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## Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform

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## SENTENCE CREEP: INCREASING PENALTIES IN MICHIGAN AND THE NEED FOR SENTENCING REFORM

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Anne Yantus\*

*The governor and several legislators have requested review of Michigan's sentencing practices with an eye toward sentence reform. Michigan leads the country in the average length of prison stay, and by internal comparisons the average minimum sentence has nearly doubled in the last decade. This Article explores cumulative increases to criminal penalties over the last several decades as reflected in amendments to the sentencing guidelines, increased maximum sentences, harsh mandatory minimum terms, increased authority for consecutive sentencing, wide sentencing discretion for habitual and repeat drug offenders, and tough parole practices and policies. The reality for legislators is that it is much easier to increase a penalty than to decrease it, but the continued incremental increases in penalty and sentence length over the years have led Michigan to the point of necessary sentence reform.*

### INTRODUCTION

There are two constants in the criminal justice system: poor human behavior and legislative efforts to address that behavior. In the latter category is yet another constant: frequent legislative revisions to the appropriate punishment. What follows is a look at increasing criminal penalties and sentence length in Michigan, focusing on the last four decades and especially the fifteen years since the advent of the statutory sentencing guidelines. The wisdom of specific legislative acts may be debatable, but their results are not. Michigan now leads the country in the average length of prison stay and incarcerates more than 43,000 people.<sup>1</sup> This Article explores the pattern of increasing penalties in Michigan as reflected in the

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1. See PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISONER TERMS 13 (2012); MICH. DEP'T OF CORR., REPORT TO THE LEGISLATURE: PRISON POPULATION PROJECTION REPORT, FEBRUARY 2013, at 1 (2013), available at [http://www.michigan.gov/documents/corrections/PA\\_200\\_of\\_2012\\_Section\\_401\\_-\\_Prison\\_Population\\_Projections\\_411256\\_7.pdf](http://www.michigan.gov/documents/corrections/PA_200_of_2012_Section_401_-_Prison_Population_Projections_411256_7.pdf).

sentencing guidelines, increased maximum sentences, mandatory minimum terms, consecutive sentencing, habitual offender enhancement, and parole and early release provisions. The reality is that it is much easier for legislators to increase a penalty than decrease it, but the cumulative effect of incremental increases in penalties over the course of forty years has led to recognition that Michigan is in dire need of comprehensive sentencing reform.

In January 2013, Governor Rick Snyder, Senate Majority Leader Randy Richardville, and House Speaker Jase Bolger requested assistance from the Council of State Governments (CSG) to work with the Michigan Law Review Commission to review Michigan's sentencing, prison, and parole systems and make recommendations for reform.<sup>2</sup> According to Public Act 9 of 2013, the state would contract with CSG "to continue its review of Michigan's sentencing guidelines and practices, including, but not limited to, studying length of prison stay and parole board discretion."<sup>3</sup>

The current interest in sentencing reform is not surprising. The Governor expressed the need for "smart justice" in preventing crime,<sup>4</sup> and some have questioned whether Michigan is headed in the right direction when it comes to punishment and the use of its finite resources. Recent reports place Michigan among the top states in terms of average minimum length of prison stay.<sup>5</sup> Even by internal comparisons within the Michigan system, the trend has been to increase penalties over time with the average sentence length nearly doubling from 1990 to 2009.<sup>6</sup> Not surprisingly, Michigan's prison population has soared dramatically, moving from

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2. See Letter from Rick Snyder, Governor, to Marshall Clement, Dir., Council of State Gov'ts Justice Ctr. (Jan. 23, 2013), available at [http://council.legislature.mi.gov/files/mlrc/MI\\_Introductory\\_Presentation\\_5\\_22\\_13.pdf](http://council.legislature.mi.gov/files/mlrc/MI_Introductory_Presentation_5_22_13.pdf).

3. Act of Mar. 27, 2013, No. 9, 2013 Mich. Pub. Acts.

4. RICK SNYDER & JOHN E. NIXON, STATE BUDGET OFFICE, EXECUTIVE BUDGET: FISCAL YEARS 2014 AND 2015, at A-9 (2013), available at [http://www.michigan.gov/documents/budget/1\\_410735\\_7.pdf](http://www.michigan.gov/documents/budget/1_410735_7.pdf).

5. PEW CTR. ON THE STATES, *supra* note 1, at 13, 16 (reporting that, in 2009, the national average was 2.9 years while Michigan averaged 4.3 years).

6. According to the Pew study, the average minimum length of stay for all Michigan offenders was 2.4 years in 1990 but 4.3 years in 2009. *Id.* at 13. For violent offenders in Michigan, the average minimum length of stay was 3.9 years in 1990 but 7.6 years in 2009. *Id.* at 16. There were only four other states that approached Michigan's number for violent offenders in 2009: Alabama, New York, and Virginia all averaged 6.0 years, and Hawaii averaged 6.2 years. *Id.* at 16.

9,079 in 1970 to 43,000 prisoners by the end of 2012.<sup>7</sup> The Michigan Department of Corrections' budget, the source of continuing concern, has risen to a current level of two billion dollars per year.<sup>8</sup>

The explosion in rates of incarceration over the past forty years is perplexing given Michigan's early history of progressive sentencing practices. In 1838, Michigan completely eliminated debtor's prison, and it imprisoned very few of its debtors before then.<sup>9</sup> Michigan was also the first state to abolish the death penalty in 1846<sup>10</sup> and one of the very first states to move to the modern, rehabilitative model of sentencing via use of the indeterminate sentence in 1869.<sup>11</sup> Additionally, Michigan pioneered one of the first parole systems in the country in 1885.<sup>12</sup>

Of course, times change, and attitudes toward crime change with the times. In the 1920s, a serious increase in crime resulted in the enactment of mandatory sentences for repeat offenders.<sup>13</sup> Likewise, in 1978 the Legislature enacted harsh penalties for violation of the drug laws to deal with the "severe" drug problem in Michigan.<sup>14</sup> Ultimately, these laws were repealed, but it took more than twenty years to do so.<sup>15</sup> What follows is an examination of penalty increases in the last several decades, as Michigan has moved to longer prison sentences and a larger prison population. This Article explores, in discrete sections, increased sentence length resulting from amendments to the sentencing guidelines, legislative revisions of maximum penalties, increased authority for consecutive sentencing, and several new and harsh mandatory minimum terms. The

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7. THE HISTORY OF MICHIGAN LAW 171 (Paul Finkelman & Martin J. Hershock, eds., 2006); MICH. DEP'T OF CORR., *supra* note 1, at 1.

8. SNYDER & NIXON, *supra* note 4, at B-23.

9. 1 WILLIS FREDERICK DUNBAR, MICHIGAN THROUGH THE CENTURIES 233 (1955). In 1824 and again in 1834, not a single person in the whole territory was in jail for crime or debt. 2 *id.* at 606.

10. In 1846, Michigan was the first state to abolish the death penalty except for the crime of treason. *Furman v. Georgia*, 408 U.S. 238, 338 (1972) (Marshall, J., concurring).

11. 2 DUNBAR, *supra* note 9, at 611; see Marvin Zalman, *The Rise and Fall of the Indeterminate Sentence*, 24 WAYNE L. REV 45, 53 (1978). Michigan's first indeterminate sentence law was enacted in 1899 and struck down in 1891. *People v. Cummings*, 50 N.W. 310 (Mich. 1891). Michigan voters amended the constitution in November 1902 to provide for indeterminate sentencing, and the first indeterminate sentence law took effect in 1903. Act of May 21, 1903, No. 136, 1903 Mich. Pub. Acts 168; *In re Campbell*, 101 N.W. 826 (Mich. 1904). There was also a 1905 indeterminate sentence act. Act of June 7, 1905, No. 184, 1905 Mich. Pub. Acts 268; *Ex parte Richards*, 114 N.W. 348 (Mich. 1907).

12. 2 DUNBAR, *supra* note 9, at 611; *People v. Moore*, 29 N.W. 80 (Mich. 1886).

13. *People v. Palm*, 223 N.W. 67 (Mich. 1929); *People v. Stoudemire*, 414 N.W.2d 693 (Mich. 1987); see also 1 DUNBAR, *supra* note 9, at 424; 2 *id.* at 608.

14. *People v. Bullock*, 485 N.W.2d 866, 888 (Mich. 1992).

15. *People v. Preleigh*, 54 N.W.2d 599 (Mich. 1959) (repeal of habitual offender mandatory terms); *People v. Doxey*, 687 N.W.2d 360 (Mich. Ct. App. 2004) (discussing 2002 repeal of drug mandatory minimum terms).

Article also addresses longer prison stays due to more conservative parole practices and policies. Historical punishments and parole practices are offered as a basis for context and comparison. The Article concludes that without aggressive reform, Michigan's persistent course toward even harsher sentences and longer prison commitments will likely continue into the indefinite future.

### I. CUMULATIVE INCREASES TO THE STATUTORY SENTENCING GUIDELINES

To its credit, the Michigan Legislature attempted comprehensive sentencing reform in 1998 when it enacted the statutory sentencing guidelines with the aid of a nineteen-member sentencing commission.<sup>16</sup> These guidelines were unprecedented in that they reflected policy concerns of the Legislature and the broad-based sentencing commission, and there was an attempt to formulate a cohesive plan that considered the seriousness of the crime and the impact on prison resources.<sup>17</sup> However, the sentencing commission was disbanded in 2002,<sup>18</sup> and the Legislature returned thereafter to a piecemeal approach to criminal punishment. Had Michigan retained the sentencing commission, it could have monitored changes in crime patterns and prison usage and effected modifications to the guidelines that would have considered discrete problems in light of the overall sentencing scheme. Unfortunately, that opportunity was lost, and the past fifteen years have shown dozens of increases in minimum and maximum penalties, as discussed below, with little apparent effort to harmonize the penalty system as a whole.

The history of the statutory sentencing guidelines begins in 1978 when the Michigan State Court Administrative Office received a grant to review Michigan's sentencing practices and develop proposed sentencing guidelines.<sup>19</sup> The four-member Michigan Felony Sentencing Project produced a report in 1979, and the Michigan Supreme Court adopted the proposed judicial sentencing guidelines in 1983.<sup>20</sup>

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16. Act of July 28, 1998, No. 317, 1998 Mich. Pub. Acts 1274.

17. See PAUL L. MALONEY ET AL., REPORT OF THE MICHIGAN SENTENCING GUIDELINES COMMISSION 3 (1997).

18. Act of Mar. 7, 2002, No. 31, 2002 Mich. Pub. Acts 68, 74 (repealing MICH. COMP. LAWS § 769.32 (1979)).

19. MARTIN ZALMAN ET AL., SENTENCING IN MICHIGAN: REPORT OF THE MICHIGAN FELONY SENTENCING PROJECT 1 (1979).

20. *People v. Broden*, 408 N.W.2d 789, 792-93 (Mich. 1987); *People v. Coles*, 339 N.W.2d 440, 452 n.31 (Mich. 1983).

The sentencing landscape before this first set of guidelines was fairly unstructured. The Legislature set the maximum penalty for a crime, and the trial judge determined the sentence within the parameters set by statute.<sup>21</sup> For most crimes, the trial judge exercised discretion as to the minimum sentence only and could choose between a probationary sentence and a prison term.<sup>22</sup> There was virtually no appellate review of sentencing decisions until 1983, and even then sentences could not be reversed unless they “shocked the conscience” of the court.<sup>23</sup> Due to considerable disparity and discrimination in the state’s sentencing practices,<sup>24</sup> and spurred on by massive prison rioting in 1981,<sup>25</sup> the Michigan Supreme Court proposed judicial sentencing guidelines to the state’s trial judges to be used on a voluntary basis in 1983.<sup>26</sup>

The judicial sentencing guidelines were not policy-based but reflected the actual sentencing practices of the state’s judges.<sup>27</sup> The guidelines applied only to the most common felony offenses, and the recommended ranges applied to the minimum sentence alone.<sup>28</sup> Consideration of the recommended ranges became mandatory in 1984, but the Michigan Supreme Court never demanded compliance with the ranges.<sup>29</sup> A second edition of the guidelines took effect in 1988, although, like the first edition, it did not apply to all felony offenses and excluded probation violators and habitual offenders.<sup>30</sup>

During the early 1980s, the Michigan Legislature formed a bipartisan committee to consider legislative sentencing guidelines, but the Legislature could not reach a consensus until it passed 1994 Public Act 445, which established the framework for the current statutory guidelines and authorized a sentencing commission to develop those guidelines.<sup>31</sup> In the meantime, the Michigan Supreme Court developed a proportionality test for review of criminal

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21. *In re Southard*, 298 N.W. 457, 458 (Mich. 1941); *Coles*, 339 N.W.2d at 440, 448.

22. MICH. COMP. LAWS ANN. § 771.1(1) (West 2007).

23. *Coles*, 339 N.W.2d at 452.

24. *Brodin*, 408 N.W.2d at 792–93.

25. *Coles*, 339 N.W.2d at 451 n.26.

26. *Id.* at 452 n.31.

27. *People v. Milbourn*, 461 N.W.2d 1, 11–12 (Mich. 1990); see also Sheila Robertson Deming, *Michigan’s Sentencing Guidelines*, 79 MICH. B.J. 652, 652–53 (2000) (discussing how the guidelines passed in 1998 were policy-based, unlike the guidelines that preceded them).

28. *Milbourn*, 461 N.W.2d at 13.

29. Mich. Sup. Ct. Admin. Order 1984-1, 418 Mich. at lxxx (1984); Mich. Sup. Ct. Admin. Order 1985-2, 420 Mich. at lxii (1985); *People v. Hegwood*, 636 N.W.2d 127, 131 (Mich. 2001).

30. MICHIGAN SENTENCING GUIDELINES 1 (2d ed. 1988); Paul L. Maloney, *The Michigan Sentencing Guidelines*, 16 T.M. COOLEY L. REV. 13, 17 (1999); Deming, *supra* note 27, at 652.

31. Maloney, *supra* note 30, at 16.

sentences in 1990.<sup>32</sup> The proportionality test, which stated that sentences should be proportionate to the severity of the crime and the background of the offender, used the judicial sentencing guidelines as the “best barometer” of the appropriate punishment.<sup>33</sup>

From early 1995 to late 1997, the nineteen-member sentencing commission met thirty-one times as it worked to develop the statutory sentencing guidelines.<sup>34</sup> The commission, composed of all the important stakeholders in the Michigan criminal justice system,<sup>35</sup> was tasked with developing guidelines that would treat crimes of violence more severely than other crimes,<sup>36</sup> consider prison resources,<sup>37</sup> incorporate intermediate sanctions as a means of keeping low-level offenders out of the prison system,<sup>38</sup> and apply to all felony offenses including habitual offenders.<sup>39</sup> Sentences were to be “proportionate to the seriousness of the offense and the offender’s prior criminal record.”<sup>40</sup>

The new statutory sentencing guidelines took effect on January 1, 1999<sup>41</sup> and addressed more than 700 felony offenses.<sup>42</sup> The guidelines provided presumptive sentencing ranges with a strict departure standard.<sup>43</sup> The legislation was part of a broader restructuring of sentencing that included revisions to the dollar threshold for property offenses and elimination of disciplinary credits for good behavior by prisoners, although these latter two changes were made by the Legislature without input from the sentencing commission.<sup>44</sup>

Despite these initial efforts at comprehensive sentencing reform, the Legislature repealed the authority for the sentencing commission in 2002.<sup>45</sup> This was done over public objection that the Legislature was ill-suited to conduct the continuing research and

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32. *Milbourn*, 461 N.W.2d at 9–11.

33. *Id.* at 11–12.

34. Maloney, *supra* note 30, at 19; Deming, *supra* note 27, at 652; MALONEY ET AL., *supra* note 17, at 3–5.

35. See MICH. COMP. LAWS ANN. § 769.32 (West 2000) (repealed 2002).

36. *Id.* § 769.33(1)(e)(ii) (repealed 2002).

37. § 769.33(2) (repealed 2002).

38. § 769.33(1)(e)(v), (3) (repealed 2002).

39. Maloney, *supra* note 30, at 18; Deming, *supra* note 27, at 653.

40. § 769.33(1)(e)(iii) (repealed 2002).

41. *Id.* § 769.34(1) (West 2006).

42. Act of July 18, 1998, No. 317, 1998 Mich. Pub. Acts 1274 (codified as amended at MICH. COMP. LAWS §§ 769.31–.34, 777.1–.69).

43. § 769.34.

44. See Act of July 28, 1998, No. 311, 1998 Mich. Pub. Acts 1222 (changing dollar thresholds); Act of July 28, 1998, No. 312, 1998 Mich. Pub. Acts 1261 (eliminating disciplinary credits).

45. Act of Mar. 7, 2002, No. 31, 2002 Mich. Pub. Acts 68, 74 (repealing MICH. COMP. LAWS §§ 769.32–.33).



study necessary to support the guidelines and that legislatures often tend “to reflect current public thought (or fears) when amending penal laws [rather] than . . . sound research in adopting a course of action most likely to deter crime and safely reduce prison overcrowding.”<sup>46</sup> In a 2008 study of the then ten-year-old Michigan sentencing guidelines, the Council of State Governments similarly remarked that “[s]ome of the challenges facing the Michigan system might have been avoided through closer monitoring [via a guidelines commission].”<sup>47</sup>

From 1999 through 2013, while operating without a sentencing commission, the Legislature passed dozens of laws that increased maximum penalties and increased the sentencing guidelines ranges, either through increased scoring of the variables or by moving offenses to higher crime classifications.<sup>48</sup> There were few notable reductions in criminal punishment.<sup>49</sup> Considered in total, the increased penalties appear to have been made without reference to the proportionality principle that “discrete crime classifications [should] make sense when matched against one another.”<sup>50</sup> The result is that stealing from a store is now treated more

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46. SENTENCING GUIDELINES REVISIONS & REPEAL SENTENCING COMM’N, HOUSE LEGISLATIVE ANALYSIS SECTION, SECOND ANALYSIS: HOUSE BILL 5392 AS ENROLLED 3-4 (2002).

