ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

American Prison-Release Systems

INDETERMINACY IN SENTENCING AND THE CONTROL OF PRISON POPULATION SIZE

FINAL REPORT

Kevin R. Reitz,
Edward E. Rhine,
Allegra Lukac, and
Melanie Griffith

April 2022

Acknowledgements

We are grateful to Arnold Ventures for their financial support of this project and the work of the staff of their Criminal Justice program. They have been supporters and collaborators from the earliest days of conception of the project.

We thank the University of Minnesota law student research assistants who worked on the first round of state reports in the summer of 2020: Bree Crye and Matt Jacobs. Coauthors Allegra Lukac and Melanie Griffith started in this capacity in the summer of 2020, continued through the 2020-21 academic year, and then stayed with the project post-graduation to contribute to various chapters of this Final Report. Melanie Griffith was most heavily involved with the planning and writing of Chapter 5. Allegra Lukac deserves special mention. She single-handedly performed the underlying research for 27 state reports and filled in gaps for several others. She also helped to conceive and then prepared most of the tables presented in this report. She was directly involved in the writing of Chapters 4, 6, and 7, although her prodigious research permeates the entire report. Her command of the broad comparative sweep of the project, her perfectionism down to the level of details, and her surprising powers of memory made completion of the project possible within its short 18-month time frame.

We extend special thanks to Carl Reynolds and Jennifer Shaffer for the extensive feedback and materials they provided, far beyond our expectations.

Table of Contents

Introduction

"Indeterminacy" is the product of uncertainty, after a judge has pronounced a prison sentence, about later official decisions that will influence the actual time served by the defendant. The uncertainty extends over many future decisions, such as good-time awards or forfeitures by prison officials and release or release-denial decisions by parole boards. To the extent these later decision patterns are unpredictable, the judge's sentence is "indeterminate" on the day of sentencing. When prison sentences are *highly* indeterminate, many months or years of time-to-be-served can be unforeseeable in individual cases.

The mechanics of indeterminacy in prison sentencing vary enormously from state to state, and are not well understood. In many states, time-served policy is largely administered at the "back end" of the sentencing system. If prison policy is aimed toward retribution or public safety, it is back-end officials who ultimately choose how best to achieve those goals. This raises critical questions of whether they are well-positioned to be stewards of the public interest, and whether their procedures are adequate to the task. Such questions are especially urgent in a nation with high incarceration rates. In most American jurisdictions, however, back-end decisionmaking about prison-sentence length has low visibility and is unglamorous. Very few people pay serious attention to its workings.

From a systemic perspective, indeterminacy can be seen as the field of play in which back-end officials with time-served discretion exercise their powers. The larger the field—the greater the *degree* of indeterminacy—the greater the whole-system impact of back-end decisions. Indeterminacy builds up cumulative effects over hundreds and thousands of cases. In systems with high degrees of indeterminacy, a substantial amount of control over prison population size is located at the back end of the system. In many states, back-end officials have more to say about prison numbers than sentencing courts. Yet few people are aware of this.

For those concerned about mass incarceration, serious attention should be paid to the prison-release frameworks at the back ends of America sentencing systems. These are varied and are often highly complex. In each state, it is important to consider the institutional structure for release decisions, how and by whom time-served discretion is currently being exercised, and the range of possibilities for future changes in existing decision patterns (in both desirable and unwanted directions). Not all, but a large portion of the nation's prison policy is implicated. In recent years, much of the mass incarceration debate has been focused on "front-end" decisionmakers such as judges and prosecutors. For a comprehensive slate of possible reforms, equal attention must be directed to the back end.

This project offers new conceptual tools to better understand and compare the wide range of prison-release systems across America. We hope this will allow state officials to see their own systems in new perspective, and may shine a spotlight on policy options that would otherwise go unseen. (Prominent policy issues are noted throughout this report.)

Justice Louis Brandeis famously wrote that states should be seen as laboratories of innovation in law and policy. He saw this as a unique advantage of the American federal system. He argued that successful experiments in individual states could be exported to other jurisdictions.[1] This route to improvement in the law can only be taken, however, if states have a sophisticated understanding of what other states have been doing. In criminal justice and incarceration policy, such knowledge can be difficult to assemble. It is time-consuming to do so and conceptually challenging.

1 *New State Ice Co. v. Liebman*, 285 U.S. 262 (1932) (dissenting opinion).

This report is an effort to fill such a need. It grows out of an ambitious 18-month project to examine the prison-release frameworks of 50 states, the District of Columbia, and the federal system. We hope the report, and the larger project that surrounds it, will provide raw material of the kind Justice Brandeis envisioned, and food for thought for present-day policymakers.

A Note About Sources

The underlying research for this report is collected in 52 separate jurisdiction-specific reports for all 50 states, the District of Columbia, and the federal system. These "state reports," which vary in length from 10 to 40 pages, are published individually by the Robina Institute of Criminal Law and Criminal Justice after they have completed the editorial and production process. Unpublished state reports are available to readers on request.

PART I

General Principles

CHAPTER 1

Overview of this report and its limitations

Definitions of "indeterminacy" and "determinacy"

"Indeterminacy" in prison sentences means "unpredictability of time served." Once we know the terms of a particular judicial sentence, can we say with confidence how much time the defendant will actually spend in prison before the sentence's expiration? If actual time-to-be-served is highly unpredictable, then the sentence is highly indeterminate. If actual time-to-be-served is knowable within a relatively small range of possibility, then the sentence has a low degree of indeterminacy—or, we might say—it has a high degree of determinacy. *"Determinacy"* means "predictability of time served" at the time of judicial sentencing.[2]

One primary insight of this project is that uncertainty about the true lengths of individual prison sentences creates uncertainty about the size of the prison population as a whole. This is a systemwide aspect of indeterminacy in prison sentencing that has not been widely recognized. Hundreds or thousands of prison-release decisions, depending on their resolutions, add up to large effects on standing prison counts.

Much of our research aims toward understanding the degree to which prison population size in each state may be influenced by decisionmakers who have time-served discretion after judicial sentences have been finalized. This is often called the "back end" of the prison-sentence chronology, governed by official actors such as parole boards and departments of correction. Higher degrees of indeterminacy in individual sentences add up to greater control over prison population size by back-end agencies. Low degrees of indeterminacy mean that greater control over prisoner counts is held by "front-end" actors such as courts, prosecutors, legislatures, and sentencing commissions. States that want to change or introduce controls on their prison populations must be aware of where the relevant decisions are taking place.

Different degrees of indeterminacy are also related to the standards that should exist for the quality and fairness of prison-release decisions. Higher degrees of indeterminacy raise the stakes of back-end decisions. When years of prison time are at issue, for example, we should be especially concerned with the capabilities of back-end decisionmakers to make good substantive judgments. Also, adequate procedural safeguards for back-end decisionmaking are most important when indeterminacy is high. Informality and approximated justice are more tolerable when a few months of prison time are under consideration than when years of confinement are at stake.

2 Our definition of terms is specific to this project. Nationwide and worldwide, the terms "indeterminate" and "determinate" prison sentences have several different definitions. One of the important contributions of this project is to offer a standardized terminology for analysis across jurisdictions within and outside the U.S.

Definitions and Concepts

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

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

Comparing American prison-release systems

The legal structures of indeterminacy vary enormously across U.S. jurisdictions. Some are relatively simple and some are maddeningly complex. Most American prison-sentencing systems are quite indeterminate at the whole-system level, but a substantial minority are highly determinate. The discretion vested in parole boards deviates widely across jurisdictions, including some systems that place nearly all control over time served in parole boards, and some that have eliminated discretionary parole release for most or all prisoners. Likewise, there is no consensus on the scope of the authority ceded to departments of correction. Prison officials dominate back-end decisionmaking over time served in many states, but are relatively powerless in others.

A basic understanding of each American system is not easy to acquire. In paroling states, one must calibrate the relative powers of parole boards and departments of corrections, which sometimes supplement each other and sometimes cancel each other out. Additional official decisionmakers play prison-release roles in various states, but with no universal pattern. There is a roster in every jurisdiction of officials who possess release discretion but rarely make use of it.

In short, the operational features of American prison-release systems, and their foreseeable results, could hardly be more dissonant. Sometimes the differences are so extreme as to be inexplicable. Prior to this project, there has been no language or conceptual framework to describe, comprehend, and compare these realities across the states.

Overview of state reports

The "state reports" prepared in this project are 52 free-standing reports for each American state, the District of Columbia, and the federal system. Basic research has been completed for all reports, which will be put into publishable form and posted on the project website by late 2022. Taken together, the state reports will add up to nearly 1,000 pages of jurisdictions-specific detail and analysis, with full citations.[3] We know of no similar nationwide survey in the past.

The research collected in the state reports is the primary raw material for the content of this Final Report. The preparation of the reports yielded a vast amount of information to the project team, including much we had not known or suspected. Indeed, the comparative power of 52 individual studies is hard to overstate. Most of the conceptual, terminological, modeling, and measurement work in the DOI project was built brick by brick from what we learned as the reports accumulated.[4]

The project's terminology, models, and measurements

We hope this project will help launch a new discipline of "indeterminacy studies" (IS). The focal points of the field would be to study: the building blocks of prison-release systems, how back-end power over time served interacts with front-end sentencing discretion, and what the distribution of time-served authority tells us about the allocation of governmental power to control prison population size. Eventually, we hope IS will grow far beyond this Final Report, to encompass: the policy rationales for different prison-release frameworks, formulas, norms, and practices; the empirical study of prison-release systems in operation, including how their behaviors change over time; inquiry into the legal and institutional structures that can best effectuate a state's policy goals; investigations into "best" and "worst" practices in the U.S. (and other countries); and workable ideas for the improvement of existing systems.

The current study shows what can be done in 18 months. We hope the IS field will grow, attract new researchers and audiences for their work, and be a source of insights and reforms for many years to come.

New concepts and terminology

This report creates a number of basic concepts and a new, more precise terminology for the analysis of indeterminacy in prison-sentencing systems.[5]

To draw policy-relevant comparisons across jurisdictions, we suggest it is useful to think in terms of the *degrees of indeterminacy (DOIs)* in individual prison sentences and in prison-sentencing systems as a whole. The project explores a number of different measures of DOIs, including mathematical expressions, visual models, estimates from correctional statistics, and qualitative assessments of the legal rules and practical obstacles that might limit the use of back-end release discretion.

3 For the state reports posted to date, go to: https://robinainstitute.umn.edu/areas-expertise/doi-state-reports.

4 Unless otherwise noted, the information and materials presented in this chapter are based on the 52 "state reports" prepared for this project, including 50 states, the District of Columbia, and the federal system. Citations to legal authorities and other sources may be found in the individual reports for specific jurisdictions accessible at: https://robinainstitute.umn.edu/areas-expertise/doi-state-reports. Prepublication drafts of reports that have not yet been posted are available to interested readers on request.

5 Although our present focus is on American systems, we have designed our framework to allow for cross-national studies.

Within the estimated DOIs of particular systems, we try to identify which official actors or entities hold what portion of the total power. There is a large literature that examines the amount of discretion over prison sentences that is concentrated at the front end of American prison-sentencing systems—a body of work that has lately stressed the importance of prosecutors.[6] This project demonstrates the importance of asking similar questions about back-end dynamics.

The project also introduces the term "population-multiplier potential" (or PMP) to quantify the influence over prison population size that is ceded by law to back-end decisionmakers such as parole boards and prison officials. To give an oversimplified example, if all prisoners in a hypothetical state were eligible for parole release after serving 25 percent of their judicial maximum sentences, then the PMP attached to the parole board's release decisions would be 4:1 for the system as a whole. That is, if the parole board were to deny release to all prisoners for as long as legally possible (*a longest-time-served scenario*), the resulting prison population would eventually be four times as large as it would be if the board were to release all prisoners at their earliest allowable release dates (*a shortest-time-served scenario*).

In our analysis of the prison-release systems of all 50 states, the District of Columbia, and the federal system, we have found classes of sentences with PMPs of more than 100:1, and some with PMPs of 1.15:1 or less. In the former case, back-end release decisions, depending on their aggregate patterns, could vary the size of the relevant subpopulation of prisoners by a factor of at least 100 to one (from *longest to shortest time-served scenarios*). In the latter example, the potential swing in subpopulation size is only 15 percent or less. These are thought-provoking comparisons. The PMP is one of the most important tools we have developed to explain the relationship between degrees of indeterminacy and prison population size, and to quantify measurable differences across jurisdictions.

In the real world of prison-sentencing systems, in between the *longest-* and *shortest-time-served scenarios* identified by the PMP, many possibilities are on the table depending on the shifting decision patterns of back-end officials. For large groups of prisoners, the average actual time served will almost always be somewhere in between the two extremes. As a consequence, a state's prison population will never be as small as it could be if release decisions were uniformly generous and will never be as large as it could be if decisions were uniformly stingy. Whatever the current status quo in back-end decisionmaking, however, things can change. And there are different ranges of variability across systems. In highly indeterminate systems, for instance, the room for prison population size to swing up and down is much greater than in highly determinate systems.

The project's relevance to mass incarceration

For those concerned about mass incarceration—either its causes or plausible remedies—it is important in every state to give serious attention to the prison-release apparatus at the back end of the prison-sentencing system. It is important to consider the institutional structure for release decisions, how release discretion is currently being exercised, and the range of possibilities for how existing decision patterns could change in the future.

Policy focus on back-end prison release is more critical in some states than in others. In many systems,

6 *See* Rachel E. Barkow, Prisoners of Politics: Breaking the Cycle of Mass Incarceration (Belknap Press, 2019); Emily Bazelon, Charged: The New Movement to Transform American Prosecution and End Mass Incarceration (Random House, 2019); John Pfaff, Locked In: The True Causes of Mass Incarceration-and How to Achieve Real Reform (Basic Books, 2017). For a view that such accounts overstate the centrality of prosecutors and neglect other critical decision stages, *see* Katherine Beckett, *Mass Incarceration and Its Discontents*, 47 Contemp. Sociology 11 (2018).

back-end release discretion has greater impact on actual time served than the judicial sentence. Sentences "pronounced" in court can leave basic questions of severity undecided. Indeed, for the majority of prisoners in some states, parole boards and departments of correction have more to say about actual sentence length than judges and prosecutors combined.[7]

This project's first ambition is simply to convince people that its subject matter is deserving of attention. In most discussions of America prison rates, among policymakers, researchers, and law reform organizations, there has been little recognition that prison-release discretion is one of the major causal engines of prison growth. If it is, it might be also harnessed as a tool for reductions in prison size.

Identification of key issues of system design

We also hope to provide information to policymakers that they can use right away. At the very least, state officials will now be equipped to compare the basic setup of their systems with the dizzying variety in other U.S. jurisdictions. The project's "state reports" will provide new perspective for practitioners everywhere.

This Final Report synthesizes what we have learned in the preparation of the state reports. At the ends of Chapters 4 through 9, we identify key policy options for the design and operation of different prison-release systems. If 10 states do things one way, and another 10 approach the same problem differently, this presents a policy choice. Dozens of policy options are identified in the pages below. We hope that state policymakers will learn from innovations in other jurisdictions that could work well in their home systems.

For this report, we illuminate policy options without expressing judgments as to which are best. Readers of the report can form their own impressions about the importance of particular issues and how best to attack them. Above all, the report is meant to provide food for thought, not a blueprint for action. We hope it will spark ideas beyond the authors' imaginations.

The study's limitations

This study focuses on the back-end mechanics of time-served discretion from the dates of prisoners' admission until their first release. This leaves important issues for future study. Indeed, we consider the current study to be no more than a first foray into the field of indeterminacy studies.

For example, many prisoners released to parole supervision are later revoked and returned to confinement. This adds new increments of time-actually-served onto their sentences. In addition, revoked prisoners become subject to new or renewed rules of prison release, a process usually called "re-release." Some prisoners are released, revoked, re-released, and revoked again. Repeated often enough, this cycle has been called "churning." Early in this project, we determined that the laws and practices of revocations and re-releases were at least as complex as those for first releases, and were harder to research. We could not embrace them in the current study.

In addition, the report does not survey states' different approaches to credits for time served prior to

7 Front-end actors share time-served discretion with back-end officials, but it is important to note that front-end actors have exclusive control over numbers of new prison admissions. During the buildup decades to mass incarceration in the 1980s and 1990s, the National Academy of Sciences estimated that increases in numbers of admissions and time served contributed about equally to U.S. prison growth, with time served becoming the more important factor in the 1990s. *See* Jeremy Travis, Bruce Western & Steve Redburn. The Growth of Incarceration in the United States: Exploring the Causes and Consequences (The National Academies Press, 2014).

conviction and sentencing. There are possible areas of confusion in data or analysis that we have not been equipped to confront. In some cases, for example, time on pretrial detention can equal or exceed the duration of the judge's later-imposed prison sentence.

A central limitation of this study is its primary focus on "general-rules prisoners." We define general-rules prisoners as those who belong to the largest groups in a state's total prison population. Most states have at least two categories of general-rules prisoners, broken down for people convicted of nonviolent and violent crimes, or those with statutorily-designated "less serious" and "more serious" convictions and criminal histories. The breakdowns are not always based on crime type.

Because of its focus on general-rules sentences, this report does not offer sustained study of mandatory minimum sentences, habitual offender provisions (including three-strikes laws), targeted sentence enhancements, or specialized penalty scales for aggravated sexual or violent offenses. Such sentences can bend or break the general rules of indeterminacy that are otherwise at work in a particular jurisdiction. They often inject reduced degrees of indeterminacy into prison-sentencing system through extended minimum terms or restrictive rules of release. It is possible to have "pockets of determinacy" within systems that generally feature very high degrees of indeterminacy.

Some states rely much more heavily on extended prison sentences than others. For individual jurisdictions, there are rarely compendiums of mandatory sentence provisions or other enhanced penalties that would provide a starting point for analysis. Early in the project, we realized that the variety and complexity of state practices ran far beyond what we could realistically study in an 18-month project.

Finally, we have not wrestled with possible ambiguities in what it means to be "released" from prison. Many states offer programs of release to halfway houses, work release, community centers, or other forms of transitional release. For purposes of our analysis, and when we have dug into publicly-available state data, we have relied on each state's definition of when release occurs, who is still in prison and who is elsewhere, etc.

CHAPTER 2

The concept of "degrees of indeterminacy"

Definitions

The conventional definition of an *indeterminate prison sentence* in the U.S. is a sentence with discretionary parole-release eligibility prior to the expiration of its maximum term (or, in the case of life sentences, prior to the end of the prisoner's natural life). The word choice reflects the fact that the courtroom sentence does not *determine* the actual length of a prison term, which is to a great degree left in the hands of later-in-time decisionmakers.

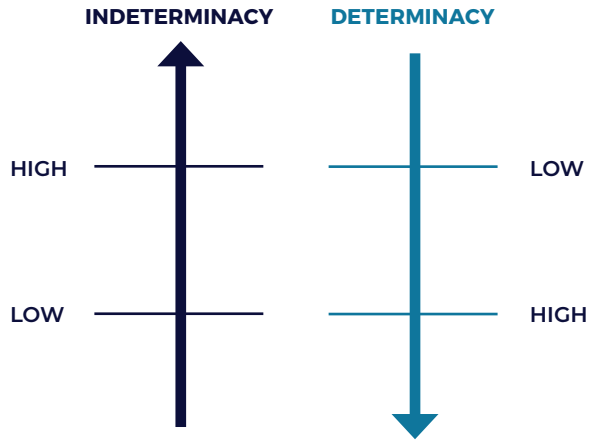
We expand on the conventional definition of "indeterminacy" in this project. Importantly, we do not equate indeterminacy narrowly with the existence of parole-release authority. Parole is only one of many sources of indeterminacy in prison sentences across the U.S. We conceive of indeterminacy as a practical phenomenon rather than the product of a specific set of institutional arrangements. Further, indeterminacy is not an absolute condition that is either totally present or totally absent in prison sentences. Rather, it exists along a continuum. In the U.S., some sentences carry extremely high *degrees of indeterminacy* (DOIs), some have an extremely low DOIs, and we have found examples of everything in between.

Indeterminacy, at its heart, means unpredictability of time served (that is, unpredictability from the standpoint of someone who has just found out what the judicial sentence is). Once we know the terms of a particular judicial sentence, can we say with confidence how much time the defendant will actually serve? If actual time-that-will-be-served is highly unpredictable, then the sentence has a high DOI. If actual time-to-be-served is knowable within a relatively small range of possibility, then the sentence has a *low* DOI.

This study also clarifies the definition of "determinate prison sentences." As the inverse of indeterminacy, *determinacy* denotes predictability of time served at the moment of judicial sentencing.[8] In our view, the continuums of indeterminacy and determinacy are mirror images of one another, as visualized in Figure 1. As the degree of indeterminacy in prison sentences becomes higher, the degree of determinacy falls lower. On this theory, we use interchangeable terminology throughout this report. For instance, "high indeterminacy" can just as easily be called "low determinacy."

8 The conventional definition of a *determinate prison sentence* in the U.S. is a sentence that carries no parole-release eligibility. Our definition is less formalistic.

Figure 1. Inverse Relationship Between Degrees of Indeterminacy and Determinacy in Prison Sentencing



No absolute forms of indeterminacy or determinacy

The complex realities of prison sentencing in America require that indeterminacy and determinacy be conceived as relative terms. Throughout the country there are no prison sentences under which actual time served is entirely predictable in advance—or wholly unpredictable. For instance, with a sentence of one-to-20 years, actual time served may be wildly unknowable on the day of courtroom sentencing (producing an extremely high DOI), but it is reasonably certain that it will be no shorter than one year and no longer than 20 years. These are at least minimal indices of determinacy. Alternatively, a mandatory prison term of 10 years may appear airtight in its determinacy, but there is always a chance of clemency, compassionate medical release, a retroactive change in the law, or something else that might shorten actual time served below the "mandatory" 10 years. The most determinate sentences in American law are always to some small degree unpredictable until they have been fully served.

With this in mind, one must use caution when labeling entire prison-sentencing systems as "indeterminate" or "determinate." Individual sentences cannot be reduced to such absolute terms, so it follows that there can be no pure system in either direction. In addition, all American jurisdictions have numerous classes of prison sentences that carry varying degrees of indeterminacy. This makes whole-system classifications still more treacherous.

For example, most prison sentences in Iowa are *extremely high in indeterminacy*.[9] In our rankings, Iowa is one of the most indeterminate among all states. Most criminal justice professionals would not hesitate to say that Iowa has an "indeterminate sentencing system." Yet Iowa also authorizes sentences of life without parole (LWOP) for some crimes, which are *extremely low in indeterminacy*. (See Chapter 9.) The state also has sentencing laws in between those two extremes, such as offenses with mandatory

9 Most prisoners in Iowa are eligible for parole release the moment they are admitted to prison. *See* Figure 19 in Chapter 7. Hawaii takes a similar approach. See Figure 9 in Chapter 4.

minimum terms fixed at 70 percent of maximum terms.[10]

Multiple tiers of sentence types are present in every U.S. system. Assigning overall DOI rankings to whole prison-sentencing systems thus requires a totaling up, prorating, and averaging out of all the different sentence classes imposed on the state's prisoners. We think systemwide DOIs can be useful for some purposes, but there is sausage-making in their calculation.

"General-rules sentences" and the holistic classification of prison-sentencing systems

Throughout this report, we will refer to "general-rules sentences" and "general-rules prisoners." These are not traditional terms, but they are important to an understanding of the scope and methodology of our work. Basically, the present study has focused on the two or three largest subgroups of prisoners in each American jurisdiction, whom we call "general-rules prisoners." This means we have set aside analysis of prisoner subgroups who have other kinds of sentences. For example, we have made no comprehensive comparative analysis of sentences with mandatory minimum prison terms, habitual offender statutes, or other targeted sentence enhancements. We have sought to study the rules of prison release the cover *most* prisoners in each system.

Figure 2 illustrates what we mean by "general-rules sentences" within a larger prison population that includes a number of additional sentence classes. It also gives visual emphasis to the strengths and limitations of our approach.

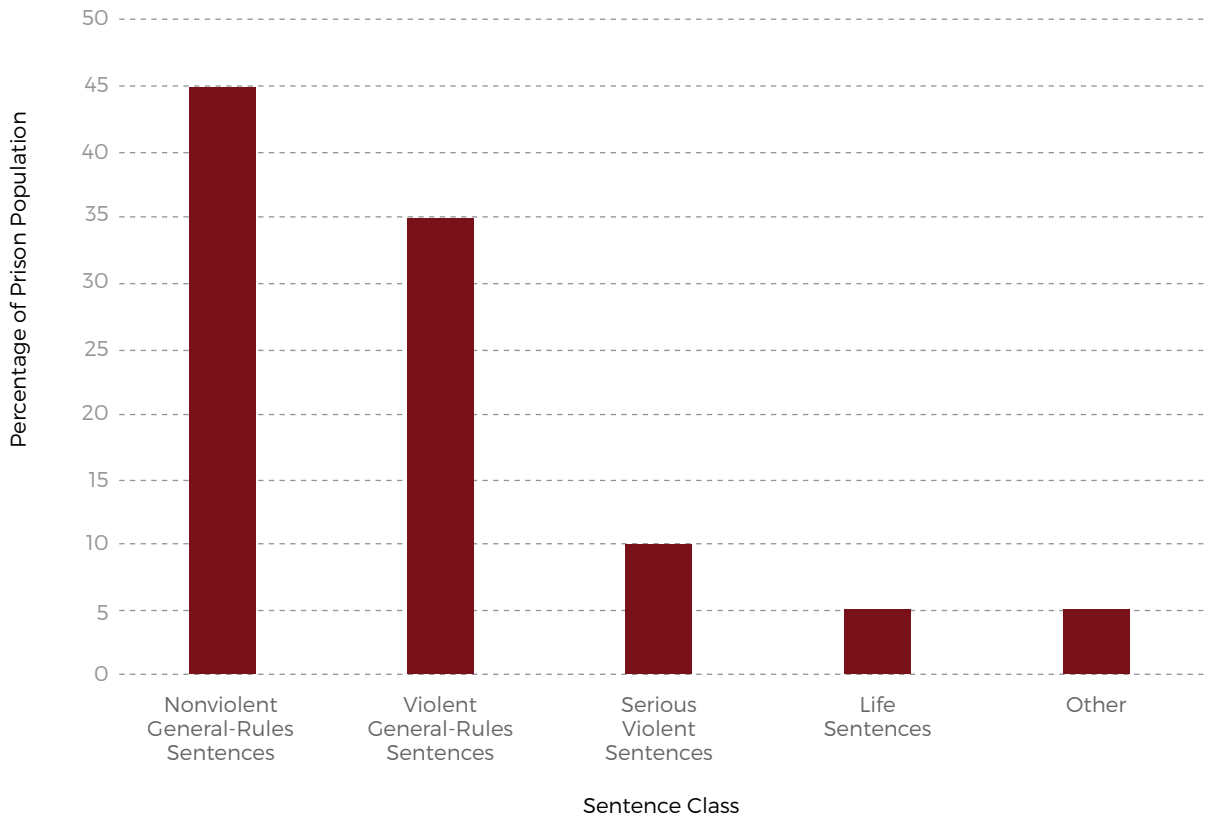
The first bar in the chart (furthest left) represents the subpopulation of prisoners convicted of nonviolent crimes whose sentences are governed by the general rules of prison release for such offenses. For example, in this hypothetical state, the general rule of prison release for people convicted of nonviolent offenses may be that they become eligible for discretionary parole release at 25 percent of their maximum terms. This group is shown to represent 45 percent of all prisoners, a realistic ballpark for many states.

The second bar in the chart represents prisoners convicted of violent offenses whose sentences fall under the general rules of prison release for those crimes, which are often different from the general rules for nonviolent offenders. For instance, our hypothetical state might provide that parole-release eligibility for people convicted of violent offenses generally occurs at the 50-percent mark of their maximum terms. Taken together with nonviolent general-rules sentences, the two subpopulations of prisoners with these classes of general-rules sentences make up 80 percent of the state's entire prison population.

When we speak of "general-rules sentences" in this report, it is a generic term meant to cover prisoners in the two categories above. (In some states, there may be more than two general-rules categories.) To distinguish between subcategories, we may speak of "nonviolent general-rules sentences" and "violent general-rules sentences," as done in Figure 2. Our goal is to give a name to the largest subgroups who, combined, make up the bulk of the total prison population.

10 For a more detailed discussion, see Kevin R. Reitz, Melanie Griffith, and Edward E. Rhine, *Prison-Release Discretion and Prison Population Size, State Report: Iowa* (Robina Institute of Criminal Law and Criminal Justice, 2020), at: https://robinainstitute.umn.edu/publications/prison-release-discretion-and-prison-population-size-state-report-iowa.

Figure 2. "General-Rules Sentences" and Other Sentence Classes in a Hypothetical State



In Figure 2, the two categories of general-rules sentences add up to 80 percent of the total prison population. These are made-up statistics, but not unrealistic for many states.[11] In addition, Figure 2 shows three other sentence categories, including the classes of sentences imposed on serious violent offenders (such as extended minimum terms or criminal history enhancements). The figure also includes life sentences, which in this hypothetical state are shown as five percent of the total, and an additional five percent with "other" classes of sentences.

Figure 2 permits visualization of the approach we have taken in this study. We have concentrated our work on general-rules sentence classes across 52 American jurisdictions. In the hypothetical state shown in Figure 2, this would add up to 80 percent of all prisoners. In actual states, the percentages could be higher or lower. The strength of our method —aside from the fact that it rendered the scope of the study manageable—is that it captures the largest subgroups of prisoners in each state. The defect is that it always excludes a substantial number, as well, including many people who are serving the longest prison terms.

11 See, e.g., Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine, Prison-Release Discretion and Prison Population Size, State Report: Texas (Robina Institute of Criminal Law and Criminal Justice, 2020), at: https://robinainstitute.umn.edu/publications/prison-release-discretion-and-prison-population-size-state-report-texas.

Officials with back-end release discretion

Indeterminacy in prison sentencing has many possible sources. Across the U.S., there are any number of officials with time-served discretion that may be exercised after judicial prison sentences have been imposed.

The best known instrument of indeterminacy is discretionary parole release, which is considered at length in Chapter 4.

The second most important engine of indeterminacy in the U.S. is the time-served authority given to departments of correction (DOCs). In most states, prison officials have discretion to administer sentence discounts in the form of good-time or earned-time credits, along with other miscellaneous deductions. DOC authority over credit discounts includes their granting, withholding, forfeiture, restoration, and (often) the power to classify prisoners for purposes of earning eligibility or differential earning rates. In addition, corrections officials are frequently called upon to certify prisoners' compliance with correctional plans, program participation, and program completion. All of these decisional powers, in most states, have direct or indirect effects on time-to-be-served by the affected prisoners. (See Chapter 5.)

