre-COVID prison population (at yearend 2019). As reported by the Robina Institute:

Although the Michigan Department of Corrections (MDOC) affirmed it had no authority to release people before their earliest release date, MDOC did state that the parole board was working to expedite paroles for eligible people in prison. For example, MDOC was requesting that prosecutors sign waivers allowing immediate release, which removed the 28-day waiting period after parole decisions. Nonviolent people who were 60 years or older and had health issues were prioritized for parole consideration. According to the MDOC legislative liaison, Kyle Kaminski, from March

⁸ See E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 17, 17 table 8 (admissions fell from 530,905 to 319,346). There was no comparable upswing in prison releases. Total releases from state prisons actually fell in 2020, dropping 9.8 percent from the previous year. *Id.* at 19 table 9 (nationwide releases fell from 557,309 to 502,723). Only five states released five percent or more of prisoners in 2020 than they had released in 2019: Arizona (6.9 percent), Maine (30.9 percent), Nebraska (5.9 percent), New Jersey (19.7 percent), and Wyoming (8.0 percent). For a focus on patterns of parole release in 2020, see Tiana Herring, *Parole boards approved fewer releases in 2020 than in 2019, despite the raging pandemic* (Prison Policy Initiative, February 3, 2021), at <https://www.prisonpolicy.org/blog/2021/02/03/parolegrants/> (surveying data from 13 states; finding that total numbers of parole releases fell in nine states; among all 13 states, the average drop in numbers of parole releases from yearend 2019 to yearend 2020 was 11.3 percent). See also Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022) (concluding that “the greatest impact on prison population overall occurred on the admissions side of the equation.”). From March 2020 through December 2021, Mitchell et al. estimate a total of 47,967 “non-routine COVID releases” from state prisons nationwide. Over a similar period (January 2020 to December 2021), Vera Institute of Justice (Vera) reported a drop in the aggregate state prison population of 217,989 people, from 1,259,977 to 1,041,988. Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2.

⁹ Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 34 Appendix A.

2020 through May 2020 an additional 500 paroles were approved, as compared to the same period during 2019.¹⁰

In calendar year 2020, Michigan's prison rate fell from 381 to 337 per 100,000—a one-year decline of -44 per 100,000. This was the 35th largest one-year drop reported among all 50 states for that year (tied with Kansas).¹¹ Measured in percentage terms, it was an 11.5-percent reduction in the state's prison rate. The state's total prison population fell by 4,436 people, from 38,053 to 33,617.¹²

Falling admissions were the dominant factor in Michigan's 2020 prison rate drop rather than increasing releases. The number of prison admissions in the state dropped by 43.9 percent in 2020 compared with the previous year (from 10,761 to 6,038). Total releases in 2020 fell by 8.6 percent over 2019 (from 11,470 to 10,478).¹³

I. General Rules of Prison Release in Michigan

A. General rules of parole-release eligibility

1.1. General rules of first release eligibility

Sentencing judges in Michigan have limited discretion to decide what maximum possible prison stays their prison sentences will carry. By statute, fixed maximum terms must be included in most judicial sentences.¹⁴ (This might be called “mandatory maximum sentences.”) In cases involving repeat felony offenders, when prosecutors seek habitual offender enhancements,¹⁵

¹⁰ Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 72 Appendix E (footnote omitted).

¹¹ The largest single-state drop from yearend 2019 to yearend 2020 was in Kentucky, from 515 to 414 per 100,000. E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 15 table 7. By yearend 2021, Michigan's prison population had fallen by 1,431 additional prisoners to a total of 32,186—a much smaller decrease than in the first year of the COVID period. E. Ann Carson, *Prisoners in 2021 - Statistical Tables* (Bureau of Justice Statistics, 2022), at 11 table 4.

¹² *Id.*, at 11 table 4, 15 table 7.

¹³ *Id.*, at 17 table 8, 19 table 9.

¹⁴ See, e.g., Mich. Comp. Laws § 750.110(1) (providing the penalty for breaking and entering as “punishable by imprisonment for not more than 10 years”); Mich. Comp. Laws § 750.321 (providing the penalty for manslaughter as “punishable by imprisonment . . . [for] not more than 15 years”); Mich. Comp. Laws § 750.530 (providing the penalty for robbery as “punishable by imprisonment for not more than 15 years”).

¹⁵ The statute requiring that prosecutors must seek an enhanced sentence is Mich. Comp. Laws § 769.13. The prosecutor may file a notice to seek enhancement following conviction or guilty plea under Mich. Comp. Laws § 769.13(3). The existence of alleged prior convictions is determined by the court at sentencing or a separate hearing prior to sentencing under Mich. Comp. Laws § 769.13(5),(6).

judges have statutory discretion to impose higher maximum terms. For some habitual offenders, maximum terms of 25 years or life are statutorily required.¹⁶

In contrast, Michigan judges have a great deal of discretion to choose what *minimum* terms to impose in most individual cases. Normally, judicial minimum terms can be as short as the judge elects, but may not exceed two-thirds of the maximum sentence.¹⁷

To describe the configuration of time-served discretion in Michigan, one must first consider the state's use of mandatory maximum terms (for most cases) and mandatory floors on maximum terms (in many others). Within these high ceilings, judicial discretion to choose low minimum terms allows for an extremely high degree of indeterminacy in individual sentences, but sentencing courts also have a great deal of power to push the degree of indeterminacy to much lower levels in individual cases.