47. *Id.*

48. *See infra* Parts I.A–C, II.

49. There were four notable reductions in criminal penalties from 1998 forward. The first occurred contemporaneously with enactment of the sentencing guidelines when the legislature increased the dollar threshold for a number of property crimes. Where the threshold between a felony and misdemeanor offense had been one hundred dollars, it was now 1,000 dollars. *See* Act No. 311, 1998 Mich. Pub. Acts 1222–35. A similar change was made in 1957 when the dollar threshold was increased from fifty dollars to one hundred dollars for felony offenses. *See* Act of May 21, 1957, No. 69, 1957 Mich. Pub. Acts 74, 75.

The second change likewise occurred contemporaneously with enactment of the sentencing guidelines. The sentencing commission had recommended a set of ranges for each crime class, and the legislature adopted those ranges with one important exception. Many of the ranges for the Class E through H grids were relaxed at the bottom of the range to offer more sentencing discretion to the trial judge. Maloney, *supra* note 30, at 21.

The third change occurred in 2002, four years after the guidelines were passed, when the Legislature revised the drug laws to eliminate most mandatory minimum terms, provide for early parole eligibility for those previously sentenced to a mandatory minimum term, remove some consecutive sentencing provisions and substitute discretionary consecutive sentencing for others, increase the weight thresholds for the more serious drug offenses, and remove mandatory life penalties. Act of Dec. 25, 2002, No. 665, 2002 Mich. Pub. Acts 2455.

The fourth change occurred in 2006 when the legislature amended the kidnapping statute to provide for a form of non-aggravated kidnapping that would be called unlawful imprisonment and would be punishable by a maximum term of fifteen years imprisonment rather than life or any term of years, which was the previous penalty. Act of May 26, 2006, No. 160, 2006 Mich. Pub. Acts 475 (codified at MICH. COMP. LAWS § 750.349b). Aggravated kidnapping remained a Class A offense under the sentencing guidelines, but unlawful imprisonment became a Class C offense. MICH. COMP. LAWS ANN. § 777.16q (West 2006).

50. MODEL PENAL CODE: SENTENCING, at xxxiv (Tentative Draft No. 1, 2007).



seriously than assault with a dangerous weapon,<sup>51</sup> and obtaining money by false pretense is punished the same as breaking into a home while armed with a weapon.<sup>52</sup> Several crimes that were mid-level offenses in the past are now punishable by up to life imprisonment,<sup>53</sup> and several low-level offenses have moved to the mid-level category (e.g., retail fraud, see below).<sup>54</sup> There has been virtually no movement in a downward direction for recommended sentences.

#### A. Amendments to Maximum Penalty and Crime Classification

Incremental increases in penalty under the statutory sentencing guidelines are best understood by reference to changes in crime classification within the guidelines, which in turn lead to higher recommended ranges. The guidelines' scheme places each felony offense into a crime class, and that crime class determines the range of allowable punishment (a range that applies to the minimum sentence only). There are nine crime classifications that move in descending order of severity and correspond roughly to the various maximum terms in Michigan, i.e., from second-degree murder with its own classification (M2 class, life maximum penalty), to Class A crimes (generally with a life maximum penalty), to Class B crimes (generally with a twenty-year maximum penalty), to Class C crimes (fifteen-year maximum penalty), to Class D (ten years), Class E (five years), Class F (four years), and Class G and H (two years).<sup>55</sup> While the guidelines' crime classification and the statutory maximum penalty do not always match (there are some notable exceptions where the maximum penalty varies from the crime classification),<sup>56</sup> the crime classification will always determine the recommended range

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51. MICH. COMP. LAWS ANN. § 750.356c (West 2004) (retail fraud first-degree, five year maximum penalty); *id.* § 750.82 (assault with a dangerous weapon, four year maximum penalty).

52. *Id.* § 750.218 (West Supp. 2013) (false pretenses over 100,000 dollars, twenty year maximum penalty); *id.* § 750.110a (West 2004) (home invasion first-degree, twenty year maximum penalty).

53. *See, e.g., id.* § 750.529a (theft of car through force); *id.* § 750.136b(2) (West Supp. 2013) (first-degree child abuse); *id.* § 750.72(3) (arson of dwelling).

54. *See, e.g., id.* § 750.81(4) (West Supp. 2013) (domestic violence third offense); *id.* § 750.356c (West 2004) (retail fraud first-degree).

55. Deming, *supra* note 27, at 653; *see also* MICH. COMP. LAWS ANN. §§ 777.61–.69 (West 2006).

56. For example, bank robbery has a life maximum penalty, but it is a Class C offense. MICH. COMP. LAWS ANN. §§ 750.531, 777.16y (West 2006). Criminal sexual conduct in the third-degree has a fifteen-year maximum penalty, but it is a Class B offense. *Id.* §§ 750.520d, 777.16y. Forgery has a fourteen-year maximum penalty, but it is a Class E offense. *Id.* §§ 750.248, 777.16n.

of punishment for the minimum sentence, and that range will be higher for more serious crimes and lower for less serious crimes.<sup>57</sup>

As indicated above, the recommended range of sentence always increases as the crime class increases. For the baseline offender who has no prior record and no aggravating offense characteristics, the recommended range is zero to one month imprisonment for a Class H offense.<sup>58</sup> That same offender faces a range of 21 to 35 months imprisonment for a Class A offense,<sup>59</sup> and 90 to 150 months imprisonment for second degree murder.<sup>60</sup> These ranges, of course, apply only to the minimum sentence. In the fifteen years since passage of the statutory sentencing guidelines, the Legislature has moved several crimes to higher crime classes and at the same time increased the statutory maximum penalty for most of these crimes. This Section discusses the most important of those changes as they relate to increased minimum sentences (via changes in crime class and changes to the scoring of the variables) and increased maximum sentences (via legislative revision of the maximum penalty).

In any sentencing scheme, moving a crime to a life-maximum penalty is significant. Twice, the Michigan Legislature has increased crimes that were previously classified as mid-level offenses under the Michigan sentencing guidelines to the maximum penalty of life imprisonment with a corresponding increase in the sentencing guidelines crime class. To do this once would be notable, but to do it twice is a significant change, especially as there were only eight crimes with a life-maximum penalty under the judicial sentencing guidelines.<sup>61</sup>

Arson is one of the two crimes that the Legislature moved to the life-maximum penalty category. Arson of a dwelling was punishable by a twenty-year maximum penalty and a Class B designation when the guidelines first took effect in 1999.<sup>62</sup> As of 2013, arson of a dwelling (now called second-degree arson, referring to arson of a single unit dwelling without physical injury) continues to be punishable by a twenty-year maximum penalty and Class B designation.<sup>63</sup>

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57. MALONEY ET AL., *supra* note 17, at 2; *see also* MICH. COMP. LAWS ANN. §§ 777.61–.69 (West 2006).

58. MICH. COMP. LAWS ANN. § 777.69.

59. *Id.* § 777.62.

60. *Id.* § 777.61.

61. MICHIGAN SENTENCING GUIDELINES, *supra* note 30, at 11–22.

62. MICH. COMP. LAWS ANN. § 750.72 (West 2004); *id.* § 777.16c (West 2006).

63. MICH. COMP. LAWS ANN. § 750.73 (West Supp. 2013); *id.* § 777.16c (West, Westlaw through 2013 Act 169).

However, first-degree arson, a brand new category, has a life maximum penalty and a Class A designation.<sup>64</sup>

Child abuse was the second crime to move to the life-maximum penalty category. Before 1988, child abuse was punishable by a four-year maximum penalty.<sup>65</sup> In 1988, the penalties ranged from one to fifteen years imprisonment.<sup>66</sup> In 1999, when the guidelines took effect, first-degree child abuse was punishable by a fifteen-year maximum penalty and a Class C designation. In 2000, the Legislature moved it to a Class B designation.<sup>67</sup> In 2012, the maximum penalty was increased to life imprisonment, and the crime was moved to a Class A offense.<sup>68</sup>

The Legislature also undertook a series of important changes to the sentencing guidelines when it moved a number of property crimes into higher crime classes and also increased the maximum penalty for these crimes. Before 1998, property crimes were distinguished in severity by maximum penalty, but there was also a dollar threshold that separated the felony-level offense from the misdemeanor-level offense for some property crimes.<sup>69</sup> If the value of property stolen was less than one hundred dollars, the crime was a misdemeanor; if the value was over one hundred dollars, the crime was a felony.<sup>70</sup> The maximum penalty for the felony offense depended on the severity of the crime (not simply the dollar amount) and could vary from four to ten years imprisonment.<sup>71</sup>

In 1998, the Legislature revised the dollar threshold to 1,000 dollars for the felony-level offense, but it left intact the various maximum penalties that ranged from four- to ten-years imprisonment.<sup>72</sup> However, from 1999 forward, the Legislature put in place

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64. *Id.* § 750.72 (West Supp. 2013); *id.* § 777.16c (West, Westlaw through 2013 Act 169). In the 1800s, arson of a dwelling was punishable by life or any term of years, *People v. Burridge*, 58 N.W. 319, 319 (Mich. 1894), but the penalty was reduced to a maximum of twenty years sometime in the first half of the twentieth century. *See People v. Losinger*, 50 N.W.2d 137, 143 (Mich. 1951). However, as of 2013, the maximum penalty for arson of a multiunit dwelling or arson of a building or structure or real property resulting in physical injury is now life imprisonment. MICH. COMP. LAWS ANN. § 750.72 (West Supp. 2013).

65. MICH. COMP. LAWS § 750.136 (1979) (repealed 1988).

66. *Id.* § 750.136b (1988).

67. Act of July 7, 2000, No. 279, 2000 Mich. Pub. Acts 1079 (codified as amended at MICH. COMP. LAWS § 777.16g).

68. MICH. COMP. LAWS ANN. § 750.136b (West Supp. 2013); *id.* § 777.16g.

69. *See, e.g., id.* § 750.356 (West 1991).

70. *Id.*

71. For example, the maximum penalty for malicious destruction of property over one hundred dollars was four years imprisonment, the maximum penalty for larceny over one hundred dollars was five years imprisonment, and the maximum penalty for false pretenses and embezzlement over one hundred dollars was ten years imprisonment. *See id.* §§ 750.380, .356, .218, .174 (West 1979).

72. Act of July 28, 1998, No. 311, 1998 Mich. Pub. Acts 1222.

multiple increases to the maximum penalty, and at the same time increased the recommended range for the minimum sentence by moving crimes to a higher crime classification when the crime involved a large sum of money. These changes were put in place for several common property crimes.

When the sentencing guidelines first took effect in 1999, both embezzlement by an agent over 1,000 dollars and false pretenses over 1,000 dollars were property offenses with a ten-year maximum penalty and a Class D and E designation, respectively.<sup>73</sup> In October of 2000, both offenses were reduced to a five-year maximum penalty if the value of property obtained was between 1,000 dollars and 20,000 dollars, and both were considered Class E offenses.<sup>74</sup> However, in 2006, the penalty for embezzlement was increased to ten years if the value was 20,000 dollars to 50,000 dollars, to fifteen years if the value was 50,000 dollars to 100,000 dollars, and to twenty years if the value was over 100,000 dollars.<sup>75</sup> The crime classifications were also increased to Class D, C, and B, respectively.<sup>76</sup>

In 2011, a similar set of changes was put into effect for false pretenses, although the maximum penalties became fifteen, fifteen, and twenty years imprisonment for the same values as embezzlement.<sup>77</sup> The crime classes increased to Class C (for a crime involving 20,000 dollars to 50,000 dollars), Class C (50,000 dollars to 100,000 dollars) and Class B (over 100,000 dollars).<sup>78</sup> In sum, for both offenses the maximum penalty increased to twenty years imprisonment, and both offenses moved from the Class E range to as high as a Class B range when the amount stolen exceeded 100,000 dollars.

With similar concern for property destruction crimes involving large sums of money, the Legislature increased the penalties for malicious destruction of property. In 1998, the penalty for malicious destruction of personal property or a building was four years

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73. While the dollar threshold increased to 1,000 dollars on January 1, 1999, there was a ten-month lag in correcting the guidelines in terms of the offense title. As a result, the original version of the guidelines referred to these crimes as embezzlement by agent over one hundred dollars and larceny by false pretenses over one hundred dollars, and the title of the offenses was not amended until October 1, 2000. Act of July 7, 2000, No. 279, 2000 Mich. Pub. Acts 1079, 1108, 1111 (codified as amended at MICH. COMP. LAWS §§ 777.16i, .16l).

74. *Id.*; see also Act of July 28, 1998, No. 312, 1998 Mich. Pub. Acts 1236, 1242–43, 1248–49 (codified as amended at MICH. COMP. LAWS §§ 750.174, .218).

75. Act of Dec. 30, 2006, No. 573, 2006 Mich. Pub. Acts 2116 (codified as amended at MICH. COMP. LAWS §§ 750.174, 777.16i).

76. *Id.*

77. Act of Oct. 20, 2011, No. 201, 2011 Mich. Pub. Acts (codified at MICH. COMP. LAWS § 750.218); MICH. COMP. LAWS ANN. § 777.16l (West Supp. 2013).

78. § 777.16l.

imprisonment.<sup>79</sup> In 1999, the Legislature increased the penalty to five years imprisonment if the value of property was 1,000 dollars to 20,000 dollars and to ten years imprisonment if the value of property was 20,000 dollars or more.<sup>80</sup> The crime class in 1999 was G for destruction of personal property and F for destruction of a building.<sup>81</sup> In 2000, the Legislature increased both crime classes to E if the value was over 1,000 dollars and to D when the value was over 20,000 dollars.<sup>82</sup> Again, the overall result shows an increase in maximum penalty (from four to ten years) and increase in crime class (from Class G/F to Class D for the over 20,000 dollars category).

In a similar manner, the Legislature increased the penalty and crime classification for both larceny and receiving and concealing stolen property for crimes involving large financial losses. In 1999, larceny over 1,000 dollars and receiving and concealing stolen property over 1,000 dollars were Class E offenses punishable by a maximum term of five years imprisonment.<sup>83</sup> In 2000, both were divided into Class D and E designations depending on whether the value was 1,000 dollars to 20,000 dollars (Class E) or 20,000 dollars and higher (Class D). The maximum penalty remained at five years imprisonment for the lower amount but increased to ten years imprisonment when the value was 20,000 dollars or higher.<sup>84</sup>

Apart from increasing penalties for property crimes, the Legislature increased the maximum penalty and crime classification for two miscellaneous crimes, the second containing an unusual twist. First, in 1999, escape from jail through assault was punishable by a four-year maximum penalty and a Class F designation.<sup>85</sup> In 2006, the penalty increased to five years imprisonment, and the crime classification moved to Class E.<sup>86</sup> Similarly, in 2005 the Legislature

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79. *Id.* §§ 750.377a, .380 (West 1991).

80. Act of July 28, 1998, No. 311, 1998 Mich. Pub. Acts 1222, 1228–30 (codified at MICH. COMP. LAWS §§ 750.377a, .380).

81. Act of July 28, 1998, No. 317, 1998 Mich. Pub. Acts 1274, 1309–10 (codified as amended at MICH. COMP. LAWS § 777.16s).

82. Act of July 7, 2000, No. 279, 2000 Mich. Pub. Acts 1079, 1115–16 (codified as amended at MICH. COMP. LAWS § 777.16s).

83. MICH. COMP. LAWS ANN. §§ 777.16r, .16z (West 2000).

84. Act No. 279, 2000 Mich. Pub. Acts at 1114–15, 1120–21; *see also* Act of July 28, 1998, No. 311, 1998 Mich. Pub. Acts 1222, 1223, 1233–34 (codified as amended at MICH. COMP. LAWS §§ 750.356, .535).

85. MICH. COMP. LAWS ANN. §§ 750.197c, 777.16j (West 2004).

86. Act of Dec. 28, 2006, No. 535, 2006 Mich. Pub. Acts 2022 (codified as amended at MICH. COMP. LAWS §§ 750.197c, 777.16j).

created the crime of identity theft and provided for a five-year maximum penalty and a Class E designation.<sup>87</sup> As of 2011, however, a second violation is punishable by a ten-year maximum penalty and a Class D designation, and a third violation is punishable by a fifteen-year maximum penalty and a Class C designation.<sup>88</sup> The increased penalties for identify theft were unusual as the Legislature bypassed traditional habitual offender increases of fifty percent (one and one-half times) for a second felony offense and one-hundred percent (double) for a third offense, instead doubling and tripling the penalty for a second and third violation.<sup>89</sup>

Additionally, in the last set of changes to the statutory sentencing guidelines, the Legislature moved two very common low-level offenses to the mid-level category with a significant increase in the maximum penalty and crime class. Domestic violence third offense was punishable by a two-year maximum penalty and a Class G designation in 1999.<sup>90</sup> As of 2013, it is punishable by a five-year maximum penalty and a Class E designation.<sup>91</sup> For first-degree retail fraud, the change is even more significant. When first enacted in 1988, retail fraud first-degree was punishable by a two-year maximum penalty with no sentencing guidelines.<sup>92</sup> The crime was created in an effort to treat shoplifters less severely than those who violated other larceny laws, and the retail fraud statutes expressly precluded conviction of the higher crime of larceny in a building (with a four-year maximum penalty).<sup>93</sup> Yet, the maximum penalty for retail fraud first-degree increased from two to five years imprisonment in 1998.<sup>94</sup> Additionally, when the statutory sentencing guidelines took effect in 1999, the crime class was Class H.<sup>95</sup> In

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87. Identity Theft Protection Act, No. 452, 2004 Mich. Pub. Acts 1856, 1857–58 (codified as amended at MICH. COMP. LAWS §§ 445.65, .69); Act of Dec. 22, 2004, No. 457, 2004 Mich. Pub. Acts 1870, 1871 (codified as amended at MICH. COMP. LAWS § 777.14h).