Third, most states have multiple forms of releasing discretion that are used infrequently, generally benefiting only small numbers of prisoners. For example, governors hold clemency power in nearly every state, sometimes shared with a board of pardons or other body. By the late 20th century, however, grants of pardons and commutations had dwindled nationwide. Today, they are unimportant sources of indeterminacy from a whole-systems perspective, although they can also be seen as latent powers that might someday flower into greater use.[12] Most states also have "compassionate release" laws that include medical parole, geriatric parole, or release discretion based on other extraordinary personal circumstances. Compassionate-release is rarely used across the country today but, as with executive clemency, there is potential for significant expansion.[13]

There are still more officials with back-end releasing authority, found scattershot across U.S. jurisdictions. They arise from atypical institutional arrangements in a handful of states, or under highly specialized circumstances. They include sentencing courts in individual cases (sometimes with power to grant "judicial parole"), courts with statutory "sentence modification" authority, courts exercising constitutional oversight of prison conditions, legislatures (as when prison penalties are retroactively reduced), sentencing commissions (which may, for example, be charged with the promulgation of parole-release guidelines), governors via executive orders, and overcrowding-emergency commissions.

For a state-by-state breakdown of officials and agencies with back-end releasing authority, see Appendix Table A-1 at the end of this report. The table identifies the main decisionmakers in each jurisdiction who are in charge of recurring functions such as discretionary release, the administration of credit-based discounts, pardons and commutations, medical and geriatric release, and emergency release mechanisms, as applicable. (The table omits extraordinary one-time interventions such as court orders based on findings of constitutional violations, retroactive legislation, and general amnesties.)

12 See, e.g., Rachel E. Barkow, The Ascent of the Administrative State and the Demise of Mercy, 121 Harv. L. Rev. 1332 (2008); Cara H. Drinan, Clemency in a Time Of Crisis, 28 GA. St. U. L. Rev.. 1121 (2013).

13 We do not rule out the possibility of exceptions to the general statements in text above. For example, California has a growing program of "elderly parole" that may become a significant element of its overall releasing practices. See Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine, Prison-Release Discretion and Prison Population Size, State Report: California (Robina Institute of Criminal Law and Criminal Justice, 2021).

Why should we care about different degrees of indeterminacy?

Indeterminacy and prison population size

The exploration of new ways to understand and control changes in prison population size is one of the key focal points of this project. We identify high degrees of indeterminacy as a risk factor that allows for unplanned prison growth, as when parole boards come under pressure to cut back on release decisions. Some might argue that this is a danger to be guarded against. In most states with high degrees of indeterminacy, informal and low-visibility release decisions are a critical part of overall prison policy. Significant changes in prison rates, up or down, are possible without any alteration in law, sentencing guidelines, or prosecutorial or judicial practices, if back-end release agencies merely shift their decision patterns. In the history of American prison policy, prison-release discretion has been in equal parts important and invisible.

Indeterminacy and the quality of substantive decisions

Different flavors of indeterminacy can be seen as different possible arrangements for organizing a prison-sentencing system so that the societal purposes of imprisonment are most likely to be successfully pursued. Responsible officials should consider whether a given system design is likely to frustrate such overarching goals. One can ask, for example, if a particular indeterminate system is well-designed to yield patterns of proportionate sentences over most or all cases. Or one could ask whether a particular indeterminate system is well-designed to effect utilitarian goals such as the rehabilitation of people who are incarcerated, or protection of the public from prisoners who would be dangerous if released.

Indeterminacy and procedural fairness

We offer a core principle of procedural justice in the domain of prison release: The greater the degree of indeterminacy in prison sentences, the more we should be concerned about the level of procedural fairness that is built into the decisionmaking machinery for filling in the indeterminate spaces. This principle has institutional implications. When a system includes multiple agencies with appreciable prison-release discretion at the back end of the prison-sentencing system, it incurs the burden of creating adequate procedures across all of those agencies. In turn, decent procedural values require substantial resources. It is costly to create even one agency that meets standards of fair process—and more expensive to do so with multiple decisionmakers.

Indeterminacy and institutional independence

The greater the degree of indeterminacy in a prison-sentencing system, the more we should care about the parole board's professional qualifications, institutional status, and independence from political pressure. The same is true for any other agencies with meaningful amounts of time-served discretion such as departments of correction. In our view, systems with higher degrees of indeterminacy require the strongest and most professionalized releasing institutions. When time-served discretion at the back end of the system approaches, equals, or exceeds that at the front end, we should want release decisionmakers who are comparable in function and dignity to sentencing judges.

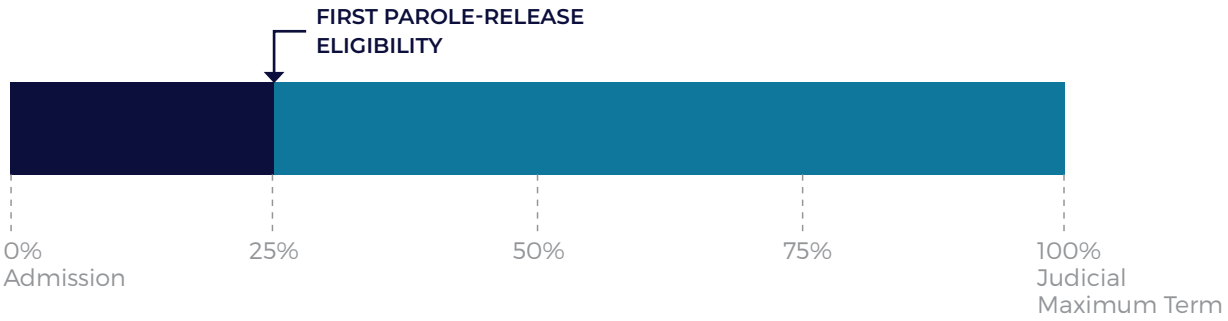
CHAPTER 3

Measuring and modeling degrees of indeterminacy

Prison-Release Timelines

In order to illustrate the degrees of indeterminacy (DOIs) in different classes of prison sentences, and to depict the mechanics of back-end releasing discretion, we have created diagrams that we call prison-release timelines. Figure 3 below is an example. Moving from left to right, the horizontal bar indicates the time-that-could-be-served on a particular sentence, starting with the date of admission (zero percent) and ending with the expiration of the judicial maximum sentence (100 percent). Actual time served in individual cases will fall somewhere on the timeline, but actual amounts remain unknown until the final expiration of each prison sentence.

Figure 3. Maryland Prison Release Timeline for Ordinary Nonviolent Offenses with No Diminution Credits



The blacked-out portion of the timeline indicates the percentage of total time-that-could-be-served that is "determined" by the judicial sentence itself. We call this the determinate segment of the sentence. In Figure 3, the determinate segment ends at the 25-percent mark of the judicial maximum term. Maryland statutes place the date of first parole-release eligibility at 25 percent for prisoners with this class of sentence.[14] For a judicial maximum of four years, the judge's order would require that the first year be spent in prison. Beyond that, for years two, three, and four, time-served decisions will be made by back-end actors.

14 For an in-depth discussion of the Maryland prison-release structure, see Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine, Prison-Release Discretion and Prison Population Size, State Report: Maryland (Robina Institute of Criminal Law and Criminal Justice, 2020), at: https://robinainstitute.umn.edu/publications/prison-release-discretion-and-prison-population-size-state-report-maryland.

The portion of the horizontal bar following the 25-percent mark, colored medium blue, is the indeterminate segment of the timeline. Still assuming a four-year maximum term, the diagram shows that any time-to-be-served between one and four years has been left "undetermined" by the judicial sentence. Figure 3 indicates that the parole board holds discretion to release or deny release throughout the timeline's indeterminate segment. The parole board may exercise its releasing powers in the direction of lenity or severity, so that some prisoners might have relatively short terms while others are required to serve a much longer portion of their maximum terms. It is important to recognize that there are two sides to the coin of parole-release discretion. When a parole board uses its authority to release a prisoner earlier than otherwise required by law, we call it an instance of release discretion. When a parole board uses its power to deny release despite having the ability to allow release, we call it an instance of release-denial discretion.

As numerical yardsticks to interpret Figure 3, we might say that its sentences are 25-percent determinate and 75-percent indeterminate (a percentage measure of indeterminacy). Or, if we know the length of the maximum term in a specific case, such as four years, we could say that the sentence includes one year of determinacy and three years of indeterminacy (an absolute-time measure). Furthermore, the medium blue segment of the timeline shows the parole board to have both release and release-denial discretion during the full indeterminate segment of the timeline. In Figure 3, the board has such two-edged powers over 75 percent of the judicial maximum term, over three years out of a four-year term, and so on. If the parole board exercises its release-denial authority throughout a prisoner's term in Figure 3, that prisoner's length of stay will be four times as long as if the board had exercised its release discretion at the first opportunity.

Figure 3 is drawn from the general rules of prison release applicable to ordinary prisoners convicted of nonviolent offenses. More serious offenders in Maryland fall under different timelines. Figure 3 also specifies that prisoners have earned no "diminution credits"—Maryland's term for good-time and earned-time credits. The granting, withholding, and forfeiture of credits are ordinarily within the jurisdiction of a state's department of corrections (DOC), administered at the level of prison officials (see Chapter 6). In most paroling states, including Maryland, such credits are deducted from prisoners' maximum terms to produce earlier mandatory release dates (MRDs) (see Chapter 7). Under our terminology, the granting of credits is a form of release discretion while the withholding or forfeiture of credits is a form of release-denial discretion.

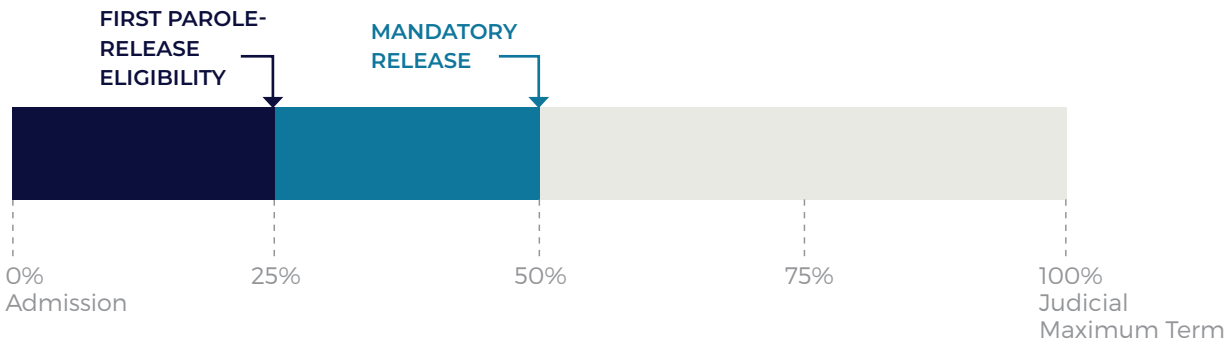
In Maryland, the DOC's time-served authority within the indeterminate segment of the timeline overlaps partially with that of the parole board. Figure 3 illustrates the case of a prisoner with no credits, which could occur if no credits were earned or all were forfeited. Most prisoners will not experience such a total failure, however. A full understanding of Maryland's framework requires more information than shown in Figure 3. Indeed, in many states, the release and release-denial discretions of the parole board and DOC can overlap: they may supplement or strengthen each other within the indeterminate segment of the timeline, or they can sometimes work to cancel each other out.

Figure 4 adds this additional moving part to its depiction of Maryland's general rules of prison release for people convicted of nonviolent crimes. The figure highlights the potential consequences of the DOC's authority when it exercises the full measure of its release discretion. This adds a layer of complexity to Figure 3 by focusing on prisoners who have earned (and not forfeited) the greatest total of diminution credits available under state law. For ordinary nonviolent offenders in Maryland, credits are capped at 30 days per month. At this earning rate, prisoners' deductions from their maximum terms could be as much as 50 percent. In the terminology of this project, full credit earnings yield a "mandatory release

date" (MRD) at the halfway point of the timeline. In Figure 4, this greatest-possible deduction is indicated by the white segment of the horizontal bar. For prisoners who have such credit-earning success, there is no back-end official with discretion to release or deny release later than the 50-percent mark. Figure 4 still shows us that the parole board's release discretion kicks in at the 25-percent mark, but the board's release-denial discretion beyond the 50-percent mark has been cancelled by the actions and decisions of DOC officials.

For prisoners who win some but not all available credits, the MRD would fall at a later juncture of the timeline, such as the 60-percent mark or the 70-percent mark. We normally draw our timeline diagrams to illustrate the fullest extent of releasing authority that exists for a given class of sentence. Many or most people in prison will not benefit from the earliest possible date of release under one mechanism or another. Our diagrams are meant to show the range of reasonably possible outcomes, which translates into the full scope of unpredictability or indeterminacy of time served found in each class of sentence.

Figure 4. Maryland Prison Release Timeline for Ordinary Nonviolent Offenses with Full Diminution Credits



The limits of mathematical measures of indeterminacy

The prison-release timelines reflect a mathematical approach to the modeling and measurement of indeterminacy in prison sentencing. As the above discussion reflects, the increments of the timelines can be expressed in percentage terms, as percentages of judicial maximum terms, or in absolute terms, denoted in months or years. That the scope prison-release powers can also be represented in visual terms, using simple geometry, does not change the fundamentally numerical content of the diagrams.

We believe mathematical measures of indeterminacy are tremendously useful, but it is important to take stock of their weaknesses. There is much that they fail to show. For example, Figure 3 shows that it is possible for prisoners to be released by the parole board at the 25-percent of their maximum terms, but it says nothing about how likely they are to win release at that juncture. Indeed, considering the long span of the indeterminate segment of the timeline, Figure 3 supplies no basis for an educated guess of the actual release date for any prisoner at any point in the segment. Likewise, Figure 4 shows it is possible for prisoners to win 50-percent deductions from their maximum terms, but it does not tell us how easy or difficult it is to earn the necessary credits. Can reasonably well-behaved prisoners expect to get the deduction? Or is it only available to high-performing prisoners, or only to super-achievers? Is the

probability 95 percent or closer to 5 percent? Or anything in between? The timeline diagrams have no language to express this critical dimension of prison-release power.

In one respect mathematical simplicity is a strength of the diagrams. Under any set of statutory release rules, actual decision patterns can and do drift over time. Sometimes they can even lurch suddenly.[15] Therefore, the true probabilities of release or release-denial within the indeterminate segment of the timeline will fluctuate from year to year or month to month. However, the legal superstructure of prison release as shown in the timeline remains the same barring statutory amendment or other structural change.

When possible in this report, we will comment on the apparent dynamics of what goes on within the indeterminate segments of prison sentences. In every American system, however, there are mutable decisionmaking policies, conventions, requirements, obstructions, patterns, and practices that provide fertile ground for research beyond the scope of the current project. We hope the project will provide a sound analytic framework for such endeavors.

Subjective DOI rankings

To compare the degrees of indeterminacy (DOIs) in individual prison sentences, classes of sentences, or across entire systems, we have created a qualitative ranking framework. It is a rough scale. To avoid false precision, we use only five categories (see Table 1 below). Each category can be expressed in two different ways: either with reference to the "degree of indeterminacy" or the "degree of determinacy" that is present.

Table 1. Rankings of "Degrees of Indeterminacy" (DOIs)

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

The DOI ranking scale is no better than approximate when applied as descriptions of states' entire prison-sentencing systems, although the reasoning that supports our judgments is laid out in the stand-alone reports for each state.[16] For individual sentences or classes of sentences, we use the following benchmarks for our five-level classifications of higher versus lower DOIs:

15 See Gerald G. Gaes & Julia Laskorunsky, Factors Affecting Colorado Parole Release Decisions (Robina Institute of Criminal Law and Criminal Justice, 2022) (documenting large changes in parole releasing practices in Colorado from 1995 to 2020); Carl Reynolds, Testimony Before the American Bar Association Justice Kennedy Commission (2004) (reporting that, in Texas, the parole approval rate was 41 percent of cases considered in 1984, grew to 77 percent in 1990, then fell precipitously to 39 percent in 1993, falling further to 25 percent by 2001).

16 Many of the individual "state reports" may be found on the project's website, https://robinainstitute.umn.edu/areas-expertise/doi-state-reports. Prepublication drafts of reports not yet posted are available on request from the Robina Institute of Criminal Law and Criminal Justice. In addition to the 50 states, separate reports have been prepared for the District of Columbia and the federal system.

Benchmarks for rankings of "degrees of indeterminacy"

- *Extremely high indeterminacy*: first prospect of release at 0-19.9% of maximum sentence
- *High indeterminacy*: first prospect of release at 20-39.9% of maximum sentence
- *Moderate indeterminacy*: first prospect of release at 40-59.9% of maximum sentence
- *Low indeterminacy*: first prospect of release at 60-79.9% of maximum sentence
- *Extremely low indeterminacy*: first prospect of release at 80-100% of maximum sentence

When we apply our DOI rankings to whole prison-sentencing systems, we see them as gross characterizations. Most importantly, systems rankings must conglomerate one or more sets of "general-rules sentences" in each jurisdiction, weighted by plausible guesses of the representation of each sentencing class in the total prison population. Table 2 below collects the rankings we have made in this project of all 50 states, the District of Columbia, and the federal system. At the end of this report, Appendix Table A-2 breaks down the different classes of general-rules sentences we have taken into account when arriving at our judgments.

We have no doubt that nuanced comparative analyses require closer inspection than our five DOI categories allow. Ultimately, the rankings are a useful indicator of the position of specific prison-sentencing systems vis-à-vis each other. Despite its crudity, the five-level scale is an improvement on the traditional binary division of all systems into categories of "indeterminate" or "determinate."

Table 2. Ranking of 50 States, the District of Columbia, and the Federal System by Degree of Indeterminacy (DOI) of Prison-Sentencing System as a Whole

Ranking of Prison-Sentencing System	
Extremely high indeterminacy	Alabama, Hawaii, Iowa, Nevada, and Utah
High indeterminacy	Alaska, Arkansas, Colorado, Georgia, Illinois, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, New Hampshire, North Dakota, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia, and Wyoming
Moderate indeterminacy	Idaho, Indiana, Louisiana, Massachusetts, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, and South Dakota
Low indeterminacy	California, Connecticut, Delaware, Minnesota, Ohio, Washington, and Wisconsin
Extremely low indeterminacy	Arizona, Florida, Kansas, Maine, North Carolina, Oregon, Virginia, District of Columbia, and the Federal System

As shown above, American prison-sentencing systems in 2022 gravitated toward the higher degrees of indeterminacy on our scale. Twenty-one states operate with systems that we rank as having high DOIs overall, with an additional five states in the category of extremely high DOIs. In contrast, seven states are ranked as having low DOIs overall with an additional seven states on the bottom rung of extremely low DOIs. (The District of Columbia and the federal system also rank as extremely low in indeterminacy.) Ten states occupy the middle tier with moderate DOIs.

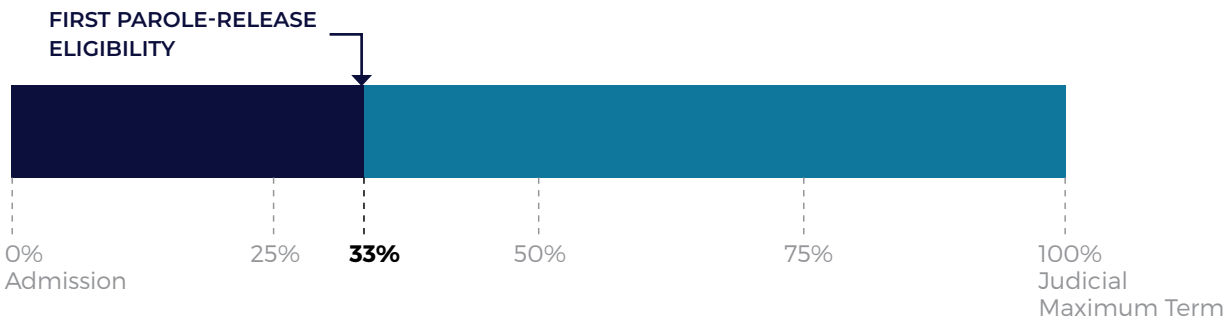
The "population multiplier potential" or "PMP"

A central concern of this project has been to explore the relationship between degrees of indeterminacy in prison sentences and the location of governmental power to influence or control prison population size. We have introduced the concept of "population-multiplier potential" (PMP) to quantify the amount of power over prison population numbers that is concentrated in back-end decisionmakers such as parole boards and prison officials.

The PMP is the ratio of two calculations. First, for each class of sentence in a given system, we ask how high the relevant prison subpopulation would rise over time if back-end decisionmakers were to use their discretion to hold everyone for as long as legally possible (a longest-time-served scenario). Second, we ask how low the prison subpopulation would sink over time if back-end decisionmakers were to use their discretion to release everyone as early as possible under existing laws (a shortest-time-served scenario). The ratio of the two estimated populations is the PMP.

For example, suppose that imaginary State A operates with an exceptionally simple prison-release system: All prisoners are serving sentences that carry first parole-release eligibility at the 33-percent mark of their judicial maximum terms, as depicted in Figure 5.[17] Suppose also that the parole board is the only back-end agency with release and release-denial discretion from the 33-percent mark of the maximum term through the 100-percent mark. For this class of sentence there is a 3:1 ratio in longest to shortest possible lengths of stays for individual prisoners prior to release on parole.

Figure 5. Rhode Island Prison Release Timeline for Ordinary Offenses with No Good Conduct Credits



17 Figure 5 shows Rhode Island's parole-eligibility formula for the vast majority of prison sentences. Unlike hypothetical State A, this is not the only sentence class in the state. Rhode Island, like all states, has multiple classes of sentences with rules of prison release that differ from those shown in Figure 5. In Rhode Island, these other sentence classes include life sentences (with and without parole), mandatory minimum sentences for some offenses, and habitual-criminal sentences.

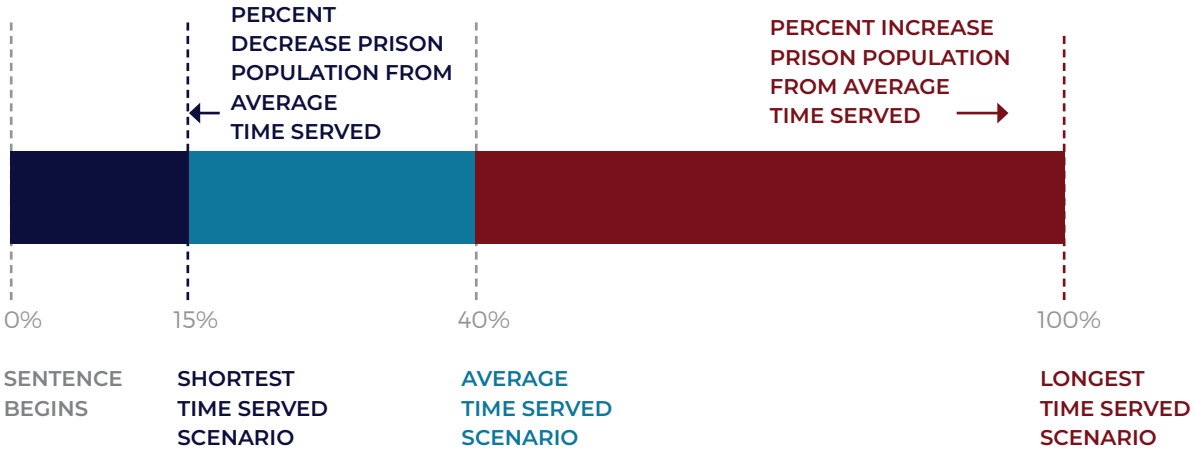
If we extrapolate across hundreds or thousands of prisoners, we can say that State A's prison-sentencing system has a PMP of 3:1 for the entire prison population. (We can make a statement about the whole prison system because we have posited only one sentence class.) If the parole board were to deny release to all prisoners until expiration of their maximum terms—all else being held equal—State A's prison population would eventually settle at an equilibrium three times as large as if the parole board were to release all prisoners at their earliest eligibility.

It is relatively easy to calculate the PMP for a single class of prison sentences, but much harder to assess where a state's actual releasing practices fall within the range of possibility expressed by the PMP. We need data to work out the actual-practices question—and the answer will be a moving target with the passage of time. For example, in the simple 3:1 system discussed above, historical statistics might show that the average length of stay among all prisoners has been 150 percent of their minimum terms (that is, the average prisoner with a one-to-three year sentence will have served 18 months before release). Armed with such information, we can use the PMP to project what could happen in the future if the parole board's releasing patterns were to change. For example, if the board were to shift to the shortest-time-served scenario in every case, the state's prison population would eventually be cut to two-thirds of its current size. On the other hand, if the board were to veer completely to the longest-time-served model, the state's prison population would ultimately reach twice its current size.

Gerald Gaes and Julia Laskorunsky have developed a visual aid to conceptualize states' actual releasing practices within the wide ranges of possibility expressed by the PMP. Figure 6 below reproduces their diagram, which illustrates a hypothetical class of prison sentences with earliest parole-release eligibility at the 15-percent mark of judicial maximum terms. Figure 6 imagines that average prisoners with this type of sentence have been serving 40 percent of their judicial maximum terms. However, without any changes in law, releasing patterns and average time actually served under each such sentences could move to the left or right of the current 40-percent average. Movement to the left could go as far as the 15-percent mark under the shortest-time-served scenario. Movement to the right could go to the 100-percent mark. For individual states, Gaes and Laskorunsky have used this model to generate estimates of potential increases and decreases in prison population size that could result from shifts in average release dates in either direction.[18]

18 This exercise ignores all the other factors that could influence the size of this subpopulation, such as crime rates and changes in prosecutorial practices, but--as argued by Gaes and Laskorunsky—the calculation has the benefit of isolating the amount of play in the system that is due to indeterminacy alone. See Gerald G. Gaes & Julia Laskorunsky, The Relationship Between Back-end Sentencing and State Prison Population Levels (unpublished ms.).

Figure 6. Visualizing the Relationship Between the Population Multiplier Potential (PMP) and the Realities of Actual Sentencing Practices at Any Moment in Time



Source: Gerald G. Gaes & Julia Laskorunsky, The Effect of Indeterminacy on State Prison Populations (unpublished ms.), figure 1.

Under the assumptions of Figure 6, a comprehensive shift in releasing practices to the shortest-time-served scenario would eventually bring about a 62.5 percent reduction in the subpopulation of prisoners who are serving this type of sentence. In the other direction, a red-lining of releasing practices to the longest-time-served scenario would result in an increase of 150 percent. If 5,000 prisoners are currently serving the class of sentence in Figure 6, changes in releasing practice could potentially reduce that subpopulation's size to as little as 1,875—or to as much as 12,500.

Actual PMP values vary a great deal across states and across discrete classes of sentences within individual states. Nationally, the greatest diversity exists for sentences for nonviolent offenses. To illustrate the breadth of approach, Table 3 collects the PMPs for 15 selected states, focusing only on the subpopulation of general-rules prisoners convicted of nonviolent offenses. In the typical state this is a sizeable subpopulation—often about 50 percent of the total. It is important to recognize that the PMPs in Table 3 express the degree of back-end control over prison population size only for the nonviolent-offense subpopulation.

Table 3. Population Multiplier Potentials (PMPs) for General-Rules Sentences for Nonviolent Offenses in 15 States

	Population Multiplier Potential for Ordinary Nonviolent Offenders
Arizona	1.16:1
Arkansas	5.9:1
Connecticut	2.3:1
Delaware	1.45:1
Illinois	3.33:1
Iowa	Greater than 100:1*
Minnesota	1.5:1
Nevada	Between 5.9:1 and 50:1
New York	Between 3.6:1 and 33.3:1
Oklahoma	4:1
Oregon	1.25:1
Rhode Island	3:1
Texas	10:1
Utah	Greater than 100:1*
Washington	1.5:1

Sources: The relevant "state reports" prepared for this project.
*Iowa and Utah have no minimum terms before parole-release eligibility for this sentence class. Technically, the parole board may release prisoners at the moment of their admission. The PMP for such sentences, if calculated in the same way as in other states, is a nonsensical ratio of ∞:1. We prefer to use the "greater than 100:1" formulation to express such extremely large PMPs.

With enough information, one can estimate a systemwide PMP for multi-tiered prison-sentencing systems, but the task requires good data and a series of calculations. Let us say that imaginary State B has a prison population of 20,000. Two thousand people are serving sentences of life without parole. The PMP for this group is 1:1. That is, no back-end agency has the power to influence the size of the LWOP subpopulation.[19] Their numbers are determined almost entirely by official decisions taken at the front-end of the prison-sentencing system such as prosecutors' choices in the use of their charging and bargaining discretion and courts' uses of their sentencing discretion.

Let us further suppose that State B has an additional 4,000 prisoners, convicted of serious sex or violent offenses, who become eligible for release after 85 percent of their maximum terms have been served. The PMP for this group is 1.17:1. If the average person with this class of sentence is currently serving 90 percent of their maximum terms, then a hard shift to the shortest-time-served scenario would eventually reduce the "85-percent" subpopulation by about 5.6 percent, while an equally hard shift to the longest-time scenario would eventually increase its size by about 11.1 percent. The lowest realizable target for subpopulation size would be about 3,776 and the highest would be 4,440.

19 We exclude rarely-used forms of back-end release discretion such as executive clemency and compassionate release.

The remaining 14,000 prisoners in State B become eligible for release after 25 percent of their maximum terms. The PMP for this group is 4:1. Let us suppose the data show that, under current releasing practices, the average person with this class of sentence is released after having served 50 percent of their maximum terms. If so, we can estimate that a full shift in releasing discretion to the shortest-time-served scenario would eventually create a new equilibrium of 7,000 people serving this class of sentence. In the other direction, a complete lurch to the longest-time-served-scenario would eventually double the size of the group to 28,000 people.

Table 4 summarizes the above calculations to derive a composite PMP for the back end of State B's prison-sentencing system as a whole. Under current state law, the parole board's aggregate choices in releasing decisions are capable of reducing the current prison population from 20,000 to as low as 12,776. Those choices could also drive the population from 20,000 to as much as 34,440. [20]

Table 4. PMPs and Potential Prison Population Change for Individual Sentence Classes and the Entire Prison-Sentencing System in Imaginary State B

	Current population	Shortest-time-served population	Longest-time-served population	PMP
General-rules sentences with release eligibility at 25%	14,000	7,000	28,000	4:1
Sentences for serious sex and violent offenses with release eligibility at 85%	4,000	3,776	4,440	1.17:1
LWOP sentences	2,000	2,000	2,000	1:1
Total	**20,000**	**12,776**	**34,440**	**2.7:1**

One advantage of the composite PMP analysis illustrated in Table 4 is that policymakers' attention can be directed to the specific compartments of back-end discretion that would have the most impact on prison population size if releasing practices were to be changed. For example, in the case of State B as sketched above, back-end reforms that target the releasing laws and practices for the 25-percent subgroup have much greater potential impact on overall prison population size than back-end reforms directed at LWOP prisoners or the 85-percent group. The 25-percent is not only the largest group of prisoners in State B, its sentence class carries the highest degree of indeterminacy of all three classes. For the LWOP and 85-percent groups, reforms aimed at the management of prison population size would be best focused at the front end of State B's prison-sentencing system.