Illustration. Imagine a case in which, by statute, the sentencing court must impose a maximum sentence no lower than 15 years. Imagine further that the judge has decided to impose a 15-year sentence.¹⁸ Despite the court's limited control on the maximum term, the court can choose any minimum sentence up to 10 years. For example, a 1-to-15-year sentence would be just as permissible as a 10-to-15-year sentence. A 1-to-15-year sentence would be 7 percent

¹⁶ See Mich. Comp. Laws § 769.12(1)(a) (providing that if a prisoner has been convicted of 3 or more felonies or felony attempts and is subsequently convicted of a felony serious crime or conspiracy to commit a serious crime with one prior conviction of a “listed prior felon[y],” then the prisoner shall be sentenced “to imprisonment for not less than 25 years”). The “listed prior felonies” are: first- or second-degree fleeing; operating a motor vehicle while under the influence causing the death of another person; controlled substances conviction punishable by imprisonment for more than 4 years; first degree arson; felonious assault; assault with intent to commit murder; assault with intent to do great bodily harm less than murder; torture; assault with intent to maim; assault with intent to commit felony; assault with intent to rob and steal; assault with intent to rob and steal armed; attempt to murder; first- or second-degree home invasion; first- or second-degree child abuse; first- or second-degree vulnerable adult abuse; solicitation of murder or other felony; assault of an employee or other custodian of a place of confinement through the use of violence, violent threats, or dangerous weapons or breaking the place of confinement; armed with intent to use dangerous or deadly weapon or instrument; concealed carry without a license; intentional discharge of a firearm from a motor vehicle; intentional discharge of firearm at dwelling or occupied structure; intentional discharge of firearm at emergency or law enforcement vehicle; second degree murder; manslaughter; intentional discharge of firearm pointed or aimed at another resulting in death; kidnapping; prisoner taking another as hostage; leading, taking, carrying away, decoying, or enticing away child under 14; mayhem; stalking of a victim under the age of 18 if 5 or more years older than the victim; aggravated stalking; first- and second-degree fleeing and eluding; first-, second-, or third-degree criminal sexual conduct; assault with intent to commit criminal sexual conduct; armed robbery; carjacking; robbery; a second or subsequent violation of possession of firearm when committing a felony or attempted felony; and, rioting at a state correctional facility.

¹⁷ Mich. Comp. Laws § 769.34(2)(b).

¹⁸ For first offenders, maximum terms are mandated at a specific amount—15 years in this case. In cases filed in which habitual offender enhancements have been filed by prosecutors, judges would have options to impose even higher maximum terms, but never lower than 15 years.

determinate and 93 percent indeterminate. A 10-to-15-year sentence would be 67 percent determinate and 33 percent indeterminate.

The statutory machinery that gives rise to these scenarios has many moving parts. Michigan is one of 14 states that do not classify offenses according to a regular grading scheme.¹⁹ Instead, each statutory provision defining an offense sets out its own authorized punishment.²⁰

Further, the law governing the form of judicial prison sentences in Michigan is more complex than in most states. For one thing, the rules vary depending on whether the defendant is a first-time felony offender or has one or more prior felony convictions.²¹

For defendants convicted of a first felony offense, the maximum term of their sentences must always be the statutory maximum for their offenses of conviction. In contrast with most states, sentencing judges in cases involving first-time felony offenders have no discretion to impose a judicial maximum term that is shorter than the statutory maximum.²²

For felony defendants with one or more prior felony convictions, however, sentencing courts have the power to select judicial maximum sentences within statutorily allowable ranges:

For defendants convicted of a felony with one prior felony conviction, sentencing courts are given discretion to impose a judicial maximum term up to 50 percent longer than the statutory maximum term for a first offender, but never shorter than the required maximum for a first offender.²³

For defendants convicted of a felony who have two prior felony convictions, sentencing courts are given discretion to impose a judicial maximum term up to

¹⁹ American Law Institute, *Model Penal Code: Sentencing* (forthcoming 2023), Section 6.01, Reporters' Note b.

²⁰ See *supra* note 16 (giving examples of criminal statutes with fixed maximum terms). Michigan's sentencing guidelines group many offenses in the state criminal code into categories, but the guidelines categories do not necessarily correspond with the level of punishment authorized for each crime. See Michigan Judicial Institute, *State of Michigan Sentencing Guidelines Manual* (2022), at 8-9 (counting the cover as page 1; document is not paginated), <https://www.courts.michigan.gov/4a1d6d/siteassets/offices/mji/felony-sentencing-online-resources/2022-mi-sentencing-guidelines-manual.pdf>.