88. MICH. COMP. LAWS ANN. § 445.69 (West 2011); *id.* § 777.14h (West Supp. 2013).

89. *Id.* § 769.10, .11 (West 2000).

90. Act of Apr. 10, 1994, No. 64, 1994 Mich. Pub. Acts 268 (codified as amended at MICH. COMP. LAWS § 750.81). Note that this crime did not exist until 1994 and was previously misdemeanor assault. *Id.*

91. Act of Dec. 14, 2012, No. 365, 2012 Mich. Pub. Acts 165 (codified at MICH. COMP. LAWS §§ 777.16d, 750.81(4)).

92. Act of Feb. 17, 1988, No. 20, 1988 Mich. Pub. Acts 34 (codified as amended at MICH. COMP. LAWS § 750.356c).

93. *See* MICH. COMP. LAWS ANN. §§ 750.356c–.356d (West 2004).

94. *See* Act of July 28, 1998, No. 311, 1998 Mich. Pub. Acts 1222, 1224 (codified as amended at MICH. COMP. LAWS § 750.356c).

95. Act of July 28, 1998, No. 317, 1998 Mich. Pub. Acts 1274, 1309 (codified as amended at MICH. COMP. LAWS § 777.16r).

2000, the crime class was increased three levels to Class E.<sup>96</sup> Meanwhile, larceny in a building continues to be treated as a Class G offense with a four-year maximum penalty.<sup>97</sup> In other words, retail fraud first-degree is now treated more seriously than larceny in a building even though the 1988 Legislature intended the opposite result.

As reflected above, the Legislature increased both the maximum penalty and the sentencing guidelines range for a dozen offenses from 1999 to 2013—but it went further. It increased the sentencing guidelines range for six additional crimes without any amendment to the maximum penalty. In other words, with no realignment of the offense in comparison to other offenses, the Legislature disagreed with the deliberate work of the sentencing commission and increased the recommended sentence range for a number of crimes with no corresponding increase in the maximum penalty. In 1999, criminal sexual conduct third-degree was punishable by a fifteen-year maximum penalty and a Class C designation.<sup>98</sup> In 2000, the Legislature moved it to a Class B designation.<sup>99</sup> In the same year, the Legislature moved perjury in a capital case up five levels from a Class G to a Class B offense. It also moved perjury in a non-capital case five levels from Class G to a Class C designation, as well as moving subordination of perjury up two levels from a Class E to a Class C offense.<sup>100</sup> More recently, it moved fleeing and eluding first-degree from a Class C to a Class B designation and moved fleeing and eluding second-degree from a Class D to a Class C designation.<sup>101</sup>

Overall, review of the sentencing guidelines scheme from 1999 to 2013 shows significant repositioning of offenses into higher crime classifications, often with corresponding increases to the statutory maximum penalty.

### *B. Amendments to Variables that Now Permit Greater Point Assessments*

In addition to increasing the crime class and maximum penalty for many common crimes, the Legislature amended the language

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96. Act of July 7, 2000, No. 279, 2000 Mich. Pub. Acts 1079, 1114 (codified as amended at MICH. COMP. LAWS § 777.16r).

97. MICH. COMP. LAWS ANN. § 777.16r (West 2006).

98. *Id.* § 777.16y (West 2000).

99. Act of July 7, 2000, No. 279, 2000 Mich. Pub. Acts 1079, 1120 (codified as amended at MICH. COMP. LAWS § 777.16y).

100. *Id.* at 1118 (codified as amended at MICH. COMP. LAWS § 777.16v).

101. Act of Oct. 9, 2012, No. 323, 2012 Mich. Pub. Acts 143 (codified at MICH. COMP. LAWS § 777.16x).



of the prior record and offense variables so that more points could be assessed for each crime. The prior record variables capture the offender's prior record, while the offense variables capture the aggravating facts of the offense.<sup>102</sup> The combination of these two scores, when placed within the appropriate grid determined by the crime class, produces a recommended range of punishment for the minimum sentence.<sup>103</sup>

Prior Record Variables (PRV) 1 through 4, which include prior high and low severity felony convictions and juvenile adjudications, were amended in 2007 to allow an assessment of points for federal and out-of-state convictions and adjudications that do not correspond to a Michigan offense.<sup>104</sup> Previously, a prior conviction or adjudication that did not correspond to a Michigan offense could not be scored. In addition to expanding the range of scorable offenses, the new language authorized an assessment of points under PRV 2 (prior low severity felony convictions) for prior felony-firearm convictions.<sup>105</sup> This change may have been inadvertent, as felony-firearm convictions were never considered under the guidelines scheme in the past.<sup>106</sup> However, as of 2007, felony-firearm convictions fall within the amended language of PRV 2.<sup>107</sup>

Prior Record Variable 4 considers prior low severity felony-level juvenile adjudications and was amended in 2000 to reduce the number of adjudications needed for each point assessment.<sup>108</sup> In 1999, the variable permitted twenty points for six adjudications, ten points for four or five adjudications, five points for two or three adjudications, and two points for one adjudication.<sup>109</sup> In 2000, the Legislature added a fifteen-point category (for five adjudications), revised the ten-point category (to include three and four adjudications, rather than four or five), and revised the five-point category (to include two adjudications, rather than two or three adjudications).<sup>110</sup>

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102. See MICH. COMP. LAWS ANN. § 769.31(c)-(d) (West 2006).

103. *Id.* § 777.21 (West Supp. 2013).

104. Act of Jan. 8, 2007, No. 655, 2006 Mich. Pub. Acts 2312, 2325-27 (codified as amended at MICH. COMP. LAWS §§ 777.51-54).

105. See, e.g., *People v. Williams*, No. 288704, 2010 WL 4671107, at \*7-8 (Mich. Ct. App. Nov. 18, 2010) (per curiam); *People v. Dent*, No. 290832, 2010 WL 3656028, at \*6-7 (Mich. Ct. App. Sept. 21, 2010) (per curiam).

106. See MICH. COMP. LAWS ANN. § 777.57(2)(d) (West 2006) (felony-firearm does not count under PRV 7); *id.* § 777.42 (felony-firearm does not count under OV 12).

107. See *Williams*, 2010 WL 4671107, at \*7-8.

108. Act of Oct. 1, 2000, No. 279, 2000 Mich. Pub. Acts 1079, 1127 (codified as amended at MICH. COMP. LAWS § 777.54).

109. MICH. COMP. LAWS ANN. § 777.54 (West 2000).

110. Act No. 279, 2000 Mich. Pub. Acts at 1127.

Prior Record Variable 5 considers prior misdemeanor convictions and adjudications.<sup>111</sup> This variable was amended in 2000 to broaden the range of scorable weapons offenses.<sup>112</sup> When the guidelines were first enacted in 1998, the variable encompassed misdemeanor weapons offenses that were enumerated in Mich. Comp. Laws 750.222 to 750.239a. In 2000, the variable included all misdemeanor weapons offenses.<sup>113</sup>

The offense variables received similar increases by legislative amendment. Offense Variables (OV) 1 and 2 are designed to address the aggravated use of a weapon and type of weapon, respectively.<sup>114</sup> These variables were amended in 2001 and 2002 to add harmful biological and chemical devices to the range of possible weapons used during an offense.<sup>115</sup>

Offense Variable 3 (physical injury) was amended in 2000 to provide an assessment of thirty-five points if death resulted from an intoxicated driving offense, and that assessment was increased to fifty points in 2003.<sup>116</sup> Previously, zero, or at best twenty-five points, could be scored for a drunk driving offense that resulted in the death of the victim.<sup>117</sup>

Offense Variables 5 (serious psychological harm to victim's family) and Offense Variable 6 (intent to kill or injure) were amended in 2000 to include attempted homicide and assault with intent to murder crimes.<sup>118</sup> These variables were amended again in 2002 to include both conspiracy and solicitation to commit homicide.<sup>119</sup> In effect, these two variables, which were designed to apply to homicide offenses and to consider the effect of the crime (OV 5) and the offender's intent during the crime (OV 6), now apply to attempts and early efforts to accomplish the homicide offense.

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111. MICH. COMP. LAWS ANN. § 777.55 (West 2006).

112. Act No. 279, 2000 Mich. Pub. Acts at 1127–28.

113. *See id.*

114. MICH. COMP. LAWS ANN. §§ 777.31–.32 (West 2006).

115. Act of Oct. 23, 2001, No. 136, 2001 Mich. Pub. Acts 1110, 1118 (codified as amended at MICH. COMP. LAWS §§ 777.31–.32); Act of Apr. 22, 2002, No. 137, 2002 Mich. Pub. Acts 409, 410 (codified as amended at MICH. COMP. LAWS § 777.31).

116. Act of Oct. 1, 2000, No. 279, 2000 Mich. Pub. Acts 1079, 1125 (codified as amended at MICH. COMP. LAWS § 777.33); Act of Sept. 30, 2003, No. 134, 2003 Mich. Pub. Act 386 (codified as amended at MICH. COMP. LAWS § 777.33).

117. *See* *People v. Houston*, 702 N.W.2d 530, 531 (Mich. 2005) (holding that although one hundred points cannot be scored under Offense Variable 3 when homicide is the sentencing offense, twenty-five points can be scored for life threatening injury that occurred before death of the victim).

118. *See* Act No. 279, 2000 Mich. Pub. Acts at 1124–25.

119. *See* Act of Apr. 1, 2002, No. 143, 2002 Mich. Pub. Acts 422, 423 (codified as amended at MICH. COMP. LAWS § 777.22).

Offense Variable 9 is a variable that considers the number of victims of the crime. This variable was amended in 2007 to include victims of property crimes and financial loss.<sup>120</sup> Previously, the definition of victim was limited to those who were placed in danger of physical injury or loss of life.<sup>121</sup>

Offense Variable 13 is a variable that considers the pattern of felony crimes committed over a five-year period. This variable originally had five categories ranging from zero to twenty-five points.<sup>122</sup> The Legislature amended the variable in 2000 to add a sixth category with fifty points when there are three or more penetrations involving a victim under the age of thirteen.<sup>123</sup> The variable was again amended in 2009 to provide a seventh category, with an assessment of twenty-five points, when there is gang-membership activity.<sup>124</sup>

Offense Variables 17 and 18 are variables that relate to operation of a vehicle at the time of the offense (whatever that offense may be).<sup>125</sup> Offense Variable 17 considers the degree of negligent driving and was amended in 2003 to remove the requirement that operation of a vehicle must be an “element of the offense.”<sup>126</sup> Now, operation of a vehicle must have occurred, but it need not be an element of the offense.<sup>127</sup>

Offense Variable 18 considers the offender’s blood alcohol level while driving.<sup>128</sup> This variable was amended in 2003 to lower the threshold blood alcohol level for the ten- and five-point assessments.<sup>129</sup> Where the variable had previously allowed ten points for a blood alcohol level (BAC) of .10 to .14, it now allows ten points when the BAC is .08 to .15.<sup>130</sup> Where it had previously allowed five points for a BAC of .07 to .09 or where the offender was “visibly impaired” or was an underage offender violating a zero tolerance provision, the variable now permits five points for visibly impaired

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120. Act of Mar. 30, 2006, No. 548, 2006 Mich. Pub. Acts 2041, 2041–42 (codified as amended at MICH. COMP. LAWS § 777.39).

121. MICH. COMP. LAWS ANN. § 777.39(2)(a) (West Supp. 2013).

122. *Id.* § 777.43 (West 2000).

123. Act of Oct. 1, 2000, No. 279, 2000 Mich. Pub. Acts 1079, 1126 (codified as amended at MICH. COMP. LAWS § 777.43).

124. Act of Apr. 1, 2009, No. 562, 2008 Mich. Pub. Acts 264 (codified at MICH. COMP. LAWS § 777.43).

125. MICH. COMP. LAWS ANN. § 777.22 (West 2006).

126. Act of Sept. 30, 2003, No. 134, 2003 Mich. Pub. Acts 384, 386 (codified as amended at MICH. COMP. LAWS § 777.22).

127. *Id.*

128. MICH. COMP. LAWS ANN. § 777.48 (West 2006).

129. Act No. 134, 2003 Mich. Pub. Acts at 388.

130. *See id.*

and underage drivers violating a zero tolerance provision (i.e., deleting the .07 category).<sup>131</sup>

Offense Variable 19 considers the extent of the offender's interference with the administration of justice.<sup>132</sup> This variable was amended in 2001 to broaden the fifteen-point category that applied to the offender's use of force or threat of force in relation to the administration of justice.<sup>133</sup> Before 2001, fifteen points could be assessed if the offender used force or threat of force to interfere with, or attempt to interfere with, the administration of justice.<sup>134</sup> In 2001, the Legislature amended the language so that the offender must use force or threat of force to (1) interfere with, (2) attempt to interfere with, or (3) act in a way "that results in" an interference with the administration of justice.<sup>135</sup> The Legislature also included interference with "the rendering of emergency services" as part of the fifteen-point category.<sup>136</sup> In 2002, the Legislature amended the title of the variable to include interference with the rendering of emergency services.<sup>137</sup> In a nutshell, the variable now covers a broader range of conduct.

Offense Variable 20 (terrorism) was added in 2002 following the deadly attacks on the World Trade Center on September 11, 2001.<sup>138</sup> This variable considers acts of terrorism against a civilian population or the government.<sup>139</sup>

In sum, the offense variables—variables designed to account for aggravating conduct that occurs during the crime—now consider additional aggravating conduct or score higher points for the same conduct previously included, depending on the variable considered.

A review of the most significant increases to the statutory sentencing guidelines would be incomplete without mention of three major court decisions that affected the scoring of two specific offense variables. In *People v. Houston*, the Michigan Supreme Court concluded that twenty-five points could be scored for life-threatening injury under Offense Variable 3 (the variable that considers physical injury to a victim) in virtually any homicide case because

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131. *Id.*

132. MICH. COMP. LAWS ANN. § 777.49 (West 2006).

133. *See* Act of Oct. 23, 2001, No. 136, 2001 Mich. Pub. Acts 1110, 1119 (codified as amended at MICH. COMP. LAWS § 777.49).

134. MICH. COMP. LAWS ANN. § 777.49 (West 2000).

135. *See* Act No. 136, 2001 Mich. Pub. Acts at 1119.

136. *Id.*

137. Act of Apr. 22, 2002, No. 137, 2002 Mich. Pub. Acts 409, 411 (codified as amended at MICH. COMP. LAWS § 777.49).

138. *Id.* at 411–12 (codified at MICH. COMP. LAWS § 777.49a).

139. *Id.*; *People v. Osantowski*, 748 N.W.2d 799 (Mich. 2008).

life-threatening injury must necessarily have occurred before death resulted.<sup>140</sup> Before this decision, the assumption was that zero points would be scored for homicide offenses.<sup>141</sup> Then, in *People v. Laidler*, the Court concluded that points could be scored under Offense Variable 3 where the co-perpetrator, or even the defendant, was injured or killed during the offense. Before this decision, there was no authority to consider injury to the co-perpetrator or the defendant.<sup>142</sup> Finally, in *People v. Hardy*, the Court concluded that fifty points could be scored under Offense Variable 7 (aggravated physical abuse) where the defendant racks the shotgun (i.e., readies it for firing by releasing a round of ammunition into the firing chamber) during a carjacking offense.<sup>143</sup> Before this decision, the Court of Appeals had concluded that the hefty fifty-point assessment did not apply unless there was “egregious” conduct by the offender that was designed to cause “copious or plentiful” amounts of additional fear.<sup>144</sup>

### C. General Impact of Sentencing Guidelines Increases

The cumulative impact of these changes in the sentencing guidelines is significant. On a structural level, the sentencing commission attempted to achieve a delicate balance between sending more violent offenders to prison and keeping low-level offenders out of prison, but the commission’s final product penalized the violent offender with even higher sentences than recommended under the judicial sentencing guidelines. For second-degree murder, the judicial sentencing guidelines started with a baseline range of 12 to 84 months and ended at 240 to 480 months or life imprisonment for the worst offender; the statutory guidelines start with a baseline of 90 to 150 months and end for the worst offender at 365 to 1200 months or life imprisonment.<sup>145</sup> Likewise, for armed robbery, the judicial guidelines started with a baseline of 0 to 36 months and

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140. *People v. Houston*, 702 N.W.2d 530, 533–34 (Mich. 2005). There is a provision not to score points for the death itself. *Id.* at 533.

141. See *People v. Brown*, 692 N.W.2d 717, 719–21 (Mich. Ct. App. 2005), *rev’d*, 704 N.W.2d 462 (Mich. 2005) (concluding that zero points should be scored under Offense Variable 3 when the sentencing offense is a homicide; this was later reversed by the Michigan Supreme Court in light of *Houston*).

142. *People v. Laidler*, 817 N.W.2d 517, 519 (Mich. 2012).

143. *People v. Hardy*, 835 N.W.2d 340, 342 (Mich. 2013).

144. *People v. Glenn*, 814 N.W.2d 686, 690, (Mich. Ct. App. 2012), *rev’d sub nom. Hardy*, 835 N.W.2d 340.