20 Within important limits due to data availability, such estimates are possible for actual states. As part of this project, Gaes and Laskorunsky authored the first-ever study of this question in 39 states based on data collected by the Bureau of Justice Statistics' National Corrections Reporting Program (NCRP). Gerald G. Gaes & Julia Laskorunsky, The Relationship Between Back-end Sentencing and State Prison Population Levels (unpublished ms.).

PART II

Findings from 52 Jurisdiction-Specific Reports

CHAPTER 4

Variations in the structure of parole-release discretion

Classifying and counting states

In America, "indeterminacy" in prison sentencing is most often associated with the existence of parole-release discretion (PRD). This study finds that, in 34 states, PRD is still a major force in the determination of actual time served by large numbers of prisoners who are subject to the states' general rules of prison release. In 16 states, the District of Columbia, and the federal system, PRD has been eliminated for the vast majority of general-rules prisoners.

For convenience, we will refer to states that incorporate PRD in large percentages of prison sentences as "paroling states." Those with no PRD for the vast majority of prison sentences will be called "non-paroling states." The terms are useful but rough approximations. No American jurisdiction is absolute in either direction.

In classifying states as paroling versus non-paroling, we have ignored their prison-release rules for life sentences. All American jurisdictions authorize sentences of life without parole (LWOP) for one or more offenses,[21] but in most states the majority of people serving life sentences will someday be eligible for parole. States differ greatly in their approaches, but not always in predictable ways. On the broad question of how much indeterminacy should be built into prison terms, many states have adopted conflicting philosophies for life and non-life sentences.

Of the 34 states we identify as paroling states under their general rules of prison release, six extend no opportunity of parole release to adults who receive life sentences (Arkansas, Iowa, Louisiana, Pennsylvania, South Dakota, and Wyoming). In other words, current law in these "paroling" states is fashioned so that a life sentence always means LWOP.[22] Looking to the 18 American non-paroling jurisdictions, ten retain the possibility of parole release for most life sentences (California, Delaware, Kansas, Minnesota, New Mexico, Ohio, Oregon, Washington, Wisconsin, and the District of Columbia).

In summary: Across American jurisdictions, the question of whether there should be PRD in prison sentencing is often answered differently for life and non-life prison terms. Because of these inconsistencies, this report treats states' approaches to the determinacy or indeterminacy of life sentences as a distinct topic (see Chapter 9). This chapter focuses on the larger prisoner subpopulations who have received non-life sentences with judicial maximum terms stated in months or years.

Table 5 shows our breakdown of paroling versus non-paroling jurisdictions in the U.S., while noting their sometimes divergent treatment of life sentences.

21 Alaska has no LWOP sentence per se, but state law authorizes prison sentences of 99 years without prospect of parole for aggravated first-degree murder. Functionally, we count this as an LWOP sentence.

22 In most states that have eliminated sentences of life with parole, there are still "legacy cases" of people in the prisons who were given such sentences under prior law.

Table 5. Presence and Absence of Parole-Release Discretion in 50 States, the District of Columbia, and the Federal System

States with parole-release discretion for a large percentage of prisoners, including some life prisoners*	Alabama, Alaska, Colorado, Connecticut, Georgia, Hawaii, Idaho, Kentucky, Maryland, Massachusetts, Michigan, Mississippi (split system), Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York (split system), North Dakota, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, and West Virginia
States with parole-release discretion for a large percentage of prisoners, but not for life prisoners	Arkansas, Iowa, Louisiana, Pennsylvania, South Dakota, and Wyoming
States with no parole-release discretion for the vast majority of prisoners, but some life sentences are parolable**	California (split system), Delaware, Kansas, Minnesota, New Mexico, Ohio (split system), Oregon, Washington, Wisconsin, and the District of Columbia
States with no parole-release discretion for the vast majority of prisoners, and no parolable life sentences***	Arizona, Florida, Illinois, Indiana, Maine, North Carolina, Virginia, and the federal sentencing system

Sources: 52 "state reports" prepared for this project, including 50 states, the District of Columbia, and the federal system.
*Most states in this category have PRD for the majority of prison sentences, but two have "split systems" in which a substantial percentage of all prison sentences have PRD, but less than a majority.
**In Minnesota, release discretion for lifers is held by the Commissioner of Corrections. In Wisconsin, it is held by sentencing courts. We apply the term "parolable life sentences" to these states even though the release decisionmaker is someone other than a parole board.
***The LWOP-only designations in rows 2 and 4 of the table do not include parolable life sentences for juvenile offenders who were under 18 at the time of their crimes, which are constitutionally required in many cases even if not authorized in statute.

Table 5 also notes the existence of what we call "split systems" in California, Mississippi, New York, and Ohio. In each of these states, substantial percentages of general-rules prisoners fall into both categories. These systems complicate our definitions of "paroling" versus "non-paroling" states. Mississippi and New York are nearly split down the middle. For the most part in both states, nonviolent offenders receive parolable sentences while sentences for violent crimes have no PRD. In California and Ohio, only small subgroups of prisoners are eligible for discretionary parole release.[23] We address these complications by flagging the split systems. Readers may decide for themselves if the "split" states should be classified differently than we have done.

23 We define paroling states as those that offer discretionary parole release to "large numbers" of general-rules prisoners rather than an outright majority. If our definition required a clear majority, we would not know what to do with Mississippi and New York. In both states, the majority of people admitted to prison have parolable sentences but, at least in New York, a majority of the standing population does not. In Mississippi, we cannot guess which group is larger in the standing population.

Modeling degrees of indeterminacy in paroling states

Among the 34 paroling states, the degrees of indeterminacy (DOI) in ordinary prison sentences vary a great deal. In addition, most states have separate classes of prison sentences with different DOIs. For example, in Connecticut, prisoners convicted of violent offenses do not become eligible for discretionary parole release until they have served 85 percent of their judicial maximum terms. See Figure 7 below.[24] In contrast, most prisoners convicted of nonviolent crimes are admitted with parole eligibility dates at the 50-percent mark of their maximum sentences. See Figure 8.[25]

Figure 7. Connecticut Prison Release Timeline for 85-Percent Violent Offenses with No Risk Reduction Credits

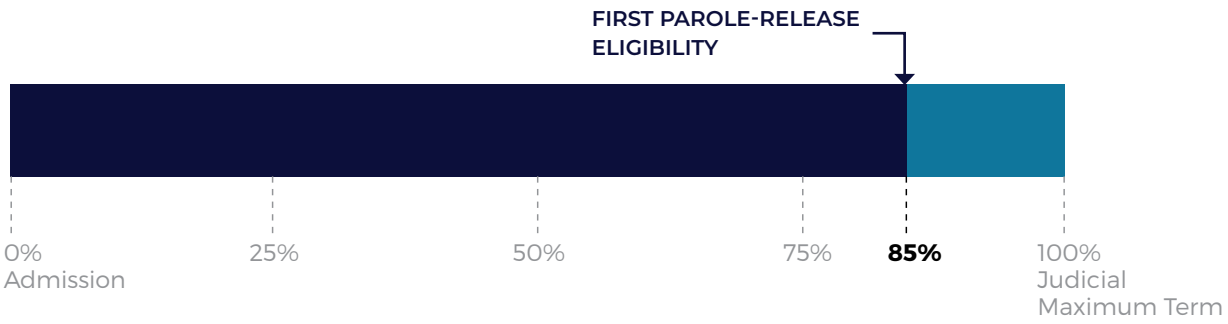
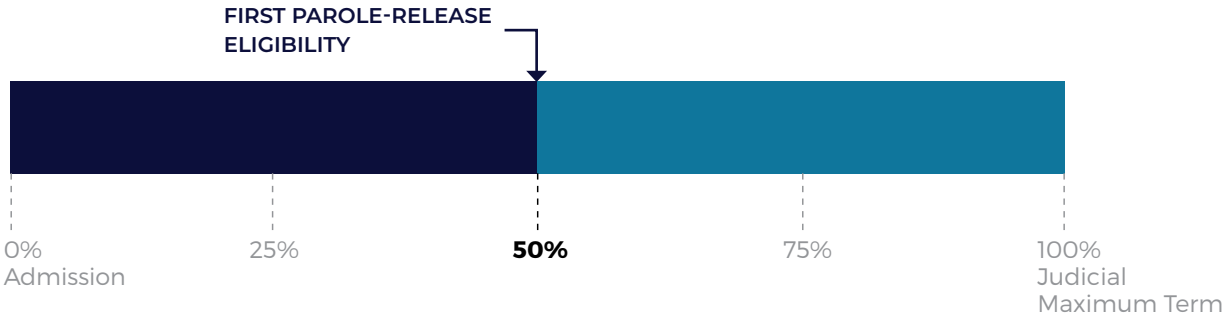


Figure 8. Connecticut Prison Release Timeline for Ordinary Nonviolent Offenses with No Risk Reduction Credits



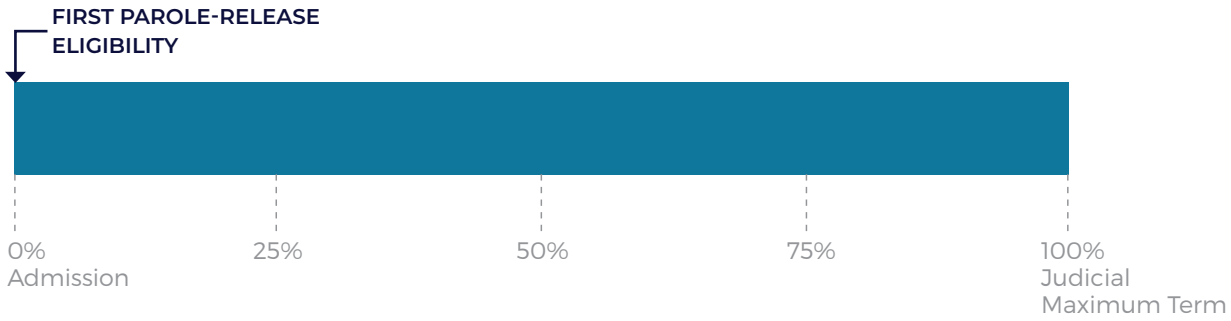
24 Our discussion of the Connecticut system is drawn from Kevin R. Reitz, Matthew Jacobs, and Edward E. Rhine, *Prison-Release Discretion and Prison Population Size, State Report: Connecticut* (Robina Institute of Criminal Law and Criminal Justice, 2021), at https://robinainstitute.umn.edu/publications/prison-release-discretion-and-prison-population-size-state-report-connecticut.

25 For people imprisoned for nonviolent offenses, this eligibility date can be advanced to the 43-percent mark if they earn all available "risk-reduction credits." Prisoners convicted of violent crimes in Connecticut cannot move their parole-release eligibility dates through credit earnings.

Although it is a paroling state, the prison-sentencing system in Connecticut operates with a *low degree of indeterminacy* overall (according to this project's subjective ranking system). We reach this judgment by averaging out the two sentence classes pictured above. In our ranking system, 85-percent sentences are an example of *extremely low indeterminacy*. Sentences with parole eligibility at 50 percent are exemplars of *moderate indeterminacy*. Because we would expect to find large numbers of prisoners in both groups, our systemwide DOI assessment falls in the middle.[26]

On the upper end of the DOI scale, a handful of paroling states allow discretionary parole release to large numbers of prisoners on the day they are admitted to prison. Judicial prison sentences of this kind have no minimum terms. This is the approach for the great majority of prison sentences in Hawaii. See Figure 9 below.[27] For example, most prison sentences with a four-year judicial maximum in Hawaii would include zero determinacy and four years of indeterminacy. In theory, the parole board could set actual sentence length anywhere from mere minutes to the full maximum term. Obviously, we rate such sentences as having an *extremely high degree of indeterminacy*.

Figure 9. Hawaii Prison Release Timeline for General-Rules Sentences



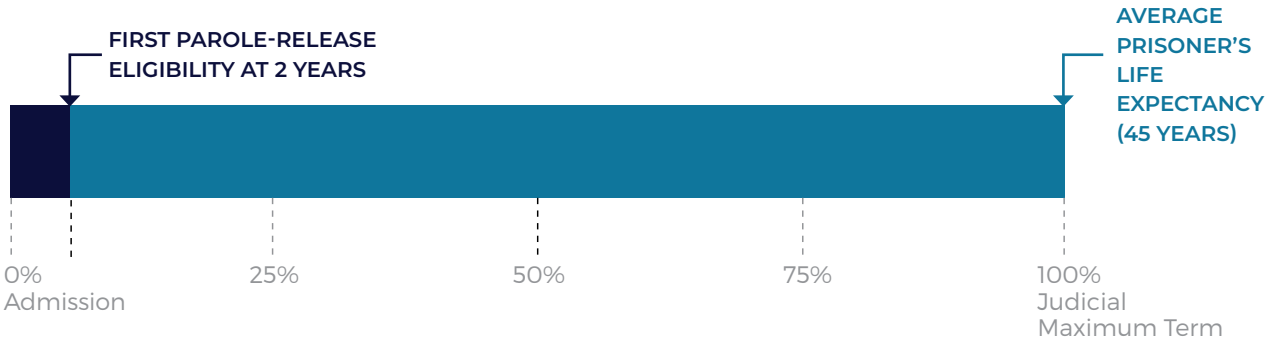
A different instance of extremely-high indeterminacy is found in Colorado, where some people convicted of sex offenses receive life sentences with minimum terms as short as two years. See Figure 10 below. Extremely high DOIs in conjunction with long maximum terms can yield dramatic amounts of indeterminacy. If we approximate the maximum using a life expectancy of 45 years,[28] Figure 10 sentences include two years of time served that are "determined" by the court plus an additional 43 years of indeterminacy.

26 As explained in Chapter 3, our DOI rankings of entire state sentencing systems are based on a composite judgment that takes into account all of the major classes of non-life sentences in each state.

27 We have found similar timelines in Iowa for most prisoners and in Utah for prisoners convicted of third-degree felonies.

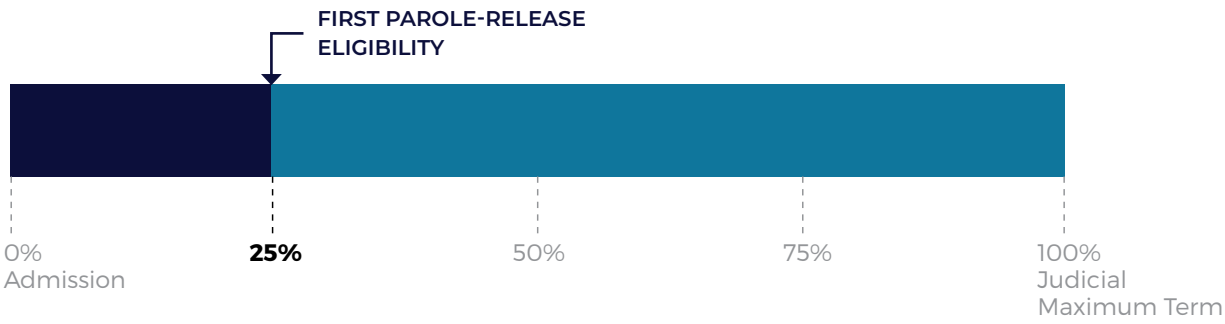
28 In Chapter 9, we suggest that average life expectancy for the average life prisoner can be used as a proxy to generate prison release timelines for differently-structured life sentences.

Figure 10. Colorado Prison Release Timeline for Sex Offenses with Sentences of 2 Years to Life



Thirteen paroling states place parole eligibility dates at the 25- or 33-percent marks of the prison-sentence timeline, at least for prisoners convicted of nonviolent crimes.[29] Texas provides most prisoners convicted of lower-level offenses with parole eligibility at the 25-percent mark. See Figure 11. In Rhode Island, standard PEDs are placed at the 33-percent mark. See Chapter 3, Figure 5.

Figure 11. Texas Prison Release Timeline for Lower-Level Offenses with No Good Time Credits



We consider prison sentences with parole release eligibility at 25 or 33 percent to be bellwethers of *high indeterminacy* in the American context. Before this study, we thought of such systems as the archetypes of parole-release discretion in the U.S. Our research for this project, however, has convinced us that there is no such thing as an identifiable prison-release paradigm in America, even among paroling states.

29 Seven of these states require higher percentages for violent or designated categories of "more serious" offenses.

Judge-made degrees of indeterminacy

In eleven states, the DOIs of prison sentences are not dictated by statutory rules or formulas, but can be varied substantially in individual cases within the discretion of sentencing judges. For example, defendants convicted of nonviolent crimes usually receive parolable sentences in New York, but sentencing courts are given meaningful authority to set the relationship between minimum and maximum terms. For many crimes, judges may impose minimums that are as long as one-third of the maximum or as short as one year. Figures 12 and 13 illustrate sentences in which judges have imposed the longest permitted minimum terms, contrasted with sentences in which judges have selected the shortest allowable minimum terms. If we assume the same 10-year maximum sentence in each figure, minimum terms could be as long as three years and four months, (Figure 12) or as short as one year (Figure 13).[30]

Figure 12. New York Prison Release Timeline for Indeterminate Sentence with Longest Allowable Minimum Term and No Credits Against Sentence

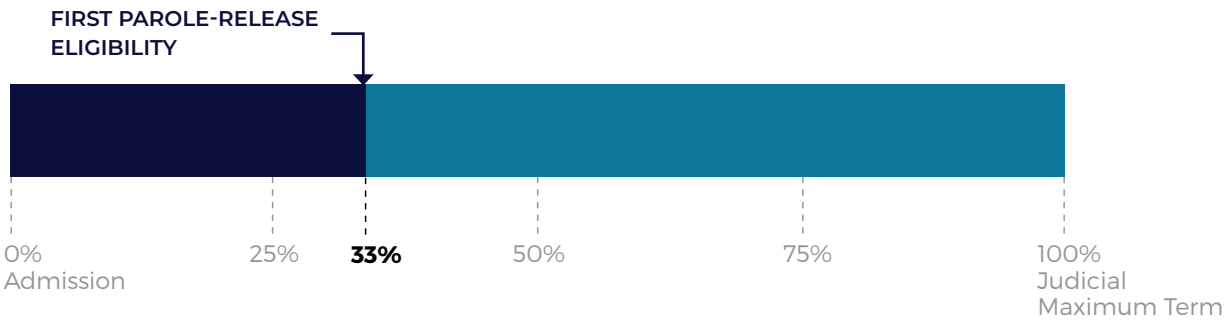
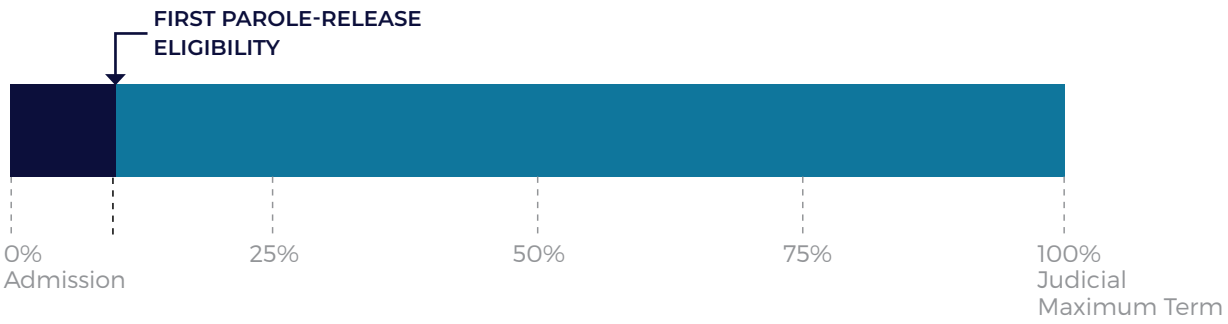


Figure 13. New York Prison Release Timeline for Indeterminate Sentence with Shortest Allowable Minimum Term and No Credits Against Sentence*



*Length of minimum term calculated based on 10-year sentence

30 In New York, judicial minimum sentences can be reduced slightly through the award of credits.

Judicial power to set the DOIs of individual prison sentences reaches extreme proportions in some states. For example, for most prison sentences in Michigan, courts can set minimum terms as low as zero or as high as two-thirds of maximum terms. (Individual sentences can range from extremely high indeterminacy to low indeterminacy.) In Montana, the default rule for most prisoners is that parole eligibility will come at 25 percent of maximum terms, but judges are free in individual cases to set longer minimum terms all the way up to 100 percent of maximum sentences, effectively eliminating parole eligibility. This is a striking power. In most other paroling states, rules concerning the "minimum-maximum ratio" are made by the legislature.

In states like Michigan and Montana, the courts have been made the primary actors in defining the DOIs of individual sentences and, over hundreds and thousands of cases, the DOI of the prison-sentencing system as a whole. In effect, it is up to judges to decide how much time-served authority to preserve at the front end of the prison-sentencing system and how much authority the parole board should receive once prisoners move to the back end of the system. These decisions are made one case at a time, but they add up to define the downstream operation of the system as a whole.

We do not speculate here why some states would want to repose DOI policy-setting in courts as opposed to legislatures, but it is a question of system design that deserves further examination. Standardized rules governing minimum-maximum ratios suggest that DOIs should be a matter of statewide policy, with a consistent approach for large groups of people with the same class of sentence. Judicially-individualized DOIs suggest that there is no broadly applicable policy at work. Instead, individual judges are somehow expected to make principled use of their authority to vary minimum-maximum ratios in each case.

Advancement of parole eligibility dates

Seventeen states allow the minimum terms in judicial prison sentences to be shortened through the accrual of good-time or earned-time credits. (Some limit this benefit to nonviolent offenders.) We refer to this as the "advancement" of parole eligibility dates (PEDs). We refer to the mechanism as one of "movable PEDs." Figures 14 and 15 illustrate the dynamic. Among the states that do this, the amount of advancement varies widely, but a generous discount is around 50 percent, as in Arkansas, visualized in the figures below.

Figure 14. Arkansas Prison Release Timeline for Sentences with Release Eligibility at One-Third of Maximum and No Meritorious Good Time

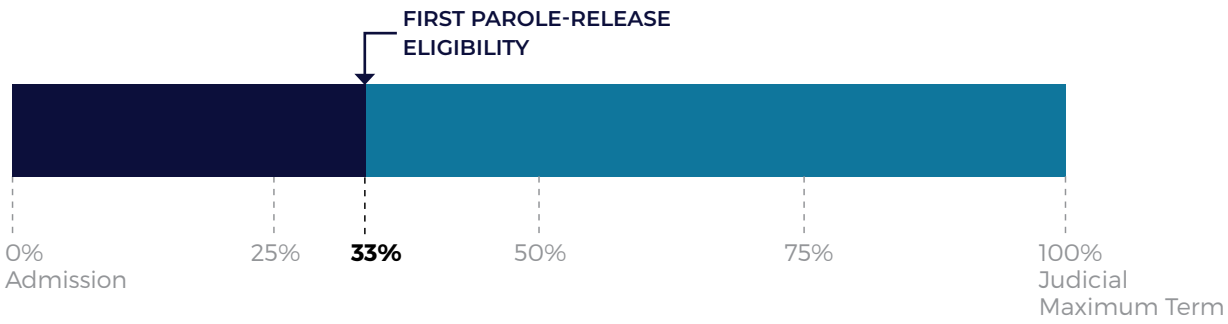
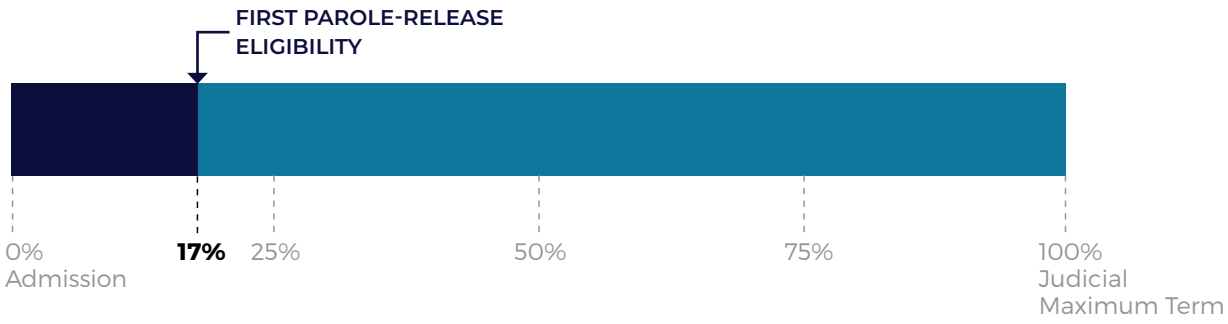


Figure 15. Arkansas Prison Release Timeline for Sentences with Release Eligibility at One-Third of Maximum and Meritorious Good Time of 30 Days per Month



The authority to advance PEDs is held by the corrections officials who administer credit discounts in each state. But it is a weak exercise of power with no definitive effect. The main result is to increase the parole board's release discretion by enlarging the indeterminate segment of the timeline.

Individual releases between the 17-percent and 33-percent marks depend on two decisions favorable to prisoners: first, there must be preliminary action by DOC officials to advance a prisoner's PED and, second, an actual release decision by the parole board. As a matter of structural design, we posit that releases are less likely to occur when two affirmative decisions are required rather than one. However, we do not know what actually happens in systems that use this mechanism. Data from states that make use of movable PEDs would be needed to examine if it is a consequential design feature of their systems.

Waiting periods following denials of release

Finally, we have been struck by the many different approaches states take to the length of waiting periods between a parole board's decision to deny release in an individual case and the next date of parole-release consideration for that person. This is an overlooked element of system design, which has greatest impact in states that deny release to large percentages of prisoners at their early eligibility dates. In effect, waiting periods operate as new minimum terms that are stacked on top of time previously served.

Twenty states limit waiting periods to one or two years for some or all prisoners, although five of these allow longer periods for designated groups such as violent offenders. In sharp contrast, twelve states give parole boards discretion to set waiting periods of any length, or to order that prisoners will *never* be reconsidered by the board.[31] As with many other matters in this chapter, we do not see obvious policy justifications for the full range of laws that currently exist on this question.

Overview of release eligibility formulas in paroling states for general-rules prisoners

Table 6 collects statutory formulas for the timing of parole-release eligibility across the 34 paroling states. The table shows the rules for "general-rules" prisoners, that is, those who make up the largest groups in a state's total prison population. Most states have two categories of general-rules prisoners, broken down for people convicted of nonviolent and violent crimes, or for those with "less serious" and "more serious" convictions and criminal histories.[32] The vague terms "less serious" and "more serious" are meant to describe statutorily groupings that do not break down neatly for nonviolent and violent crimes. Many states have idiosyncratic laws of this kind.

Table 6 lays out the formulas for calculation of prisoners' first parole-eligibility dates in each state—a segment of the timeline usually called the "minimum term." The table also specifies whether minimum terms may be reduced through the accrual good- or earned-time credits and, if so, by how much. Finally the table shows the amount of time prisoners must wait after release denials for their next release consideration.

31 In Nebraska, the parole board must ordinarily schedule reconsiderations within one year, but they also have the power to deny reconsideration for the remainder of a prisoner's term.

32 In our definition, prisoners with special classes of sentences, such as life or mandatory minimum sentences, are not considered general-rules prisoners.