²¹ In the Michigan system, defendants with even a single prior felony conviction are considered "habitual offenders." See Michigan Judicial Institute, *State of Michigan Sentencing Guidelines Manual* (2022), at 10-11, <https://www.courts.michigan.gov/4a1d6d/siteassets/offices/mji/felony-sentencing-online-resources/2022-mi-sentencing-guidelines-manual.pdf>.

²² Mich. Comp. Laws § 769.8(1). The main exception to this rule is the sentencing of "habitual offenders," for whom judges are given discretion to impose longer maximum terms, but never less than the ordinary statutory maximum terms, see Mich. Comp. Laws §§. 769.10(2); 769.11(2); 769.12(2).

²³ Mich. Comp. Laws § 769.10(1)(a),(2).

twice the statutory maximum term for a first offender, but never shorter than the statutory maximum for a first offender.²⁴

*For defendants convicted of a felony who have three or more prior felony convictions, sentencing courts are given discretion to impose judicial maximum terms greater than the statutory maximum term for a first offender, according to a variety of formulas depending on the seriousness of the current conviction. The elevated maximum terms could be as much as 15 years, 25 years, or life, but never less than the statutory maximum for a first offender.*²⁵

In general, Michigan judges have wide discretion to set whatever minimum sentence they deem appropriate in a specific case so long as the minimum term does not exceed two-thirds of the maximum sentence.²⁶ Judges must “consider” advisory sentencing guidelines when selecting minimum sentences, but the guidelines are not legally-binding.²⁷

1.2. Reconsideration after denial of release

Prisoners who are denied parole release must generally be reconsidered at intervals no greater than 24 months. In specified circumstances, the parole board may set intervals of 60 months.²⁸

²⁴ Mich. Comp. Laws § 769.11(1)(a),(2).

²⁵ Mich. Comp. Laws § 769.12(1)(a)-(c),(2).

²⁶ Mich. Comp. Laws § 769.34(2)(b) (“The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.”). There are exceptions for offenses that carry mandatory minimum sentences or mandatory maximum life sentences. Mich. Comp. Laws § 769.34(5).

²⁷ See Mich. Comp. Laws § 769.34(2) (“Except as otherwise provided in this subsection or for a departure . . . the minimum sentence imposed by a court of this state for a felony . . . *may* be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.” (emphasis added)). Among all states with sentencing guidelines, Michigan’s system is unique in that it speaks only to minimum sentences and not maximum possible terms. Council of State Governments, *Applying a Justice Reinvestment Approach to Improve Michigan’s Sentencing System: Summary Report of Analyses and Policy Options* (2014), at 11, <https://csgjusticecenter.org/wp-content/uploads/2020/01/Applying-a-JR-Approach-to-Improve-Michigans-Sentencing-System.pdf> (“Michigan’s sentencing guidelines only define the minimum prison sentence; the maximum sentence is set by statute and the parole board determines the final length of stay in prison.”).

²⁸ Mich. Dep’t of Corr. Policy Directive 06.05.104(AA) (eff. Oct. 4, 2021), available at https://www.michigan.gov/-/media/Project/Websites/corrections/publications/Folder7/06_05_104_combined_10-4-21.pdf?rev=e89b326f98284a53874be7d17878e7f6. The circumstances sufficient to justify 60-month delays are: a prisoner’s history of predatory, deviant or violent behavior indicating a present risk to public safety which cannot be reasonably expected to be mitigated in less than 60 months; the prisoner was convicted of certain firearm-related offenses; or the prisoner had a prior parole revocation for violating a condition of parole regarding firearm possession.

B. General rules on the effects of good-time, earned-time, and other discounts

1.3. Generally available credits: types and amounts

There is no system of good-time, earned-time, or similar credits that may be accumulated by prisoners as discounts against their sentences. Since 1998, Michigan has used a bad-time mechanism that allows prison officials to mete out “disciplinary time” based on formal findings of “major misconduct.” Disciplinary time does not affect the length of prisoners’ minimum or maximum sentences, but is submitted to the parole board for consideration when making release decisions.²⁹

The department of corrections may reduce accumulated disciplinary time for prisoners who have “demonstrated exemplary good conduct,” but there is no routine process for such reductions.³⁰

1.4. Administrative parole release

A prisoner may be released without a hearing if the parole board determines they have a “high probability” of release in accordance with parole guidelines and indicates an intention to release.³¹ This streamlined process is one iteration of “administrative parole release” (APR) as we use the term in this project:

We define administrative parole release as a routinized path to release that requires fewer procedural stages and less case-by-case discretion than the traditional parole-release process.³²

The parole board may deny release to a prisoner designated as “high probability of parole” only for one of a list of statutorily enumerated reasons.³³

²⁹ Mich. Comp. Laws § 800.34(1),(2).

³⁰ Mich. Comp. Laws § 800.34(4).

³¹ Mich. Comp. Laws § 791.235(1).

³² See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 47 (“We distinguish APR from ‘discretionary parole release’—the traditional process that in most states includes a release hearing; individualized consideration by the board of prisoners’ fitness for release; broad discretion on the board’s part to weigh prisoners’ self-presentation, life circumstances, institutional behavior, offenses of conviction, prior records, and victim input; and the requirement of affirmative votes in favor of release.”)