145. MICHIGAN SENTENCING GUIDELINES, *supra* note 30, at 80; MICH. COMP. LAWS ANN. § 777.61 (West 2006).

ended at 120 to 300 months or life imprisonment; the statutory guidelines start at 21 to 35 months and end at 270 to 900 months or life imprisonment.<sup>146</sup> Even for the crime of breaking and entering an occupied dwelling (now known as home invasion), the judicial guidelines started with a baseline of 0 to 6 months and ended at 60 to 120 months; the statutory guidelines for home invasion first-degree begin at 0 to 18 months and end at 117 to 320 months.<sup>147</sup>

On another structural level, the act of moving crimes to a higher crime class after the statutory guidelines were enacted in 1998—particularly with no notable movement downward among crime classes—has created a top-heavy system where the most common crimes are bunched between Class A and Class E levels, and fewer crimes fall into the lower levels.

The practical impact of these changes is noteworthy. When arson of a dwelling moved from a Class B up to a Class A category in 2012 (provided there are injuries or a multi-unit building, both being necessary for the new crime of arson in the first-degree),<sup>148</sup> the two-level increase elevated the baseline range from 0 to 6 months to 0 to 18 months and increased the upper range from 43 to 152 months to 117 to 320 months.<sup>149</sup> Similarly, for domestic violence third offense, moving the crime from Class G to Class E elevated the baseline and upper ranges to a significant degree, but it also had the effect of mandating a prison sentence for twenty-five percent of the offenders.<sup>150</sup> Before the move, there were no mandatory prison sentences. Instead, forty-six percent of offenders were in straddle cells (a cell allowing either prison or an intermediate sanction, the latter referring to a non-prison sentence),<sup>151</sup> and fifty-four percent of offenders were in intermediate sanction cells (again, meaning a complete lockout from prison).<sup>152</sup> Like domestic violence, the effect of moving first-degree retail fraud from Class H to

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146. MICHIGAN SENTENCING GUIDELINES, *supra* note 30, at 102; MICH. COMP. LAWS ANN. § 777.62 (West 2006) (Class A offenses); *id.* § 777.16y (armed robbery is a Class A offense).

147. MICHIGAN SENTENCING GUIDELINES, *supra* note 30, at 38; MICH. COMP. LAWS ANN. § 777.63 (West 2006) (Class B offenses); *id.* § 777.16f (home invasion first-degree is a Class B offense).

148. See MICH. COMP. LAWS ANN. § 750.72 (West, Westlaw through P.A. 2013, No. 119).

149. Compare *id.* § 777.63 (West 2006) (Class B offenses), with *id.* § 777.65 (Class D offenses).

150. Compare *id.* § 777.66 (Class E offenses, where the grid contains nine prison cells out of a total of thirty-six cells), with *id.* § 777.68 (Class G offenses, where the grid contains no prison cells).

151. Straddle cells are cells where the upper limit of the range is more than eighteen months and the lower limit of the range is twelve months or less. The trial court has the choice of prison or an intermediate sanction. *Id.* § 769.34(4)(a), (c).

152. Compare *id.* § 777.66 (Class E offenses, with a third of the cells having a range of fourteen or more months), with *id.* § 777.68 (Class G offenses, where a third of the cells are

Class E meant that twenty-five percent of the offenders will now go to prison, absent a departure, when before the amendment there were no mandatory prison sentences, a split of twenty-nine percent straddle cells, and seventy-one percent intermediate sanction cells for the Class H offense.<sup>153</sup> This stands in stark comparison to the recommended ranges for larceny from a building, a Class G offense, where there are no prison cells.<sup>154</sup>

Even an increase in the number of points assessed under the prior record and offense variables can have a dramatic impact on the recommended range. Based on the 2013 *Hardy* case, fifty points will be assessed more frequently under Offense Variable 7,<sup>155</sup> and the recommended ranges will often double.<sup>156</sup> The ranges are more than doubled as a result of the 2003 amendment when adding fifty points under Offense Variable 3 for drunk driving offenses resulting in death.<sup>157</sup> Likewise, adding twenty-five points under Offense Variable 3 for the life-threatening injury that must have occurred prior to death—per the 2005 *Houston* case—can change the range for a Class A offense by twenty-five percent or more.<sup>158</sup> By way of example, an offender who commits a Class A offense with no prior record and who receives sixty points under the offense variables will have a recommended range of 51 to 85 months, but the range increases to 81 to 135 months if that offender is given an additional twenty-five points under Offense Variable 3 per the *Houston* case.<sup>159</sup>

The steady increases in recommended sentencing ranges add up. The compliance rate with the judicial sentencing guidelines, with its wide-open departure policy, was approximately eighty percent.<sup>160</sup> While there exists no official data on trial courts' compliance with

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at most a straddle cell). The sentencing guidelines require a prison sentence for cells with a starting number of thirteen months or higher, while they allow a prison sentence or an intermediate sanction for ranges where the starting number is twelve months or less. *Id.* § 769.34(4)(a)–(c).

153. Compare *id.* § 777.66 (Class E offenses, where the grid contains nine prison cells out of a total of thirty-six cells), with *id.* § 777.69 (Class H offenses, where the grid contains no prison cells).

154. *Id.* § 777.68.

155. See *supra* notes 143–44 and accompanying text.

156. MICH. COMP. LAWS ANN. § 777.62 (West 2006) (Class A offenses).

157. See *id.* § 777.64 (Class C offenses); *id.* § 777.12f (operating vehicle causing death can be Class C offense).

158. *Id.* § 777.62 (Class A offenses); see also *People v. Houston*, 702 N.W.2d 530 (Mich. 2005).

159. See MICH. COMP. LAWS ANN. § 777.62 (Class A grid).

160. *People v. Milbourn*, 461 N.W.2d 1, 11 (Mich. 1990).



the statutory sentencing guidelines, the very strict departure standard set forth in Michigan Compiled Laws section 769.34(3) would suggest a much higher compliance rate.<sup>161</sup>

In sum, trial judges using the new guidelines are faced with presumptive sentence ranges that have increased steadily since 1999. Moreover, the loss of a sentencing commission was most unfortunate, as legislators have acted each year under political pressure to increase penalties for specific crimes without considering the effect on the whole sentencing scheme. “The use of an independent commission to draft presumptive sentences has two advantages: it allows sentencing policy to be both more expertly crafted and [also] less subject to distorting political pressures.”<sup>162</sup> The sentencing guidelines of 2013 reflect the Legislature’s concern with financial crimes and a few other discrete problems, but they lack balance as a whole and reflect overall movement toward harsher punishment. Sentencing commissions, on the other hand, take the long view and are able to review and revise guidelines in harmonious fashion while also considering the effective use of future resources:

Established policies are no more self-sustaining over time than they are self-executing at inception. Sentencing Commissions play a vital role in quality control. They are able to discern if sentences are harmonious with intended goals and make targeted adjustments when necessary. Given the initial purposeful and deliberative investment made by policymakers and commissions to guide sentencing, it is worthwhile to reexamine basic decision-making elements to solidify past and current gains as well as reorient future resources in the most effective manner.<sup>163</sup>

A comprehensive review of Michigan’s statutory sentencing guidelines from enactment in 1998 to 2013 reveals guidelines that have failed to evolve in a meaningful way. Instead, these guidelines

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161. See MICH. COMP. LAWS ANN. § 769.34(3) (West 2006). An informal email to the author from Marge Bossenberry, then with the Policy and Strategic Planning Administration of the Michigan Department of Corrections, claimed an overall compliance rate of ninety-one percent based on 2003 data. E-mail from Margaret A. Bossenberry, Policy and Strategic Planning Administration, Michigan Department of Corrections, to author (Feb. 2, 2005, 3:41 PM) (on file with author).

162. Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent’s Structuring Criminal Sentences: The Evolution of Minnesota’s Sentencing Guidelines*, 75 MINN. L. REV. 727, 729–30 (1991); Deming, *supra* note 27, at 654.

163. BRIAN J. OSTROM ET AL., NAT’L CTR. FOR STATE COURTS, *ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES* 3 (2008).

reflect the politics of criminal law: a one-way ratchet that leads to ever-increasing penalties.<sup>164</sup>

## II. INCREASING MAXIMUM SENTENCES

“[P]iecemeal legislative changes in penalties tend to produce the evils of disproportionality in penalties and an ‘inching up’ of allowable maximum terms.”<sup>165</sup>

The previous Part looked at increases to the sentencing guidelines, often with contemporaneous changes in the maximum sentence, and how those increases played out in longer recommended sentencing ranges for the minimum sentence. In this Part, increased maximum sentences are discussed without reference to the sentencing guidelines ranges, as many of the increased penalties were put into effect before the sentencing guidelines took effect and have no connection to the sentencing guidelines ranges. Increased maximum sentences are important, however, because they delineate the maximum amount of time the offender may be held in prison, serve to limit the minimum sentence (pursuant to the two-thirds rule discussed in Part V, *infra*), and generally reflect where on the continuum of most-serious to least-serious offense the crime falls.

To a surprising extent, the maximum penalty for many common felonies has remained the same since the 1800s. First-degree murder is still punishable by mandatory life imprisonment, and second-degree murder is still punishable by life or any term of years.<sup>166</sup> The penalty for first-degree criminal sexual conduct (previously known as carnal knowledge) is still life or any term of years, and the penalty for armed robbery is much the same as it was in the nineteenth

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164. BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES 3 (2008).

165. ZALMAN ET AL., *supra* note 19, at 8.

166. Compare MICH. COMP. LAWS ANN. § 750.316 (West 2004) (first-degree murder penalty is life imprisonment), and *id.* § 750.317 (second-degree murder penalty is life or any term of years), with *People v. Repke*, 61 N.W. 861, 863–64 (Mich. 1895) (noting sentence of life imprisonment for first-degree murder), and *In re Campbell*, 101 N.W. 826, 827 (Mich. 1904) (noting penalty of life or any term of years for second-degree murder).

century.<sup>167</sup> For less serious crimes as well, the maximum penalty has remained remarkably consistent.<sup>168</sup>

Yet, since the mid-1970s, and particularly in the last twenty years, the Legislature has revised the maximum penalty for a number of crimes, occasionally reducing the penalty but more often than not increasing it. The increases have ranged from small to large, but they add up on a cumulative basis and change the relationship of one crime to another.

#### A. Felony-Firearm (1977)

In 1977, the Legislature created the crime of possession of a firearm during commission of a felony (felony-firearm).<sup>169</sup> The mandatory penalty was two years imprisonment for a first offense, five years imprisonment for a second offense, and ten years imprisonment for a third or subsequent offense.<sup>170</sup> There was and is no departure provision. The sentence for felony-firearm always runs consecutively to the sentence for the underlying felony offense.<sup>171</sup>

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167. Compare MICH. COMP. LAWS ANN. § 750.520b(2)(a) (West Supp. 2013) (penalty of life or any term of years for criminal sexual conduct in the first degree), and *id.* § 750.529 (West 2004) (penalty of life or any term of years for armed robbery), with *In re Campbell*, 101 N.W. at 827–28 (holding that the maximum penalty for rape is “life or for any such period as the court in its discretion shall direct”), *People v. Scofield*, 105 N.W. 610, 610 (Mich. 1905) (most serious form of armed robbery included intent to kill or maim if victim resisted), *People v. Dumas*, 125 N.W. 766, 768 (Mich. 1910) (holding that maximum penalty was life imprisonment or a term of years for the most serious form of armed robbery), and *In re Southard*, 298 N.W. 457, 460 (Mich. 1941) (holding that the maximum penalty for armed robbery was life or any term of years).

168. Compare MICH. COMP. LAWS ANN. § 750.321 (West 2004) (maximum penalty of fifteen years imprisonment for manslaughter), *id.* § 750.248 (maximum penalty of fourteen years imprisonment for forgery), *id.* § 750.110a(6) (maximum penalty of fifteen years imprisonment for home invasion second-degree), *id.* § 750.520g(1) (maximum penalty of ten years imprisonment for assault with intent to commit sexual penetration), and *id.* § 750.74(3) (West Supp. 2013) (maximum penalty of ten years imprisonment for third-degree arson), with *People v. Cummings*, 50 N.W. 310, 312 (Mich. 1891) (noting a fifteen-year maximum penalty for manslaughter), and FRANZ C. KUHN, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN 172–74 (1912) (showing a maximum penalty of fourteen years for forgery, fifteen years for burglary, ten years for assault with intent to rape, and ten years for burning of a barn).

169. Act of Jan. 1, 1977, No. 6, 1976 Mich. Pub. Acts 27 (codified as amended at MICH. COMP. LAWS § 750.227b).

170. MICH. COMP. LAWS ANN. § 750.227b (West 2004).

171. *Id.* § 750.227b(2).

Given the consecutive nature of the penalty, the Legislature effectively increased the maximum sentence by two years for any felony offense committed with a gun.<sup>172</sup>

### *B. Fleeing and Eluding (1988)*

Initially, fleeing and eluding was a one-year misdemeanor offense, which was added to the penal code in 1966.<sup>173</sup> In 1988, the misdemeanor version included a mandatory minimum term of “not less than 30 days” and a repeat offender version that carried a mandatory minimum term of one year and a maximum term of four years imprisonment.<sup>174</sup> In 1996, in what was named the Lt. Donald Bezenah Law in honor of an officer killed in action, the Legislature removed the mandatory minimum terms and created four tiers with penalties ranging from two years (for fourth-degree fleeing and eluding, the original offense), five years (third-degree fleeing and eluding with an accident, when the speed limit was thirty-five miles per hour or less, or with a prior conviction), ten years (second-degree fleeing and eluding with serious injury or prior convictions), and fifteen years (first-degree fleeing and eluding resulting in death).<sup>175</sup>

In a nutshell, fleeing and eluding went from a one-year misdemeanor in 1966 to a two-year felony offense in 1996, with aggravating conduct increasing the penalty all the way to fifteen years imprisonment in 1996.

### *C. Carjacking (1994, 2004)*

For many years, stealing a car without a weapon, but with force or violence, was considered unarmed robbery, a crime punishable by a maximum penalty of fifteen years imprisonment.<sup>176</sup> As of October 1, 1994, the Legislature increased the penalty to life or any term of

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172. There are four exceptions. The statute does not apply if the underlying felony is carrying a concealed weapon, unlawful sale of a firearm or pistol, unlawful possession of a pistol by a licensee, or altering the identity mark on a firearm. *Id.* § 750.227b(1).

173. Act of Mar. 10, 1967, No. 299, 1966 Mich. Pub. Acts 509 (codified as amended at MICH. COMP. LAWS § 750.479a).

174. Act of Mar. 30, 1989, No. 407, 1988 Mich. Pub. Acts 1628, 1628–29 (codified as amended at MICH. COMP. LAWS § 750.479a).

175. See Act of June 1, 1996, No. 586, 1996 Mich. Pub. Acts 2604, 2604–05 (codified as amended at MICH. COMP. LAWS § 750.479a); Liz Shepard, *Bill Named in Honor of St. Clair County Deputy*, TIMES HERALD (Port Huron, Mich.), Dec. 2, 2011, at A.1.

176. See MICH. COMP. LAWS ANN. § 750.530(1) (West 2004).

years and added a consecutive sentencing provision for crimes committed during the same transaction.<sup>177</sup> This new crime, called “carjacking,” reflects “the Legislative intent to facilitate the prosecution of, and provide harsh penalties for, those persons who use force to take a motor vehicle from another.”<sup>178</sup> In 2004, the Legislature expanded the crime of carjacking to include the taking of a vehicle when the required force is used *after* the crime in an effort to flee the scene or retain possession of the vehicle.<sup>179</sup>

#### D. Home Invasion (1994, 1999)

On October 1, 1994, the Legislature created the crime of home invasion.<sup>180</sup> First-degree home invasion built upon the former crime of breaking and entering an occupied dwelling (otherwise known as burglary at common law) by adding the aggravating circumstance of a weapon or a person present in the home.<sup>181</sup> Either circumstance increased the maximum penalty from fifteen to twenty years imprisonment.<sup>182</sup> Second-degree home invasion similarly replaced the former crime of breaking and entering an occupied dwelling but continued the maximum penalty of fifteen years imprisonment.<sup>183</sup> The Legislature added third-degree home invasion (essentially breaking and entering a dwelling with intent to commit a misdemeanor) with a five-year maximum penalty in 1999.<sup>184</sup>

The end result was a five-year increase in the maximum penalty for what was earlier known as breaking and entering an occupied dwelling (now home invasion first-degree) where there were aggravating circumstances and expansion of the crime to include misdemeanor conduct (i.e. home invasion third-degree). In effect,

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177. Act of Oct. 1, 1994, No. 191, 1994 Mich. Pub. Acts 820 (codified at MICH. COMP. LAWS § 750.529a).

178. *People v. Raper*, 563 N.W.2d 709, 712 (Mich. Ct. App. 1997).

179. Act of June 3, 2004, No. 128, 2004 Mich. Pub. Acts 405, 405 (codified at MICH. COMP. LAWS § 750.529a).

180. Act of Oct. 1, 1994, No. 270, 1994 Mich. Pub. Acts 1264, 1264–65 (codified at MICH. COMP. LAWS § 750.110a).

181. MICH. COMP. LAWS ANN. § 750.110a (West 2004).

182. *Id.*

183. *See id.*

184. Act of Oct. 1, 1999, No. 44, 1999 Mich. Pub. Acts 120, 120–21 (codified at MICH. COMP. LAWS § 750.110a). If the breaking and entering is done *without* the intent to commit a felony or misdemeanor and no misdemeanor occurs, it is punishable as a ninety-day misdemeanor. MICH. COMP. LAWS ANN. §§ 750.115, .504 (West 2004).