Table 6. Parole-Release Eligibility for General-Rules Prisoners in 34 American Paroling States

	Minimum terms for nonviolent or less serious offenses	Minimum terms for violent or more serious offenses	Minimum terms reducible by good time or earned time credits?	Waiting period after denial of release	Comments
Alabama	0% of MAX for sentences of five years or less	18 months before mandatory release date for sentences of more than five years and up to 10 years; 30 months before mandatory release date for sentences of more than 10 years and up to 15 years; 33% of MAX for sentences of more than 15 years; 85% of MAX for statutorily designated serious violent offenses	Yes, for sentences of more than five years and up to 15 years, complex formulas allow for roughly 60-70% reductions of minimum terms at highest earning classifications (e.g., parole eligibility can conceivably occur earlier than 20% of MAX for high earners)	Parole board has discretion to deny reconsideration, but if the board decides to set a new date: reconsideration for those convicted of nonviolent offenses and with sentences of 20 years or less must be set within 2 years, all other cases within 5 years	Alabama's release formulas are among the most complex and multi-layered in the country
Alaska	25% of MAX. Sentencing courts have discretion to set longer minimum terms or order that defendant will not be eligible for parole.	25% of MAX. Sentencing courts have discretion to set longer minimum terms or order that defendant will not be eligible for parole.	No	At parole board's discretion, including denials of reconsideration	Sentencing courts' discretion to set extended minimum terms is only to be used in exceptional case, subject to statutory factors and appellate review.
Arkansas	33% of MAX	50% of MAX; 70% of MAX for statutorily designated serious offenses	Up to 50% reduction	Up to 2 years	The sorting of prisoners into the 33% and 50% categories is based on the seriousness determination made by the Arkansas Sentencing Commission in the state's sentencing guidelines.
Colorado	50% of MAX	50% of MAX; various MIN terms authorized for sex offenders with parolable life sentences, as short as 2 years	Earned time credits of 12 days per month (29% reduction), plus additional earned time credits up to 120 days for completion of program milestones	Up to 1 year; 3 or 5 years for designated serious felonies	The 50% MIN for most offenses is based on an automatic award of good time credits, which may be lost for misconduct

	Minimum terms for nonviolent or less serious offenses	Minimum terms for violent or more serious offenses	Minimum terms reducible by good time or earned time credits?	Waiting period after denial of release	Comments
Connecticut	50% of MAX	85% of MAX	Only for nonviolent offenders, up to 5 days per month (14% reduction)	At parole board's discretion, including denials of reconsideration	Parole board has discretion to classify prisoners into 50% or 85% formulas; relevant offenses are not specified in statute
Georgia	33% of MAX or 9 months, whichever is greater, for MAXs less than 21 years	Fixed MIN of 7 years for MAXs of 21 years or more	"Performance Incentive Credits" do not reduce MIN, but support DOC recommendations for parole board to consider earlier release dates within its preexisting range of discretion	At parole board's discretion, including denials of reconsideration	
Hawaii	0% of MAX; date of first release consideration is a matter of parole board discretion	0% of MAX; date of first release consideration is a matter of parole board discretion	No	Up to 1 year	Judges have no power to select MIN or MAX sentences for most general-rules cases; judges have limited power to set MAX terms (but not MIN terms) for most felony drug offenses
Idaho	Sentencing courts have discretion to set MIN terms from 0% of MAX to 100% of MAX with no statutory limitation	Sentencing courts have discretion to set MIN terms from 0% of MAX to 100% of MAX with no statutory limitation	No	At parole board's discretion, prisoners may apply for reconsideration once per year	Sentencing courts are powerful "gatekeepers" of the degree of indeterminacy for most prison sentences on a case-by-case basis
Iowa	0% of MAX	Various MIN terms for more serious offenses or prior records, between 20% and 100% of MAX; many of these MIN terms are fixed by statutory formula; for others, judges have discretion to set MIN term within statutory ranges	No	Up to 1 year	In most cases, Iowa judges have discretion to choose a judicial MAX term within statutory limits; but have discretion to set MIN terms only in a narrow selection of cases

	Minimum terms for nonviolent or less serious offenses	Minimum terms for violent or more serious offenses	Minimum terms reducible by good time or earned time credits?	Waiting period after denial of release	Comments
Kentucky	20% of MAX for sentences ranging from 2-39 years; 15% of MAX for least serious nonviolent offenses	20% of MAX for sentences ranging from 2-39 years; 85% of MAX for statutorily designated serious violent and sex offenses	No	Up to 2 years for prisoners convicted of nonviolent offenses at low felony grades; up to 10 years for all others	
Louisiana	25% of MAX	65% of MAX for first conviction of violent crime; 75% of MAX for second crime of violence or sex offense	No	At parole board's discretion, prisoners may apply for reconsideration at intervals of 6, 12, or 24 months, depending on their offenses of conviction	In recent years, prisoners released through discretionary parole have made up only about three percent of all releases
Maryland	25% of MAX	50% of MAX	No	At parole board's discretion, including denials of further consideration	
Massachusetts	Sentencing courts have discretion to set MIN terms from 0% of MAX to 100% of MAX with no statutory limitation	Sentencing courts have discretion to set MIN terms from 0% of MAX to 100% of MAX with no statutory limitation	Up to 35%	At least once per year for general-rules prisoners; five years for life prisoners	Sentencing courts are powerful "gatekeepers" of the degree of indeterminacy for most prison sentences on a case-by-case basis
Michigan	Sentencing courts have discretion to set MIN terms from 0% of MAX to 67% of MAX	Sentencing courts have discretion to set MIN terms from 0% of MAX to 67% of MAX	No	Up to 2 years; up to 5 years for designated firearms offenses or prisoners determined to present high risk to public safety	Sentencing courts are important "gatekeepers" of the degree of indeterminacy for most prison sentences on a case-by-case basis

	Minimum terms for nonviolent or less serious offenses	Minimum terms for violent or more serious offenses	Minimum terms reducible by good time or earned time credits?	Waiting period after denial of release	Comments
Mississippi	25% of MAX or 10 years, whichever is shorter	50% of MAX or 20 years, whichever is shorter, for those convicted of most violent crimes; those convicted of most sex offenses and designated serious violent offenses are ineligible for parole release	No	Up to 1 year	
Missouri	15%, 20%, or 25% of MAX depending on felony grade of nonviolent offense	33% of MAX for most violent and sex offenses; 85% for serious offenses designated as "dangerous felonies"	No	Between 1 and 5 years	
Montana	25% of MAX is default; sentencing courts have authority to set longer MIN terms or deny parole eligibility entirely upon finding that such restriction is "necessary for protection of society"	25% of MAX is default; sentencing courts have discretion to set longer MIN terms or deny parole eligibility entirely upon finding that such restriction is "necessary for protection of society"	No	Up to 1 year; up to 6 years for designated violent and sexual offenses	Sentencing courts are "gatekeepers" of the degree of indeterminacy for some prison sentences when authorized to impose a longer MIN than the default 25%
Nebraska	No discretionary parole release for lower level felony offenses	MIN terms set within discretion of sentencing courts, up to 50% of MAX	Yes, as much as 39% reduction of judicial MIN	Up to 1 year; parole board can also deny for the remainder of the sentence	
Nevada	Sentencing courts have discretion to select MINs of one year or longer, up to 40% of MAX	Sentencing courts have discretion to select MINs of one year or longer, up to 40% of MAX	Yes, as much as 58% reduction of judicial MIN	Up to 3 years; up to 5 years for prisoners who have more than 10 years of their maximum sentences remaining	

	Minimum terms for nonviolent or less serious offenses	Minimum terms for violent or more serious offenses	Minimum terms reducible by good time or earned time credits?	Waiting period after denial of release	Comments
New Hampshire	Sentencing courts have discretion to set MIN terms from 0% of MAX to 50% of MAX; judicial MIN terms of more than one year are extended by a "disciplinary period" of 150 days per year	Sentencing courts have discretion to set MIN terms from 0% of MAX to 50% of MAX; judicial MIN terms of more than one year are extended by a "disciplinary period" of 150 days per year	Disciplinary periods added to judicial MIN terms may be reduced or eliminated by good conduct credits; additional earned-time reductions capped at 21 months	At parole board's discretion	Sentencing courts are important "gatekeepers" of the degree of indeterminacy for most prison sentences on a case-by-case basis
New Jersey	33% of MAX or 9 months, whichever is greater	85% of MAX for serious offenses included in the No Early Release Act (NERA)	MIN terms reducible to about 20% of MAX for less serious offenders; no credit reductions from MIN terms for NERA offenses	Between 8-27 months depending on offense, with parole board discretion to deviate from schedule	
New York	Parolable sentences available only for nonviolent offenses; sentencing courts have discretion in most cases to set MIN terms between one year and 33% of MAX	No discretionary parole release for most violent offenses and serious drug offenses	Yes, only for nonviolent offenders with parolable sentences, up to 17% reduction	Up to 2 years	For parolable sentences only, sentencing courts are "gatekeepers" of the degree of indeterminacy within statutory range
North Dakota	0% of MAX for nonviolent and lower-level violent offenses; parole board sets date of first release consideration.	85% of MAX for statutorily designated serious violent offenses	No	At parole board's discretion	
Oklahoma	25% of MAX	25% of MAX	No	Up to 1 year for nonviolent offenses; up to 2 or 3 years for violent offenses	Parole release of prisoners convicted of violent offenses requires approval of governor

	Minimum terms for nonviolent or less serious offenses	Minimum terms for violent or more serious offenses	Minimum terms reducible by good time or earned time credits?	Waiting period after denial of release	Comments
Pennsylvania	Sentencing courts have discretion to set MIN terms from 0% of MAX to 50% of MAX	MIN is 10 years for those convicted of a second crime of violence and 25 years for those convicted of two or more crimes of violence	Pennsylvania has a "Recidivism Risk Reduction Incentive Program" for many convicted of nonviolent offenses if ordered by sentencing court; MIN terms reduced by 25% for sentences with MAXs of 3 years or less; 17% for MAXs of more than 3 years	Up to 1 year	Sentencing courts are important "gatekeepers" of the degree of indeterminacy for most prison sentences on a case-by-case basis
Rhode Island	33% of MAX	33% of MAX but prisoners convicted of sex offenses should not be "seriously considered for parole" until they have completed sex offender treatment	No	At parole board's discretion up to 6 years, or denial of further consideration	
South Carolina	25% of MAX	33% of MAX for many violent offenses; 85% of MAX for offenses with authorized MAX penalties of 20 years or more (but not life); no parole release for repeat violent offenders	Yes, "work" credits advance parole eligibility, but "good time" and "education" credits do not. Work credit reductions capped at 180 days per year.	Up to 1 year after denial for nonviolent offenses, up to 2 years after denial for violent offenses	
South Dakota	Between 25 and 50% of MAX depending on felony class and previous convictions	Between 35 and 75% of MAX depending on felony class and previous convictions	No	Up to 2 years	Most prisoners are eligible for administrative parole release at expiration of MIN terms if they adhere to their "individual program directive" established by DOC (see Table 7)

	Minimum terms for nonviolent or less serious offenses	Minimum terms for violent or more serious offenses	Minimum terms reducible by good time or earned time credits?	Waiting period after denial of release	Comments
Tennessee	Between 20% and 60% for most felony sentences depending on defendants' prior convictions	Between 20% and 60% for most felony sentences depending on defendants' prior convictions; a number of statutorily designated serious offenses have longer MIN terms of 70% to 85%	Credit-based reductions capped at 30%	At parole board's discretion up to six years.	Parole eligibility formulas for general-rules cases turn on number and types of prior convictions; defendants are sorted into five categories
Texas	25% of MAX	50% of MAX	Yes, but only less-serious ("non-3g") offenders. Realistic credits could reduce parole eligibility to 10% of MAX.	"As soon as practicable" after 1 year; up to 5 or 10 years for designated offenses; "serve all orders" authorized for designated offenses	
Utah	0% of MAX for third-degree felonies	6.7% of MAX for second-degree felonies; 11% for first-degree felonies	No	At parole board's discretion	Sentencing courts have no discretion to set MAX or MIN terms for most cases; MAX is always the statutory maximum penalty
Vermont	Sentencing courts have discretion to set MIN terms from 0% of MAX to 100% of MAX	Sentencing courts have discretion to set MIN terms from 0% of MAX to 100% of MAX except for some serious offenses that require MIN terms as specified in offense definition	Up to 19% reduction	Up to 1 year if the maximum sentence is less than 15 years; up to 2 years if the maximum is 15 years or more.	Sentencing courts are powerful "gatekeepers" of the degree of indeterminacy for most prison sentences on a case-by-case basis

	Minimum terms for nonviolent or less serious offenses	Minimum terms for violent or more serious offenses	Minimum terms reducible by good time or earned time credits?	Waiting period after denial of release	Comments
West Virginia	For "indeterminate" sentences, MIN terms set by statute for individual offenses, varying from 7% to 50% of MAX; under general rules for "definite" sentences, MIN is 25% of MAX	For "indeterminate" sentences, MIN terms set by statute for individual offenses, varying from 7 to 50% of MAX; under general rules for "definite" sentences, MIN is 25% of MAX	For prisoners never convicted of a violent offense, limited reductions of 90 days available for program completion under "accelerated parole program"	Up to 1 year for most prisoners; 3 years for those with parolable life sentences	
Wyoming	Sentencing courts have discretion to set MIN terms from 0% of MAX to 90% of MAX	Sentencing courts have discretion to set MIN terms from 0% of MAX to 90% of MAX	Up to 41% reduction with good time and "special good time" credits	Up to 1 year	Sentencing courts are powerful "gatekeepers" of the degree of indeterminacy for most prison sentences on a case-by-case basis

Sources: 52 "state reports" prepared for this project, including 50 states, the District of Columbia, and the federal system.
Note: MAX means the judicial maximum sentence. MIN means the judicial minimum sentence.

Key policy issues: The structure of parole-release discretion

Policy issue 1: What is the right amount of indeterminacy in prison sentences?

While there has been much debate of the relative merits of "indeterminate" versus "determinate" sentences, we have found no research or policy literature that addresses the question of what *degree* of indeterminacy should be included in prison sentences. The collective precedents across American jurisdictions offer little guidance. The visible signposts point in every direction at once.

From our state reports, we can cite numerous examples of parolable prison sentences that are 100 percent indeterminate and many that are only 15 percent indeterminate. Even in paroling states, at least some classes of sentences are zero percent indeterminate.

There is so much cross-jurisdictional variation that states cannot possibly be following the same philosophies. Even in individual states we cannot say what rationales are at work. This is a foundational question that so far has prompted little theoretical or practical debate. We think Policy Issue 1 is worth pondering with greater care, both in the interest of good sentencing policy in individual cases and because of the powerful ramifications of different DOIs for the structural dynamics of prison population control.

Policy issue 2: Should degrees of indeterminacy in prison sentences be lower for more serious cases than for less serious? Should they be the same?

In all paroling states, statutory formulas provide minimum terms for violent (or "more serious") offenders that are the same as or longer than those for nonviolent (or "less serious") offenders. For example, if minimum terms are set in standard ratio to maximum terms, the percentage formula is often higher for more serious offenders but is sometimes the same.

For example, in Alabama minimum terms for nonviolent crimes run for 33 percent of maximum sentences while minimum terms for violent offenses are fixed at 85 percent. In South Carolina the differential is only 25/35 percent. In Missouri there are four separate percentage formulas: 15, 20, 25, and 33 percent for increasingly serious felonies. In contrast, more than one-third of the paroling states use the same percentage calculations across the board. (Most non-paroling states also use the same release-eligibility formula for the majority of nonviolent and violent crimes.)

We have not tried to work out why some states have enacted nonviolent-violent differentials in DOIs and others have not, let alone how the varying sizes of the differentials might be justified. The pros and cons of the assorted approaches are not self-evident, yet we have little doubt that they produce dissimilar patterns of time-actually-served and the numbers of people who build up in the prison system as a whole. Examination or reexamination of these issues is warranted.

Policy issue 3: What is the relationship between varying degrees of indeterminacy in prison sentences and the generation of prison population size?

We have one partial answer to this question: Higher degrees of indeterminacy in a prison-sentencing system mean that a greater share of effective control over a state's prison population size is located at the back end of the system as compared with highly determinate systems, where population size is dictated to a greater extent at the front end of the system. It is imperative that policymakers recognize this relationship when considering matters of system design and operation.

Beyond this general principle lie complex questions that we cannot begin to address in this report. We only note that, in highly indeterminate systems, time-served decision patterns are fluid and changeable without formal amendments to legislation, sentencing guidelines (if any), or broadly applicable regulations. On the other hand, when DOIs are low, prison population size is "stickier." Large changes in aggregate sentence lengths are less likely to amass without formal changes in law.

High DOIs may be more desirable in some contexts than others. If our focus is on how to remedy or avoid mass incarceration, high indeterminacy suggests the possibility of remedies with low transaction costs—but also the absence of structural guardrails to inhibit rapid prison growth in the longer term. We see bottomless opportunities for debate and empirical study of these advantages and disadvantages.

Policy issue 4: How should the existence of indeterminacy based on good time and earned time affect the amount of release discretion given to parole boards?

In most paroling states, the parole board's release and release-denial discretions coexists with different forms of time-served authority ceded to departments of corrections. Within the total DOI of a given prison sentence, more than one agency can be at work.

This raises basic questions of system design: Is there an optimum division of power between parole boards and departments of correction? What are the comparative institutional advantages of parole-board versus DOC decisionmaking? How does the balance of power affect the determination of prison population size?

Policy issue 5: How long should waiting periods be between a denial of release and the date of release reconsideration?

There are no benchmarks here. Significant variation is found ranging from one to two years to indefinite periods at the discretion of the parole board to outright denials of release consideration for the remainder of the prison term. What thought processes have produced this variation? Why might some states choose to mandate annual reconsiderations while others allow much longer intervals? Should some states consider a change in their laws? What identifiable rationales or principles *should be* considered when addressing these questions?

Policy issue 6: Should sentencing courts have the power to vary the relationship between minimum and maximum terms on an individualized case-by-case basis? If yes, how much power of this kind should they be given?

In most states, sentencing courts control the in-out decision. Also in most states, sentencing courts choose a judicial maximum sentence within an authorized ceiling specified by the "statutory maximum sentence." In most states, however, sentencing courts *do not* have the power to decide on the relationship between minimum and maximum terms (the "minimum-maximum ratio"). In 23 of 34 paroling states, the minimum term to parole eligibility is set by statutory formula or rule, often taking the form of a fixed ratio.

A small minority of states entrust appreciable powers in sentencing courts to alter the DOIs of each prison sentence they impose. This raises provocative questions: Why should courts have this power? Is individualized sentencing needed for the setting of DOI formulas? What should the courts' thought processes be when exercising such power? If we believe sentencing courts should hold such authority, how narrow or sweeping should it be? (Our research reveals a great diversity of approach on the scope of the power.) Does this form of judicial sentencing discretion further or frustrate systemwide policies of prison sentencing? What are the anticipated effects on governance of total prison population size?

CHAPTER 5

Highlighted topic: Administrative parole release

In the state-by-state research for this project, we have been surprised to discover a growing number of experiments nationwide with streamlined release procedures for certain classes of prisoners. We collect twelve of these programs under the heading of "administrative parole release" (APR). In general, APR employs fewer procedural steps than the traditional parole process and dramatically lightens the burden on decisionmakers to exercise case-by-case discretion. While release is never guaranteed for eligible prisoners, APR is designed to inject a new level of automaticity into release decisions.

Although APR programs follow no universal model, they represent a potentially important innovation in the structure of release decisionmaking in paroling states.[33] We therefore highlight them in this chapter.

Definitions

We define administrative parole release as a routinized path to release that requires fewer procedural stages and less case-by-case discretion than the traditional parole-release process. APR is fundamentally built on a contract model: Prisoners are assigned a correctional plan early in their terms; if they follow the plan, the state extends them a credible promise that they will be released on an established date. To give such contracts credibility, denials of release or "derailment" from the APR track are permitted only under defined circumstances.

The exact shape of existing APR programs varies greatly from state to state. In APR's purest form, once eligible prisoners have served a specified amount of time and have satisfied predetermined APR criteria, they are released without further consideration. Unless eligible prisoners have been "derailed" from the APR process (for example, as a result of a serious disciplinary infraction), parole officials have no discretion to debate or deny release. In APR programs that call upon the parole board to participate, their role is often pro forma or limited to narrow issues such as reviewing prisoners for eligibility.

We distinguish APR from "discretionary parole release"—the traditional process that in most states includes a release hearing; individualized consideration by the board of prisoners' fitness for release; broad discretion on the board's part to weigh prisoners' self-presentation, life circumstances, institutional behavior, offenses of conviction, prior records, and victim input; and the requirement of affirmative votes in favor of release.

One prominent feature of APR is that, in most cases, parole board members are not called upon to cast votes in favor of release or deferral based on their individualized judgments of each prisoner. In the traditional parole-release process there is a record of which board members vote in favor of a release, which holds them personally accountable in the future. APR's dilution of voting requirements may

33 We are indebted to two unpublished student papers prepared for the Criminal Punishment seminar at the University of Minnesota Law School, Spring 2021: Bree Crye, *Examining the Efficacy of Emerging Approaches to Administrative Parole on Prison Population: A State-by-State Comparison and Policy Analysis;* and Sarah K. Metropulos, *Administrative Parole and American Decarceration*. We have benefited from their research and analysis.

give some insulation to board members from personal and political pressures they would otherwise feel. If so, APR may help address the widely-acknowledged problem of risk aversion in parole release decisionmaking.[34]

From prisoners' perspectives, APR offers a defined behavioral agenda, clear incentives, an expected timeline, and a reciprocal commitment from the state to follow through. Prisoners are given a formalized checklist of what they must do and may not do. If they satisfy the checklist, the system (in theory) promises them a high probability of release at next eligibility.

Presumptive parole distinguished

APR is different from many iterations of "presumptive parole release" that exist or have been proposed across the U.S. "Presumptive parole release," as we use the term, starts with the premise that certain prisoners should be released at their next eligibility date; in principle, the board should order release unless there is a sufficient showing to overcome the "presumption." For example, many state systems operate with parole-release guidelines that set forth release and deferral presumptions.

Presumptive release systems are designed on the theory that formal articulation of the presumption will influence the reasoning of parole board members, with practical effects on their decision patterns. No matter how release presumptions are styled, however, we know of no system in which they carry legal force. Critically, there is no apparatus to enforce presumptions if the board has disregarded them—or none with teeth. Indeed, most state laws governing presumptive release emphasize that the parole board's ultimate discretion to grant or deny release remains firmly in place.

This project has not included a study of the operation of presumptive-parole mechanisms in the U.S. However, our study permits us to draw structural comparisons between presumptive and administrative parole release. Presumptive parole attempts to put a substantive thumb on the scale that will affect parole boards' decision patterns one case at a time. In contrast, APR encourages the routinized release of designated groups of prisoners by charting a shortened procedural path to release that bypasses the discretionary framework of case-by-case consideration. To us, these are strikingly different strategies: APR places a procedural thumb on the scale rather than a substantive one.

34 In a 2015 national survey, a majority of parole board chairs named political vulnerability and pressure toward minimization of all risk as one of the most important problems confronting their field. See Ebony L. Ruhland, Edward E. Rhine, Jason P. Robey, & Kelly Lyn Mitchell, *The Continuing Leverage of Releasing Authorities: Findings from a National Survey* (Robina Institute of Criminal Law and Criminal Justice, 2017).

Survey of APR programs

A growing number of states have already adopted APR programs for large or small subgroups of prisoners. We were unaware of the number of such experiments before our work on the DOI Project. Table 7 collects information on the basic elements of twelve programs that meet most or all of our definitional criteria for APR.

Table 7. Features of Administrative Parole Release (APR) Programs in Twelve States

	Prisoners included in APR program	Requirements for prisoners to obtain APR	Minimum term to APR	Parole board action?	Victim veto?	APR eligibility after denial?
Arkansas	All except those convicted of statutorily designated serious offenses	Compliance with correctional plan; no major violations with loss of good time	33% or 50% of MAX, depending on seriousness of offense	Reviews files to ensure eligibility for APR and conducts "risk-needs assessment review;" hearing required if major violation with loss of good time, victim requests, or board's risk-needs assessment review indicates need for special conditions of supervision	Hearing required if victim requests to have input on conditions of supervision	Release delayed until a later date upon successful completion of course of action prescribed by parole board
Maryland	Selected low level drug crimes and property crimes under $1500, with no prior conviction of violent or sexual offense	Compliance with case plan; no serious rule violation	Greater of 25% of MAX or mandatory minimum	Board must find that hearing is unnecessary given individual prisoner's "history, progress, and compliance"	Yes, hearing before parole board required if requested by victim	No
Michigan	Prisoners who are classified under the state's parole guidelines as having a "high probability" of parole release	Classification of "high probability" of being released under parole guidelines	MIN terms vary from 0 to 67% of MAX within discretion of sentencing courts	Parole board must determine without an interview of prisoner that prisoner has high probability of parole release and the parole board intends to grant release	No. Victims may object to or appeal release decisions, but have no power to demand traditional parole release hearing	Yes
Mississippi	Nonviolent offenders	Compliance with parole case plan; no serious disciplinary infractions in past 6 months; approval of discharge plan	25% of MAX or 10 years, whichever is less	No hearing allowed if statutory preconditions are met; parole board must approve prisoner's discharge plan	Yes, hearing required upon request of victim or law enforcement official from prisoner's home community	No

	Prisoners included in APR program	Requirements for prisoners to obtain APR	Minimum term to APR	Parole board action?	Victim veto?	APR eligibility after denial?
New Jersey	Nonviolent and some lower-level violent offenders; serious violent and most sex offenders excluded	Completion of rehabilitation programs designated by DOC and parole board; no serious disciplinary infractions	Greater of 33% of MAX or 9 months, reducible to about 20% of MAX with greatest possible credits	Certifies release without hearing; no discretionary power to block release	No	Yes, APR available to eligible prisoners at first and subsequent parole release eligibility
New York	Nonviolent offenders with parolable sentences	Completion of assigned work and treatment programs as certified by DOC; no serious disciplinary infractions; no frivolous civil lawsuits	Judicial MIN term, potentially reduced by 17% for merit time	No actions by parole board authorized. DOC decisions considered final. DOC may deny if release not "consistent with the safety of the community or the welfare of the inmate"	No	No
North Carolina	Defendants selected by sentencing court for "Advanced Supervised Release" program, subject to prosecutor veto	Completion of risk-reduction programs as designed by DOC; no disciplinary infractions	80% of judicial MIN term	None	No	No
Ohio	Defendants selected by sentencing court for "risk reduction sentence"	Cooperation in risk and needs assessment process; completion of all relevant programming ordered by DOC	80% of MAX	None	No	No
Oklahoma	Nonviolent offenders	Compliance with case plans; certification of compliance by DOC; no infractions within past 2 years	25% of MAX	Majority vote in favor of release but no hearing required	Yes, victim may block release via administrative parole by submitting an objection	No, prisoners denied APR revert to traditional parole release process

	Prisoners included in APR program	Requirements for prisoners to obtain APR	Minimum term to APR	Parole board action?	Victim veto?	APR eligibility after denial?
South Dakota	All except those sentenced to death or life imprisonment, or sex offenders whose parole has been withheld by parole board (on recommendation of DOC)	Compliance with individual program directives established by DOC; certification of compliance by DOC	Varies from 25 to 75% of MAX based on current and any prior convictions	Parole board has no role unless certification of compliance with individual program directive is missing or unclear	No	No
Tennessee	Most prisoners are eligible but must reach an agreement with DOC and parole board to enter "contract sentencing program"	Completion of objectives or programs as per contract (DOC promises to provide necessary programs and services to fulfill contract)	Up to 30% reduction from original MIN term	No action other than entering into contract in the first place	No	Yes
Vermont	All prisoners except those convicted of statutorily-designated serious offenses	Compliance with case plan, avoidance of major disciplinary violations; DOC conducts risk screening for eligible prisoners that may trigger parole hearing	No predictable formula; MIN terms set in discretion of sentencing courts from 0 to 100% of MAX terms	Administrative (paper) review limited to consideration of whether victim should have opportunity to participate in a full parole hearing	No, except parole board has discretion to derail APR-eligible prisoner if it decides victim should have opportunity to participate in a full parole hearing	No

Sources: 52 "state reports" prepared for this project, including 50 states, the District of Columbia, and the federal system; Bree Crye, *Examining the Efficacy of Emerging Approaches to Administrative Parole on Prison Population: A State-by-State Comparison and Policy Analysis* (unpublished seminar paper, 2021) (on file with authors); Sarah K. Metropulos, *Administrative Parole and American Decarceration* (unpublished seminar paper, 2021) (on file with authors).
Note: MAX means the judicial maximum sentence. MIN means the judicial minimum sentence.

Each APR jurisdiction begins by specifying explicit standards governing eligibility for release. Offenders must satisfy a minimum period of their sentence before becoming eligible for release. For example, Mississippi requires those convicted of nonviolent crimes to serve 25 percent of their judicial maximum terms. In South Dakota the setting of an administrative parole release date can be as low as 25 percent and as high as 75 percent of a prisoner's sentence. Where they fall on this continuum is dependent on their crime of conviction and prior history.

Maryland sets a release date at one-quarter of the sentence imposed, albeit for a narrower band of drug offenses or property crimes under $1500. Another state, Oklahoma, requires that 25 percent of the maximum sentence be served for nonviolent offenders. Arkansas, on the other hand, requires 33 or 50 percent depending on the seriousness of the offense.

In most of the states identified in this section, individuals convicted of committing serious and violent crimes are excluded from APR programs. A notable exception is South Dakota, discussed below.

At a high level of abstraction, the requirements for obtaining administrative parole release are fairly standardized across most jurisdictions. Generally, compliance with the individual's correctional case plan must be certified, usually by the department of corrections. Prisoners' institutional records must also be free of serious disciplinary violations.

There is jurisdictional variation in the actions required by the parole board within the APR process. The boards in Arkansas and South Dakota review files to ensure offenders' program eligibility. Maryland does so as well, while at the same time making a determination that a hearing is not necessary. The parole board in Michigan authorizes offenders' release without an interview. Mississippi's parole board is asked to approve the individual's discharge plan.

For prisoners who have not met the criteria of their correctional plans, or are otherwise disqualified, most APR systems shift them to a conventional release hearing before the parole board. We call this "derailment." Prisoners are no longer in the APR process, but are moved sideways into the discretionary-parole-release track. Almost universally, the decision regarding noncompliance resides in the hands of prison officials. Derailment can sometimes come from other sources, however. In several of the APR frameworks, a hearing is required if there is an objection from the crime victim, or even from the prosecutor in one state. When this occurs, there need be no substantive justification for the derailment. It is, in effect, a form of plenary sentencing discretion afforded to crime victims.

In eight out of the 12 states illustrated in Table 7, prisoners lose future APR eligibility after an initial denial. In contrast, Arkansas permits individuals one additional chance to meet the APR criteria established after a denial, but requires that they petition the parole board for a hearing. Michigan, New Jersey, and Tennessee provide continuous APR eligibility after each release denial, at least as a general rule. While we have not studied these systems in actual operation, full continuity would place the prisoner back into the APR program with a revised correctional plan tied to a new specified release date.

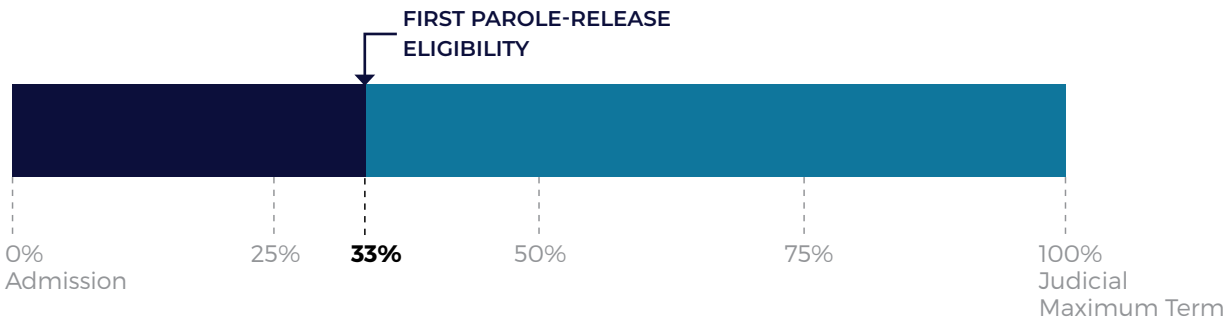
A closer examination of APR programs in New Jersey and South Dakota will highlight some of the policy choices that may be incorporated in states wishing to establish their own APR programs.

APR in New Jersey

New Jersey's Earn Your Way Out Act—effective February 1, 2021—established an APR process for prisoners convicted of less serious crimes who have not committed disciplinary infractions and have participated in prison programming. Minimum terms for most prisoners come at one-third of their judicial maximum sentences. If prisoners meet program criteria, release at their first parole eligibility dates is virtually guaranteed. A parole board hearing officer must formally recommend release and a member of the board must certify the decision, but both actions are statutorily mandated. No hearing is required. Crime victims are notified if required by law, but they do not have statutory power to block release or derail eligible prisoners from the APR track.

Figure 16 illustrates New Jersey's timeline to release for APR-eligible prisoners. The 33-percent timeline resembles that of a number of traditional paroling states. Simply as a matter of mathematical measurement, such sentences are 67 percent indeterminate. The important difference between APR and conventional parole release is not necessarily the breakdown of determinate and indeterminate segments along the timeline, but in the heightened probability of release at first eligibility. In traditional parole-release systems, a timeline such as that in Figure 16 would suggest a wide variety of time-actually-served outcomes for prisoners: anything between one and three years, for example, for sentences with three-year maximum terms. In contrast, if an APR program is designed to do so, actual release dates over large percentages of cases can be heavily weighted to the minimum term. Further, if prisoners are given repeat APR eligibility, actual-time-served patterns would continue to shift leftward on the diagram even for prisoners not released at their first chance. Actual releases would systematically be weighted to earlier rather than later dates.

Figure 16. New Jersey Prison Release Timeline for Eligibility for Administrative Parole Release



Note: For judicual maximum sentences shorter than 27 months, the required minimum term is nine months

Prisoners are APR eligible if they have completed "relevant" rehabilitation programs designated by the department of corrections and the parole board. Additionally, they must have not committed a new crime or serious disciplinary infraction. Many New Jersey prisoners are ineligible. Excluded prisoners include those convicted of one of the many violent crimes listed in the state's No Early Release Act or designated offenses involving firearms, those who must register as a sex offender, or those classified as "sexually violent predators." As discussed below, one key design element of any APR program is its breadth of eligibility, which in some states is very narrow.

APR in South Dakota

Under South Dakota's APR program, most prisoners are assigned "initial parole dates" shortly after admission. This means they will be released without a hearing by the parole board if they comply with the requirements of their "individual program directives" as drawn up by the department of corrections. Automatic release occurs on the projected date if the department has not raised questions about the prisoner's compliance. If the department reports noncompliance or says it has insufficient information to determine compliance, questions of compliance and release must then be addressed in an ordinary parole-board hearing.