³³ Mich. Comp. Laws § 791.233e(7). The reasons set forth in Mich. Comp. Laws § 791.233e(7) are as follows:

(a) The prisoner exhibits a pattern of ongoing behavior while incarcerated indicating that he or she would be a substantial risk to public safety, including major misconducts or additional criminal convictions.

Michigan law gives the department of corrections the power to promulgate parole guidelines.³⁴ This gives the department a unique role in designing criteria for admission into the state's APR program that we have not seen in other states.

Unlike some other APR programs in the country, Michigan provides no power to crime victims to remove a prisoner from the program by filing an objection.³⁵

II. Life Sentences in Michigan

2.1. Life without parole

Prisoners sentenced to life without parole (LWOP) for a conviction of certain enumerated offenses are ineligible for release unless their sentences are commuted or pardoned by the governor.³⁶ Such prisoners are first interviewed by a parole board member after serving 10

- (b) The prisoner refuses to participate in programming ordered by the department to reduce the prisoner's risk. A prisoner may not be considered to have refused programming if unable to complete programming due to factors beyond his or her control.
- (c) There is verified objective evidence of substantial harm to a victim that could not have been available for consideration at the time of sentencing.
- (d) The prisoner has threatened harm to another person if released.
- (e) There is objective evidence of post-sentencing conduct, not already scored under the parole guidelines, that the prisoner would present a high risk to public safety if paroled.
- (f) The prisoner is a suspect in an unsolved criminal case that is being actively investigated.
- (g) The prisoner has a pending felony charge or is subject to a detainer request from another jurisdiction.
- (h) The prisoner has not yet completed programming ordered by the department to reduce the prisoner's risk, and the programming is not available in the community and the risk cannot be adequately managed in the community before completion.
- (i) The release of the prisoner is otherwise barred by law.
- (j) The prisoner fails to present a sufficient parole plan adequately addressing his or her identified risks and needs to ensure that he or she will not present a risk to public safety if released on parole. If a prisoner is denied parole under this subdivision, the parole board must provide the prisoner a detailed explanation of the deficiencies in the parole plan so that the prisoner may address the deficiencies before his or her next review.
- (k) The prisoner has received a psychological evaluation in the past 3 years indicating the prisoner would present a high risk to public safety if paroled.

³⁴ Mich. Comp. Laws § 791.233e(1).

³⁵ See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 49-51 table 7. See also *id.* at 60 ("Four APR programs in Table 7 [out of 12] allow victims to 'derail' the APR process and require a full parole-board hearing before the prisoner may be released. Upon a victim's request or objection in these states, the prisoner is removed from the APR track to the traditional process of individualized, discretionary parole release.").

³⁶ These offenses are (1) first degree murder; (2) adulterating, misbranding, removing or substituting a drug with the intent to kill or cause serious injury to 2 or more victims that results in death; (3) mixing powdered drugs or medicine to injuriously affect the quality or potency with the intent to kill or cause serious injury to 2 or more victims that results in death, (4) an offense involving explosives, bombs, and other harmful devices, (5) selling or

years. As a result of this interview, the board may initiate a thorough investigative hearing process through which a recommendation may be issued to the governor to grant a reprieve, pardon or commutation of a prisoner's sentence.³⁷

2.2. Life sentences with possibility of parole

Prisoners sentenced to life with the possibility of parole generally become parole eligible after serving 10-20 years of their sentence.³⁸ A public hearing must be held prior to the parole board's release decision. The sentencing judge in the court before which the prisoner was convicted and sentenced may file a written objection to the granting of parole release, in which case the parole board must not grant parole.³⁹

2.3. Juvenile life sentences

Following the Supreme Court's 2012 ruling in *Miller v. Alabama*,⁴⁰ Michigan courts have held resentencing hearings for prisoners sentenced to LWOP for crimes committed when they were under age 18.⁴¹ Prosecutors may recommend that such prisoners continue to serve LWOP sentences consistent with *Miller* requirements that the resentencing court "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Prisoners resentenced to a term of years must serve a minimum sentence of 25 to 40 years.⁴²

manufacturing mislabeled drugs with intent to kill or cause serious injury to 2 or more victims that results in death; and (6) first degree criminal sexual conduct. Mich. Comp. Laws § 791.234(6)(a)-(f).

³⁷ Mich. Comp. Laws § 791.244(1)

³⁸ The minimum length of time a prisoner must serve is dependent upon the offense type. Mich. Comp. Laws § 791.234(7)(a)-(c).

³⁹ Mich. Comp. Laws § 791.234(8)(c).

⁴⁰ See *Miller v. Alabama*, 567 U.S. 460, 480 (2012) (holding mandatory sentences of life without parole unconstitutional when applied to defendants who were under age 18 at the time of their crimes; stating further that, "[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"); see also *Montgomery v. Louisiana*, 136 S.Ct. 718, 735 (2016) (stating that *Miller* required "a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence"); *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (holding that sentencing courts are not required to make a factual finding of "permanent incorrigibility" before sentencing a juvenile offender to life without parole so long as court has considered the defendant's youth before imposing the LWOP sentence).