Michigan has now moved backwards in time to the 1800s, when burglary was punishable by up to twenty years imprisonment,<sup>185</sup> and it has expanded the crime to include misdemeanor conduct.

#### *E. Resisting and Obstructing an Officer (2002)*

In the 1931 penal code, the crime of resisting and obstructing an officer was classified as a two-year misdemeanor.<sup>186</sup> In 2002, the Legislature added Mich. Comp. Laws section 750.81d (resisting and obstructing a person performing duties) and amended Mich. Comp. Laws section 750.479 (assaulting, battering, obstructing officer performing duty). This increased the underlying penalty to a two-year felony and provided increased penalties for bodily injury (four years), serious impairment of a body function (ten to fifteen years), and death (twenty years).<sup>187</sup> Both statutes also include a discretionary consecutive sentencing provision for offenses committed during the same transaction.<sup>188</sup>

#### *F. Criminal Sexual Conduct (Including Mandatory Lifetime Monitoring) (2006)*

In 1975, the Michigan Legislature repealed the carnal knowledge statute and replaced it with a series of six new criminal sexual conduct (CSC) offenses.<sup>189</sup> The statutory penalty for the most serious

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185. It appears history may have repeated itself as the burglary statute of the 1800s initially provided for a twenty-year maximum penalty for aggravated burglary (with a weapon, assault or person present) and a fifteen-year maximum penalty for breaking and entering an occupied or unoccupied building at night. *People v. Huffman*, 23 N.W.2d 236, 236–37 (Mich. 1946); *People v. Shaver*, 65 N.W. 538, 538 (Mich. 1895); *Harris v. People*, 6 N.W. 677, 677–78 (Mich. Ct. App. 1880). The penalty for breaking and entering an unoccupied dwelling or building was reduced to ten years imprisonment in 1964. Act of May 16, 1964, No. 133, 1964 Mich. Pub. Acts 126 (codified as amended at MICH. COMP. LAWS § 750.110); *see also* *People v. Poole*, 151 N.W.2d 365, 369 (Mich. Ct. App. 1967). The ten-year offense has remained essentially the same since 1964 and continues to be found under section 750.110.

186. Act of June 16, 1931, No. 328, 1931 Mich. Pub. Acts 624, 718–19. It appears the crime was a misdemeanor in the 1800s as well. *See People v. McLean*, 36 N.W. 231 (Mich. 1888). In 1989, forcibly assaulting an officer or causing bodily injury to an officer was a two-year misdemeanor offense captured in the fleeing and eluding statute. Act of Mar. 30, 1989, No. 407, 1988 Mich. Pub. Acts 1628, 1629 (codified as amended at MICH. COMP. LAWS § 750.479a).

187. Act of July 15, 2002, No. 266, 2002 Mich. Pub. Acts 750, 751 (codified at MICH. COMP. LAWS § 750.81d); Act of May 9, 2002, No. 270, 2002 Mich. Pub. Acts 758, 759 (codified as amended at MICH. COMP. LAWS § 750.479).

188. MICH. COMP. LAWS ANN. §§ 750.81d(6), .479(7) (West 2004).

189. *See* Act of Aug. 12, 1974, No. 266, 1974 Mich. Pub. Acts 1025, 1025–28 (codified as amended at MICH. COMP. LAWS §§ 750.520a–.520l).

crime remained at life or any term of years, but the penalty for statutory rape and other forms of nonconsensual conduct decreased to fifteen years imprisonment or less.<sup>190</sup> Although some penalties went down, the new CSC statutes covered a greater range of conduct, eliminated the need to prove resistance or non-consent, and extended protection to groups not previously covered such as uninjured victims, prostitutes, males, and spouses.<sup>191</sup> The legislation also added a five-year mandatory minimum term for conviction of a second or subsequent CSC offense.<sup>192</sup>

In August of 2006, in response to the highly publicized rape and murder of nine-year-old Jessica Lunsford in Florida, the Legislature increased the penalty for first-degree CSC with a victim under the age of thirteen in two ways.<sup>193</sup> First, the Legislature added a mandatory minimum term of twenty-five years for an offense committed by an individual at least seventeen years old with a victim under the age of thirteen.<sup>194</sup> Second, the Legislature added the penalty of mandatory life imprisonment without parole for this particular variation of first-degree CSC (offender seventeen years of age or older, victim under the age of thirteen) when the offender has a prior CSC conviction (any degree) involving a child under the age of thirteen (i.e., a repeat child molester).<sup>195</sup>

Moreover, for all first-degree CSC convictions, and for second-degree CSC convictions involving a minor under thirteen where the offender is sentenced to prison, the Legislature added mandatory lifetime electronic monitoring.<sup>196</sup> Additionally, the Legislature added a discretionary consecutive sentencing provision for first-degree CSC convictions and the sentences for offenses arising out of the same transaction.<sup>197</sup>

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190. See MICH. COMP. LAWS ANN. §§ 750.520b–.520g (West 2006).

191. See Note, *Analysis of Michigan's Criminal Sexual Conduct Act*, 23 WAYNE L. REV. 203, 208–10 (1976).

192. Act No. 266, 1974 Mich. Public Acts at 1028.

193. Act of May 29, 2006, No. 169, 2006 Mich. Pub. Acts 499 (codified as amended at MICH. COMP. LAWS § 750.520b).

194. *Id.*

195. *Id.*

196. Act of May 29, 2006, No. 171, 2006 Mich. Pub. Acts 502, 502–05 (codified as amended at MICH. COMP. LAWS §§ 750.520b–.520c, .520n) (providing for mandatory sentence of lifetime electronic surveillance); Act of May 29, 2006, No. 172, 2006 Mich. Pub. Acts 506, 507–08 (codified as amended at MICH. COMP. LAWS § 791.285) (establishing a lifetime electronic monitoring program); see also *People v. Kern*, 794 N.W.2d 362, 369 (Mich. Ct. App. 2010) (holding that lifetime monitoring does not apply for CSC second-degree unless the offender is sentenced to prison).

197. Act No. 169, 2006 Mich. Pub. Acts at 500.



*G. Impact of Increasing Maximum Sentences*

In small and not so small increments, the maximum penalty has crept up for a number of common felony crimes. For some of these crimes, the Legislature has reverted to penalties existing in the 1800s despite the fact that the 1800s penalty had been reduced by a subsequent legislature.<sup>198</sup> For other crimes, the Legislature has increased the statutory maximum penalty to a significant degree. The prison population seems to mirror the changes, as the population moved from 9,000 in 1970 to 43,000 prisoners in 2012.<sup>199</sup>

Although most inmates do not serve the maximum sentence, some will serve a good portion of the maximum term, and others will serve all of it. The latest published numbers for individuals who served the entire maximum sentence are as follows:

- 2003: 990
- 2004: 1,306
- 2005: 1,344
- 2006: 1,230
- 2007: 1,282<sup>200</sup>

While the above numbers are not large, the number of individuals who may serve a portion of these newly increased maximum terms is more significant. According to Michigan Department of Corrections' statistical reports from 2009 through 2011 (2011 being the most recent year for purposes of statistical analysis), there are thousands of offenders sentenced each year under the increased maximum penalties discussed above. Given current parole practices (see Part VI, *infra*), many will serve some portion of the maximum sentence (i.e., will serve time beyond the minimum sentence). The following is a list of the average number of offenders per year subject to the new maximum terms:

- *Felony-Firearm (two-year penalty)*: The average number of prison commitments per year is 1,616.<sup>201</sup>
- *Fleeing and Eluding Third-Degree*: The average number of prison commitments per year is 65.<sup>202</sup>

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198. See *supra* notes 64, 185 and accompanying text.

199. See *supra* note 7 and accompanying text.

200. MICH. DEP'T OF CORR., OFFENDERS WHO HAVE SERVED THEIR MAXIMUM SENTENCE AND HAVE BEEN RELEASED FROM PRISON, 2003–2007, at 2 tbl.A (2008).

201. See MICH. DEP'T OF CORR., COURT DISPOSITIONS, MDOC STATISTICAL REPORT SUPPLEMENT 2003–2011, at A-31, A-107, A-182 (2012) [hereinafter COURT DISPOSITIONS] (reporting 1,599 prison commitments for felony firearm in 2011, 1,664 in 2010, and 1,587 in 2009).

202. See *id.* at A-38, A-115, A-190 (reporting forty-nine prison commitments for third-degree fleeing and eluding in 2011, sixty-eight in 2010, and seventy-seven in 2009).

- *Carjacking*: The average number of prison commitments per year for this crime—a crime that would have been unarmed robbery before 1994—is 147.<sup>203</sup>
- *Home Invasion First-Degree*: The average number of prison commitments per year for this crime, now with a twenty-year maximum penalty, is 485.<sup>204</sup>
- *Home Invasion Third-Degree*: The average number of prison commitments per year for this crime, a felony offense that did not exist until 1999, is 118.<sup>205</sup>
- *Resisting an Officer*: The average number of prison commitments per year, reflecting a cumulative total under both statutes, is 535.<sup>206</sup>
- *Arson of a Dwelling*: The average number of prison commitments per year for this crime, before it became the new crime of arson first- and second-degree, was 52.<sup>207</sup>
- *Domestic Violence Third Offense*: The average number of prison commitments per year is 136.<sup>208</sup>
- *Retail Fraud First-Degree*: The average number of prison commitments per year for this crime, with the new five-year maximum penalty, is 301.<sup>209</sup>

In addition, 2006 amendments' impact to the CSC laws merits special attention. The average number of prison commitments for CSC first-degree with an offender aged at least seventeen and a victim under the age of thirteen (with a mandatory minimum term of twenty-five years) is sixty-nine per year.<sup>210</sup> For the non-parolable life

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203. See *id.* at A-41, A-118, A-192 (reporting 146 prison commitments for carjacking in 2011, 149 in 2010, and 146 in 2009).

204. See *id.* at A-25, A-101, A-176 (reporting 468 prison commitments for first-degree home invasion in 2011, 517 in 2010, and 471 in 2009).

205. See *id.* (reporting 115 prison commitments for third-degree home invasion in 2011, 108 in 2010, and 131 in 2009).

206. For commitments under section 750.81d(1), the three-year average is 529 cases. See *id.* at A-44, A-120, A-195 (reporting 560 prison commitments for resisting an officer under 750.81d(1) in 2011, 516 in 2010, and 511 in 2009). For commitments under section 750.479(2), the three-year average is six cases. See *id.* at A-38, A-115, A-189 (reporting seven prison commitments for resisting an officer under 750.479(2) in 2011, eight in 2010, and two in 2009).

207. See *id.* at A-43, A-119, A-194 (reporting fifty-nine prison commitments for arson under 750.72 in 2011, forty-nine in 2010, and forty-seven in 2009).

208. See *id.* at A-43, A-120, A-194 (reporting 143 prison commitments for domestic violence third offense in 2011, 138 in 2010, and 128 in 2009).

209. See *id.* at A-35, A-111, A-186 (reporting 311 prison commitments for retail fraud first-degree in 2011, 325 in 2010, and 268 in 2009).

210. See *id.* at A-40, A-117, A-191 (reporting fifty-seven prison commitments in 2011, ninety-five in 2010, and fifty-six in 2009).

sentence for CSC first-degree second offense, the average number of prison commitments is three per year.<sup>211</sup> The average number of prison commitments for CSC second-degree with an offender aged at least seventeen and a victim under the age of thirteen (i.e., where there is mandatory lifetime monitoring) is fifty-nine per year.<sup>212</sup>

As of November 2013, there were forty-two individuals in the lifetime monitoring program at a cost of five dollars per day—for equipment costs only—for each individual subject to monitoring.<sup>213</sup> The number of monitored individuals is expected to increase significantly in the future as more offenders are released from prison and placed into the monitoring program. Offenders who cannot pay the daily cost of monitoring are subject to a new two-year felony conviction.<sup>214</sup> In addition, the state will incur costs of a minimum of 1,825 dollars per year per offender (sometimes for as long as fifty years for each offender) when the individual cannot afford to pay. There is no discretionary release from the monitoring program, and the individual must be monitored “until the time of the individual’s death.”<sup>215</sup>

All told, multiple increases to the maximum penalty are significant, costly, and tend to move the entire system of punishment into a higher realm.

### III. MANDATORY MINIMUM TERMS—A POWERFUL FEW

Mandatory minimum terms inspire a great deal of debate because the Legislature employs them to address discrete and sometimes intractable problems of crime, but the bench and bar generally oppose them due to the lack of an individualized sentence.

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211. *See id.* at A-40, A-117, A-191 (reporting three prison commitments in 2011, three in 2010, and three in 2009).

212. *See id.* at A-41, A-117, A-192 (reporting sixty-three prison commitments in 2011, seventy-two in 2010, and forty-one in 2009).

213. The manager of the Parole/Probation Electronic Monitoring Program, Gregory L. Roach, reported forty-two individuals as of November 19, 2013. E-mail from Gregory L. Roach, Manager, Elec. Monitoring Ctr., to author (Nov. 19, 2013) (on file with author); *see also* MICH. DEP’T OF CORR., REPORT TO THE LEGISLATURE PURSUANT TO P.A. 200 OF 2012, SEC 608, GPS ELECTRONIC TETHER PROGRAM 1 (2013). The daily cost of equipment is five dollars. MICH. DEP’T OF CORR., *Lifetime Electronic Monitoring Program Current Daily Rate* (May 19, 2011), [http://www.michigan.gov/documents/corrections/Current\\_Daily\\_Rate\\_for\\_Lifetime\\_Electronic\\_Monitoring\\_Program\\_353451\\_7.pdf](http://www.michigan.gov/documents/corrections/Current_Daily_Rate_for_Lifetime_Electronic_Monitoring_Program_353451_7.pdf).

214. MICH. COMP. LAWS ANN. § 750.520n(2)(c) (West Supp. 2013).

215. *Id.* § 791.285(1)(a).

The Legislature controls this debate because it has the constitutional power to determine the punishment for crime.<sup>216</sup> The Legislature may reserve all or most of the sentencing discretion through enactment of mandatory penalties.<sup>217</sup>

Mandatory minimum terms constitute one form of mandatory penalty, and there are three distinct forms: (1) the absolute version, where there is no discretion to impose a lesser term; (2) the departure-valve version, where the judge has discretion to depart below the term in limited circumstances; and (3) the conditional version, where the judge may impose either a fine or a minimum period of incarceration.<sup>218</sup>

Michigan has a large number of conditional mandatory minimum terms for both felony and misdemeanor crimes,<sup>219</sup> but there is little talk of these provisions, as the judge can avoid the mandatory minimum term by imposition of a fine alone. There are significantly fewer absolute and departure-valve mandatory minimum terms, but those that exist tend to be well known. This Part addresses the absolute and departure-valve varieties as they apply to the most common felony offenses. The small number of absolute and departure-valve mandatory minimum terms is not surprising because the Legislature appears to take a targeted approach when reducing or eliminating the trial court's sentencing discretion. Mandatory minimum terms have been around since 1877, but the Legislature repeals them and enacts new provisions as it attempts to

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216. *People v. Hegwood*, 636 N.W.2d 127, 130 (Mich. 2001).

217. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.316(1) (West 2004) (mandatory life without parole for first-degree murder); *id.* § 750.520b(2)(c) (mandatory life without parole for CSC first-degree with victim under thirteen and prior conviction of CSC involving victim under thirteen); *id.* § 750.544 (mandatory life for treason); *id.* § 333.7413(1)(a)–(c) (West 2012) (mandatory life without parole for second or subsequent violations of sections 333.7401(2)(a)(ii) or (iii), 333.7403(2)(a)(ii) or (iii), and conspiracy to commit these offenses); *id.* § 750.227b (West 2004) (mandatory two-year, five-year, and ten-year sentences for felony firearm first, second, or third offenses); *id.* §§ 750.16(5), .18(7); *id.* § 333.17764(7) (West 2008) (mandatory life without parole for adulterating or misbranding drugs and the sale or manufacture of adulterated or misbranded drugs, all as to two or more persons with intent to kill or seriously injure); *id.* §§ 750.200i(2)(e), .204(2)(e), .207(1)(e), .209(1)(e), .210(2)(e), .211a(2)(f) (West 2004) (mandatory life without parole for explosives and other injurious substances causing death).

218. There are only two mandatory minimum terms with a true departure valve. *See id.* §§ 333.7410(5), 333.7413(4) (West 2012). There are also a large number of crimes—both felonies and misdemeanors—punishable by a mandatory minimum term or a fine. *See, e.g.*, *id.* § 257.902 (West 2009) (fine or mandatory minimum term of one year for felony motor vehicle violations); *id.* § 28.293(1) (West 2012) (fine or mandatory minimum term of one year for felony false representation in application for state I.D.); *id.* § 19.142(2) (West 2004) (fine or not less than ten days for misdemeanor state property violations).

219. *See e.g.*, *id.* § 19.142 (destruction of state property, minimum term of ten days or fine of fifty dollars, or both); *id.* § 257.902 (West 2009) (felony motor vehicle violations, minimum term of one year or fine of not less than 500 dollars, or both).