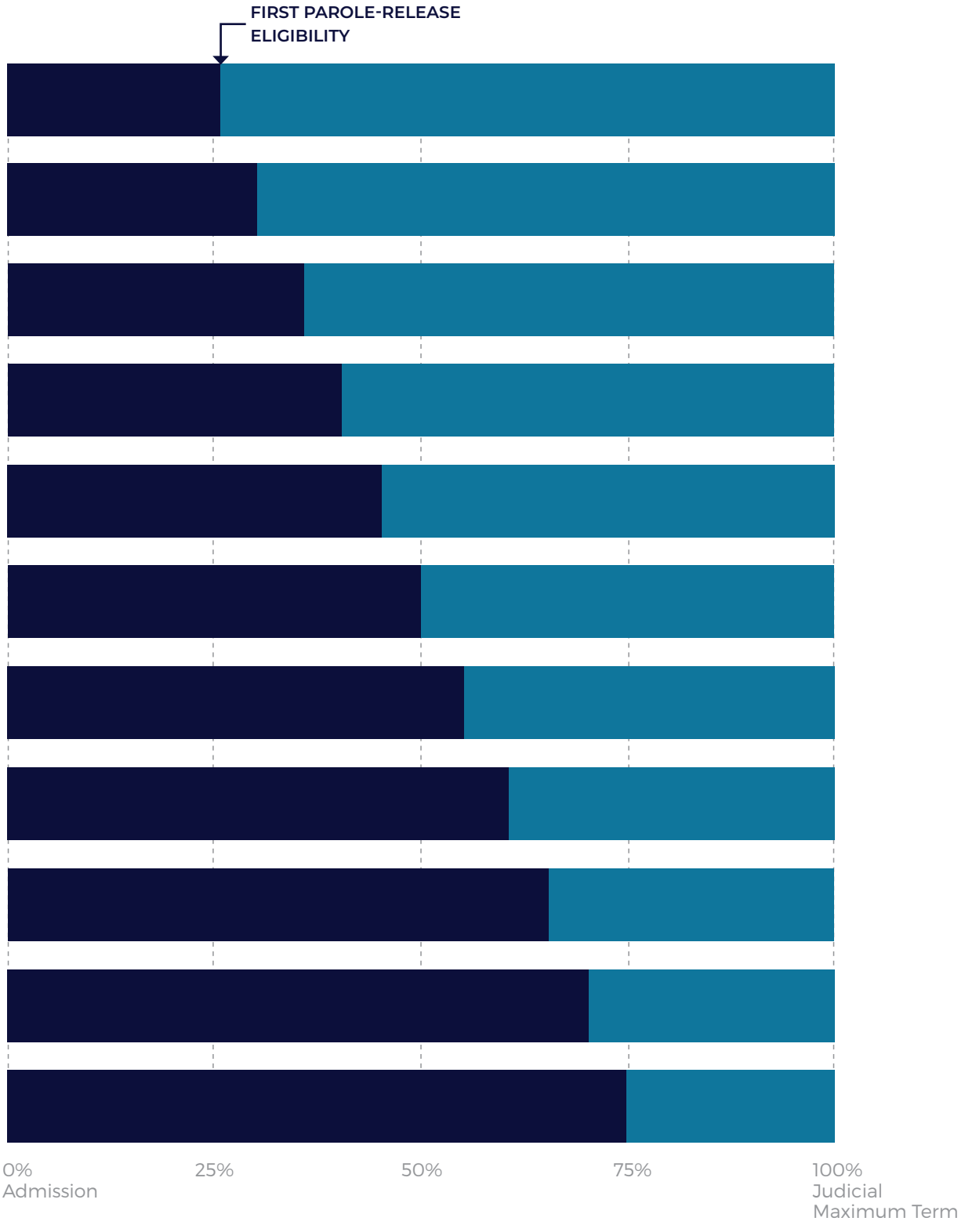
Initial parole dates are calculated by a variety of formulas depending on the felony grade of a prisoner's conviction, prior felony convictions, and the classification of the current offense as violent or nonviolent. Seven of the nine classes of felonies in South Dakota carry sentences with presumptive parole release. The formulas for initial release vary between the 25 and 75 percent marks of judicial maximum sentences, and are fixed for every newly-admitted prisoner according to a grid set out in statute. See Figure 17 below. The various possibilities shown on the matrix are translated into prison-release timelines in Figure 18.

Figure 17. South Dakota Initial-Parole-Date Grid

	1st Felony Conviction		2nd Felony Conviction		3rd Felony Conviction	
Felony Class	Non-violent	Violent	Non-violent	Violent	Non-violent	Violent
A	-	1	-	1	-	1
B	-	1	-	1	-	1
C	.35	,50	,40	,65	,50	,75
1	.35	,50	,40	,65	,50	,75
2	.30	,50	,40	,65	,50	,75
3	.30	,50	,40	,60	,50	,70
4	.25	,40	,35	,50	,40	,65
5	.25	,40	,35	,50	,40	,60
6	.25	,35	,30	,45	,40	,55

Source: S.D. Codified Laws § 24-15A-32.

Figure 18. South Dakota Prison Release Timelines for Various Dates of Eligibility for Administrative Parole Release



South Dakota's is the most sentencing-guidelines-like APR program we have found. In many state systems of judicial sentencing guidelines, the guidelines matrix is constructed with prison population control in mind. There is strong evidence that judicial sentencing guidelines can successfully perform this function.[35] As far as we know, however, South Dakota does not use its APR matrix as an instrument of prison population control. We see no evidence that it was designed to perform this function. Indeed, South Dakota's prison rate has been increasing in recent years, out of trend with the average state's drop in prison rates. However, South Dakota's system could be retooled to act like sentencing guidelines as a prison population mechanism through the recalibration of time served for different classes of sentences. This could contain prison population size overall *and* allow for the setting priorities in the use of finite bed spaces. For example, if existing minimum term schedules are resulting in unwanted prison growth, or insufficient population reductions, they could be adjusted to change those aggregate outcomes. As some sentencing guidelines jurisdictions have discovered, small time-served adjustments for people convicted of low-level crimes can have great impact on total prisoner numbers because the flow of low-seriousness offenders is larger and faster than for high-serious crimes.

We have good reason to think that South Dakota's APR framework introduces a significant measure of predictability into time-served outcomes that would not be found in systems of traditional parole-release discretion. By statute, prisoners must be released on their initial parole dates—without a hearing before the parole board—if they have met the requirements of their "individual program directives (IPD)," have an approved parole release plan, and have agreed to their conditions of supervision. The parole board has no legal authority to challenge or impede such a release on its own. Comments by prison officials in South Dakota indicate that an estimated 80 percent of prisoners are granted release under APR upon reaching their presumptive date.[36] There is no provision for derailment in South Dakota at the request of crime victims.

South Dakota's arrangement places unusual power in the department of corrections. Prison officials have absolute authority to ensure that prisoners will be released on their initial parole dates—a form of release discretion that cannot be overridden by the parole board. In this sense, the DOC is the primary gatekeeper of South Dakota's APR system, depending on how it chooses to approach the issue of IPD compliance. It is striking that, for all general-rules sentences, South Dakota's parole board has no release discretion whatsoever unless ceded to it by the triggering actions of prison officials.

Prisoners denied release on their initial APR dates must afterward be given a "discretionary parole hearing" at least once every two years.[37] They do not receive a new date of presumptive release comparable to the initial parole date. No further presumption of administrative release carries over into subsequent hearings. For prisoners so derailed, release discretion largely moves out of the hands of prison officials to be reallocated to the parole board

35 *See* American Law Institute, Model Penal Code: Sentencing (forthcoming 2022).

36 *See* Alexis Lee Watts, Brendan Delaney, & Kevin R. Reitz, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: South Dakota* (Robina Institute of Criminal Law and Criminal Justice, 2019).

37 S.D. Codified Laws § 24-15A-39.

Key policy issues specific to administrative parole release (APR)

Policy issue 7: Should states consider the adoption or expansion of APR programs?

Arguably, there is no need to ramp up the full discretionary release process for all classes of prisoners. APR could be a boon for administrative efficiency in straightforward cases, while preserving the parole board's resources for harder cases. APR may also address problems of decisionmaking disparities among individual parole board members and mitigate problems of risk aversion. APR's incorporation of a contract model for release decisionmaking is potentially of interest to the field of prison policy as a whole.

APR could also foster administrative efficiency more broadly, which could allow for the provision of increased due process safeguards in individual cases. If release becomes relatively automatic for a large number of straightforward cases, parole boards' limited resources can be devoted more heavily elsewhere. To us, one important goal would be to increase the time and procedural care devoted to non-APR decisions: those for individuals whose behavior in confinement, crime of conviction, and/or criminal history demand a more traditional parole review.

The creation of APR programs is a trend already underway in the U.S. Continued experimentation appears likely, and is warranted. We emphasize that the advent of APR programs is a relatively new development, however. Most of what we know about their design and operation is grounded in statutory research of innovations in only twelve states. Largely, the potential of APR has been suggested rather than demonstrated. Most importantly, we doubt that present-day APR programs have been designed to advance a comprehensive set of policy goals such as sentence proportionality and prison population management. In theory, such objectives could be pursued through projection models similar to those used by many state sentencing commissions in conjunction with judicial sentencing guidelines. If APR adds to the predictability of time actually served for large groups of prisoners, aggregate effects can be modeled in advance.

In our view, a forward-looking agenda will require that states invest in the start-up of APR programs, drawing from—and improving on—the features of existing programs. To build confidence in APR reforms, and knowledge of how they should be constructed, innovating states should have a robust willingness to monitor and evaluate results.

Policy issue 8: What classes of prisoners should be included in APR programs?

Existing APR programs run the gamut from narrow to broad eligibility. Attention is needed to the question of who should be included. For example, one might argue that all prisoners who present a low risk of serious recidivism should be eligible. Or perhaps there should be universal coverage. South Dakota's APR program embraces the vast majority of prisoners, including violent offenders, but varies the timing of expected release according to crime seriousness. Some states take the opposite approach. Maryland, for example, includes only tiny subgroups of low-level prisoners. Many states exclude violent offenders categorically.

One possible approach is to include most or all prisoners convicted of nonviolent offenses, as well as prisoners who present a low risk of violent recidivism. Perhaps the relevant question should be: Who should *not* be eligible for APR? Prisoners who present substantial risk of serious violent recidivism might justifiably be kept off the APR track, for instance, and there may be other categorical grounds of exclusion.

We see today's narrower APR programs as tests of concept, with room for future experimentation. In the end, the question of proper scope will be best informed by experience and data. The APR model is built on the belief that desirable and productive behavior on the part of prisoners can best be incentivized by holding out solid expectations of release. If that theory proves to hold water, it is an approach that might be desirable across many offense categories.

Policy issue 9: What requirements should be placed on prisoners to win release?

There are foreseeable questions of program design that we did not explore in depth in this study: What are the appropriate substantive requirements for prisoners' release checklists in APR settings? What should be on the list of things that could go wrong, resulting in a denial of APR? These questions call for evidence-based analysis. We do not see the contents of plans as static, but as evolving with research and experience.

It is important that prisoners be given a clear understanding of the behavioral and other expectations that will secure their release at initial eligibility. Notice must also be given to prisoners of what could go wrong, that is, what would count as noncompliance with their correctional plans and what disciplinary infractions would disqualify them from APR.

We also foresee the need to address circumstances of unavailability of required programming or program slots. In an ideal world, prisoners on the APR track would have timely access to required activities as they progress through their correctional plans. There would be no waiting lists or administrative delays. Unfortunately, the reality is much different in most American prisons. This is a cross-cutting problem that exists throughout the prison-release field. In order to support a credible contract model of APR design, adequate resources must be in place to carry out the state's side of the bargain. The undersupply of needed in-prison activities is a form of reneging on the deal. Hoped-for rehabilitative benefits may recede if prisoners come to see the APR program as lacking in honesty and legitimacy. Moreover, APR furthers multiple goals beyond prisoners' self interest in obtaining release, such as administrative efficiency and prison population control. These systemic objectives will also be frustrated if APR programs founder on shortages of correctional resources.

Given these realities, adjustments may be needed. One possibility is to give APR prisoners priority for program enrollment in the flow of openings. Unfortunately, this would have the effect of disadvantaging other groups of prisoners. Another possible approach is to presumptively screen low-risk prisoners from any but the most essential programs they require. A growing body of research suggests that rehabilitative programming has the greatest positive effects for high-risk-and-needs subjects. Scarce program slots could be rationed on this basis. Where such measures prove insufficient, prison officials could mitigate the requirements of correctional case plans to give eligible prisoners a realistic chance to comply.

Another possibility is to waive stated APR requirements if prisoners are blocked from meeting them due to shortfalls in programming. For example, New Jersey's APR statute provides that credit for APR compliance will be granted if "the inmate has completed relevant rehabilitation programs … or applied for but was unable to complete or was denied access to these programs due to circumstances beyond the inmate's control including, but not limited to, capacity limitations or exclusionary policies of these programs."[38] In North Carolina, APR credits are granted even if prisoners have not completed their "risk reduction incentives" as normally required, if the DOC finds that "that the defendant is unable to complete the incentives [by the required date] through no fault of the defendant."[39]

Finally, all APR programs contemplate that departments of corrections will monitor prisoners' compliance with APR requirements. The power to declare noncompliance is therefore a form of release-denial discretion. We have not studied the question of what constraints have been or should be placed on this certification power. (Similar questions arise in the context of credit awards and forfeitures, see Chapter 6.) We suspect there is a wide diversity of practices across jurisdictions and even at the level of individual prisons. As a general principle, the level of difficulty in meeting correctional plans should not be set unrealistically high. The APR "contract" will be of little value if only a few high-achieving prisoners can satisfy its terms. Indeed, arbitrary or unfair requirements could frustrate the program entirely.

Policy issue 10: What parole board actions or decisions should be contemplated in the design of an APR program?

In the most aggressive APR programs, release is automatic if the DOC has certified compliance with a prisoner's correctional plan or has not raised a red flag of noncompliance. In a number of programs, however, the parole board must take some form of action in addition to the DOC's sign-off. See Table 7, column 4. The parole board has ministerial roles in some states but apparent discretion to deny APR in individual cases in some other systems. More thought should be given to the appropriate decisionmaking obligations of parole boards within APR programs.

Narrowing of the board's role in APR cases provides advantages for the range of cases that continue to fall within their full decisionmaking jurisdiction. For example, parole boards' limited resources may be channeled toward more heavily toward serious, high risk offenders, or where complex consideration of individualized risk and needs assessments are needed as part of release deliberations. By reducing the numbers of cases that require affirmative board action, it may be possible to offer significant improvements in resources per decision and the procedural integrity offered to prisoners.

38 N.J. Stat. § 30:4-123.355d(a)(3).

39 N.C. Gen. Stat. § 15A-1340.18(e).

Policy issue 11: What is the proper role for crime victims in an APR program?

Four APR programs in Table 7 allow victims to "derail" the APR process and require a full parole-board hearing before the prisoner may be released. Upon a victim's request or objection in these states, the prisoner is removed from the APR track to the traditional process of individualized, discretionary parole release. Derailment does not bar the prisoner's discretionary release by vote of the parole board, but makes release significantly less likely than under the relatively automatic APR pathway.

There is no uniform approach to the question of victim participation across the small number of APR programs in the U.S. See Table 7, column 5. Relevant inquiries of desirable policy, procedural fairness, and empirical results should be undertaken.

Granting victims a derailment power could have important impact on the contract model of APR. It qualifies the state's ability to make credible representations to prisoners about their prospects of release. In effect, APR becomes contingent on victims' failure to register an objection. This in turn reduces prisoners' incentives to uphold their side of the bargain. From a prisoner's viewpoint, release becomes less a matter of their own agency and more of a game of chance. Indeed, all of the benefits of APR that flow from increased predictability are implicated. Prison-population management is more difficult, and administrative efficiency is compromised when prisoners must be transferred from one track to another, and from routinized release to a full discretionary hearing.

Policy issue 12: Should prisoners who do not win release in an APR program remain eligible for APR in the future?

The "denial" of APR is almost never an outright denial of release. Instead, it usually represents removal from the prospect of future APR consideration. Offenders subject to such "derailment" are shifted onto the parole board's docket for future review within the state's discretionary parole process. In contrast with this "majority approach," three states offer recurring eligibility for prisoners who have been denied administrative release (Michigan, Tennessee, and New Jersey), while Arkansas offers one further chance for APR participation if conditions established by the parole board are met. The pros and cons of these different approaches should be considered in the ongoing development of APR experiments. If there were good reasons for the APR approach early in a prisoner's terms, they do not necessarily evaporate because of a first denial.

Consideration might also be given to the specific circumstances that justify permanent derailment. Obviously, conviction of a new offense so serious that the prisoner is no longer eligible for APR is one such circumstance. We do not attempt to propose specific rules here. In terms of appropriate response, however, there is probably a big difference between serious misconduct and the failure to complete required programs.

Policy issue 13: How should minimum terms be set in APR programs?

The question of percentage formulas for minimum terms is highly complex, because a number of variables are in play. In some states, large numbers of people are admitted to prison with long judicial maximum terms by world standards. In some systems, judges must impose maximum terms as dictated by statute, with no discretion to choose a lower ceiling. In still other states, judicial maximum terms have been fixed at relatively low levels that reflect expectations of time-actually-served for most prisoners.

Thought might be given to South Dakota's model of staggered APR release formulas for prisoners convicted of different offenses or with materially different criminal histories. The desirability of this approach depends entirely on how the formulas are set. In the most successful judicial sentencing guidelines systems, presumptive sentencing ranges reflect considerations of proportionality in individual sentences as well as prison-population control. They sometimes incorporate different sentencing policies for different offense categories, such as retribution and incapacitation for the most serious crimes and rehabilitation and victim restitution for less serious offenses. Guidelines ranges for specific types of cases may be calibrated to reflect priorities in the use of scarce bedspaces, and those priorities can be adjusted through periodic amendments.[40]

We know of no existing APR program that has been built on such objectives. There is no sign that the creators of South Dakota's system had anything like this in mind, despite the structural resemblance of their APR matrix to sentencing guidelines. The point we make here is that, if wanted, the APR architecture could accommodate such broader systemic goals.

40 *See generally* American Law Institute, Model Penal Code: Sentencing (forthcoming 2022), Articles 8 & 9.

CHAPTER 6

Variations in the use of good-time and earned-time discounts

Alongside the release discretion ceded to parole boards, the main sources of indeterminacy in prison sentencing in the U.S. are the conduct-based credit systems administered by departments of corrections (DOCs). Different levels within a DOC may be involved in policymaking versus case-by-case determinations, or for different types of credit awards or release decisions. For daily administration of the most common types of credits, the relevant decisionmakers are usually corrections officers at the level of individual prisons.

In most states, DOC officials have multiple authorities over the dispensation of credits, including the power to grant, withhold, forfeit, and restore credits. DOC officials in many states also classify prisoners for purposes of earning eligibility or differential earning rates. They may also be in charge of certifying prisoners' compliance with correctional plans, their participation in or completion of specific programs, and the adequacy of their reentry planning. All of these discretionary actions can influence the timing of release or eligibility for release. For most decisions there are applicable rules and regulations, but ultimate and effectively unreviewable discretion generally rests with DOC officials.

Whenever it is within the discretion of corrections officials to grant credits, bestow earning eligibility, certify compliance, etc., this implies a complementary power to refuse to confer such benefits. The directionality of time-served authority is not always toward leniency. This is analogous to our observation in Chapter 3 that the presence of parole-*release* discretion is nearly always paired with release-*denial* discretion. Depending on one's angle of perception, most forms of back-end releasing discretion can therefore be viewed as instruments of lenity or severity. Greater power to release "early" comes with the ability to hold some prisoners much longer than others.

The core nature of discretion over credit-based discounts is different from parole-release discretion. While parole boards tend to engage in gestalt decisionmaking that encompasses a universe of factors, decisions about credit awards tend to focus on specific behaviors in which prisoners have or have not engaged. Furthermore, many types of credits and certifications are only available if the predicate programs and program slots are available. For example, the "discretion" to grant credits for completion of a drug treatment program does not exist unless it is possible to place a prisoner into a qualifying program. Resource shortages, waiting lists, and administrative delays can erase large increments of time-served discretion that are nominally in the hands of corrections officials.

Across America, credit discounts are a far greater source of indeterminacy in prison sentencing than we realized at the outset of the project. Most people associate indeterminacy with parole-release discretion, but we conclude that credit discounts are an equally important instrument of indeterminacy nationwide. Naturally this varies a great deal by jurisdiction, but in most states credits are highly significant. In some paroling states, the potential effects of credit discounts on sentence length are large enough to overshadow the time-served discretion of the parole board—a distribution of power many people will find surprising. And in America's 18 non-paroling jurisdictions, credit discounts are the *sole* vehicle for prisoners to shorten their time in confinement.

Altogether, credit discounts are a major force to be reckoned with in the determination of actual time served by individual prisoners. In the aggregate, they add up to an important contributor to the size of U.S. prison populations. Given the national impact of credit discounts, they are a seriously understudied subject—both in the context of individual sentences and for their systemwide effects.[41]

Definitions

This chapter is concerned chiefly with good-time and earned-time credits, their effects on time served by individual prisoners, and their potential influence on prison population numbers. The chapter's focus is on the types of credits that are awarded to large numbers of prisoners in each system. Our aim is to examine the big picture.

The terminology of credit discounts varies quite a bit from state to state, so we adopt standardized definitions to aid cross-jurisdictional comparisons.

We define "good-time credits" as those obtained through the avoidance of disciplinary violations. "Violations" mean different things in different states, and can take the form of forbidden acts or the failure to engage in required behavior. (Sometimes good-time credits are withheld if prisoners refuse to participate in required programming.) The default is that good-time credits will be granted; they accrue unless something bad happens. Usually—but not always—good-time credits are given according to the passage of time; for example *x credits* for every month without a serious disciplinary infraction. Sometimes credits are calculated early in prisoners' terms to set projected release dates; they are prisoners' to lose.

"Earned-time credits," as we define them, must be won through participation in or completion of designated activities. These commonly include work in prison, rehabilitative programs, vocational training, and educational accomplishments. With earned-time credits, the default is that credits will not be issued unless something good happens. Award formulas vary. Earned-time credits for program participation are sometimes handed out with the passage of time, so long as a prisoner is enrolled. If credits are based on program completion or educational achievement, they are usually awarded in lump sum amounts.

One limiting feature of earned-time credits is that they cannot be awarded unless the requisite activities are in place and accessible to prisoners. Credits ostensibly available under the law may be blocked by the lack of program slots, staff shortages, unaccommodated prisoner disabilities, waiting lists, administrative delays, and so forth. The *appearance* of generosity of earned-time credits, if one looks only at the statute books, may be deceiving. In contrast, good-time credits do not typically depend on program availability

41 There is a small policy literature on the subject, although no prior study has examined the structural issues of indeterminacy and prison-population control that are the centerpieces of this project. See James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. Rev. 217 (1982); Nora V. Demleitner, *Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 Fla. L. Rev. 777 (2009); Michael M. O'Hear, *Solving the Good-Time Puzzle: Why Following the Rules Should Get You Out of Prison Early*, 2012 Wis. L. Rev. 195 (2012); Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 Marquette L. Rev. 1551 (2012); Michael O'Hear, *Good Conduct Time for Prisoners: Why (and How) Wisconsin Should Provide Credits Toward Early Release*, 98 Marquette L. Rev. 487 (2014). There is also a small and inconclusive empirical literature concerning the effects of credit availability or removal on rates of disciplinary violations and recidivism. See Elizabeth K. Drake, Robert Barnoski & Steve Aos, *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs, Revised* (Washington State Institute for Public Policy, 2009); William D. Bales & Courtenay H. Miller, *The Impact of Determinate Sentencing on Prisoner Misconduct*, 40 J. Crim. Just. 394 (2012); Benjamin Steiner & Calli M. Cain, *The Effect of Removing Sentencing Credits on Inmate Misbehavior*, 35 J. Quant. Criminol. 89 (2019).

and administrative efficiency. Their descriptions in legal sources probably resemble the discounts actually within reach of ordinary prisoners.[42]

Several states place statutory caps on the total amount of good-time, earned-time, or other credits that may be awarded to prisoners. That is, the earning formulas in such states would permit larger sentence discounts of one kind or another, except that the caps cut off "excess" earnings. We are uncertain of the reasoning behind such cutoffs. Their effects are visited primarily on high-achieving prisoners.

This chapter disregards the many state laws that allow credit awards for extraordinary service, saving the life of a correctional officer, or other heroic actions. We call these "meritorious-conduct credits." Although such laws are ubiquitous in the U.S., we have seen no evidence that meritorious-conduct credits are bestowed very often. We therefore put them aside in our analysis—along with any other infrequently-used credit schemes that exist in particular states.

All states allow for the "forfeiture" of credits that have been earned, and sometimes credits that have not been earned can be forfeited in advance. Most states also allow for the restoration of credits after they have been forfeited, usually within the broad discretion of DOC officials. The rules and procedures of forfeiture vary across states. We have noticed provisions in a surprising number of states that authorize forfeiture of credits for the filing of frivolous law suits against prison officials.[43] A few states limit forfeiture to serious violations or cap the amount of credits that may be forfeited per violation. Very rarely, credits of certain kinds are not forfeitable once earned.

In most states, actual practices and decision patterns concerning the award, withholding, forfeiture, and restoration of good-time and earned-time credits are not transparent to outside inspection. Systemwide statistics are rarely if ever maintained. Unlike parole release, authority is decentralized to the level of corrections officials in individual prisons. There is no easy way to know how readily credits are dispensed and how often they are withdrawn, or if their administration is the same from prison to prison.

General survey of good time and earned time in the US

We see major differences among the states in how systems of good time and earned time are constructed in statutory law. Some states emphasize good time over earned time, and vice versa. States are all over the map in the generosity of credits offered to prisoners. They also differ in the effects given to credits once they are earned: Some states apply credits to advance parole-eligibility dates (PEDs). Some states use them to advance mandatory release dates (MRDs) so that prisoners will be released before expiration

42 Nationally, there is evidence that prisoners seldom lose their good time credits, see Bureau of Justice Statistics. *Survey of Prison Inmates, United States*, 2016. Inter-university Consortium for Political and Social Research [distributor], 2021-09-15. https://doi.org/10.3886/ICPSR37692.v4 (3.5% of prisoners in the survey reported that they had lost good time credits for disciplinary violations). Research in this project, in collaboration with the Colorado Board of Parole and Department of Corrections, found that loss of good time was rare in the Colorado prison system from 1995-2000, see Gerald G. Gaes & Julia Laskorunsky, *Factors Affecting Colorado Parole Release Decisions* (Robina Institute of Criminal Law and Criminal Justice, forthcoming 2022).

43 *See also* Michael M. O'Hear, *Solving the Good-Time Puzzle: Why Following the Rules Should Get You Out of Prison Early*, 2012 Wis. L. Rev. 195, 228 (2012) ("Of particular concern … are the states that deny or take away good time on the basis of the filing of a frivolous claim in a prisoner rights lawsuit. A frivolous claim need not be willful; indeed, given the lack of legal representation for prisoners, the risk of inadvertent errors seems high. … [I]t hardly seems consistent to diminish the accountability of prison officials at the same time that we are trying to instill a greater sense of accountability among inmates.") (footnotes omitted).

of their maximum terms. Some states do both. Some do neither.[44]

Table 8 surveys the major structural differences across 52 American jurisdictions. Columns one and two show state-by-state differences in the authorization of good time and earned time. Nearly half of all states offer both types of credits, although there are considerable jurisdictional variations in the rules and requirements for different types of credit awards that are not captured in the table. (Some notable features of specific states are mentioned in the "comments" column at the far right of the table.)

Columns three and four show the diversity in approach concerning how credits are applied once earned. The most common sentence milestones affected by credit-based discounts are parole eligibility dates and dates of mandatory release. In nearly all systems, mandatory release occurs, at the latest, with the expiration of the maximum judicial sentence. In 40 states, credits earned and not forfeited are deducted from the judicial maximum to advance the timing of mandatory release. (This mechanism is highlighted for separate attention in Chapter 7.)

In column five, Table 8 offers our characterizations of the "generosity" of the credit earning formulas in each system. These are not rigid scientific descriptions, but are based on formal statutory language and, sometimes, our best guesses of how credit systems work in practice. For states in which credits accrue at an established rate over time, we consider credit amounts that subtract 0-19 percent from sentence requirements to be "minimal," 20-39 percent to be "average," and 40 percent and above to be "generous." We use the same percentage cutoffs regardless of whether credit earnings are subtracted from judicial maximum terms, dates of parole eligibility, or both.

Where credits are not dispensed entirely by day-for-day formulas, but include lump sums for program participation, completion, or other accomplishments, our classifications of credit earning levels are based on our subjective estimates of realistic earnings that could be accrued by a high-achieving prisoner serving a five-year maximum term. For states that offer no good-time or earned-time credits as we define them, column five is left blank.

Our "generosity" rankings reflect the *highest* earning formulas available in each state, which may not be open to all prisoners. In a substantial minority of states, the same rules apply to prisoners across the board, with limited exceptions. The one-size-fits-all approach is most likely to be found for good-time credits that are dispensed for staying out of trouble, and in systems where credit earning levels are low.[45]

In some states high earnings are offered only to small percentages of prisoners, with most others relegated to smaller discounts. Sometimes high earnings are offered "on paper" but require tenacity on the part of prisoners, not to mention a run of good luck. We have based our generosity characterizations in Table 8 on the total earnings we think are realistically available to high-achieving prisoners. Average and lower achievers would get less.

Across all jurisdictions in the table, it may be assumed that the "highest earning levels" in column five are at the uppermost tier, so there are likely to be less generous formulas for many prisoners not included in the table. Still, peak earning rules are a useful window into the different philosophies at work across jurisdictions. The continuum of possible credit earnings may go down from the peak, but not up.

44 A handful of states have thought of other ways to apply credits. Utah, for example, allows credits to advance parole release dates that have previously been set by the parole board. In Texas, the accrual of credits can change the statutory criteria for parole-release decisions so the wording is more favorable to release, although ultimate release discretion remains with the board.

45 Chapter 7 surveys credit-earning rates according to the general rules applied to violent and nonviolent offenders in 40 jurisdictions. About one-third of these take the one-size-fits-all approach.