⁴¹ Allie Gross, "More than half of Michigan juvenile lifers still wait for resentencing," *Detroit Free Press* (Aug. 15, 2019) <https://www.freep.com/in-depth/news/local/michigan/2019/08/15/juvenile-lifers-michigan/1370127001/>.

⁴² Mich. Comp. Laws § 769.25(2),(3),(9). Prisoners sentenced to a term of years will receive credit for time served without consideration of good time credits or disciplinary credits to reduce their minimum sentence. See Mich. Comp. Laws § 769.25(10).

2.4. Drug lifers

Prisoners sentenced to life with the possibility of parole for certain drug manufacturing or possession offenses who have separate, earlier convictions of another serious crime become parole eligible after serving 20 years.⁴³

A prisoner convicted of the same drug manufacturing and possession charges that trigger life imprisonment may become parole eligible two and one-half years earlier than the 20-year eligibility date if it is found that they cooperated with law enforcement in solving any crime. This determination is made by the sentencing judge or their successor.⁴⁴

⁴³ Mich. Comp. Laws § 791.234(7)(b).

⁴⁴ Mich. Comp. Laws § 791.234(12).

III. Infrequently Used Forms of Prison Release in Michigan

3.1. Medical or “compassionate” release

Prisoners who are deemed medically frail⁴⁵ may be released on medical parole upon the recommendation of the Bureau of Health Care Services in the Department of Corrections.⁴⁶ The Bureau must consult with an appropriate medical specialist who is not employed by the department to evaluate the health condition of the prisoner, and the Board and Bureau will collaborate to determine whether a prisoner is medically frail and eligible for medical parole.⁴⁷

Prisoners sentenced to LWOP or serving a sentence for a conviction of first-degree criminal sexual conduct are ineligible for medical parole.⁴⁸

3.2. Executive clemency

The Governor of Michigan has the power to grant reprieves, commutations and pardons for all offenses, excepting impeachment, upon such limitations and procedures as he may direct, subject to statutory procedures and regulations. The governor must inform the legislature yearly of each pardon, reprieve, or commutation granted and state the reasons for each.⁴⁹

3.3. Emergency release for prison overcrowding

Michigan statutes provide an emergency release procedure for overcrowding only at the county jail level, with no similar provision for the state’s prisons.⁵⁰

⁴⁵ “Medically frail” prisoners are those who pose a minimum risk to society as a result of their medical condition, have received a low risk score on a validated risk assessment, who are unlikely to engage in assaultive conduct, and who suffer from a permanent or terminal physical medical condition or a disabling mental disorder. Mich. Comp. Laws § 791.235(22)(c).

⁴⁶ Mich. Comp. Laws § 791.235(10).

⁴⁷ Mich. Comp. Laws § 791.235(10).

⁴⁸ Mich. Comp. Laws § 791.235(10).

⁴⁹ Mich. Const. art. 5, § 14.

⁵⁰ Mich. Comp. Laws § 801.57. Authorized actions to reduce inmate overcrowding include accelerated review and rescheduling of court dates, use of prosecutorial pre-trial diversion programs, use of work release and other community programs, and acceleration of prisoner transfers to the state prison system. A complete list of available authorized actions is located in Mich. Comp Laws §§ 801.55 and 801.56.

IV. Overall Assessment of Indeterminacy in Michigan's Prison-Sentencing System

Michigan's parole-release rates dropped through much of the 1990s. In 1992, the parole board released 68 percent of all prisoners who had reached their first date of release eligibility.⁵¹ By the year 2000, the state's release rate had fallen below one-in-two (47 percent).⁵²

This resulted in the "piling up" of parole-eligible prisoners in the state's prisons. In 1991, 16.5 percent of the total prison population were people who were eligible for parole but had not been released, but this group increased to 34.5 percent by 2003.⁵³ In other words, a full 18 percent of Michigan prisoners in 2003 would not have been incarcerated if the more generous releasing practices of the early 1990s had continued forward.

During this same period, Michigan's prison rate rose by 27 percent. This suggests that most of the state's prison growth through the 1990s was attributable to changes in parole-releasing practices.⁵⁴

⁵¹ Citizens Alliance on Prisons and Public Spending, *The high cost of denying parole: an analysis of prisoners eligible for release* (2003), at 5, <https://static.prisonpolicy.org/scans/cappsmi/fulldatareport.pdf>. This report gave the following narrative account:

Until late 1992, the parole board was comprised of seven experienced corrections professionals who were subject to civil service regulations. In 1992, the membership was changed to ten political appointees. ...

While prisoners were never automatically released as soon as they were eligible, historically, prisoners who behaved well and were judged not to be currently dangerous could expect parole. The "old" board released 68 percent of prisoners at their earliest release date (ERD). Prisoners were encouraged to believe they could earn their release. At parole interviews, board members looked for positive signs of growth and change. Holding people to serve the statutory maximum was uncommon.