“solve particularly vexing crime problems.”<sup>220</sup> The problem with mandatory minimum terms is the lack of individualized sentencing. The penalty applies regardless of the mitigating circumstances surrounding the offense or the otherwise good character of the offender. The State Bar of Michigan categorically opposes mandatory minimum terms due to the lack of judicial discretion.<sup>221</sup> A former Michigan Supreme Court justice voiced similar concern that mandatory minimum terms create “the kind of tension between the Legislature and the judiciary that classically leads to making bad law from hard cases.”<sup>222</sup>

While mandatory minimum terms come and go, history suggests that it can take more than twenty years to repeal particularly harsh mandatory minimum terms. The severe mandatory minimum terms set forth under the 1978 drug laws were repealed in 2003 after years of debate and legal challenges.<sup>223</sup> Likewise, the merciless mandatory sentences enacted as part of the first habitual offenders laws in 1927 were not repealed until 1949.<sup>224</sup>

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220. Zalman, *supra* note 11, at 859. One of the first mandatory minimum terms in Michigan history involved a three-year prison sentence for larceny of a horse, second offense (this penalty no longer exists). The Michigan Supreme Court concluded the 1877 law did not constitute cruel or unusual punishment because “[t]he larceny of a horse usually, if not necessarily, implies a bad and wicked disposition.” *People v. Morris*, 45 N.W. 591, 593 (Mich. 1890). Likewise, in 1907 the Legislature provided for a fifteen-year minimum term for burglary with explosives (this provision still exists), and the Michigan Supreme Court concluded the penalty was not unconstitutional given the “alarming increase” in the use of high explosives. *People v. Mire*, 138 N.W. 1066, 1067 (Mich. 1912).

221. The State Bar opposes mandatory minimum terms as a matter of principle: “The State Bar has a long-standing position of opposing any measure that would limit judicial discretion, which HB 5421 would effectively do by imposing a mandatory minimum sentence.” Letter Regarding HB 5421, Penalties for Certain Sex Offenders, from Janet Welch, Gen. Counsel, State Bar of Mich., & Elizabeth K. Lyon, Pub. Policy Program Analyst, State Bar of Mich., to Phillip J. Pavlov, State Representative (Feb. 6, 2006), available at <http://www.michbar.org/publicpolicy/positionpdfs/positionPDF367.pdf>; see also *United States v. C.R.*, 792 F. Supp. 2d 343, 484 (E.D.N.Y. 2011) (discussing public policy concerns with mandatory minimum terms).

222. *People v. Bullock*, 485 N.W.2d 866, 893 n.10 (Mich. 1992) (Boyle, J., concurring in part and dissenting in part).

223. The drug laws were revised in 2002. Act of Dec. 25, 2002, No. 665, 2002 Mich. Pub. Acts 2455 (codified as amended at MICH. COMP. LAWS § 333.7401); Act of Dec. 30, 2002, No. 710, 2002 Mich. Pub. Acts 2641, 2643–44 (codified as amended at MICH. COMP. LAWS § 333.7403). The 1978 drug laws had earlier survived multiple challenges, including a federal constitutional challenge. See *Harmelin v. Michigan*, 501 U.S. 957 (1991). However, there was some relief on the parole front. See *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992) (concluding the penalty for possession of 650 grams or more of cocaine had to be *paroleable* life imprisonment to survive constitutional muster under the Michigan Constitution).

224. See *infra* notes 273–76 and accompanying text.

Today, there are only eight mandatory minimum terms left from the period of 1907 to 1955, and the crimes to which they correspond are rarely seen in the twenty-first century.<sup>225</sup> On the other hand, there are eleven mandatory minimum terms dating from 1959 through 2013, and seven of this group apply to common felony crimes, while the remaining four relate to offenses involving wildlife,<sup>226</sup> hazardous waste,<sup>227</sup> and tobacco stamp violations.<sup>228</sup> The seven mandatory minimum terms are listed below and include two very recent provisions (both of the absolute variety) that are exceptionally long:

Armed robbery with aggravated assault or serious injury. <sup>229</sup> Effective 1959.	Two-year minimum term
Criminal sexual conduct first, second, or third degree; second offense. <sup>230</sup> Effective 1975.	Five-year minimum term
Delivery or possession with intent to deliver drugs to minors, students, or near school property. <sup>231</sup> Effective 1978, 1988.	One- and two-year minimum terms (departure available)
Delivery or possession with intent to deliver drugs to students or near school property, second offense. <sup>232</sup> Effective 1988.	Five-year minimum term (departure available)
OWI Third Offense. <sup>233</sup> Effective 1992.	One-year minimum prison sentence or jail incarceration of not less than thirty days
Criminal sexual conduct first-degree by offender seventeen years or older with minor under thirteen years. <sup>234</sup> Effective 2006.	Twenty-five-year minimum term
Habitual offender fourth offense (specified felonies). <sup>235</sup> Effective 2012.	Twenty-five-year minimum term

225. See MICH. COMP. LAWS ANN. § 750.112 (West 2004) (fifteen-year mandatory minimum term for burglary with explosives, 1907); *id.* § 45.82 (West 2006) (not less than two years for illegal acts by county purchasing agent, 1917); *id.* § 750.361 (West 2004) (not less than one year for larceny of locomotive parts, 1917); *id.* § 750.458 (not less than two years for detaining female in house of prostitution, 1931); *id.* § 750.210a (not less than two years for valerium offenses, 1942); *id.* §§ 35.929, 35.980 (West 2013) (not less than one year for willful false application for veterans benefits, 1947, 1955).

226. *Id.* § 324.40118 (West 2009) (wildlife conservation violation, five-, ten- and ninety-day minimum terms, all misdemeanors, 1995); *id.* § 324.48738(3) (West Supp. 2013) (illegal possession of sturgeon, thirty-day minimum term, misdemeanor, 2003).

227. *Id.* § 324.8905(3) (West 2009) (hazardous waste at health facility, second offense, one year minimum, felony, 1995).

228. *Id.* § 205.428(6) (tobacco stamp violation, one year minimum, felony, 1997).

229. *Id.* § 750.529 (West 2004).

230. *Id.* § 750.520f.

231. *Id.* § 333.7410 (West 2012).

232. *Id.* § 333.7413(3).

233. *Id.* § 257.625(9)(c) (West 2006).

234. *Id.* § 750.520b(2)(b) (West Supp. 2013).

235. *Id.* § 769.12.

The two longest mandatory minimum terms, which are for CSC first-degree and the fourth habitual offender, are also the most recent. In 2006, the Legislature added a twenty-five year mandatory minimum term for CSC first-degree against a victim under the age of thirteen.<sup>236</sup> This was done in response to the rape and murder of Jessica Lunsford by a convicted sex offender in Florida, as previously mentioned.<sup>237</sup> In October of 2012, the Legislature added the twenty-five year mandatory minimum term for certain fourth habitual offenders (specified felonies only). This was done in response to the murder of Larry Nehasil, a Livonia police officer. Officer Nehasil was murdered by a repeat offender who was being investigated for a series of home invasions.<sup>238</sup> These two mandatory minimum terms appear to be the longest in Michigan's history, excluding mandatory life sentences.<sup>239</sup>

The impact of the two twenty-five year mandatory minimum terms has been and will be significant. For the CSC offender, the legislative analysis projected an "indeterminate fiscal impact" that nevertheless acknowledged "increased incarceration costs" for those serving "increased incarceration time prior to parole."<sup>240</sup> The legislative analysis also noted 260 new dispositions for CSC first-degree with a victim under the age of thirteen in 2004 (prior to the amendment).<sup>241</sup> According to the Michigan Department of Corrections' annual statistics from 2009 to 2011, there was an average of sixty-nine new commitments each year for CSC first-degree with a victim under thirteen.<sup>242</sup> While undoubtedly some portion of those offenders would have received twenty-five years imprisonment before the 2006 amendment, for many offenders that would not have been the case. The sentencing guidelines range for an individual convicted of CSC first-degree with no prior record and the highest offense severity level would be 108 to 180 months.<sup>243</sup> In

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236. See Act of May 29, 2006, No. 169, 2006 Mich. Pub. Acts 499; SENATE FISCAL AGENCY, SENATE FISCAL ANALYSIS OF SENATE BILLS 709, 717, 718, & 1122 AND HOUSE BILLS 5421, 5422, 5531, & 5532 I (2006).

237. See *supra* note 193 and accompanying text.

238. Act of Oct. 1, 2012, No. 319, 2012 Mich. Pub. Acts 136; HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: MINIMUM PRISON SENTENCES FOR FOURTH HABITUAL OFFENDERS I (2012).

239. There is also a mandatory minimum term of twenty-five years for possession with intent to deliver over 1,000 grams committed by a juvenile offender, but this is one of three alternative sentencing options available to the court. MICH. COMP. LAWS ANN. § 769.1(5), (12) (West 2000).

240. SENATE FISCAL AGENCY, *supra* note 236, at 7–8.

241. *Id.* at 9.

242. COURT DISPOSITIONS, *supra* note 201, at A-40, A-117, A-191.

243. MICH. COMP. LAWS ANN. § 777.62 (West 2006) (Class A grid). For the sentencing guidelines range to recommend twenty-five years, the person would have to have a significant prior record and/or a high offense severity level and some prior record. *Id.*



other words, the new mandatory minimum term for CSC first-degree would add approximately ten years imprisonment for those with no prior criminal record.<sup>244</sup>

For the fourth habitual offender, it may be too early to predict the number of people affected since the provision went into effect in October of 2012. Nonetheless, the estimated impact of this new law is alarming. The legislative analysis predicts the need for an additional 1,600 prison beds after ten years and an additional 7,300 prison beds after twenty-five years.<sup>245</sup> The total cost could run as high as 55.7 million dollars per year after ten years and 250.7 million dollars per year after twenty-five years.<sup>246</sup> Focusing on the sentencing guidelines ranges alone, nearly half of the offenders falling in the Class A crime class would not have a recommended range reaching 300 months if sentenced as a fourth habitual offender.<sup>247</sup> In addition, a sentence of 300 months would be a departure for nearly all Class B fourth offenders and all Class C and D fourth offenders.<sup>248</sup> In other words, many offenders who fall under the new fourth habitual offender provision will receive a much longer sentence.

Notably lacking in these new laws is a departure valve. For drug offenses and drunk driving, the Legislature provided either a departure valve or an alternative jail and probationary sentence, respectively.<sup>249</sup> There is likewise a movement afoot to remove tough mandatory minimum terms for some federal crimes.<sup>250</sup> Yet, Michigan has moved in the opposite direction with two very heavy mandatory minimum terms with no departure provisions.

With no discretion on the part of the sentencing judge, the prison population is likely to increase as judges must impose at least twenty-five years imprisonment and cannot tailor the sentence to the facts of the case. Even if the mandatory minimum terms function more as prosecutorial bargaining tools to induce guilty pleas to lesser offenses, prison populations will still increase as offenders who might have won acquittals at trial are frightened into pleading

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244. A mandatory minimum term always controls when there is conflict with the sentencing guidelines range. *Id.* § 769.34(2)(a).

245. SENATE FISCAL AGENCY, FISCAL ANALYSIS OF SENATE BILL 1109, at 3 (2013).

246. *Id.*

247. MICH. COMP. LAWS ANN. §§ 777.61–.62 (West 2006).

248. *Id.* §§ 777.63–.65.

249. *See id.* § 333.7413(4) (West 2012) (departure provision for second or subsequent drug offenses); *id.* § 257.625(9)(c) (West 2006) (alternative jail and probationary sentence for drunk driving repeat offenders); *see also* *People v. Fields*, 528 N.W.2d 176, 178 (Mich. 1995) (discussing departure provision under drug laws).

250. *See United States v. Kupa*, No. 11-CR-345, 2013 WL 5550419, at \*1 (E.D.N.Y. Oct. 9, 2013).

guilty. Indeed, even the presumed deterrent effect of such a harsh mandatory penalty may be illusory, as studies show no deterrent effect from mandatory terms in general (this conclusion surprisingly includes no deterrent effect for the 1977 mandatory felony-firearm sentences as well).<sup>251</sup> Thus, the next several decades may be a particularly difficult time in Michigan given the harsh new mandatory minimum terms.

#### IV. INCREASES IN CONSECUTIVE SENTENCING AUTHORITY

Before 1990, there were thirteen consecutive sentencing statutes in Michigan.<sup>252</sup> From 1990 to 2013, the Legislature added twenty-nine new consecutive sentencing provisions.<sup>253</sup> This increase is startling given Michigan's history as a predominantly concurrent sentencing state.<sup>254</sup>

Michigan has always operated under a system of presumptive concurrent sentencing. There must be statutory authority for the imposition of consecutive sentences.<sup>255</sup> This preference for statutory regulation was based on the historical anomaly that Michigan, unlike other states, did not import the common law tradition of discretionary consecutive sentencing into its jurisprudence.<sup>256</sup> Instead, the authority for consecutive sentencing must come from a statute, as the Michigan Supreme Court explained in *In re Lamphere*:

The relations of this commonwealth to the common law are not all together conformed to the holdings of some other states. In many of the states, statutes of parliament passed before or during the early days of the American colonies, as well as old colonial statutes and usages, have been recognized as part of the common law and have been construed and applied by the courts. But Michigan was never a common-law colony, and while we have recognized the common law as accepted into our jurisprudence, it is the English common law, unaffected by statute. In 1810 an act was passed putting an end to all the written law of England, France, Canada and the

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251. See George C. Thomas III & David Edelman, *An Evaluation of Conservative Crime Control Theology*, 63 NOTRE DAME L. REV. 123, 136 n.95 (1988); Michael Tony, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 96 (2009).

252. See *infra* notes 262–63 and accompanying text.

253. See *infra* note 264 and accompanying text.

254. See *In re Lamphere*, 27 N.W. 882 (Mich. 1886).

255. See *People v. Sawyer*, 302 N.W.2d 534 (Mich. 1981).

256. See *Oregon v. Ice*, 555 U.S. 160, 163–64, 168–69 (2009).

Northwest and Indiana territories, as well as the French and Canadian customs, leaving no statute or code law in force except that of Michigan territory and the United States. 1 Terr. Laws, 900. And while we have kept in our statute books a general statute resorting to the common law for all non-enumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible, by statute. There is no crime whatever punishable by our laws except by virtue of a statutory provision. The punishment of all undefined offenses is fixed within named limits, and beyond the unregulated discretion of the courts. While we refer with profit to the rulings of other courts, there are many cases where we cannot regard them as binding.<sup>257</sup>

Consecutive sentencing has always been considered “strong medicine,”<sup>258</sup> and it would appear that the Legislature was careful in crafting only a few consecutive sentencing provisions from 1877 through 1978. The first consecutive sentencing statute provided for discretionary consecutive sentencing for crimes committed by inmates.<sup>259</sup> A handful of consecutive sentencing statutes blossomed over the early years, mostly for inmate crimes.<sup>260</sup> In 1977 and 1978, the Legislature additionally authorized consecutive sentencing for possession of a weapon during commission of a felony (felony-firearm) and for the commission of certain controlled substance offenses and “another felony.”<sup>261</sup> Altogether, as of 1990 there were nine statutes that provided for mandatory consecutive sentencing (mostly for inmate crimes)<sup>262</sup> and four that provided for discretionary consecutive sentencing (namely for felony offenses committed while other felony charges were pending, for serious assaults while

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257. 27 N.W. at 883.

258. *People v. Chambers*, 421 N.W.2d 903, 909 (Mich. 1988) (quoting *Salley v. United States*, 786 F.2d 546, 548 (2d Cir. 1986)).

259. *See People v. Huntley*, 71 N.W. 178 (1897).

260. *See, e.g.*, Act of Mar. 17, 1927, No. 8, 1927 Mich. Pub. Acts 12 (prison escape); Act of June 16, 1931, No. 328, § 195, 1931 Mich. Pub. Acts 624, 663 (jail escape).

261. MICH. COMP. LAWS ANN. § 750.227b(2) (West 2004) (felony-firearm); *id.* § 333.7401(3) (West 2012) (manufacture, delivery, or possession with intent to deliver certain major controlled substances).

262. *Id.* § 750.193 (West 2004) (prison break and escape); *id.* § 750.195(2) (jail escape felony); *id.* § 750.196 (escape county work farm); *id.* § 750.197(2) (escape awaiting trial felony); *id.* § 750.227b (felony-firearm, 1977); *id.* § 750.349a (prisoner taking hostage, 1973); *id.* § 768.7a (West 2000) (crimes committed while incarcerated or on escape or parole); *id.* § 768.7b(2)(b) (major controlled substance offense committed pending disposition of felony, 1988); *id.* § 333.7401 (West 2012) (major controlled substance offense and “another felony,” mandatory in 1978, discretionary as of 2003).

detained or incarcerated, and for two provisions specific to Medicaid and Condominium Act crimes).<sup>263</sup>

Surprisingly, the Legislature apparently abandoned the cautious approach to consecutive sentencing when it added twenty-nine new provisions from 1994 to 2013. Most provisions accompanied newly created crimes (e.g., using a computer to commit a crime, 2000; identity theft, 2005; and false statement in a DNA petition, 2009), but some exceptions included discretionary consecutive sentencing for long-standing crimes such as first-degree criminal sexual conduct, first-degree home invasion (formerly known as breaking and entering an occupied dwelling), and resisting an officer.<sup>264</sup>

This turnaround on consecutive sentencing comes with a price. While there is no published data on the number of consecutive sentences imposed in Michigan, and even recognizing that most of the new provisions authorize *discretionary* consecutive sentencing, the sheer number of provisions is important. In 1990, there were only thirteen statutes that authorized consecutive sentences. In 2013, there were forty-two. This is an increase of 223 percent. In the legislative analysis accompanying just one of the new consecutive sentencing provisions, namely for multiple deaths arising out of a traffic incident, researchers estimated an additional cost of one million dollars per year to taxpayers (in 1999 dollars) for each new set of offenders sentenced for driving offenses involving multiple

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263. *Id.* § 750.506a (West 2004) (certain assaults while detained or incarcerated, 1974); *id.* § 768.7b(2)(a) (West 2000) (felony pending disposition of felony, 1988); *id.* § 400.609(2) (West 2008) (repeated Medicaid false claims, 1977); *id.* § 559.258 (West 2004) (Condominium Act violations, 1983).