Table 8. Good-Time and Earned-Time Credit Discounts against Prison Sentences in 50 American States, DC, and Federal System

	Good time credits	Earned time credits	Credits advance parole eligibility date	Credits advance mandatory release date	Credit amounts at highest earning levels	Comments
Alabama	√		√	√	Generous	Higher and lower earning levels depend on discretionary classification by DOC officials across four levels
Alaska	√			√	Average	Good time credits are awarded at beginning of prisoners' terms, reduction of 33% of MAX; credits may be lost through forfeiture
Arizona	√			√	Minimal	Prisoners convicted of low-level drug possession can earn credits at higher rate but drug treatment or other program completion is required
Arkansas	√	√	√		Generous	Minimum terms to parole eligibility cannot be reduced by more than 50%
California	√	√	√	√	Generous	Most generous for nonviolent offenders with determinate sentences; generous earnings for violent offenders require unusual success in program completion and/or educational achievements
Colorado	√	√	√	√	Average	Statutory cap on earnings at 25% reductions from MAX terms; no cap on reductions of MIN terms
Connecticut	√		√	√	Minimal	Credits advance parole eligibility for nonviolent offenses only
Delaware	√	√		√	Average	Full earnings require good time credits plus steady additional credits for program participation and completion

	Good time credits	Earned time credits	Credits advance parole eligibility date	Credits advance mandatory release date	Credit amounts at highest earning levels	Comments
Florida	√	√		√	Minimal	Statutory cap on earnings at 15%.
Georgia		√			None	Georgia has a "Performance Incentive Credits" program in which prisoners receive one month PIC credit for each point earned. Credits are factors considered in DOC recommendations of release dates and in parole board's setting of release dates. PICs are earned by satisfactory progress in educational or treatment programs and contingent upon good conduct.
Hawaii					None	Hawaii has no formal system of good time or earned time credits. Prisoner behavior in institutions is a factor that may be considered by the parole board when making release decisions.
Idaho					None	No standard good time or earned time credits.
Illinois	√	√		√	Generous	Credits do not advance mandatory release dates for prisoners convicted of statutorily designated serious offenses.
Indiana	√	√		√	Generous	Earning rates depend on classification of prisoners into four groups. Only the highest of the classifications offers generous earning rates.
Iowa	√	√		√	Generous	Generous earning rates are extended to most prisoners except those convicted of designated serious offenses or with especially serious criminal histories, most of whom earn at minimal rates

	Good time credits	Earned time credits	Credits advance parole eligibility date	Credits advance mandatory release date	Credit amounts at highest earning levels	Comments
Kansas	√	√		√	Average	Prisoners convicted of lower-severity felonies can earn a maximum of 20% off the judicial maximum term whereas prisoners convicted of higher-severity felonies may earn only 15%
Kentucky	√	√		√	Generous	Generous only for less serious offenses, requires multiple types of good time and earned time credits (total reductions of more than 45% possible for general-rules sentences); sentence reductions capped at 15% for many violent and sex offenses
Louisiana	√	√		√	Generous	Generous only for prisoners convicted of nonviolent offenses; prisoners with first convictions of violent offenses earn at much lower rates; prisoners convicted of sex offenses or repeat convictions of violent offenses earn no credits
Maine	√			√	Average	Average awards for most prisoners convicted of general-rules offenses (23%) but minimal for prisoners convicted of sexual assault or designated violent offenses (14%).
Maryland	√	√		√	Generous	Credits are available at generous levels to most general-rules prisoners: 50% reductions for those convicted of nonviolent offenses and 40% reductions for those convicted of many violent offenses.
Massachusetts		√	√	√	Average	Program participation and completion credits are statutorily capped at combined total of 35% of the judicial maximum.

	Good time credits	Earned time credits	Credits advance parole eligibility date	Credits advance mandatory release date	Credit amounts at highest earning levels	Comments
Michigan					None	No good time or earned time deductions.
Minnesota	√			√	Average	Full credits are built into sentences at the outset of prisoners' terms and may be lost only for serious disciplinary violations.
Mississippi	√	√		√	Generous	Credit earning rates depend on classification of prisoners by DOC, with highest rates reserved for those given "trusty status." At their base level, good time credits alone are capped at the "minimal" level of 15% deduction from MAX.
Missouri	√			√	Average	All general-rules prisoners receive projected MRDs that duplicate average credit earnings but could be pushed back for disciplinary violations; the projected MRDs can be advanced with good time credits but only at minimal earning levels
Montana					None	
Nebraska	√		√	√	Average	Good time credits are granted by default and count as sentence reductions unless forfeited; credit amounts are "average" but border on our definition of "generous"
Nevada	√	√	√	√	Generous	Prisoners can receive 50% reductions for good time alone, with additional earned time possible; reductions from MINs capped at 58% but no cap on reductions from MAXs

	Good time credits	Earned time credits	Credits advance parole eligibility date	Credits advance mandatory release date	Credit amounts at highest earning levels	Comments
New Hampshire	√	√	√	√	Average	Good conduct credits up to 29% affect only time to parole release eligibility. Earned time credits reduce both MIN and MAX but are capped at a total of 21 months.
New Jersey	√	√	√	√	Average	Average reductions from MIN terms, minimal reductions from MAX terms, no reductions for designated serious offenses. New Jersey has a complex set of rules and schedules for different types of credits.
New Mexico		√		√	Generous	Generous for prisoners convicted of nonviolent offenders who earn 30 days per month for program participation with more possible for completion; prisoners convicted of violent offenses earn at minimal rates for program participation but may step up to average rates with completion credits
New York	√	√	√	√	Average	Reductions from MIN terms apply only to parolable sentences for nonviolent offenses
North Carolina	√			√	Minimal	No statutorily-prescribed earning rates for credits or criteria for accrual, but capped at minimal level
North Dakota	√			√	Minimal	Credits can at most deduct nine percent from prisoners' MAX terms.

	Good time credits	Earned time credits	Credits advance parole eligibility date	Credits advance mandatory release date	Credit amounts at highest earning levels	Comments
Ohio	√	√	√	√	Minimal	Deductions against MAX terms capped at 18% even with highest earnings of good time and earned time credits; credits advance parole eligibility dates only for small group of serious violent offenders with parolable sentences (including some life sentences)
Oklahoma	√	√		√	Generous	Unusually generous earning rates for both nonviolent and violent offenses but dependent on DOC classification of prisoners; at highest earning classifications, reductions of more than 50% are possible; some prisoners subject to caps on credit reductions ranging from 50-85%
Oregon	√			√	Average	Prisoners convicted of nonviolent offenses and some less serious violent offenses may earn deductions of as much as 20%; nearly half of all prisoners convicted of more serious "Measure 11" offenses earn no credits
Pennsylvania		√	√		Average	Pennsylvania has a "Recidivism Risk Reduction Incentive Program" for many convicted of nonviolent offenses if ordered by sentencing court; MIN terms reduced by 25% for sentences with MAXs of 3 years or less; 17% for MAXs of more than 3 years

	Good time credits	Earned time credits	Credits advance parole eligibility date	Credits advance mandatory release date	Credit amounts at highest earning levels	Comments
Rhode Island	√	√		√	Average	Most general-rules prisoners can earn credits of 15 days per month with full good time, work, and program participation credits; those convicted of especially serious offenses earn at lower rates or are ineligible for credits
South Carolina	√	√	√	√	Generous	Generous credits for movable mandatory release dates (up to 73% reductions) for nonviolent and violent offenders convicted of offenses with authorized MAX terms of less than 20 years. Average reductions of MIN terms to parole release (up to 33 percent).
South Dakota		√		√	Generous	All credits require satisfactory participation in prison work or program completion; high achievers could earn as much as 43% reductions. (estimated)
Tennessee	√	√	√	√	Generous	Credits reach generous level for deductions from MAX sentences creating MRDs, but only for prisoners who qualify for and complete drug treatment; otherwise credits are at average levels for general-rules sentences. Reductions from MIN terms capped at 30%.
Texas	√		√		Generous	Generous for lower-severity prisoners only; higher-severity prisoners not eligible for credits

	Good time credits	Earned time credits	Credits advance parole eligibility date	Credits advance mandatory release date	Credit amounts at highest earning levels	Comments
Utah		√				Earned credits advance release date if already set by the parole board but they do not advance release eligibility or the mandatory release date; parole board has discretion to override advancement of release date due to credits earned
Vermont	√	√	√	√	Minimal	Vast majority of prisoners can earn deductions of 19% from good time credits; additional earned-time credits available only in narrow circumstances
Virginia	√			√	Minimal	Credit earning levels will increase to "average" for nonviolent offenders per legislation to become effective in 2022
Washington	√			√	Average	Deductions of 33% of MAX term available for most prisoners; capped at 10% for designated serious violent offenses
West Virginia	√	√	√	√	Generous	Good time credits that reduce MAX terms by 50% are available to most prisoners. Earned time credits are only available to prisoners never convicted of a violent offense, are limited to 90 days, and reduce only the MIN term to parole release eligibility.
Wisconsin						Release dates set by sentencing courts may be delayed by DOC for disciplinary violations; 10 days for first offense, 20 days for second offense, 40 days for all subsequent offenses; longest prison stay limited by court's "total bifurcated sentence" combining confinement term and extended supervision term.

	Good time credits	Earned time credits	Credits advance parole eligibility date	Credits advance mandatory release date	Credit amounts at highest earning levels	Comments
Wyoming	√		√	√	Average	MIN terms may be reduced by as much as 41% with good time and "special good time" credits; MAX terms may be reduced by as much as 33% with good time credits (special good time has no effect on the MAX).
District of Columbia	√	√		√	Average	Minimal for the vast majority of prisoners; average only for eligible nonviolent offenders who complete drug treatment program
Federal System	√	√		√	Minimal	

Sources: 52 "state reports" prepared for this project, including 50 states, the District of Columbia, and the federal system.
Note: MAX means the judicial maximum sentence. MIN means the judicial minimum sentence.

Key Policy Options: Good time, earned time, and other discounts

Policy issue 14: Should state prison-sentencing system rely most heavily on good-time credits, earned-time credits, or a combination of both?

Only four American states operate without credit-based discounts against sentence based on a good-time or earned time model. By our count, 39 states, the District of Columbia, and the federal system offer some form of good-time credits that accrue steadily over time. Thirty offer some form of earned-time credits. Twenty-four some of both. At least on the American scene, the existence of some kind of credit-based discounts is the overwhelming majority approach.

Looking across the country as a whole, we have been surprised by the sheer amount of time-served authority that has been placed in departments of corrections via credit-based discounts. Our presupposition had been that such mechanisms would be relatively marginal sources of indeterminacy compared with parole-release discretion.

One major variation in credit-based systems across states is in the balance struck between good-time and earned-time models as potential influences on lengths of prison terms. Fifteen jurisdictions offer good-time credits only, and five offer only earned-time credits.

We hypothesize that good-time credits are more easily earned (by staying out of serious trouble) than earned-time credits (which require affirmative behavior and program availability). Thus, every day of potential earned-time credit set forth in statutory law probably has less systemwide effect on time served and prison population size than one day of good-time credits. Good-time credits are the workhorses of American conduct-based credit systems. They are routinized and carry no prerequisites; they are awarded by default.

We note that a number of states give prisoners projected release dates at the outset of their prison terms, with the caveat that release can be delayed for bad behavior. This is sometimes called a "bad-time" model. We have no preconceptions about the benefits or downsides of this approach, except that it is an intriguing alternative to the typical good-time framework. We can see possible pros and cons, but all of these translate into research questions.

On the one hand, the bad-time model could be viewed as the use of "sticks" rather than "carrots," which is often thought to be a poor strategy. There is research to support this negative view. On the other hand, bad-time systems skip over the discretionary decision point of awarding credits in the first place, which would seem to increase the baseline probabilities that prisoners will receive all credits for which they are eligible. The credits may still be subject to forfeiture as in other systems, but their initial bestowal is relatively assured. (Placed against the carrot/stick concern, some cognitive behavioral psychologists believe that people will work harder to avoid the loss of a benefit they already possess than to gain something they do not have.) This suggests that the bad-time format may produce especially reliable effects, over many cases, on time served and overall prison population size.

Policy issue 15: What sentence milestones should credits be counted against? Should credits advance parole-eligibility dates, mandatory release dates, or both?

In virtually all credit-granting jurisdictions, credits are applied to one or both of two sentence milestones: (1) The first date of parole-release eligibility (PEDs); and (2) Mandatory release dates (MRDs).[46]

Credits that advance PEDs are probably the less significant of the two approaches. Eighteen of 34 paroling states apply credits in this way. Such credits are not a vehicle of release discretion; they merely create an enlarged period of release and release-denial discretion vested in the parole board. The newly-expanded increment of release discretion is added early in the prison-sentence timeline, with no assurance that it will be used. It would require empirical studies of actual systems to know whether movable PEDs play an important role in overall time served and prison population size. From the surface, this would not appear to be an automatic outcome.

In contrast, credits that advance MRDs are a form of unilateral release discretion. They may also cancel portions of the release-*denial* discretion otherwise held by the parole board, whenever credits compel a release that the board has been unwilling to grant. Scaled up to hundreds or thousands of prisoners, we see the potential for large system effects here. (The use of credits to advance MRDs will be the focus of the next chapter.) Twenty-four of 34 paroling states apply credits in this way, as do a total of 40 of 50 states.

Policy issue 16: What should be required of prisoners to earn credits, and how generous should credit earning formulas be?

Our statutory research has alerted us to large variability across the states concerning how easy it is for prisoners to earn credits. We have also been told, in conversations with corrections officials, that shortages of program availability can play a large role in prisoners' practical abilities to win earned-time credits. This has led us to see the good-time model as a more consistent mechanism for the regulation of time actually served by individual prisoners and for its effects on prison population size over many cases.

Our main point here is that state policymakers should think about the expected operation of their credit-based discounts not simply with regard to the *apparent* earning potential provided to prisoners, but in light of practical realities. The more that is required of prisoners to earn credits, the less likely it is that the necessary institutional infrastructure will be in place.

A related question is the generosity of credit-earning levels for different types of credits. Table 8 gives a window into the differences of approach across the states. We know of no studies that examine to the efficacy of high versus low earning levels. There is no broadly-accepted approach to the question of "generosity" as a result of trial and error among the many states. We are fairly sure that high versus low earning levels have effects on prison-population size, but this too requires research that no one has performed.

There is dissensus among U.S. jurisdictions on whether credit earning levels should be staggered for different classes of prisoners. For example, it is common to see more generous earning formulas for

46 In one or two states, credits are applied to advance actual release dates after they have been set by the parole board. In Texas, credits are applied to change the wording of the legal standard applicable to some of the parole board's release decisions, from more demanding to less demanding. The board retains ultimate discretion, however.

nonviolent than violent offenders. (In Chapter 4, we noted a similar difference with respect to earlier versus later PEDs.) In contrast, many other states do not for the most part differentiate between nonviolent and violent offenders, and extend the same earning rates to the great majority of prisoners.

We can speculate as to the arguments in favor of one approach or another, but we have not found close analysis of the question in government or academic publications. On the face of it, we wonder about the wisdom—on utilitarian grounds—of providing lower incentives for desired behaviors to prisoners convicted of more serious crimes. It might make more sense to heed the research suggesting that correctional programming tends to benefit high-risk, high-needs clients more than people who present lower risks and needs. If credit-earning differentials are rooted primarily in retributive instincts (our best guess), thought should be given to the likely tradeoffs between the conflicting goals of punishment and rehabilitation.

Policy issue 17: What requirements should there be for forfeiture of credits after they have been earned?

How easy should it be for prisoners to lose credits after they are awarded? That is, how low should the bar of misbehavior be set to trigger the forfeiture process, and how punitive should authorized penalties be for different kinds of violations? In most states, as a matter of statutory law, any violation of prison rules or new criminal offense can trigger the forfeiture process. It is not clear that principles of proportionality are always built into the process. We have been struck, for example, by the large number of states that allow removal of credits from prisoners who have filed frivolous lawsuits. There is room in many American jurisdictions for taking stock of the bases of credit forfeitures.

Also, the most common statutory provision of penalty levels is that any amount of forfeiture may be affixed to any violation. In some states, credits may be forfeited before they have been earned. These are sweeping instances of time-served discretion all by themselves. Because of the decentralized nature of the forfeiture process, such wide-open discretion would seem to invite disuniformity from case to case or from prison to prison. In contrast, a few states limit forfeitures to serious violations or delineated categories of violations. Some also limit the amount of credit toward time served that may be forfeited per violation. These are provisions that may enhance proportionality and uniformity in outcomes. Going one step further, it may be worthwhile to explore the idea of "forfeiture guidelines" that resemble the judicial sentencing guidelines used in criminal courtrooms.

Our study was not designed to make close study of the states' forfeiture processes in actual operation (and we do not know of any such studies). Given the breadth of the time-served power that could be exerted under forfeiture laws, this should be a research priority for the future.

CHAPTER 7

Highlighted topic: Movable mandatory release dates

Definitions

Our focus in this chapter is on advancing mandatory release dates (MRDs), which are *movable milestones* with reliable impact on the timing of first release. As we define movable MRDs, they exist when credit awards are applied as reductions from judicial maximum terms to adjust the dates on which prisoners must be released. State laws generally place movable MRDs under the jurisdiction of departments of corrections (DOCs) through their administration of conduct-based credit systems.

While judicial maximum terms tend to remain fixed, MRDs in most systems can edge earlier and earlier, step-by-step with the accrual of good-time and/or earned-time credits. That is, MRDs usually start out at the beginning of a prison term at the same position on the timeline as the judicial maximum sentence. The maximum term in most states is the default MRD. As time goes by, if credits accrue, an advancing MRD separates from the maximum and moves incrementally to earlier dates on the timeline (from right to left on our timeline diagrams). Even though MRDs are changeable, their eventual effects in most cases are compulsory. So long as the requisite credits have been earned and not forfeited, MRDs arrive as "hard" release decisions that need not be reviewed by a discretionary agency.[47]

In our study of 52 American jurisdictions, we have found movable MRDs to be the most consequential form of DOC authority to influence sentence length—at least in states that have enacted the mechanism in a robust form. Notably, it is a species of time-served discretion that is wholly independent from the authority of parole boards, and can be an alternative form of release discretion.

MRDs are particularly important instruments of time-served policy when state laws make credit allotments "generous" in amount. We define "generous" earning levels as those that can deduct 40 percent or more from judicial maximum terms.[48] (As a reference point: the accrual of one day of credit for each day served would result in a 50-percent deduction.) Roughly speaking, we view this as the ballpark in which advancing MRDs begin to overlap into the portion of the prison-release timeline where one would expect discretionary parole release to be granted to large numbers of prisoners. Put another way, movable MRDs and parole release become competing forms of release discretion most often when credit earning levels are high.

Within the resulting zone of overlap, there are two forms of *unilateral* release discretion in play at the same time. From prisoners' point of view, they can win release from one of two agencies, without any action or assent from the other. When unilateral release discretions overlap, a release decision by one authority has the effect of canceling the release-*denial* discretion of the other. When there is a significant amount of overlap of dueling release discretions, we call it a "checks-and-balances" framework. Refusal

47 MRDs can move in both directions on the timeline. Once earned, the forfeiture of credits generally causes MRDs to revert back to later and later positions, potentially as far back as the judicial maximum term.

48 We use the following benchmarks for our classifications of credit earning levels as "generous," "average," or "minimal." Our cutoffs are: "generous" deductions (40 percent off or more); "average" (20 to 39 percent); and "minimal" (19 percent or less).

to release on the part of one decisionmaker cannot unilaterally preclude release by the other.

Movable MRDs at generous levels are especially noteworthy when they extend to violent and nonviolent offenders alike. Many jurisdictions restrict high credit-earning rates to nonviolent or "less-serious" offenders as enumerated by statute. Violent or "more serious" offenders may still have movable MRDs, but they are often consigned to credit earnings at minimal or dramatically reduced rates.[49] Movable MRDs can be especially meaningful for violent offenders because they are the people least likely to win discretionary release from a parole board. The existence of an alternative pathway to release makes more of a difference to them than to others with better chances of parole release.

All told, the length of the timeline overlap between parole-board and DOC releasing authorities for violent offenders can be a major factor in a state's time-served policy. It can appreciably affect the results in individual cases and, over many cases, it can have significant impact on prison population size. On the other side of the spectrum, movable MRDs that are fueled by modest deductions or are restricted to lower-level felonies can be relatively inconsequential in the big picture. What matters is not the mere existence of a movable MRD mechanism in a prison-sentencing system, but its scope and size.

We see a final critical variable in the design and operation of advancing MRD mechanisms: How hard is it in each system for prisoners to build up the credits necessary to win full deductions against maximum sentences? Our "overflight" survey of 52 American jurisdictions does not have the depth to support confident answers to this question, but we can offer educated guesses.

As a rule of thumb, when credits accrue under a basic good-time model so that staying out of serious trouble is the only prerequisite, we consider it "easy" to build up the necessary credit totals. We may be wrong about this in some jurisdictions, but it is the appearance of things from the applicable legal rules we have reviewed.[50] Furthermore, we consider credits that accrue steadily with clockwork regularity to be more likely to add up into big piles, when compared with credit awards that must be handed out sporadically and in sizeable lump sums. We imagine a phenomenon similar to the surprisingly large monthly totals of consumer credit card bills: a compounding of small decisions.

In many systems, however, some or all MRD credits are based on prisoners' program participation, completion, or other affirmative accomplishments—our earned-time paradigm. In this context, we tend to see full credit earnings as "difficult" or "moderately difficult" for prisoners to achieve. These are eyeball judgments on our part, but we base them on considerations such as the generosity of credits available for each activity, the number of separate activities that must be started and finished in order to win full available discounts, how long we think each activity will take, and our rough sense of the likelihood that particular kinds of programs will be available to prisoners as wanted.

When we say that full credit earnings are "difficult," it reflects our judgment that the only people who will get them are high-achieving prisoners lucky enough to find program slots available more or less as they need them. When we characterize earned-time credits as "moderately difficult" to win, it reflects our estimate that ordinary prisoners have a realistic chance to gain full deductions, perhaps because credit awards per accomplishment are high, credits accumulate for participation and not just for completion, or there are numerous alternative routes to full credit earnings.

49 *See* Table 9, later this chapter.

50 Nationally, there is evidence that very small percentages of all prisoners lose any of their allotted good time credits, *see* Bureau of Justice Statistics. *Survey of Prison Inmates, United States*, 2016. Inter-university Consortium for Political and Social Research [distributor], 2021-09-15, at https://doi.org/10.3886/ICPSR37692.v4 (reporting that only 3.5 percent of respondents in national survey of prisoners said they had lost good time credits for disciplinary violations).

Movable MRDs in non-paroling systems

Advancing MRDs play a different role in non-paroling systems than in paroling jurisdictions. Non-paroling systems tend to have lower overall degrees of indeterminacy, and there is no parole release by definition, so altogether there is less back-end releasing discretion to be structured or shared. There is also less release-*denial* discretion to be offset by checks and balances across agencies. In our analysis of different legal configurations of movable MRDs, we have concluded that paroling and non-paroling systems are distinct policy environments.

Nearly all non-paroling jurisdictions make use of movable MRDs. For the most part earning formulas are the same for nonviolent and violent offenders and credits are easy to earn—but, counteracting all of that, credit amounts tend to be minimal. Advancing MRDs in the setting of extremely low degrees of indeterminacy do not add up to very much. This is no accident and might be seen as a "feature" rather than a "bug." Many non-paroling systems are designed to dramatically reduce back-end prison release discretion so that sentence severity and prison population size can be regulated at the front end of the prison-sentencing system. (See Chapter 8, which focuses on non-paroling systems.)

We will put aside the special case of non-paroling systems for now. In this chapter, we are primarily interested in movable MRDs that play a large role in settings of high indeterminacy and considerable parole release discretion.

Illustrations of MRDs at work

Iowa

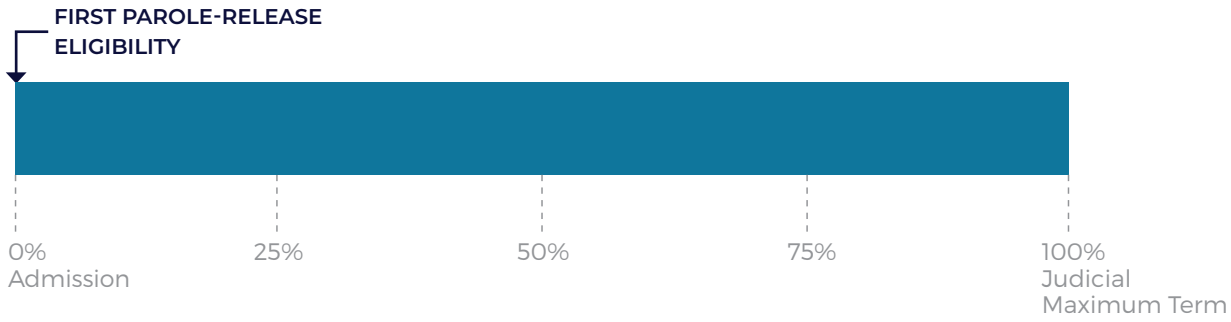
The operation and potential benefits of movable MRDs are best described through examples. We start with an overview of the current Iowa system.[51]

Iowa has one of the most indeterminate prison-sentencing systems in the country. It is one of only five states that we rate as operating with an *extremely high degree of indeterminacy* overall.[52] Remarkably, most Iowa prisoners are eligible for discretionary parole release immediately upon admission. Figure 19 depicts this arrangement for general-rules prisoners, whom we estimate to be two-thirds or more of Iowa's total prison population. The timeline bar in the figure is entirely blue from left to right with no blacked-in segment (which would normally represent the determinate portion of the sentence). This indicates that prison-release discretion exists across the entire back-end timeline. Depending on how that discretion is used, time served for an individual prisoner could be anywhere between zero and 100 percent of the judicial maximum term.

51 *See* Kevin R. Reitz, Melanie Griffith, and Edward E. Rhine, *Prison Release Discretion and Prison Population Size, State Report: Iowa* (Robina Institute of Criminal Law and Criminal Justice, 2020), at https://robinainstitute.umn.edu/publications/prison-release-discretion-and-prison-population-size-state-report-iowa.

52 See Appendix Table A-2 for our rankings of all 52 jurisdictions in this study.

Figure 19. Iowa Prison Release Timeline for Ordinary Offenses with No Earned Time Credits



Iowa Figure 3 isolates the power of the parole board without regard to earned time credits, visualizing cases in which no earned-time credits have been granted or all have been forfeited. In such circumstances, the parole board holds continuous release and release-denial discretion across the full timeline. This is breathtaking power over time served in particular cases and, as hundreds and thousands of decisions accumulate, over prison population size. The figure applies to the large subpopulation that is made up of general-rules prisoners, not the entire prison population. Nevertheless, this adds up to a huge potential effect on the bottom line.[53]

Our standard measure of the population multiplier potential (PMP) fails us in Figure 19 because the *shortest-time-served scenario* for this class of prisoner gives us a denominator of zero. That is, if the parole board consistently released every prisoner at earliest eligibility, the subpopulation of general-rules prisoners would eventually disappear from the standing population. With enough information about admissions and judicial sentencing patterns we could estimate the eventual size of the subpopulation in a *longest-time-served scenario*, but dividing this number by zero would always yield a PMP ratio of infinity. Because this is a nonsensical result, we have adopted the convention that all classes of sentences that are 100 percent indeterminate will be assigned a stand-in PMP of "greater than 100:1" rather than ∞:1.

However the PMP is expressed, it is not driven exclusively by parole board discretion. As in many states, the Iowa parole board shares its time-served authority with corrections officials. Every state divides up back-end discretion differently. The critical issues of system design include not only how much aggregate back-end power there is (the PMP) but also how that total power is apportioned among back-end decisionmakers. We thus turn to the prison-release powers held by Iowa's department of corrections (DOC).

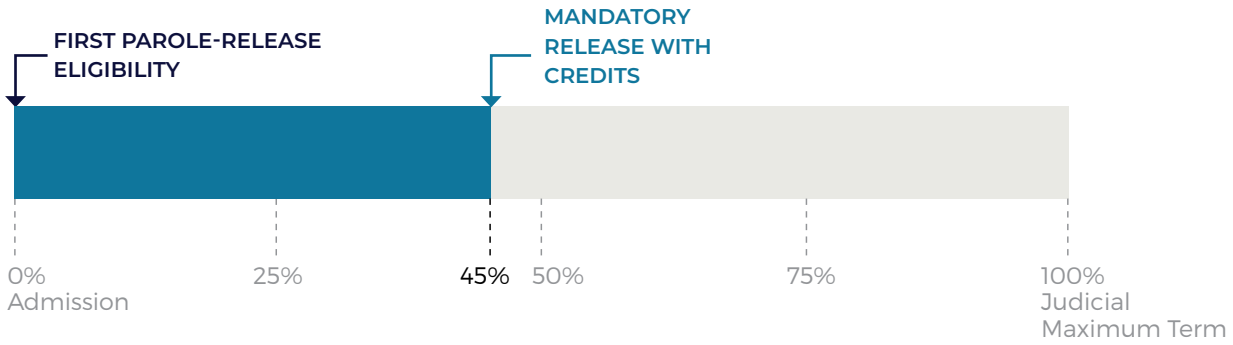
General-rules prisoners are eligible for good-time credits called "earned time" in Iowa, which are administered by the DOC. The amount of available credits depends on the type of sentence being

53 For example, if Iowa had a total prison population of 10,000 and 7,000 of these were general rules prisoners, then release decisions affecting general-rules prisoners could reduce the total population size as low as 3,000 under the *shortest-time-served scenario*. Consistent release-*denial* decisions under the *longest-time-served scenario* would likely increase total prison population size well above 10,000, but we would need data on historical release practices to make an estimate. For example, if general-rules prisoners have historically been released at the 50-percent mark on average, a hard swing to the *longest-time-served scenario* would eventually double that group's size from 7,000 to 14,000 (holding all other factors constant). This would increase the state's total prison population from 10,000 to 17,000.

served, but general-rules prisoners are eligible to earn 1.2 days for each day of good behavior. For most Iowa prisoners, credits are deducted from the judicial maximum term to produce a mandatory release date (MRD), so long as credits earned are not later forfeited.

MRDs are calculated by Iowa's DOC early in prisoners' terms based on their projected earnings, essentially awarding credits in advance. The system is set up to create expectations of full credits. Prisoners can lose their projected MRDs through the disciplinary and forfeiture process, but the release date is theirs to lose. Figure 20 is a visualization of how things work out for a general-rules prisoner with steady earnings of credits of 1.2 days per day.

Figure 20. Iowa Prison Release Timeline for Ordinary Offenses with Standard Earned Time Credits



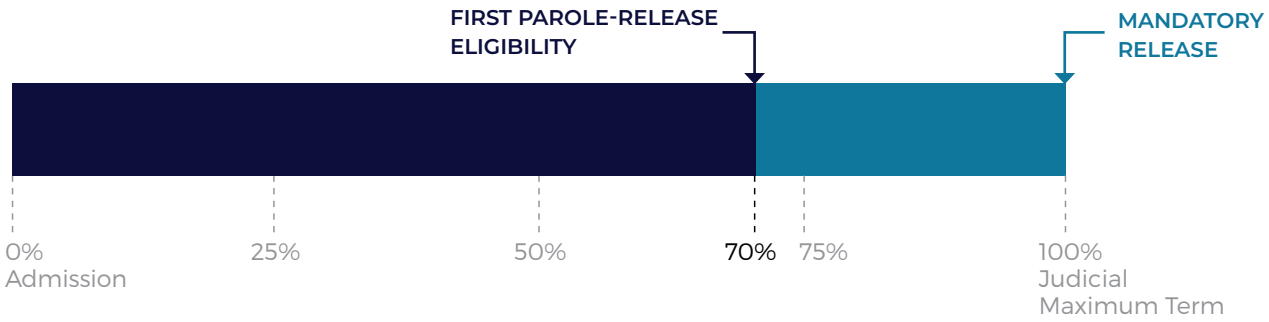
Two things are especially notable here. First, the prisoner's time-served exposure has been reduced by 55 percent (if credits are earned and not forfeited). Second, while the parole board's *release* discretion still kicks in at the time of admission, the board's release-denial discretion has been extinguished beyond the 45-percent mark of the judicial maximum term. Moving from Iowa Figure 19 to 20, more than half of the parole board's release-*denial* power has been erased. We see this as an appreciable check on the board's power to hold prisoners for most or all of their maximum sentences. It is an example of what we call a checks-and-balances approach to release outcomes within a highly indeterminate framework.