The "new" board has a much different philosophy. Rather than paroling on the minimum sentence unless there is a clear reason not to, this board tends to revisit the crime and reject minimum sentences with which it disagrees. Thus, in a 1997 report entitled "Five Years After," which highlighted the differences between the prior and current boards, then MDOC Director Kenneth McGinnis stated: "Among the most important differences since the overhaul is a Parole Board that is much less willing to release criminals who complete their minimum sentences—and much less willing to release criminals at all, forcing many to serve their maximum sentences." ...

The new approach achieved its intended consequences. The overall release rate dropped from 68 to 48 percent. For sex offenders, in 2002, it was 10 percent. Also in that year, about 1,500 prisoners (14 percent of the total released) "maxed out."

⁵² This percentage is derived from Michigan Department of Corrections, *2018 Statistical Report* (2019), at D-3 table D1, and is based on the reported numbers of "total paroles ordered" and "parole denials."

⁵³ Citizens Alliance on Prisons and Public Spending, *The high cost of denying parole: an analysis of prisoners eligible for release* (2003), at 1, <https://static.prisonpolicy.org/scans/cappsmi/fulldatareport.pdf>.

⁵⁴ An 18-percent share of the 2003 prison population represents a 22 percent increase over the state's smaller prison population in 1991. Thus, roughly 81 percent of Michigan's prison population growth between 1991 and 2003 is explained by lowered rates of parole release. Citizens Alliance on Prisons and Public Spending, *The high*

Since the turn of the 21st century, Michigan's parole release rates have generally climbed back toward their positions in the early 1990s. There was a sudden surge in release rates in 2011 (reaching 66 percent, up from 56 percent the year before). By 2021, Michigan's parole-release rate had risen to almost two-in-three (65 percent).⁵⁵

Once again, there is an apparent connection between parole release practices and prison population size in Michigan. From its peak position in 2006 through 2018, the prison rate in Michigan fell 24 percent, returning to the exact same rate as in 1991 (387 per 100,000). Uncannily, the state's return to a parole-release rate comparable to that of 1991 has yielded the same prison rate as in 1991. This history suggests that a loosening of parole-release rates back to the levels of the early 1990s was an important cause of the reduction of Michigan's prison rate back to its early-1990s' position.

A systemic analysis of time-served discretion in Michigan supports the view that the parole board is the single most powerful player in the state's prison-sentencing system, with few checks on its capacity to drive prison population size.

4.1. Prisoners subject to general rules of parole release

The form of judicial prison sentences in Michigan is highly unusual, in ways that affect the degree of indeterminacy across the system as a whole, the upper capacity of the system to produce large prison populations, and the relative absence of institutional checks if political pressures or other conditions push the system toward prison growth. The story begins with the observation that Michigan sentencing judges are very powerful in one sense, but are also missing basic forms of sentencing discretion that are routinely present in most other states.

Michigan judges have unusually broad discretion when setting the lengths of minimum sentences. In general, the only statutory constraint is that the minimum sentence may not exceed two-thirds of the statutory maximum sentence.⁵⁶ Even under most provisions concerning repeat offenders, there is no statutory floor on the length of judicially-imposed minimum terms.

cost of denying parole: an analysis of prisoners eligible for release (2003), at 1, <https://static.prisonpolicy.org/scans/cappsmi/fulldatareport.pdf>.

⁵⁵ These percentages are derived as explained in *supra* note 54 using the 2021 Statistical Report.

⁵⁶ Mich. Comp. Laws § 769.34(2)(b). Keep track of this? How many other states give judges so much power over minimum terms? Note that, in most states, a judge who wants to keep the minimum low must be willing to accept a lower maximum term to go along with it. For example, there may be a statutorily determined 1:3 ration between minimum and maximum. In Michigan, judges can vary the relationship between minimum and maximum across a wide range of possibility.

The selection of judicial minimum sentences is informed by advisory sentencing guidelines in Michigan.⁵⁷ These guidelines are devoid of legal force, however, and do not appear to act as meaningful constraints on judicial sentencing discretion.⁵⁸ In 2012, for example, the Council of State Governments reported that nearly 75 percent of all judicial sentences in Michigan had minimum terms that were 110 to 500 percent higher than the lowest minimum terms recommended by the sentencing guidelines.⁵⁹

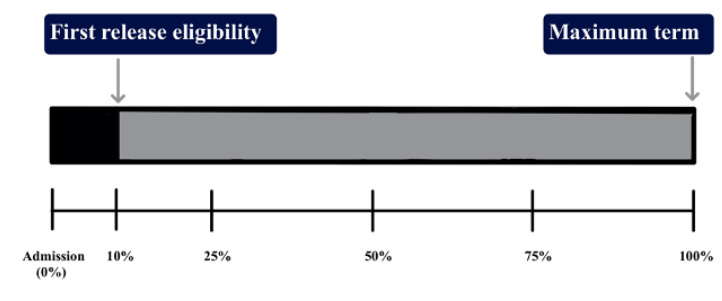
⁵⁷ Among all states with sentencing guidelines, Michigan's system is unique in that it speaks only to minimum sentences and not maximum possible terms. Council of State Governments, *Applying a Justice Reinvestment Approach to Improve Michigan's Sentencing System: Summary Report of Analyses and Policy Options* (2014), at 11, <https://csgjusticecenter.org/wp-content/uploads/2020/01/Applying-a-JR-Approach-to-Improve-Michigans-Sentencing-System.pdf>.