264. *See id.* § 259.80f(6) (West Supp. 2013) (airport weapons, 2002); *id.* § 333.7401c(5) (West 2012) (maintaining drug house, lab, vehicle, 2001); *id.* § 445.69(4) (West 2011) (identity theft, 2005); *id.* § 750.50(7) (West Supp. 2013) (animal cruelty, 2008); *id.* § 750.81d (West 2004) (resisting officer, 2002); *id.* § 750.110a (home invasion first-degree, 1994); *id.* § 750.119(3) (corruption of appraisers, jurors, referees, 2001); *id.* § 750.120a(6) (juror intimidation, 2001); *id.* § 750.122(11) (bribery witness, 2001); *id.* § 750.145d(3) (using Internet to commit crime, 1999); *id.* § 750.174(12) (West Supp. 2013) (embezzlement vulnerable victim, 2007); *id.* § 750.174a(13) (embezzlement vulnerable adult, 2013); *id.* § 750.212a(1) (West 2004) (explosives, bombs, vulnerable target, 2002); *id.* § 750.215 (impersonating peace officer, 2003); *id.* § 750.217(f) (West Supp. 2013) (impersonating firefighter, 2006); *id.* § 750.227f (West 2004) (body armor, 2000); *id.* § 750.411u(2) (West Supp. 2013) (gang involvement and underlying felony, 2009); *id.* § 750.411v(4) (gang recruitment, 2009); *id.* § 750.422a(2) (false statement in DNA petition, 2009); *id.* § 750.436(4) (West 2004) (poisoning food or drink, 2002); *id.* § 750.462j(4) (West Supp. 2013) (human trafficking, 2011); *id.* § 750.479(7) (West 2004) (assault on police officer, 2002); *id.* § 750.479b(4) (taking weapon from officer, 1994); *id.* § 750.483a(10) (interfering with court or reporting of crime, 2001); *id.* § 750.520b(3) (West Supp. 2013) (CSC first-degree, 2006); *id.* § 750.520n(4) (lifetime monitoring violation, 2006); *id.* § 750.529a (West 2004) (carjacking, 1994); *id.* § 752.797(4) (using computer to commit crime, 2000); *id.* § 769.36(1) (West 2006) (multiple deaths and operation of vehicle, 2002).

deaths where it was predicted that the trial judge might impose a discretionary consecutive sentence.<sup>265</sup>

Additionally, and anecdotally speaking, the impact of consecutive sentencing on overall sentence length is significant. In a 1997 case where the offender was resentenced for home invasion first-degree and commission of another felony, the judge converted the concurrent sentences to consecutive sentences, thereby resulting in a cumulative sentence of twenty to thirty-five years rather than twelve to twenty years, as would have been the case with concurrent sentences.<sup>266</sup> In another home invasion case reported in 1998, the judge exercised discretion to order consecutive sentencing, and the cumulative sentence length became sixteen to thirty-five years rather than ten to fifteen years.<sup>267</sup> In a CSC first-degree case reported in 2012, the judge imposed consecutive sentences of twenty-five to fifty years imprisonment, resulting in a cumulative sentence of fifty to one-hundred years.<sup>268</sup> In an even more dramatic example of the consequences of this trend, the Court of Appeals recently upheld seven consecutive sentences of forty to sixty years imprisonment for seven convictions of CSC first-degree.<sup>269</sup> The Court noted that it would not review the sentences in their aggregate for proportionality purposes. Rather, it must focus on each sentence individually without consideration of the cumulative effect.<sup>270</sup>

In sum, today's judges have much more discretion to impose consecutive sentences, and the exercise of that discretion increases the overall sentence in a significant way.

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265. SENATE FISCAL AGENCY, FISCAL ANALYSIS OF SENATE BILL 0257: ENROLLED ANALYSIS 3 (2002).

266. *People v. Hill*, 561 N.W.2d 862, 864 (Mich. Ct. App. 1997) (affirming the consecutive sentences of twelve to twenty years for home invasion first-degree and eight to fifteen years for assault with intent to rob ordered at a resentencing where the judge did not realize the authority for consecutive sentencing at the original sentencing hearing).

267. *People v. St. John*, 585 N.W.2d 849, 851 (Mich. Ct. App. 1998) (affirming consecutive sentences of ten to fifteen years and six to twenty years for involuntary manslaughter and home invasion first-degree).

268. *People v. Ryan*, 819 N.W.2d 55, 67 (Mich. Ct. App. 2012) (affirming consecutive sentences of twenty-five to fifty years and twenty-five to fifty years for CSC first-degree).

269. *People v. Brown*, No. 308510, 2013 WL 3942486, at \*7 (Mich. Ct. App. July 30, 2013) (affirming seven consecutive sentences of forty to sixty years imprisonment for seven convictions of first-degree CSC).

270. *Id.* at \*3 (citing *People v. Warner*, 476 N.W.2d 660 (Mich. Ct. App. 1991), and *People v. Hardy*, 537 N.W.2d 267 (Mich. Ct. App. 1995)).

## V. HABITUAL OFFENDERS AND REPEAT DRUG OFFENDERS

Sentencing the habitual offender has always been a challenge. The delicate balance between rehabilitation, deterrence, protection of society, and punishment<sup>271</sup> tends to weigh heavily in favor of harsh punishment. As with most sentencing decisions, however, there is no universally approved punishment, and attitudes toward the sentencing of habitual offenders have fluctuated over time. With the advent of the statutory sentencing guidelines, the recommended range of punishment for the habitual offender and repeat drug offenders is quite wide, leaving a large degree of discretion in the hands of the sentencing judge.

While there were habitual offender laws in existence in the 1800s,<sup>272</sup> the first habitual offender laws included in our modern Code of Criminal Procedure were enacted in 1927 in response to a serious increase in crime following World War I.<sup>273</sup> These enhanced sentences were harsh and often mandatory.<sup>274</sup> The mandatory terms were repealed in 1949 in favor of a discretionary sentence enhancement scheme.<sup>275</sup> The 1949 revisions also offered the prosecutor discretion to charge or not charge the offender as a habitual offender.<sup>276</sup> The 1949 law did not provide for indeterminate sentencing, and the Legislature did not authorize indeterminate sentencing for habitual offender sentences until 1978.<sup>277</sup> While there was a right to a jury trial for the habitual offender enhancement as part of the 1949 law, this right was eliminated in 1994.<sup>278</sup> The sentencing guidelines were not made applicable to habitual offender sentences until 1999.<sup>279</sup>

One problem with applying the statutory sentencing guidelines to habitual offenders is the very large ranges provided for the repeat offender. By statute, the top level of the sentencing range is increased by twenty-five percent, fifty percent, and one hundred

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271. These are the state's four articulated sentencing goals. *People v. Coles*, 339 N.W.2d 440, 453 (Mich. 1983) (citing *People v. Snow*, 194 N.W.2d 314 (Mich. 1972)).

272. *People v. Campbell*, 139 N.W. 24, 25 (Mich. 1912).

273. See 1 DUNBAR, *supra* note 9, at 424, 608; *People v. Stoudemire*, 414 N.W.2d 693, 695 (Mich. 1987).

274. For certain fourth habitual offenders, the mandatory sentence was life without parole. For the third offender, there was a mandatory minimum term of seven and one half years. See *People v. Palm*, 223 N.W. 67 (Mich. 1929); *In re Southard*, 298 N.W. 457 (Mich. 1941); *Stoudemire*, 414 N.W.2d at 695.

275. *Brinson v. Genesee Circuit Judge*, 272 N.W.2d 513, 516 (Mich. 1978); *Stoudemire*, 414 N.W.2d at 699–700.

276. *Brinson*, 272 N.W.2d at 515.

277. *People v. Wright*, 437 N.W.2d 603, 605–06 (Mich. 1989).

278. *People v. Zinn*, 551 N.W.2d 704, 706–07 (Mich. Ct. App. 1996).

279. MICH. COMP. LAWS ANN. § 777.21(3) (West 2006).

percent for the second, third, and fourth offender, respectively.<sup>280</sup> While these increases are lower than the increases permitted for the maximum sentence,<sup>281</sup> the sentencing commission, and ultimately the Legislature, made a policy choice that appears to have been the subject of some debate. In the final report to the Legislature dated December 2, 1997, the sentencing commission recommended the habitual offender ranges that are set forth above.<sup>282</sup> Yet, only weeks earlier, the commission had intended to recommend increases of five percent, ten percent, and fifteen percent.<sup>283</sup> Research at the time showed that approximately nineteen percent of offenders were being sentenced as habitual offenders.<sup>284</sup>

Unfortunately, the choice of a higher level of enhancement created very broad sentencing ranges. The ranges can be as wide as fifteen to fifty years for an individual convicted of second degree murder as a fourth habitual offender and nine to thirty years for one convicted of armed robbery as a fourth habitual offender.<sup>285</sup> These are ranges for the minimum sentence only. The problem with “very large guideline sentencing ranges” is the disparity in sentencing it produces, especially between metropolitan and out-of-state areas.<sup>286</sup> According to a 2008 study conducted by the National Center for State Courts, “the probability of going to prison is 10–15 percent higher in out-state Michigan and the length of sentence is 25–30 percent greater.”<sup>287</sup>

From a historical perspective, were the sentences for habitual offenders lower or higher before the advent of the statutory sentencing guidelines? The answer is likely higher in 1929, when there were mandatory terms, but it is harder to tell moving into the 1980s and 1990s. For some habitual offenders, the judges increased the maximum term but did little to the minimum term.<sup>288</sup> For other offenders, judges increased both the minimum and maximum

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280. *Id.*

281. *Id.* § 769.10 (West 2000) (fifty percent for second offender); *id.* § 769.11 (West 2000) (one hundred percent for third offender); *id.* § 769.12 (life or fifteen years for the fourth offender depending on whether the underlying maximum term is above or below five years imprisonment).

282. MALONEY ET AL., *supra* note 17, at 26.

283. *Id.* app. C, at 8.

284. *Id.* app. C, at 2.

285. MICH. COMP. LAWS ANN. §§ 777.61–.62 (West 2006).

286. OSTROM ET AL., *supra* note 163, at 15–16.

287. *Id.*

288. *See e.g.*, *People v. Fountain*, 282 N.W.2d 168, 169 (Mich. 1979) (original sentence of ten to fifteen years for unarmed robbery, increased to ten to thirty years as fourth habitual offender); *People v. Johnson*, 317 N.W.2d 645, 646–49 (Mich. Ct. App. 1982) (same sentence of ten to thirty years for underlying crime of armed robbery and enhancement with second



terms to a large degree.<sup>289</sup> As with any sentencing decision, the appropriate punishment was often in the eye of the beholder.

All things considered, today's habitual offenders face very wide sentencing ranges and some face a mandatory minimum term of twenty-five years.<sup>290</sup> Moreover, the unspoken question is whether the Legislature will wait another twenty years to modify or repeal the new mandatory minimum term as it did with the stiff 1927 habitual offender punishments.<sup>291</sup>

There is much less room to doubt that repeat drug offenders are punished more severely under the statutory sentencing guidelines than before the guidelines, even in comparison to the punishment of habitual offenders. The statutory guidelines are silent as to the level of enhancement appropriate for individuals convicted under Mich. Comp. Laws Section 333.7413 (the second drug offender provision),<sup>292</sup> but a 2007 amendment provided for the scoring of offense variables relating to the underlying crime and the public trust category (the latter category applies to all second drug offenders).<sup>293</sup> Additionally, through the combination of a Michigan Supreme Court case holding that the sentencing guidelines ranges could be doubled for the repeat drug offender,<sup>294</sup> and a Court of Appeals decision that assumed—arguably in dicta—that both the top and bottom numbers of the range could be doubled,<sup>295</sup> trial judges are now permitted to sentence repeat drug offenders within a range that is higher than that provided for the third habitual offender (although both enhancement statutes permit the same

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habitual offender); *People v. Johnson*, 348 N.W.2d 716, 717, 720 (Mich. Ct. App. 1984) (sentence of three to five years for larceny over one hundred dollars enhanced to five to twenty years as fourth habitual offender).

289. See e.g., *People v. Odendahl*, 505 N.W.2d 16, 16 (1993) (ten to fifteen years for felonious assault as a fourth habitual offender); cf. *People v. Hansford*, 562 N.W.2d 460, 461 (Mich. Ct. App. 1997) (forty to sixty years imprisonment for breaking and entering an occupied dwelling and receiving and concealing stolen property, both as a fourth habitual offender). But see *People v. Curry*, 371 N.W.2d 854, 859–60 (Mich. Ct. App. 1985) (reversing life imprisonment for breaking and entering a motor vehicle as a fourth habitual offender).

290. MICH. COMP. LAWS ANN. § 769.12 (West Supp. 2013).

291. See *supra* notes 13–15 and accompanying text.

292. See MICH. COMP. LAWS ANN. § 777.18 (West Supp. 2013).

293. Act of Jan. 8, 2007, No. 655, 2006 Mich. Pub. Acts 2312 (codified at MICH. COMP. LAWS § 777.21).

294. *People v. Lowe*, 773 N.W.2d 1, 1 (Mich. 2009).

295. *People v. Williams*, 707 N.W.2d 624, 632–33 (Mich. Ct. App. 2005).

doubling of the penalty).<sup>296</sup> There is no increased floor for the sentencing guidelines ranges for the habitual offender, but there appears to be an increased floor for the repeat drug offender.<sup>297</sup>

In sum, while many viewed the guidelines' inclusion of the habitual offender (and to a lesser extent the repeat drug offender) as a major improvement over the earlier years of less regulated repeat offender sentencing,<sup>298</sup> that assessment may be called into question by the very large ranges available for the habitual offender and the doubling of the range on both ends for the repeat drug offender.

## VI. INCREASING LENGTH OF PRISON STAY BEFORE PAROLE

Parole policy and practice can have a profound impact on the amount of time an individual serves. Discussion of the Michigan parole system could easily justify its own article, but what follows is a summary of the major changes in parole eligibility and approval rates over the years with particular emphasis placed on the period between 1992 and the present.

By the late 1880s, and before official commencement of indeterminate sentencing in 1903, Michigan had a parole system and also statutory authority for release based on good behavior. The first good-time statute can be traced to 1857, when inmates could receive a two-month reduction of their sentence during each of the first three years and a reduction of up to seventy-five days per year during the third, fourth, and fifth years, all the way up to six months per year during the twentieth and subsequent years.<sup>299</sup> This system remained substantially intact through 1978.

Michigan was also one of the first states to develop a parole system in the years 1885 to 1886. This nascent parole system was technically more a system of conditional pardons and commutations.<sup>300</sup> Nonetheless, regardless of the label of the new system,

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296. Compare MICH. COMP. LAWS ANN. § 333.7413 (West 2012) (allowing double the penalty for repeat drug offenders), with *id.* § 769.11 (West 2006) (allowing double the penalty for the third habitual offender).

297. See *id.* § 777.21(3) (West Supp. 2013).

298. *People v. Cervantes*, 532 N.W.2d 831, 835–36 (Mich. 1995) (Cavanagh, J., concurring in part and dissenting in part) (using the judicial sentencing guidelines as a benchmark to sentence habitual offenders aids the proportionality analysis applicable to all sentences).

299. *In re Walsh*, 49 N.W. 606, 607 (Mich. 1891).

300. See 2 DUNBAR, *supra* note 9, at 611; see, e.g., *People v. Moore*, 29 N.W. 80, 81 (Mich. 1886).

good behavior in prison was rewarded by early release into the community.<sup>301</sup>

For years, Michigan prisoners received two rewards for good behavior: good time reductions and release into the community via the parole process. The good-time statutes stayed in force until 1978, when a ballot proposal (Proposal B of 1978) eliminated good-time credits for those convicted of certain assaultive offenses.<sup>302</sup> In 1982, the good-time statute was amended to allow disciplinary credits (less favorable than good time credits) for the earlier Proposal B offenders.<sup>303</sup> In 1986, disciplinary credits were substituted for good-time credits for all offenders, with a few limited exceptions.<sup>304</sup> In 1998, disciplinary credits were eliminated for most assaultive crimes, and in 2000 the entire system of disciplinary credits was eliminated.<sup>305</sup> As of December 15, 2000, Michigan operates under a system of truth-in-sentencing, where the offender must serve the entire minimum term before becoming eligible for parole.<sup>306</sup> Truth-in-sentencing not only eliminates early release for good behavior, but also eliminates placement of some prisoners into community residential programs before their minimum terms have expired.<sup>307</sup>

Apart from the major transition to truth-in-sentencing, the parole practices and policies in Michigan changed significantly from 1992 onward following the tragic release of serial killer Leslie Allen Williams.<sup>308</sup> After Williams was released on parole and killed several young women in 1991 and 1992, Governor John Engler revised the parole board, changing it from a board of civil service employees to

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301. I DUNBAR, *supra* note 9, at 457 (“Michigan was one of the first states to develop the parole system. Since 1896 good behavior in prisons has been rewarded by this means.”); *People v. Cummings*, 50 N.W. 310, 314 (Mich. 1891) (“The term of imprisonment depends upon the ability of the convict to please the prison officials in his deportment, and not upon the enormity of his offense.”).

302. See Act of Nov. 7, 1978, Initiated Law, 1978 Mich. Pub. Acts 2632, 2632–33 (codified as amended at MICH. COMP. LAWS §§ 791.233, .233b).

303. Act of Dec. 30, 1982, No. 422, 1982 Mich. Pub. Acts 1720, 1720–21 (codified as amended at MICH. COMP. LAWS § 800.33).