Like all states, Iowa has more than one class of prison sentence. Other groups of prisoners do not benefit from movable MRDs to the extent described in Figures 19 and 20. To provide a contrast, we turn our focus to the next most important subpopulation of Iowa prisoners, which makes up roughly 15 percent of the state's total prison population. Defendants convicted of one of several statutorily-enumerated felonies must serve 70 percent of their judicial maximum terms before becoming eligible for parole release.[54] Figure 21 illustrates sentences for the 70-percent subgroup, ignoring for a moment the effect of earned time credits. The blacked-in portion of timeline indicates that 70 percent of potential time served is controlled by the judicial sentence rather than the actions of back-end decisionmakers.[55]

54 The enumerated felonies are: second-degree murder, attempted murder, second-degree sexual abuse, second-degree kidnapping, second-degree robbery, and vehicular homicide by an intoxicated or reckless driver if the defendant failed to stop and remain at the scene.

55 The figure ignores low-probability forms of release such as clemency, compassionate release, or discounts for heroic conduct.

Figure 21. Iowa Prison Release Timeline for Sentences with 70-Percent Minimums and No Earned Time Credits

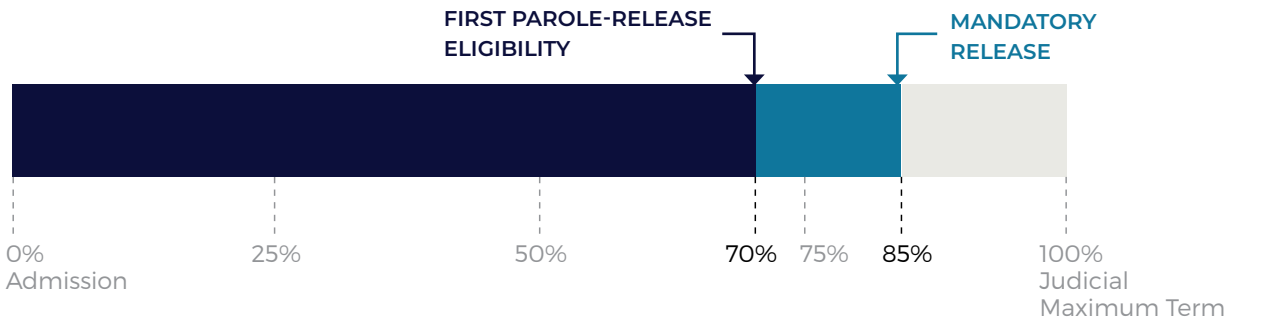


This class of sentence carries a *low degree of indeterminacy* on our five-level ranking scale, which could alternatively be characterized as a *high degree of determinacy*. The PMP for this sentence type is 1.43:1. That is, total prisoner counts for the 70-percent subpopulation would be 43 percent higher in the *longest*- versus the *shortest-time-served scenarios*.

Prisoners in the 70-percent group are given movable MRDs based on earned time credits, but the benefit is small compared with that available to general-rules prisoners. First, the earning rate is lower: it is set at the puzzling figure of "fifteen eighty-fifths of a day for each day of good conduct." This would allow for as much as 18-percent deductions from prisoners' judicial maximum terms. Second, however, total deductions from prisoners' maximum terms are statutorily capped at 15 percent.

Figure 22 shows the timeline breakdown for 70-percent prisoners with the largest allowable earned-time deductions and earliest possible MRDs. The main point of the figure is to show that the movable MRD provides at most a "minimal" deduction from the maximum term as opposed to the "generous" deduction available to general-rules prisoners in Figure 20.

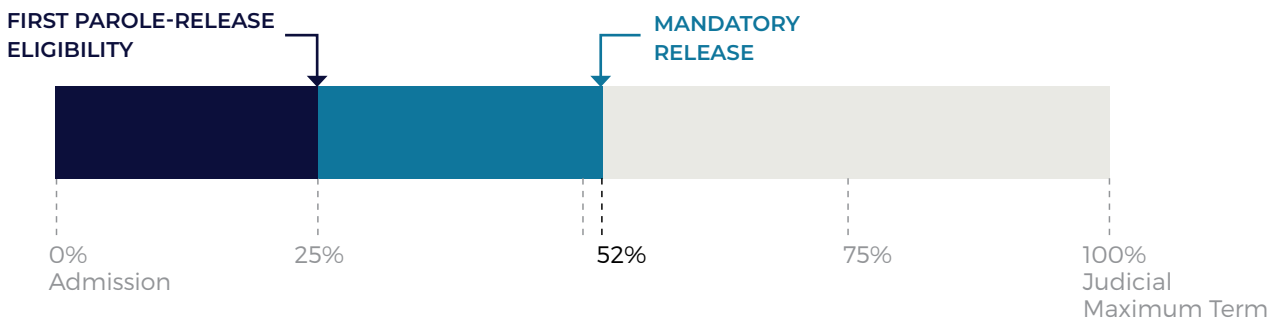
Figure 22. Iowa Prison Release Timeline for Sentences with 70-Percent Minimums and Full Earned Time Credits



Oklahoma

Movable MRDs available to nonviolent offenders in Oklahoma can subtract as much as two-thirds from their judicial maximum terms. Only extraordinarily high-achieving prisoners can gain this full benefit, however. We estimate that "ordinary" achievers could reach deductions in the realm of 58 percent. Violent offenders are also eligible for such deductions, but at a somewhat lower rate. We estimate realistic deductions for ordinary achievers of roughly 48 percent, as shown below in Figure 23.[56] By our definition, this still qualifies as a "generous" MRD benefit.

Figure 23. Oklahoma Prison Release Timeline for General-Rules Sentences with Earned Credits of 33 Days per Month



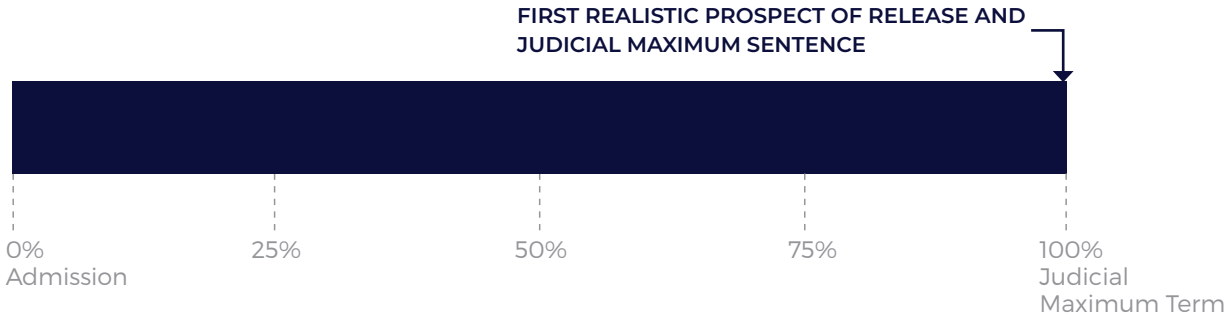
*Note: Earned credits accrue at a rate of 22 days per month for the first three months before going up to 33 days per month. The calculation of time served to mandatory release in the figure is based on a five-year sentence. The longer the judicial maximum sentence, the closer the mandatory release date will get to 48 percent

In the context of the system as a whole, Oklahoma's movable MRD mechanism for violent offenders is especially significant because discretionary parole release is functionally unavailable to them. While they are technically eligible for discretionary release as soon as the 25-percent mark of their maximum terms, Oklahoma is unusual in making the governor the ultimate parole-release authority for all violent offenders. The parole board has final release discretion only for nonviolent prisoners, but can only offer recommendations for violent offenders. In recent years, Oklahoma governors have used their release-*denial* power in nearly every case, with release rates for violent offenders in the low single digits.

We can diagram the *effective* time-served prospects of the vast majority of prisoners convicted of violent offenses in Oklahoma if they were left to rely exclusively on their chances of parole release in the governor's discretion. Figure 24 charts the actual release-denial practices of Oklahoma recent governors rather than the (unused) release authority they possess on paper. Future governors may act differently,

56 By statute, prisoners convicted of most violent crimes in Oklahoma are eligible to earn up to 44 days of credits per month, but Oklahoma Figure 5 works with a more realistic earning level of 33 days per month. Oklahoma prisoners can accrue "earned credits" each month, with available amounts depending on prisoners' assignments into one of four "class levels" by prison officials. At each level, the earning rate is lower for prisoners with a current or prior conviction of one of 65 designated violent offenses. Essentially, this creates different earning scales for nonviolent and violent offenders. Earning rates may reach 60 days per month for prisoners convicted of nonviolent crimes who are evaluated as "outstanding" in program participation, hygiene, and maintenance of living area. The highest earning rate for violent offenders is 44 days per month, still a "generous" rate by our definitions.

Figure 24. Oklahoma Prison Release Timeline for Violent Offenders Under Current Release-Denial Practices



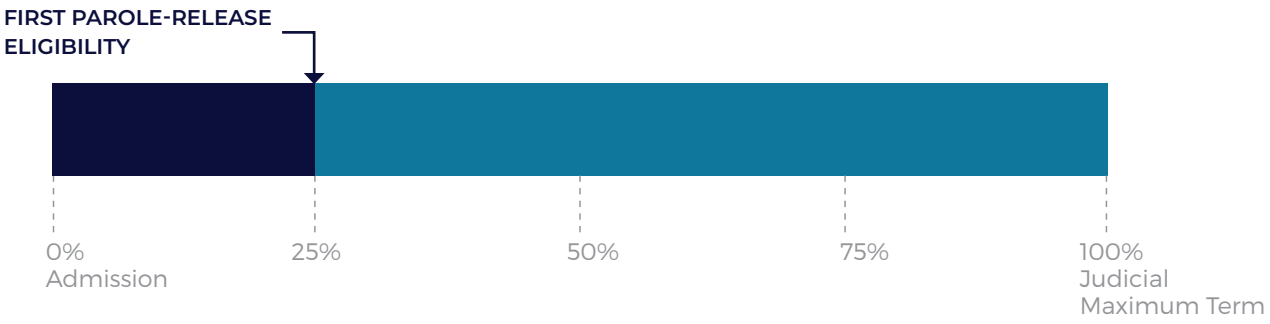
but the main point here is that the *longest-time-served scenario*, or something very close to it, is a genuine possibility for a large group of Oklahoma prisoners.

Given the bleak picture painted in Figure 24 for people imprisoned for violent crimes, it becomes immensely important that the parole process is not the only game in town. While we have not studied the Oklahoma system in actual operation—a large but worthwhile project in itself, Figure 23 presents what we believe to be a realistic opportunity for violent offenders to gain release through a movable MRD that subtracts as much as 48 percent of their maximum terms. We do not imagine that all or even most prisoners convicted of violent offenses will win the full generous deduction, but their prospects of a meaningful sentence discount are much better through earned credits administered by the DOC than the parole process. Oklahoma vividly illustrates the potential importance of the checks-and-balances approach at the back end of a prison-sentencing system.

Texas

The Texas prison-release system provides a pointed contrast to the states discussed above. Texas makes no use of movable MRDs. Instead, the main effect of good-time credits is to advance prisoners' first dates of parole-release eligibility. As shown in Figure 25 below, parole-release eligibility occurs at the 25-percent mark of the judicial maximum term without accounting for possible credit earnings.

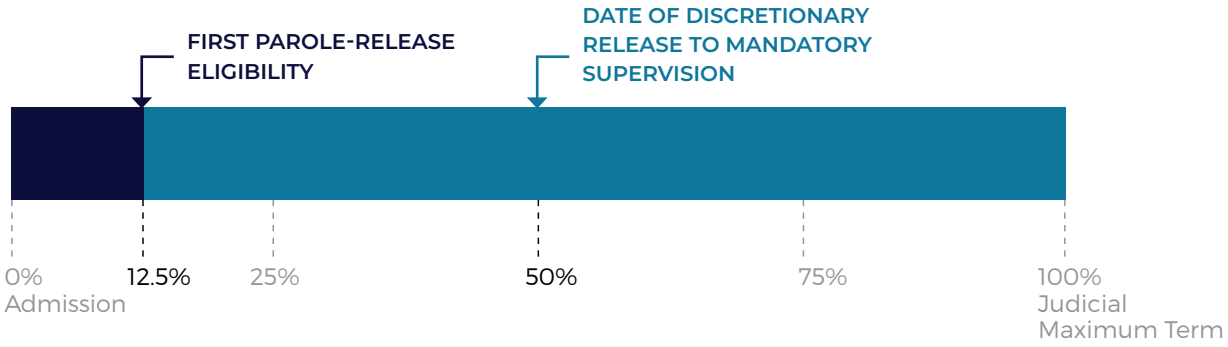
Figure 25. Texas Prison Release Timeline for Lower-Severity Offenses with No Good Time Credits



Texas offers a generous earning rate of 30 days of credits for every month of good behavior, applying these credits to propel movable parole-eligibility dates to earlier positions on the timeline. As shown in Figure 26, full credits at this earning rate would cut the affected segment of the timeline in half, moving a prisoner's first parole eligibility back to the 12.5-percent mark.

In a fashion, credits are also subtracted from judicial maximum terms for this class of sentence, but they do not produce earlier MRDs. Instead, to use Texas's terminology, the state offers movable dates of "discretionary release to mandatory supervision" (DRMS). This tortured phrasing—with the words "discretionary" and "mandatory" side-by-side—comes from legislative history in Texas. At one time the state did provide movable MRDs for prisoners convicted of less serious offenses but, in 1996, the mandatory character of release was eliminated and replaced with discretionary release. Since then, release at the DRMS milestone may be blocked "if a parole panel determines that: (1) the inmate's accrued good conduct time is not an accurate reflection of the inmate's potential for rehabilitation; and (2) the inmate's release would endanger the public." Thus, as shown in Figure 26, prisoners' MRDs are immovably fixed at the 100-percent marks of their judicial maximum terms. The parole board retains unilateral release and release-denial discretion from the 12.5-percent mark to the expiration of the maximum term.

Figure 26. Texas Prison Release Timeline for Lower-Severity Offenses with Good Time Credits of 30 Days per Month



As shown above, the operation of good-time credits in Texas builds no checks and balances into the prison-release system. Rather than acting as a counterbalance, the effect of full credit awards is to *increase* the release and release-denial discretion of the parole board. Under Texas Figure 25, the parole board is in control of 75 percent of the time-served timeline. When we move to Figure 26, adding in the effect of credits, the parole board's power has expanded to 87.5 percent. At no point along the timeline do corrections officials have unilateral authority to set release dates short of expiration of prisoners' maximum terms. The population multiplier potential (PMP) that is controlled exclusively by the parole board in Figure 26 is 8:1. That is, the subpopulation of prisoners with this type of sentence would be eight times larger in numbers under a longest-time-served scenario (if the parole board were to hold all prisoners for as long as possible) than under a shortest-time-served scenario (if the parole board released all prisoners at their earliest eligibility).

Under the Texas model, actual time served by individual prisoners, and the aggregate prison population size of people sentenced for less serious crimes, is controlled almost entirely by the parole board. In recent years, the Texas parole board is credited with releasing relatively high percentages of prisoners who come before them, and local observers believe this has contributed to an overall drop in the state's imprisonment rate. But the parole board's decision patterns can change dramatically, as they did in Texas in the 1990s—firmly in the direction of release denial.[57] Much more than in Iowa or Oklahoma, Texas prison policy is placed in the hands of the parole board alone.

57 *See* Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine, *Prison Release Discretion and Prison Population Size, State Report: Texas* (Robina Institute of Criminal Law and Criminal Justice, 2020), at https://robinainstitute.umn.edu/publications/prison-release-discretion-and-prison-population-size-state-report-texas.

Overview of state practices

As shown in Table 9 below, movable MRDs are employed in 40 states, the District of Columbia, and the federal system. This total includes 25 of the 34 paroling states and 15 of the 16 non-paroling states.[58]

We group states according to the highest credit-earning levels that are made available *to at least some prisoners*. Often, peak earning rates are offered only to select groups according to their offenses of conviction and/or earnings classifications assigned by prison officials. On this measure, 16 of the states included in Table 9 authorize "generous" deductions from maximum terms through movable MRDs, which we define as deductions of 40 percent or more that are realistically achievable by prisoners. (We do not count credit earnings that are available on paper but would be nearly impossible to earn.) Fifteen states and the District of Columbia allow "average" deductions of 20 to 39 percent. Nine states and the federal system allow only "minimal" deductions of 19 percent or less.[59] Ten states make no provision for movable MRDs at all. Putting the last two groups of states together, 40 percent of U.S. jurisdictions allow zero or minimal deductions.

Among the 16 states with generous MRD deductions, 13 allow at least some prisoners with convictions for violent offenses to benefit from generous credit-earning levels without having to work their way up to an especially favorable classification status. However, the necessary credits are "easy" to obtain in only six of these states (as indicated in the third column of Table 9). These are: Illinois, Iowa, Nevada, Oklahoma, South Carolina, and West Virginia.[60]

We conclude that six out of the 52 American systems shown in Table 9 have adopted what might be called the "trifecta model" of movable MRDs: (1) generous deductions from judicial maximum sentences; (2) comparable deductions available to most general-rules prisoners, including some convicted of violent offenses; and (3) relative ease of earning the credits needed for the generous deductions on offer. We are struck by how few states have adopted this approach: less than 12 percent of all 52 U.S. jurisdictions studied in this project.

58 Wisconsin is the only American non-paroling jurisdiction to have no mechanism of movable MRDs and no system of good time or earned time credits. However, most people enter prisons in Wisconsin with MRDs that can be pushed back for serious misconduct, which is functionally similar to movable MRDs in other states.

59 Where credits are not dispensed entirely by day-for-day formulas, but include lump sums for program participation, completion, or other accomplishments, our classifications of credit earning levels are based on our subjective estimates of realistic earnings that could be accrued by a high-achieving prisoner serving a five-year maximum term.

60 We classify the effort level as "easy" when full deductions can be won through the accumulation of good-time credits, awarded for staying out of trouble. We rate the required effort levels as "moderately difficult" and "difficult" when program participation and/or completion are needed for full deductions.

Table 9. American Jurisdictions that Advance Mandatory Release Dates for General-Rules Prisoners through Credit Deductions

	Prisoners eligible	Credit amounts at highest earning levels	Feasibility of earning highest amount of credits
Alabama	Prisoners must work their way up through four earning classifications. All general-rules prisoners start in the lowest classification (ineligible to earn credits).	Generous	Difficult, given the classification system and the fact that every prisoner must start out in a credit-earning-ineligible class.
Alaska	All general-rules prisoners, including nonviolent and violent offenders	Average	Easy. The highest earning rate is the norm for most prisoners. Credits are awarded up front; may be lost through forfeiture
Arizona	All general-rules prisoners, including nonviolent and violent offenders	Minimal	Easy. The highest earning rate is the norm for most prisoners, but DOC can classify prisoners into non-earning status.
California	All general-rules prisoners, including nonviolent and violent offenders	Generous	Difficult. Only high-achieving prisoners can earn credits in "generous" as opposed to "average" amounts. Less difficult for prisoners convicted of nonviolent offenses: a small percentage of all prisoners in California.
Colorado	All general-rules prisoners, including nonviolent and violent offenders	Average	Easy. Average earning rate is the norm for most prisoners; modest additional earnings possible for completion of program milestones
Connecticut	All general rules prisoners, including nonviolent and violent offenders (excluding the most serious offenses)	Minimal	Moderately difficult. The department classifies prisoners into different risk levels, all with low earning rates
Delaware	All general-rules prisoners, including nonviolent and violent offenders	Average	Difficult. Full earnings require good time credits plus steady additional credits for program participation and completion
Florida	All general-rules prisoners, including nonviolent and violent offenders	Minimal	Easy. Gain time credits easily overshoot the 15% cap on deductions from maximum term.
Illinois	The great majority of general-rules prisoners, including some violent offenders	Generous	Easy for most prisoners. Good conduct earning rates are generous and there are numerous additional avenues to earn program sentence credits. However, prisoners convicted of certain offenses must serve at least 85%, 75%, or 60% of their judicial maximum terms, not reducible by credits.

	Prisoners eligible	Credit amounts at highest earning levels	Feasibility of earning highest amount of credits
Indiana	Only prisoners who work their way up to the highest of four earning classifications. Certain prisoners are limited to the lower earning classes and have no opportunities to advance	Generous	Difficult. Due to the prisoner classification system and the fact that certain program credit opportunities are available only to higher earning credit classes.
Iowa	Most general-rules prisoners, including nonviolent and some violent offenders	Generous	Easy. Generous earning rates are extended to most prisoners except those convicted of designated serious offenses or with especially serious criminal histories, most of whom earn at minimal rates
Kansas	Most general-rules prisoners, including nonviolent and some violent offenders, but prisoners convicted of more serious offenses earn at a somewhat lower rate	Average	Moderately difficult. Prisoners must earn program completion credits for full reductions.
Kentucky	Most general-rules prisoners; designated violent and sex offenders are eligible for some earned time reductions but ineligible for good time	Generous	Difficult. General rules prisoners must earn full good time and multiple types of earned time credits to reach generous earning levels; prisoners convicted of certain violent and sex offenses are ineligible for good time credits and earned time credits are capped at minimal level.
Louisiana	Most general-rules prisoners, excluding prisoners convicted of sex offenses or a second crime of violence	Generous	Moderately difficult. Requirements are good conduct plus participation in work or other self-improvement activities. Generous credits offered only for prisoners convicted of nonviolent offenses; prisoners with convictions of violent offenses earn at low average rates.
Maine	All general-rules prisoners, including nonviolent and violent offenders	Average	Easy. Low average awards for most prisoners convicted of general-rules offenses; minimal for prisoners convicted of sexual assault or designated violent offenses.
Maryland	All general-rules prisoners, including nonviolent and violent offenders	Generous	Moderately difficult. The baseline earning rate for good conduct is not generous, but there are various earned credit opportunities for particularly motivated offenders.
Massachusetts	All general-rules prisoners, including nonviolent and violent offenders	Average	Difficult. All credits require participation in or completion of in-prison work, education, or rehabilitation programs. Full earnings require high levels of achievement by prisoners and good program availability.

	Prisoners eligible	Credit amounts at highest earning levels	Feasibility of earning highest amount of credits
Minnesota	All general-rules prisoners, including nonviolent and violent offenders	Average	Easy. The highest earning rate is the norm for most prisoners. Full deductions from MRDs are built into prisoners' sentences and may be lost only for serious disciplinary violations.
Mississippi	All general-rules prisoners, including nonviolent and violent offenders, are eligible for credits of some kind; earning rates depend on classification of prisoners and program participation	Generous	Difficult. The highest earning rate open only to those classified into "trusty status" by DOC who achieve "satisfactory participation" in approved programs. At their base rates, good time credits alone are awarded at a minimal level.
Missouri	All general-rules prisoners including nonviolent and violent offenders	Average	Easy. Initial MRDs are set at average levels for all general-rules prison terms. Additional but minimal credits may be earned through good conduct.
Nebraska	All general-rules prisoners, including nonviolent and violent offenders	Average	Easy. Good time credits are granted by default and count as sentence reductions unless forfeited; credit amounts are "average" but border on our definition of "generous"
Nevada	All general-rules prisoners, including nonviolent and violent offenders	Generous	Easy. Prisoners can win 50 percent reductions from MAX for good time alone with additional deductions for earned time; peak reductions estimated at 60-65%
New Hampshire	All general-rules prisoners, including nonviolent and violent offenders	Average	Difficult. Only earned-time credits are deducted from MAX terms; lump sum credits per achievement or completion are low; they are also capped at a total of 21 months.
New Jersey	All general-rules prisoners, including nonviolent and violent offenders	Minimal	Easy. Good time credits supply minimal reductions. If earnings are supplemented with most possible earned time credits, deductions from MAX are still minimal.
New Mexico	All general-rules prisoners, including nonviolent and violent offenders	Generous	Moderately difficult. Generous earnings for prisoners convicted of nonviolent offenses requires program participation, with still more credits possible for program completion; for prisoners convicted of violent offenses, program participation yields only minimal earnings and completion credits must be added to achieve average earning levels

	Prisoners eligible	Credit amounts at highest earning levels	Feasibility of earning highest amount of credits
New York	All general rules prisoners, including those with parolable and non-parolable sentences	Average	Moderately difficult. Average credit reductions available only for nonviolent and drug offenses, and some earnings require program participation. The majority of determinate sentences for violent crime carry only minimal potential reductions, with no available credits for program participation.
North Carolina	All general-rules prisoners, including nonviolent and violent offenders	Minimal	Easy. Earning criteria are in the discretion of DOC; this judgment of degree of difficulty assumes a good time model
North Dakota	All general-rules prisoners, including nonviolent and violent offenders	Minimal	Easy. Credits are awarded on a good time model.
Ohio	All general rules prisoners, including those with parolable and non-parolable sentences	Minimal	Moderately difficult. Full earnings require both good time and earned time credits.
Oklahoma	All general-rules prisoners, including nonviolent and violent offenders	Generous	Easy. Most prisoners convicted of violent or nonviolent offenses can earn credits at generous rates for good conduct if classified into highest of four earning groups by DOC; earning rates for prisoners convicted of violent crimes are slightly lower at two highest levels. Some prisoners convicted of designated serious offenses earn at minimal levels.
Oregon	Nonviolent and some violent offenders	Average	Easy. Prisoners convicted of nonviolent offenses and some less serious violent offenses may earn deductions of as much as 20% through good conduct; nearly half of all prisoners convicted of more serious "Measure 11" offenses earn no credits
Rhode Island	All general-rules prisoners, including nonviolent and violent offenders	Average	Moderately difficult. Most general-rules prisoners can earn average deductions with good time credits alone, but full deductions (at higher but still "average" levels) require additional work and program participation credits; those convicted of especially serious offenses earn at lower rates or are ineligible
South Carolina	All general-rules prisoners, including nonviolent and many violent offenders	Generous	Easy for general-rules prisoners convicted of nonviolent and many violent crimes to earn generous good time deductions against MAX, with further reductions possible for "work" and "education" credits. For more serious violent offenses, earning rates are minimal for good time credits alone but average with work and/or education credits added.

	Prisoners eligible	Credit amounts at highest earning levels	Feasibility of earning highest amount of credits
South Dakota	All general-rules prisoners, including nonviolent and violent offenders	Generous	Difficult. No credits for good behavior; all credits require time spent in prison work or completion of rehabilitative programs. Generous rates available only to high achievers.
Tennessee	All general-rules prisoners, including nonviolent and violent offenders	Generous	Difficult. Credits reach generous level only for prisoners who qualify for and complete drug treatment and also win good conduct and work credits; otherwise credits are at average levels for general-rules sentences.
Vermont	All general-rules prisoners, including nonviolent and violent offenders	Minimal	Easy. Credits accrue on good-time model. Additional earned-time credits, available to narrow classes of prisoners, are difficult to earn.
Virginia	All general-rules prisoners, including nonviolent and violent offenders	Minimal	Easy. Full credits are awarded for good conduct.
Washington	All general-rules prisoners, including nonviolent and violent offenders	Average	Easy. Full credits are awarded for good conduct. Deductions are minimal for designated serious violent offenses
West Virginia	All general-rules prisoners, including nonviolent and violent offenders	Generous	Easy. Most prisoners earn the maximum amount of good time.
Wyoming	All general-rules prisoners, including nonviolent and violent offenders	Average	Easy. Full credits are awarded for good conduct.
District of Columbia	All general-rules prisoners, including violent offenders	Average	Moderately difficult. Average deductions require good conduct and completion of drug treatment program, and are available only to some prisoners convicted of nonviolent offenses. Minimal deductions are available for the vast majority of prisoners for good conduct.
Federal System	All general-rules prisoners, including violent offenders	Minimal	Easy. The highest earning rate is the norm for most prisoners.

Sources: 52 "state reports" prepared for this project, including 50 states, the District of Columbia, and the federal system

Key Policy Options: Advancement of mandatory release dates

Policy issue 18: Should states make the advancement of mandatory release dates a major determinant of time-actually-served by prisoners?

The majority of states have the skeletons of movable MRD programs in place but make limited use of them. The policy question we pose here is whether more states should consider the "trifecta model" of movable MRDs driven by generous credit levels, available to nonviolent and at least some violent offenders, which are relatively easy to earn. In this setup, movable MRDs could become a major determinant of prison population size for people with the affected classes of sentence. Such reforms could advance proportionality in individual sentences, and could be designed to introduce new systemic controls on prison population size. What is missing, to our knowledge, is deliberate effort by any state to design a movable MRD system with the above goals in mind. For example, the best sentencing guidelines commissions use computer simulations of prison-population change to help set "sentencing ranges" for specific categories of cases. A similar approach could be used to tailor the values of movable MRDs to produce planned systemwide outcomes.

Policy issue 18 poses an especially important question in paroling states. When degrees of indeterminacy are high, there is a big difference between having one and two institutions with appreciable release discretion. Two counterbalanced institutions can provide checks on the overuse of release-denial power by the other.

Further, parole boards and departments of corrections employ different modes of decisionmaking, in ways that could matter a great deal. In the framework of advancing MRDs, release discretion can be exercised in small increments rather than at a single all-or-nothing decision point. The incremental model may yield important differences in the pressures felt by decisionmakers, with less tendency of risk aversion to skew the system's overall operation. Historically at least, release through the steady accrual of credits has not been as politically fraught as discretionary parole release.

If comprehensive policy goals such as prison population control were built into the design of movable MRDs, ongoing research and evaluation would be required. Legislatures are often reluctant to supply funding for such tasks. However, the research capacity attached to a system of movable MRDs could be a key element in realizing the fiscal savings of prison population management.

Policy issue 19: What classes of prisoners should be eligible for advancing mandatory release dates?

Our research has found only seven states that offer advancing MRDs with generous credit deductions to people convicted of nonviolent and at least some violent offenses. This leaves many American jurisdictions with room to reassess their approaches.

The application of advancing MRDs to violent-offender populations provides an especially significant alternative to the operation of parole release discretion. For nonviolent offenders, we consider advancing MRDs to be of less importance because the odds of parole release are better during early segments of the prison-sentence timeline. For people convicted of violent crimes, at least in some systems, movable MRDs may be their most credible route to release.