⁵⁸ Michigan's judicial guidelines were legally binding prior to the Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99, 103 (2013). See *People v. Lockridge*, 870 N.W.2d 502, 520-21 (Mich. 2015) (applying *Alleyne* to strip the legally-presumptive effect of Michigan's sentencing guidelines, rendering the guidelines "relevant" but "advisory" considerations at sentencing).

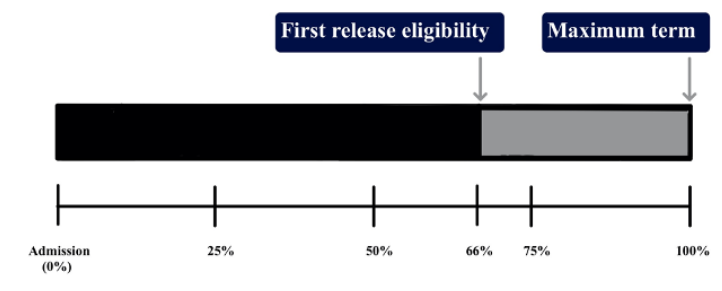
⁵⁹ Council of State Governments, *Applying a Justice Reinvestment Approach to Improve Michigan's Sentencing System: Summary Report of Analyses and Policy Options* (2014), at 11, <https://csgjusticecenter.org/wp-content/uploads/2020/01/Applying-a-JR-Approach-to-Improve-Michigans-Sentencing-System.pdf>. And this was before the guidelines were declared to be advisory in 2015. There is no annual reporting of rates of judicial conformity with sentencing guidelines in Michigan.

On a case-by-case basis, Michigan judges have substantial control over the degree of indeterminacy that is built into their individual sentences. Figures 3 and 4 give contrasting illustrations of the possible forms of judicial sentences in Michigan law.

**Michigan Figure 3. Prison-Release Timeline
for General-Rules Cases With Low
Judicial Minimum Sentence**



**Michigan Figure 4. Prison-Release Timeline
for General-Rules Cases With Highest
Judicial Minimum Sentence**



Suppose that we assume Figures 3 and 4 both depict sentences with a 15-year maximum term. In Figure 3, the trial court has set the minimum term at 18 months, or 10 percent of the maximum. Figure 4 demonstrates the longest possible minimum sentence the judge could impose given the same 15-year maximum. At a full two-thirds of the maximum, the minimum term would be 10 years.

We can compare the differences in degrees of indeterminacy between these two illustrative sentences in several ways. We might say that the 18-month-to-10-years sentence is 10 percent determinate and 90 percent indeterminate, while the 10-to-15-year sentence is 67 percent determinate and 33 percent indeterminate. We could observe that the first sentence has 14 years of indeterminacy, and the latter has 5.⁶⁰

⁶⁰ I'm intrigued with the idea of measuring lengths-of-terms against the life expectancies of individual defendants. This wouldn't be a scientific measurement, but one designed to lend meaning to the statistics through human

Across large numbers of prisoners, the population-multiplier potential (PMP) (see p. vi) for the first type of sentence is 10:1. For the second sentence, it is 1.5:1 (see p. vi). This is a very wide range in the possible degrees of indeterminacy that may be selected by the courts. Given unregulated judicial discretion, the degrees of indeterminacy in individual sentences could fall anywhere in between the two examples here.⁶¹

From a different angle, however, it can be said that sentencing courts in Michigan have very limited control over the configurations of their sentences. Compared with judges in most other states, Michigan judges have limited discretion over the maximum terms of their prison sentences. For first offenders, the judicial maximum sentence must *always* be the statutory maximum for the offense of conviction.⁶² For repeat offenders, judges have discretion to impose enhanced judicial-maximum sentences that are longer than the statutory maximums for first offenders, but never shorter.

While judges have appreciable power to control the degrees of indeterminacy in their sentences, they have relatively little power to control maximum possible severity. If a judge wishes to fashion a prison sentence with a low degree of indeterminacy, the judge can do so only by imposing a lengthy minimum term. The power to render a comparatively determinate sentence is a one-way ratchet. Judges are blocked from lowering the indeterminacy of prison sentences by selecting a short maximum term to go alongside a short minimum. One way to characterize this institutional arrangement is to say that sentencing courts have great freedom to reduce the *release* discretion of parole boards, but cannot reduce the board's parole *release-denial* discretion. Indeed, in the Michigan prison-sentencing system as a whole, there is no check anywhere on the parole board's release-denial discretion.