304. See Act of Dec. 24, 1986, No. 322, 1986 Mich. Pub. Acts 1511 (codified as amended at MICH. COMP. LAWS § 800.33).

305. See Act of June 24, 1994, No. 217, 1994 Mich. Pub. Acts 962; Act of June 24, 1994, No. 218, 1994 Mich. Pub. Acts 977; Act of July 28, 1998, No. 315, 1998 Mich. Pub. Acts 1261; Act of July 28, 1998, No. 316, 1998 Mich. Pub. Acts 1272; Miriam A. Cavanagh, *If You Do the Crime, You Will Do the Time: A Look at the New “Truth in Sentencing” Law in Michigan*, 77 U. DET. MERCY L. REV. 375, 384 (2000).

306. See MICH. COMP. LAWS ANN. § 791.234(2) (West 2007).

307. See *id.* § 791.265(2); see, e.g., *id.* § 791.265a; cf. *People v. Woods*, 535 N.W.2d 259 (Mich. Ct. App. 1995).

308. William D. Adams, *The Prosecutorial Appeal of Parole: The Indigent Prisoner’s Right to Counsel*, 41 WAYNE L. REV. 177, 180–81 (1994).

a board of political appointees:<sup>309</sup> “The primary goal of the reorganization was to increase public safety by minimizing the number of dangerous and assaultive offenders being placed on parole.”<sup>310</sup> The intent was to make communities safer “by making more criminals serve more time and keeping many more locked up for as long as possible.”<sup>311</sup>

A Michigan Department of Corrections report summarizing parole practices from 1992 to 1997 described the new parole board as “far more conservative than its predecessor” and “much less willing to release criminals at all, forcing many to serve their maximum sentences.”<sup>312</sup> The report stressed the board’s interest in preventing crime and the desire “to keep them [inmates] locked up longer. [The former inmates] got out only because courts and statutes required them to be released.”<sup>313</sup>

Inmates serving parolable life sentences were hit particularly hard by changes put into effect by the new board and Legislature. The frequency of parole interviews for offenders serving parolable life sentences was reduced in 1992 and again in 1999, but the position the parole board took in 1992 was that “life means life,” even for those serving parolable life.<sup>314</sup> Although many sentencing judges imposed a life sentence before 1992 with the assumption that the inmate would be eligible for parole, and presumptively released on parole after twelve to twenty years,<sup>315</sup> this was no longer the state’s practice, and there was no right to resentencing.<sup>316</sup>

Putting aside the predicament faced by those serving parolable life sentences, the parole review process changed for all inmates from 1992 forward. Inmates won the right to appeal a parole denial in 1982 but then lost that right in 1999.<sup>317</sup> Prosecutors and victims gained the right to appeal parole decisions in 1992.<sup>318</sup> Parole guidelines went into effect in 1994, and although the board was required to follow those guidelines absent a departure for substantial and

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309. *People v. Hill*, 705 N.W.2d 139, 141 (Mich. Ct. App. 2005); Act of Sept. 21, 1992, No. 181, 1992 Mich. Pub. Act 1123, 1124 (codified at MICH. COMP. LAWS § 791.231a).

310. *Hill*, 705 N.W.2d at 141 (quoting the Michigan Parole Board website).

311. *Id.* (quoting former MDOC Director Kenneth L. McGinnis).

312. MICH. DEP’T OF CORR., FIVE YEARS AFTER—AN ANALYSIS OF THE MICHIGAN PAROLE BOARD SINCE 1992, at 2 (1997), available at <http://www.capps-mi.org/wp-content/uploads/2013/09/Five-years-after-An-analysis-of-the-parole-board-since-1992.pdf>.

313. *Id.*

314. *Hill*, 705 N.W.2d at 142; see, e.g., *People v. Scott*, 743 N.W.2d 62, 63 (Mich. 2008) (Kelly, J., dissenting from denial of leave to appeal).

315. See *Hill*, 705 N.W.2d at 141.

316. See, e.g., *People v. Moore*, 664 N.W.2d 700, 701–02 (Mich. 2003).

317. *Morales v. Mich. Parole Bd.*, 676 N.W.2d 221, 226–27 (Mich. Ct. App. 2003).

318. *Id.* at 227.

compelling reasons,<sup>319</sup> little case law developed as inmates subsequently lost the right to enforce those guidelines through judicial review.<sup>320</sup> Even today, statistics show offenders with a parole guidelines score reflecting a high probability of parole are often passed over for parole when the crime is assaultive or sexual in nature.<sup>321</sup>

All of this naturally leads to a discussion of parole approval rates. The average annual parole approval rate was sixty-six percent in the years 1976 to 1992 but decreased to fifty-four percent from 1992 to 2006.<sup>322</sup> In 1991, only 16.5 percent of prisoners were not paroled on their earliest release dates, while in 2003 nearly thirty-five percent of prisoners were serving past the first parole eligibility date.<sup>323</sup> In the last five years, the parole approval rate has climbed from 52.5 percent (2007) to 65.1 percent (2012), with an average annual rate of sixty percent.<sup>324</sup> However, increased parole approval rates often correspond to periods of high prison population and a contemporaneous effort to parole those who were previously denied parole. The prison population in Michigan skyrocketed to an all time high of 51,554 inmates in 2007,<sup>325</sup> and the parole approval rate rose in response. Nevertheless, corrections officials are now seeing fewer inmates who are eligible for parole, and the prison population is expected to grow from 43,594 at the end of 2102 to 45,000 by August of 2016.<sup>326</sup>

The big picture, which looks at parole from its inception, suggests a major change in the parole and release policies of the state over time. As initially conceived, “[t]he parole system constitutes a

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319. Act of Sept. 21, 1992, No. 181, 1992 Mich. Pub. Act 1123, 1125–26 (codified at MICH. COMP. LAWS § 791.233e).

320. The only notable decision reversing a parole denial came from *Scholtz v. Michigan Parole Board*, 585 N.W.2d 352, 357 (Mich. Ct. App. 1998).

321. CITIZENS ALLIANCE ON PRISONS & PUB. SPENDING, DENYING PAROLE AT FIRST ELIGIBILITY: HOW MUCH PUBLIC SAFETY DOES IT ACTUALLY BUY? 5, 8 (2009); Richard Stapleton, *Real Truth in Sentencing Could Save Really Big Prison Dollars*, BRIDGE MICH. (Mar. 29, 2012), available at <http://bridgemi.com/2012/03/guest-column-real-truth-in-sentencing-could-save-really-big-prison-dollars/>.

322. CITIZENS RESEARCH COUNCIL OF MICH., GROWTH IN MICHIGAN’S CORRECTIONS SYSTEM: HISTORICAL AND COMPARATIVE PERSPECTIVES 12 (2008).

323. THE HISTORY OF MICHIGAN LAW, *supra* note 7, at 171.

324. See MICH. DEP’T OF CORR., *supra* note 1, at 1; MICH. DEP’T OF CORR., REPORT TO THE LEGISLATURE: PRISON POPULATION PROJECTION REPORT, FEBRUARY 2011, at 4 (2011); MICH. DEP’T OF CORR., REPORT TO THE LEGISLATURE: PRISON POPULATION PROJECTION REPORT, JANUARY 2010, at 4 (2010); MICH. DEP’T OF CORR., REPORT TO THE LEGISLATURE: PRISON POPULATION PROJECTION REPORT, JANUARY 2009, at 3, 5 (2009).

325. MICH. DEP’T OF CORR., REPORT TO THE LEGISLATURE: PRISON POPULATION PROJECTION REPORT, FEBRUARY 2012, at 1 (2012).

326. *Id.*; MICH. DEP’T OF CORR., *supra* note 1, at 3, 7.

means for gradually re-orienting the prisoner to the duties of citizenship.”<sup>327</sup> The purpose of parole was to place the inmate beyond the bounds of the prison “so that he may have an opportunity to show that he can refrain from committing crime.”<sup>328</sup> Yet, as now construed, the parole process looks more closely at the crime committed and requires greater assurance that some offenders (namely lifers and those serving sex crimes) have reformed.<sup>329</sup> Moreover, for the first time in the state’s history, inmates no longer receive good-time or disciplinary credits for good behavior and must serve one hundred percent or more of the minimum sentence.

## VII. RULES THAT SURFACE, RETREAT, AND REAPPEAR

Increased sentence length and prolonged prison stays are easily traced to new laws and parole practices that serve to extend the length of a given sentence. However, sentence length can also be extended by the absence of rules that previously served to limit the overall minimum and maximum terms. Three previously existing rules fit this category.

The first is known as the *Stoudemire* rule. Michigan’s habitual offender statutes were enacted in 1927, and they were adopted without revision from the New York habitual offender statutes.<sup>330</sup> The New York courts had construed their statutes to require habitual offender penalties only when the offender had been convicted in separate proceedings and had an opportunity to reform between convictions.<sup>331</sup> This was the rule adopted by the Michigan Supreme Court in 1987 in a case called *People v. Stoudemire*.<sup>332</sup> However, the Michigan Supreme Court overruled the *Stoudemire* case in 2008.<sup>333</sup> The 2008 Court relied on the “plain text” of the statutes, which did not include a “same transaction” prohibition.<sup>334</sup>

Elimination of the *Stoudemire* rule has had a very significant effect on the sentencing of habitual offenders, since prosecutors now have discretion to seek sentence enhancement as a fourth habitual offender for an individual who has three prior convictions that

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327. 1 DUNBAR, *supra* note 9, at 457.

328. *In re Eddinger*, 211 N.W. 54, 54–55 (Mich. 1926).

329. *See Parole Approval Rates by Offense Group*, MICH. DEP’T OF CORR., [http://www.michigan.gov/documents/corrections/Parole\\_Approval\\_Rates\\_190318\\_7.pdf](http://www.michigan.gov/documents/corrections/Parole_Approval_Rates_190318_7.pdf) (last visited Nov. 29, 2013); *cf. Foster v. Booker*, 595 F.3d 353, 360, 363 (6th Cir. 2010).

330. *People v. Stoudemire*, 414 N.W.2d 693, 695 (Mich. 1987).

331. *Id.* at 696.

332. *Id.*

333. *People v. Gardner*, 753 N.W.2d 78, 91 (Mich. 2008).

334. *Id.* at 81.

arose from a single act or transaction. The previous requirement that there must be three separate opportunities to reform before exposing the individual to a life-maximum penalty or up to fifteen years imprisonment is now gone.<sup>335</sup>

Despite the absence of a *Stoudemire* rule under the case law, the Legislature has continued to recognize the *Stoudemire* rule in two distinct settings. When scoring Offense Variable 13 (pattern of crimes over a period of five years), the trial court shall “not count more than 1 controlled substance offense arising out of the criminal episode for which the person is being sentenced,”<sup>336</sup> and with the new twenty-five-year mandatory minimum term for fourth habitual offenders, “[n]ot more than 1 conviction arising out of the same transaction shall be considered a prior conviction . . . .”<sup>337</sup> These two exceptions suggest at least some continued acceptance of the same-transaction prohibition when increasing a sentence based on past conduct.

Another sentencing rule with a modest but important limitation on sentence length was the Life Expectancy Rule. In 1888, the Michigan Supreme Court reversed a fifty-year sentence for a twenty-three-year-old offender convicted of forcing himself upon his ten-year-old cousin while in a highly inebriated state.<sup>338</sup> The girl was not injured, either physically or emotionally, and the family did not wish to prosecute.<sup>339</sup> The Supreme Court ordered a new trial but observed that the sentence was also excessive and unconstitutional because it exceeded the life expectancy of the offender:

There is another feature of this case to which we wish to call special attention, and that relates to the sentence imposed. It is for 50 years, and will very likely reach beyond the natural life of the respondent, unrestrained of his liberty, and overreach by 10 or 15 years his natural life if so restrained. We see nothing in this record warranting any such sentence, and it must be regarded as excessive. It will not do to say the executive may apply the remedy in such a case. We do not know what the executive may do, and it is but a poor commentary upon the judiciary when it becomes necessary for the executive to regulate the humanity of the bench. But the constitution has not left the liberty of the citizen of any state entirely to the indiscretion or caprice of its judiciary, but enjoins upon all that

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335. See MICH. COMP. LAWS ANN. § 769.12 (West 2006).

336. *Id.* § 777.43(2)(e).

337. *Id.* § 769.12(1)(a) (West Supp. 2013).

338. *People v. Murray*, 40 N.W. 29 (Mich. 1888).

339. *Id.* at 30–31.



unusual punishments shall not be inflicted. Where the punishment for an offense is for a term of years, to be fixed by the judge, it should never be made to extent beyond the average period of persons in prison life, which seldom exceeds 25 years.<sup>340</sup>

In 1989, the Michigan Supreme Court formally adopted a life expectancy rule for individuals sentenced under statutes that permitted “life, or any term of years,” reasoning that a sentence longer than the offender’s life violated the statute.<sup>341</sup> The so-called *Moore* rule was in place for five brief years before it was impliedly overruled by a more conservative Supreme Court in a series of decisions between 1994 and 1997.<sup>342</sup> However, the 1888 *Murray* case has never been overruled, and some note it relied not on statutory construction but on constitutional excessiveness.<sup>343</sup>

A statutory life expectancy rule might not dramatically reduce the state’s prison population because reducing a thirty-year-old offender’s sentence from one hundred to 200 years to sixty to ninety years is not likely to reduce the overall length of prison stay for that offender,<sup>344</sup> but the rule nevertheless has important policy implications for the state. Michigan’s current problem, as explained throughout this Article, is excessive punishment. A life expectancy rule reinforces the need for punishment that is proportionate to the offense and the offender.

Finally, there is the *Tanner* rule, which states that the minimum sentence may not exceed two-thirds of the maximum sentence.<sup>345</sup> This limitation was set in place in 1972 when the Michigan Supreme Court concluded that a minimum sentence that is only days shorter than the maximum sentence frustrates the indeterminate sentencing law because it does not allow “a sufficient interval of time to guarantee that the corrections authorities will be able to exercise their jurisdiction of judgment with any practicality.”<sup>346</sup> The

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340. *Id.* at 16–17.

341. *People v. Moore*, 439 N.W.2d 684, 687 (Mich. 1989).

342. *People v. Kelly*, 539 N.W.2d 538, 540–41 (Mich. 1995) (noting implicit overruling of *Moore* by *Merriweather* decision); *see also* *People v. Merriweather*, 527 N.W.2d 460 (Mich. 1994); *People v. Lemons*, 562 N.W.2d 447 (Mich. 1997).

343. *See* *People v. Bullock*, 485 N.W.2d 866, 874 n.18 (Mich. 1992) (noting constitutional analysis in *Murray*).

344. The statutory sentencing guidelines currently permit a sentence of up to one hundred years for an individual convicted of second-degree murder without reference to the age of the offender. *See* MICH. COMP. LAWS ANN. § 777.61 (West 2006).

345. *People v. Tanner*, 199 N.W.2d 202, 204–05 (Mich. 1972).

346. *Id.*

Legislature agreed and incorporated this rule in the statutory sentencing guidelines in 1999.<sup>347</sup> However, the Supreme Court substantially cut back on the *Tanner* rule in 2004 when it concluded that the rule did not apply to crimes for which the maximum penalty was life or any term of years.<sup>348</sup>

The *Tanner* rule raises two areas of concern. First, many debate the wisdom of the 2004 decision, as it leaves no cap on the minimum sentence for a very large number of crimes. The Legislature has not stepped in to remedy this problem. Additionally, what is interesting about the *Tanner* rule is the Supreme Court's choice of a two-thirds rule rather than some other mathematical approach. Michigan's 1905 indeterminate sentence act provided for a minimum term that could not exceed one-half of the statutory maximum penalty.<sup>349</sup> The American Bar Association recommended a one-third rule when the *Tanner* case was decided.<sup>350</sup> The Supreme Court acknowledged the ABA Minimum Standards but reasoned that "Michigan's statutory provisions relating to regular and special good time credits in conjunction with the rule we hereby adopt today fairly approximates the objective of the American Bar Association's minimum standards 3.2(c) (iii)."<sup>351</sup> Given the abolishment of good-time and disciplinary credits in 1998, the two-thirds rule now appears antiquated and in need of reform.

#### CONCLUSION

Michigan attempted comprehensive sentencing reform in 1998 with new sentencing guidelines and also revised dollar thresholds for a number of property crimes. However, in the intervening fifteen years, the state has veered off course with dozens of new laws undoing much of what had been previously accomplished. The cumulative effect of the new laws has been to increase minimum and maximum sentences with little to no movement in the opposite direction. The "get tough" approach to parole since 1992 has similarly led to longer prison stays, longer sentences via truth-in-sentencing, and the long-term commitment of individuals serving

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347. MICH. COMP. LAWS ANN. § 769.34(2) (b) (West 2006).

348. *People v. Powe*, 679 N.W.2d 67, 67 (Mich. 2004); *People v. Washington*, 795 N.W.2d 816 (Mich. 2011).

349. Act of June 7, 1905, No. 184, 1905 Mich. Pub. Acts 268, 268; see also *Ex parte Richards*, 114 N.W. 348, 349 (Mich. 1907).

350. *Tanner*, 199 N.W.2d at 204–05.

351. *Id.*

parolable life sentences despite the often contrary intent of the sentencing judge.

Term-limited legislators, through no fault of their own, may lack the depth of experience necessary to recognize the problems caused by a system that now elevates retail fraud to a five-year maximum penalty when the crime was created to avoid charging the offender with a four-year offense. They may not recognize the lack of proportionality resulting from a sentencing scheme that treats home invasion with a gun the same as obtaining a person's money by false pretense. Additionally, there may be no institutional memory of the state's unique consecutive sentencing history or the decades it can take to remove mandatory minimum terms that were passed to deal with the pressing problems of the day. Viewed as a whole, and in light of years of steadily increasing penalties, Michigan's sentencing scheme and parole system are in need of meaningful, comprehensive reform.