The lack of judicial authority to moderate the upper range of severity of their sentences is compounded by the fact that the high maximum terms dictated by Michigan's statutory scheme are immovable milestones. Michigan has no system of earned time or other discounts that can advance prisoner's dates of mandatory release to occur before expiration of their maximum sentences, nor does the state have any mechanism to move up dates of parole-release

experience. In the above examples, we could posit a defendant with 45 remaining years of life expectancy. An 18-month sentence would subtract a little more than 3 percent of his life expectancy, while a 10-year sentence would subtract a little more than 22 percent. I think it was Thoreau who said that the personal "cost" of any given thing was the amount of time in one's life that it subtracts.

⁶¹ As noted above, a Michigan judge could have set an even shorter minimum term than shown in Figure 3, but we do not include a visual illustration for the outer possibility. We suspect that, below a certain point, extremely brief minimum terms are rarely handed out. We are simply guessing that the in-practice boundary on the shortness of minimum terms is probably closer to 10 percent than to zero.

⁶² In most states, the statutory maximum sentence would set the longest possible maximum term the judge is authorized to impose, and most judicial sentences would be expected to fall well below the maximum level.

eligibility. Only six other states follow a similar approach.⁶³ Some states allow for movable mandatory release dates (MRDs) that shave off one-half or more of prisoners' judicial maximum sentences.⁶⁴ The absence of any mechanism of movable MRDs is especially significant in a system that ensures defendants will receive long maximum terms at the outset.

The result of this overall institutional configuration is that the Michigan parole board has plenary authority over the actual lengths of prison sentences within maximum ceilings that are set at a position of high severity. The only institutional actor with power to check the parole board's authority are the sentencing courts, but they may do so only through the use of lengthy minimum terms. While this mechanism might guard against undue leniency on the part of the parole board, it places no constraint on a board that is inclined to be overly severe in its releasing practices.

4.2. Overall assessment

Michigan's system creates a unique division of authority across the various officials who have direct power to influence or determine time served in prison cases. At the back end, the department of corrections is a non-player in Michigan's prison-release system. That is, the department lacks any formal authority to advance prisoners' dates of release. Because of this vacuum, the parole board holds unilateral release and release-denial authority within the range of possibility laid out by judicial sentences. It is easy to quantify the relative allocations of time-served authority as between the parole board and the department of corrections: 100 percent and zero.

Nor does the Michigan system include the usual institutional checks on the parole board's power at the front end of the prison-sentencing system. Because judges are bound by statute to order high maximum terms in every case, the aggregate of all judicial prison sentences will always produce the possibility of a large prison population—at least when compared to other states that give judges greater powers to mitigate the harshness of maximum terms. For example, it is possible to imagine a state judiciary with professional norms that most judicial maximum sentences will be set well below the longest allowable statutory-maximum terms. Such decisions magnified across many sentences would place a judicially devised ceiling on the state's prison population size, even if back-end authorities were to operate in a draconian *longest-time-served scenario* (see p. vi). In Michigan compared with most states, however, judges have much-reduced power to place hard upper limits on prison population size.⁶⁵

⁶³ See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 66-74 table 8.

⁶⁴ See *id.*

⁶⁵ If a lenity-minded sentencing court imposes a short minimum sentence in Michigan, this does not guarantee or even encourage release. It merely creates the possibility of release by giving life to the parole board's release and release-denial discretions at an earlier stage.

No one has any solid power to move the prison-sentencing system in the direction of lenity except the parole board. For this reason alone, we would characterize the Michigan prison-sentencing system as one of high indeterminacy. The power to make decisions within degrees of indeterminacy is concentrated entirely in one agency, and the upper boundary on the collective severity of such decisions is always set at a high position.

One recurrent theme in this project, through numerous state reports, is that state departments of corrections can often wield a surprising amount of power over time-served determinations. We believe that the magnitude of this power, at least in many states, is one of the major findings of the project. Michigan is an illustration of the opposite phenomenon. The department of corrections in Michigan is a central element of the state's prison-sentencing system because of its *absence* of power.

It is worth noting that this was not an accidental development in Michigan's system, but a deliberate policy choice. Good-time credits came under public attack in the late 1980s as anathema to "truth in sentencing." The credit scheme in place in 1987 (which was not particularly generous) was abolished by voter initiative. There was a later restoration of another ungenerous scheme, but this too was canceled by the legislature in the name of truth in sentencing.⁶⁶

⁶⁶ A recent news story suggests that Michigan may be in the process of revisiting this policy choice. See Beth LeBlanc, *[Michigan] Judge revives ballot initiative seeking to reinstate 'good time' prison credits*, The Detroit News (June 12, 2020) ("A federal judge has ruled the state of Michigan cannot exclude from the November ballot a proposed initiative by a civil rights organization seeking to restore 'good time' credits so prisoners can get early release for good behavior"). Although the ballot initiative did not collect enough signatures to appear on the 2020 or 2022 ballots, the movement to reinstate good time credits is still active. See *The Good Time Ballot Initiative*, The Liberty & Justice For All Coalition, available at <https://www.goodtimeinitiative.org/>.