Policy issue 20: How generous should credit-based advancements of mandatory release dates be in relation to maximum terms?

On our scale, only 30 percent of American jurisdictions offer credits toward movable MRDs at "generous" earning levels, 30 percent maintain "average" levels, and 40 percent offer minimal or no deductions. Clearly there is no national consensus on this policy issue, which is enough reason for all states to reexamine their own approach. Comparative analysis may produce an informed sense of best practices.

For us, generous earning levels are a potentially critical feature of system design. Roughly speaking, this is the ballpark in which advancing MRDs begin to overlap into the portion of the prison-release timeline where one would expect discretionary parole release to be granted or denied to large numbers of prisoners. Put another way, advancing MRDs and parole release become competing forms of release discretion most often when credit earning levels are high.

Within the resulting zone of overlap, two forms of unilateral release discretion are in play at the same time. From prisoners' point of view, they can win release from one of two agencies, without any action or assent from the other. A release decision by one authority has the effect of canceling the release-*denial* discretion of the other.

When there is a significant amount of overlap of dueling release discretions, we have called it a "checks-and-balances" framework. Refusal to release on the part of one decisionmaker cannot unilaterally preclude release by the other. This may be especially important in highly-indeterminate structures. Movable MRDs can be an appreciable check on the parole board's power to hold prisoners for most or all of their maximum sentences.

Checks-and-balances also make it far less probable that the system will "red-line" toward runaway population growth. In order for a longest-time-served scenario to unfold for large numbers of prisoners over a sustained period, two separate agencies must consistently exercise their discretion to deny release and credits toward MRDs. Extreme behavior by two decisionmakers, simultaneously and over a long period of time, is less likely to occur than when a single agency is in charge.

Policy issue 21: How hard should it be to earn the credits needed for full advancement of prisoners' mandatory release dates?

Table 9 shows a wide range of practice on the question of whether full credit earnings toward movable MRDs should be easy to win, at least for some prisoners. Twenty-three of 42 jurisdictions take this approach, propelled by standardized good time formulas. However, nineteen states make full credit earnings "difficult" or "moderately difficult" for prisoners to amass. In these jurisdictions, prisoners must participate in or complete programs to accumulate credits. Ten American states offer no such credits at all—a difficulty level of "impossible."

There may be good reasons for states' decisions to make credits difficult to win, and the strength of the reasoning may vary with different classes of offenders. We note the obvious, however, to say that greater levels of difficulty in the production of advancing MRDs probably have a long-term impact on prison population size (as do variations in breadth of application and earning rates). For states looking for population-control mechanisms, this topic is important to overall system design.

One limiting feature of earned-time credits is that they cannot be awarded unless the requisite activities are in place and accessible to prisoners. Credits ostensibly available under the law may be blocked by the lack of program slots, staff shortages, unaccommodated prisoner disabilities, waiting lists, administrative delays, and so forth. The *appearance* of generosity of earned-time credits, if one looks only at the statute books, may be deceiving. In contrast, good-time credits do not typically depend on program availability and administrative efficiency. Their descriptions in legal sources probably resemble the discounts actually within reach of ordinary prisoners.[61]

61 For some ideas of how a prison system could adapt to shortfalls in program availability, *see* Chapter 5, Policy issue 9.

CHAPTER 8

Variations in "non-paroling" prison-sentencing systems

Classifying non-paroling systems

According to conventional usage, jurisdictions that have eliminated parole-release discretion for the vast majority of prison sentences are described as having "determinate" sentencing systems. It is often said that such systems were created through a process of "determinate sentencing reform."

We reject this simplistic terminology. The research for this project has shown that systems with and without the heavy use of parole release discretion operate with varying degrees of indeterminacy or determinacy. They are not all-or-nothing phenomena. Further, we have found that indeterminacy can be rooted in many sources other than parole-release discretion. In our view, the equation of indeterminacy with parole release is unhelpful and misleading.

We propose new terminology for distinguishing jurisdictions that make heavy use of parole-release discretion from those that seldom or never use it. The appropriate labels, in our view, should make explicit reference to the pervasiveness of parole release in a given system rather than the imprecise terminology of determinacy/indeterminacy. We suggest that systems that have eliminated parole-release discretion for all or the vast majority of prisoners should be called "non-paroling systems." Systems that extend parole-release discretion to substantial percentages of prisoners should be called "paroling systems." Obviously, these are still inexact terms—and they overlook many variations in system design. Still, we have found the breakdown to be a useful analytic tool for the sorting of different system types.

We classify the following 18 jurisdictions as operating with non-paroling prison-sentencing systems: Arizona, California, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, New Mexico, North Carolina, Ohio, Oregon, Virginia, Washington, Wisconsin, the District of Columbia, and the federal sentencing system. Two additional states have "split" systems that divide prison sentences into two large categories, one with and one without parole release discretion: Mississippi and New York. In both, highly determinate sentences are given to prisoners convicted of more serious offenses. These states straddle the dividing line between paroling and non-paroling systems, as we define the terms.[62]

From the mid-1970s through the end of the 20th century, there was a slow but continuous trend among states to abolish most or all parole-release discretion in their prison-sentencing systems.[63] At the time this was referred to as "determinate sentencing reform." This trend has slowed to a near halt in the 21st century, but remains a subject of debate.[64] The purpose of this report is not to argue the relative merits of paroling versus

62 California and Ohio may also be characterized as "split systems," but they employ parole-release discretion for much smaller categories of general-rules sentences than Mississippi and New York. Thus, they are "split" but remain overwhelmingly non-paroling jurisdictions for the bulk of general-rules prisoners.

63 Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (Oxford University Press, 2003), at 66-67 table 3.1.

64 *Compare* American Law Institute, Model Penal Code: Sentencing (forthcoming 2022), Appendix C (recommending that states should abolish discretionary parole release); Catherine C. McVey, Edward E. Rhine & Carl V. Reynolds, *Modernizing Parole Statutes: Guidance from Evidence-Based Practice* (Robina Institute of Criminal Law and Criminal Justice, 2018) (offering legislative recommendations for states wishing to modernize their parole laws).

non-paroling systems, but to develop new tools to explore and compare the system designs found under both headings.

There is a substantial literature about "determinate sentencing reform," especially in jurisdictions that have adopted judicial sentencing guidelines along with the abolition of parole release discretion.[65] The discussion in this chapter will not survey that preexisting literature. Instead, we will concentrate on questions concerning the degrees of indeterminacy found in non-paroling jurisdictions, and the legal frameworks they have devised for the exercise of back-end release discretion. In other words, the discussion in this chapter focuses on observations that have grown out of this project.

Indeterminacy in non-paroling jurisdictions

On average, non-paroling jurisdictions in the U.S. currently operate with lower degrees of indeterminacy than paroling states when comparing systems as a whole. Yet some non-paroling systems have attached high degrees of indeterminacy to large classes of sentences, including California, Illinois, Indiana, New Mexico, and Wisconsin (for a summary of release formulas, see Table 10 below). And many paroling systems feature significant numbers of sentences with very low degrees of indeterminacy.

We conclude that the presence or absence of parole-release discretion has no necessary connection to the degree of indeterminacy that may be built into a prison sentence or a prison-sentencing system. DOIs are determined in large part by the release formulas written into statutes and the actual practices of releasing decisionmakers. In Europe, for example, most countries employ some form of discretionary parole release, yet we believe their prison sentences would score low in indeterminacy according to the definitions we have used in this study. Indeed, we hypothesize that very few countries worldwide have designed sentencing systems with degrees of indeterminacy as high as those commonly found in American states.[66]

The most powerful instruments of indeterminacy in non-paroling systems are their good-time and/or earned-time mechanisms. In this sense, non-paroling systems have relatively simple back-end designs. By definition, parole-release discretion is a non-factor for the vast majority of prisoners. Latent or little-used sources of indeterminacy such as executive clemency and compassionate release exist in most non-paroling states, but touch the lives of few prisoners. Unless something changes in those domains,

65 See, e.g., Richard S. Frase, Just Sentencing: Principles and Procedures for a Workable System (Oxford University Press, 2013); Michael Tonry, Sentencing Matters (Oxford University Press, 1996); Kay A. Knapp, *Allocation of Discretion and Accountability within Sentencing Structures*, 64 U. Col. L. Rev. 679 (1993). Far more has been written about the beleaguered federal sentencing system than any state system. *See*, e.g., Kate Stith & José Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (University of Chicago Press, 1998).

66 We have not extended our comparative analysis to Europe, but have reviewed the country-specific descriptions collected in Nicola Padfield, Dirk Van Zyl Smit & Frieder Dünkel Eds., Release From Prison: European Policy and Practice (Willan Publishing 2010). On the rejection of the model of high indeterminacy outside the U.S., *see* Michele Pifferi, *Individualization of Punishment and the Rule of Law: Reshaping Legality in the United States and Europe between the 19th and the 20th Century*, 52 Amer. J. Legal Hist. 325-76 (2012) (recounting history of America's widespread adoption of administrative parole-release systems and Europe's rejection of the American model). In Canada, parole release is granted so infrequently that we would place it in our "little-used" category, that is, a release mechanism affecting such small numbers that it cannot be counted toward defining the system as a whole. See Anthony N. Doob, Cheryl Marie Webster & Allan Manson, *Zombie Parole: The Withering of Conditional Release in Canada*, 61 Crim. L.Q. 301 (2014).

these marginal release mechanisms have little impact on the operation of systems as a whole.[67]

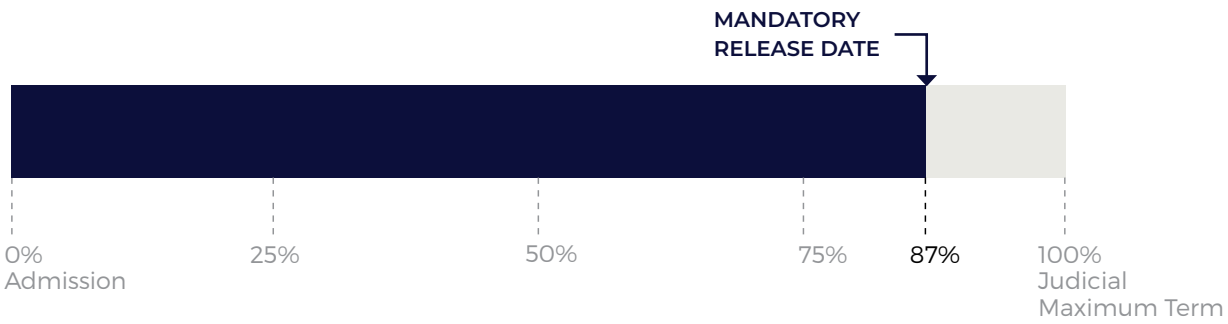
Overwhelmingly, American legislatures in non-paroling jurisdictions have chosen to concentrate meaningful prison-release discretion in departments of correction (DOCs), usually exercised by corrections officials at the prison level. In Chapter 6 we reported that nearly all American jurisdictions offer some form of credit-based discounts against prison sentences. This raises the policy issue of the "right" amount of time-served discretion that ought to be ceded to DOCs. We think the context for this question is different in paroling and non-paroling systems, however. In non-paroling structures, credits are effectively the only game in town for the movement of release dates. Arguably, therefore, the role of the DOC via credit discounts assumes elevated importance in non-paroling systems.

Modeling degrees of indeterminacy in non-paroling jurisdictions

Credit discounts in American non-paroling systems are applied as deductions against judicial maximum sentences. Credits are used to advance mandatory release dates (MRDs) when they are earned and not forfeited. (For an in-depth discussion of movable MRDs, see Chapter 8.) Often, however, these deductions are not terribly large in non-paroling jurisdictions.

Indeed, the stereotypical American non-paroling system is one that offers relatively small credit discounts against sentence length. The best known of all, the federal system, allows 4.5 days of credit per month to nearly all prisoners. If such credits accrue throughout a prisoner's stay, they allow for release just after the 87-percent mark of the judicial maximum term. See Figure 27 below. In the mid-1990s, this was touted as the national template for "truth-in-sentencing" legislation; states were encouraged by federal grants to follow similar formulas.

Figure 27. Federal System Prison Release Timeline for General-Rules Sentences with Good Time Credits

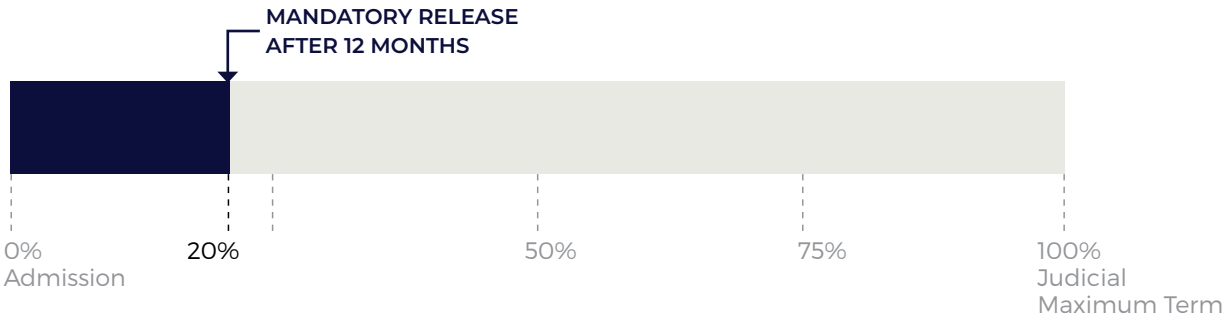


67 The "little-used" release mechanisms mentioned in text have the potential to enlarge and affect the lives of a great many prisoners. There are very few instances in recent history where that has happened. One promising experiment is found in California, which has steadily expanded the scope of "elderly parole" over the past ten years. Elderly parole accounted for a quarter of all parole releases in 2019, even before its most recent expansion in 2021. See Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine, *Prison-Release Discretion and Prison Population Size, State Report: California* (Robina Institute of Criminal Law and Criminal Justice, 2021).

Today, several non-paroling states work with systems that are just as uniformly rigid as the federal system. Arizona, Florida, North Carolina, Oregon, and Virginia have used similar release formulas for nearly all prisoners—with earliest release roughly at the 85-percent mark of maximum terms. On our subjective ranking scale, these six systems have *extremely low degrees of indeterminacy*. We find it more natural to say they operate with an *extremely high degree of determinacy*. Indeed, they are currently the most determinate systems in the country.

Most other non-paroling states apply the 85-percent benchmark to discrete subgroups of prisoners, but probably less than half of their total populations. Minimal credit offerings are common for designated categories of violent offenders, or for especially serious offenses or prior records. States with such targeted rules include: California (release for some prisoners possible only after serving 80 percent of their maximum terms), Delaware (92 percent), Illinois (85 percent), Indiana (86 percent), Kansas (82 percent), Maine (86 percent), New Mexico (88 percent), New York (86 percent), Ohio (87 percent), Washington (90 percent), and the District of Columbia (87 percent). State statutes vary greatly in how they define or list cases that fall in the lowest credit-earning rate. While we have not collected the relevant correctional statistics, we suspect there is considerable jurisdictional variation in the percentages of all prisoners that fall into such categories.

Figure 28. California Prison Release Timeline for Determinate Sentence of 5 Years (Nonviolent Offender with Minimum Custody Assignment, Full Good Conduct, Milestone Completion, and Rehabilitative Achievement Credits and One-Time Award for Education Merit Credits)



Some non-paroling states offer comparatively generous credit discounts to groups of prisoners convicted of less serious crimes or with unexceptional criminal records. Criteria vary greatly, along with the sizes of the qualifying groups. Some states have multiple tiers with differential earning formulas. For example, we have identified one class of sentences in California that offers nonviolent offenders the chance of release as early as 20 percent of their maximum terms. See Figure 28. We doubt this sentence class includes large numbers of people, but it reveals a high water mark of indeterminacy in the California system. For most nonviolent offenders in California's prisons, good performance records yield release dates between the 33- and 50-percent marks of their maximum terms.

For most nonviolent offenders, Illinois sets release dates at 50 percent for good conduct alone (that is, the avoidance of disciplinary violations). See Figure 29. With high earnings of "program credits," we estimate realistically-attainable release dates as early as 30 percent. See Figure 30.

Figure 29. Illinois Prison Release Timeline for General-Rules Sentences with Full Good-Conduct Credits

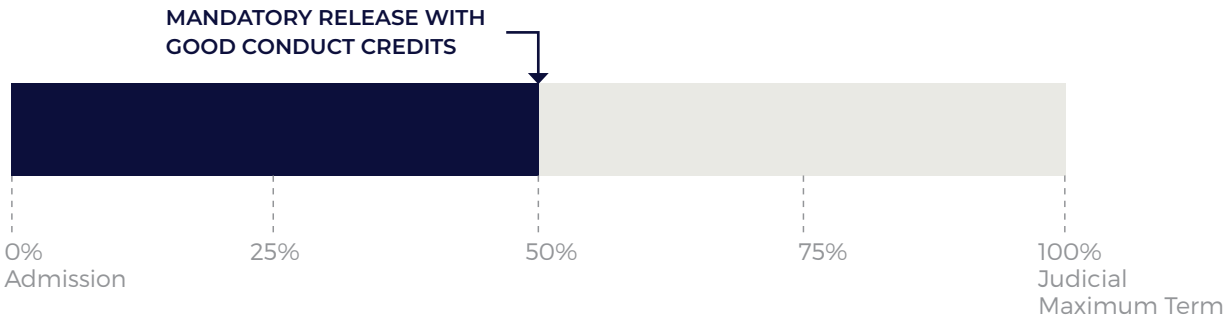
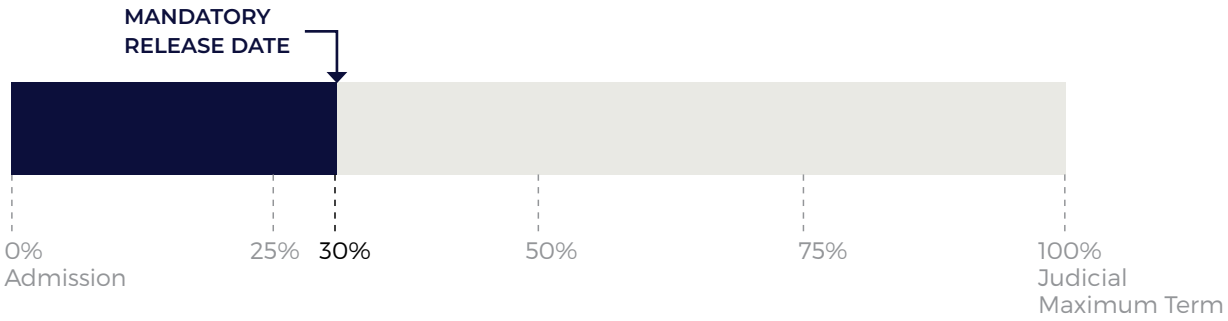


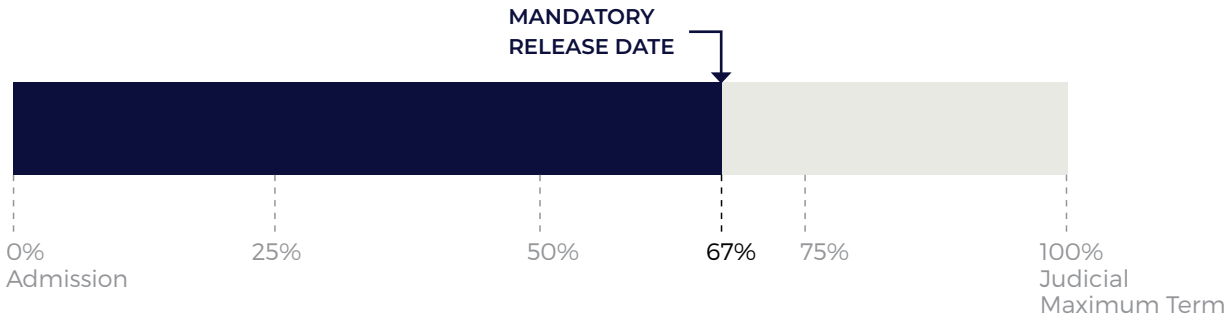
Figure 30. Illinois Prison Release Timeline for General-Rules Sentence of 5 Years with Full Good-Conduct Credits Plus One Year of Program Credits



The above examples from California and Illinois show that, even in non-paroling states, there are classes of prison sentences with high degrees of indeterminacy. In our state reports, we have come across similar examples in Indiana, New Mexico, and Wisconsin.

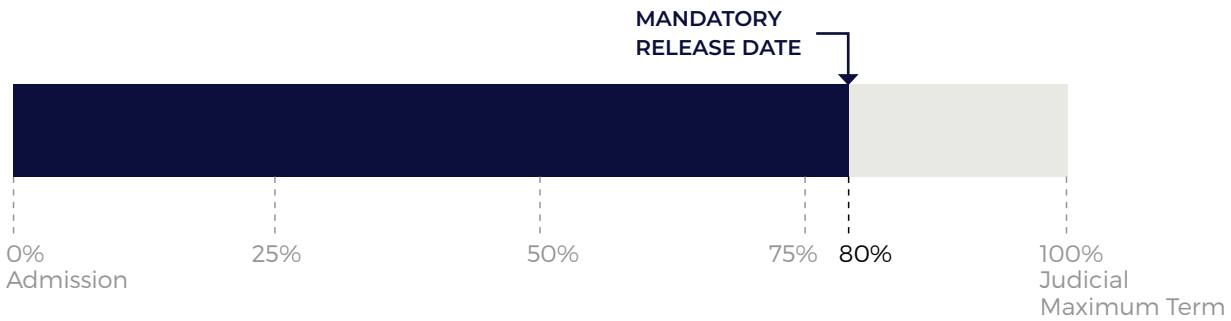
The first state sentencing guidelines systems created in the late 1970s and early 1980s instituted judicial sentencing guidelines while at the same time abolishing parole-release discretion for new prison sentences. The influential "Minnesota model" for "determinate" sentencing guidelines reforms gives most prisoners projected release dates at two-thirds of their judicial maximum sentences. Actual dates of release may be pushed back for serious disciplinary violations, but never farther than their maximum terms. See Figure 31. We have treated the Minnesota model as an exemplar of *low indeterminacy* (or *high determinacy*).

Figure 31. Minnesota Prison Release Timeline for General-Rules Sentences with No Serious Disciplinary Violation



Significantly, credit-based deductions from maximum terms in the Minnesota system are uniform across sentences for nonviolent and violent offenses. There is also evidence suggesting that the great majority of prisoners receive their full discounts, or something close.[68] Many later state guidelines reforms followed Minnesota's across-the-board approach to credit earning levels, although there has been a drift toward lower earning rates. Kansas, North Carolina, Oregon, and Virginia all created non-paroling sentencing guidelines systems with credit-based deductions of 23 percent or less from prisoners' maximum terms. Figure 32 shows the Oregon timeline for general-rules sentences. These systems approach or cross the boundary into *extremely low indeterminacy*.

Figure 32. Oregon Prison Release Timeline for General-Rules Sentences with Full Time Credits



68 *See* Kevin R. Reitz, *Prison-Release Discretion and Prison Population Size, State Report: Minnesota* (Robina Institute of Criminal Law and Criminal Justice, 2022). The Minnesota Supreme Court has stated that extensions of incarceration beyond the presumptive release date should be regarded as a serious matter requiring high threshold conditions. *See* Carrillo v. Fabian, 701 N.W.2d 763, 771-72 (Minn. 2005).

Whatever the potential mathematical effects of credit discounts may be, it is critical to examine how easy and realistic it is for prisoners to earn the credits that are ostensibly on offer. In their basic structural designs, American non-paroling systems diverge significantly on these points. For example, we have estimated for some classes of sentences in Indiana that prisoners can earn 30-percent reductions from their maximum terms, which is not far different from the 33-percent reductions offered in Minnesota. However, in order for Indiana prisoners to win the full 30-percent reduction they must participate in and complete numerous programs, sometimes within a short span of time, so we estimate that only "high-achieving" prisoners will be able to do so. In contrast, in Minnesota the 33-percent reduction is the default rate for ordinary prisoners, who need do nothing exceptional to earn it.

Life sentences in non-paroling systems

In our classifications of states as "paroling" or "non-paroling," we have ignored their treatment of life sentences. All non-paroling states authorize sentences of life without parole (LWOP), at least for aggravated murder. But 10 of the 18 non-paroling jurisdictions in America currently authorize life sentences with the possibility of release for some crimes. The number would be larger if we counted states that offer discretionary release for "juvenile lifers," that is, prisoners with life sentences who committed their crimes while under age 18.[69] (For further discussion of life sentences, see Chapter 9.)

Parole-release discretion and prison population size

On average, American non-paroling jurisdictions place far less power over prison population size at the back end of the prison-sentencing system than in the average paroling state. Often, this was an explicit goal in the original designs of non-paroling systems. There were a variety of motivations for abolition of parole-release discretion in the 20th century, within and across jurisdictions. Some reformers wanted actual lengths of prison sentences to become more "uniform" and less arbitrary or discriminatory; some wanted to ensure greater severity or "truth" in prison sentencing; some were hoping for greater lenity; and some wanted future changes in prison population size to become more predictable and manageable. In the last decade or so of the 20th century, control of prison population size became a paramount objective in many state sentencing guidelines regimes.[70]

Certain broad patterns of prison-rate change have emerged over the last several decades. On average, during the "prison buildup" years of nationwide prison-rate growth to the pinnacle of "mass incarceration" (1972-2007), states that adopted non-paroling systems experienced less per capita prison growth than paroling jurisdictions. This was especially true of non-paroling states that had adopted judicial sentencing guidelines. In contrast, paroling states on average had the highest increments of per capita prison growth nationwide. At the end of the buildup period, the states with the highest standing prison rates were nearly all paroling jurisdictions. This was true even among sentencing guidelines states. Among guidelines jurisdictions, those that retained parole-release discretion saw considerably higher prison growth than in non-paroling guidelines systems.[71]

69 For most juvenile lifers, the U.S. Supreme Court has laid down the constitutional requirement that states must provide a "meaningful opportunity for release." *See Miller v. Alabama*, 567 U.S. 460, 480 (2012).

70 See Richard S. Frase, Just Sentencing: Principles and Procedures for a Workable System (Oxford University Press, 2013).

71 Kevin R. Reitz, Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces, 84 STAN. L. REV. 1787 (2006).

In the post-buildup years (2008 to the present), a different pattern has emerged. Most states have seen reductions in per capita prison rates since their peak rates during the buildup period. (About a quarter of all states have seen continued increases.) Some drop-offs have been much larger than others. One recent survey found that the average prison-rate drop among paroling states has been twice that in non-paroling states.[72] This raises the two-edged possibility that, while prison rates among paroling states grew more readily in the political environment of the buildup era, they are now falling more freely in the post-buildup years.

This pattern is consistent with the observation made in Chapter 4, that time-served practices in paroling systems can be quite flexible and changeable, without any alterations in the legal provisions that govern prison release. The necessary discretion for large policy shifts is already built in. In contrast, non-paroling systems tend to be "stickier" in their time-served outcomes. Meaningful changes in prison population size are less subject to the discretion of back-end decisionmakers; they tend to require formal modifications in positive law such as statutory amendments or revisions to judicial sentencing guidelines.

These general observations gloss over the fact that individual states (both paroling and non-paroling) have had prison-rate histories that do not match the broad averages or trends. For example, the federal sentencing system (a guidelines system with no discretionary parole release) displayed far more prison growth than state sentencing systems with the same institutional structure. In the national law-reform sector, much effort has been expended to investigate best practices in the design and operation of non-paroling systems.[73]

One pressing research need, within the new field of indeterminacy studies, is to study the differences among paroling jurisdictions, to complement the literature that has grown up around non-paroling systems. While non-paroling systems such as those in Minnesota, Washington, Oregon, Kansas, North Carolina, and Virginia can boast deliberately-engineered successes in the control of prison population growth, there are an equal number of paroling states that had comparable low-growth records during the buildup period. These include Massachusetts, New Hampshire, Iowa, Nebraska, North Dakota, and Utah. While it is well understood how certain non-paroling jurisdictions achieved lower prison-growth rates, we lack comparative studies among paroling systems to tease out the relevant correlates and possible causal forces.

72 See Kevin R. Reitz, Measuring Changes in Incarceration Scale: Shifts in Carceral Intensity as Felt by Communities, 23 BERKELEY J. CRIM. L. 1 (2019).

73 *See* American Law Institute, Model Penal Code: Sentencing, Report (American Law Institute, 2003) (extensive comparisons of different American sentencing system models).

Overview of release formulas in non-paroling systems

Table 10 below collects the release formulas for general-rules prisoners in 18 non-paroling jurisdictions. It also describes differences across systems in the requirements for the earning of credits used to reduce time served before release. Finally, the table notes whether or not each non-paroling jurisdiction has retained some form of discretionary release for at least some prisoners with life sentences.

Table 10. Release Formulas for Prisoners in 18 American "Non-Paroling" Jurisdictions

	Earliest release dates for nonviolent or less serious offenders	Earliest release dates for violent or more serious offenders	Requirements for credits to get earliest release date	Are some life sentences parolable?
Arizona	86% of MAX, 70% for some prisoners convicted of low-level drug possession	86% of MAX	Compliance with rules, work performance, and program participation; prisoners convicted of low-level drug possession must complete drug treatment or other required program for higher credit earnings	No (all life sentences are LWOP)
California*	50% of MAX with good conduct credits; 33% with high earnings of additional credits. For those with "minimum custody status," 33% of MAX with good conduct credits; 20% with high earnings of additional credits.	80% of MAX with good conduct credits; 58% with high earnings of additional credits	Good conduct plus milestone, completion, rehabilitative achievement, and educational merit credits	Yes
Delaware**	69% of MAX with high earnings of 3 types of credits	69% of MAX with high earnings of 3 types of credits	Good-time credits for release at 92%; add steady program participation credits for release at 80%; add annual program completion credits for release at 69%	Yes
Florida	85% of MAX	85% of MAX	3 types of "gain time" available, but total reductions capped at 15% of max	No (all life sentences are LWOP except some juvenile life sentences)

	Earliest release dates for nonviolent or less serious offenders	Earliest release dates for violent or more serious offenders	Requirements for credits to get earliest release date	Are some life sentences parolable?
Illinois**	30% of MAX with high credit earnings	60%, 75%, or 85% of MAX for statutorily designated serious offenders	For less serious offenses, full good-time credits set release at 50%; additional credits are available for program participation and educational achievement; for more serious offenders, no credit deductions are available	No (all life sentences are LWOP)
Indiana**	25% of MAX for prisoners convicted of less serious offenses who are classified by DOC at the highest credit-earning level	Depending on DOC classifications, 63% of MAX for some prisoners with high earnings of good-time and educational credits; 86% of MAX for some prisoners ineligible for educational credits	Good-time credits available to all but at different rates per DOC classifications of prisoners into four groups; educational credits available only to prisoners with the two highest classifications	No (all life sentences are LWOP)
Kansas**	77% of MAX with good-time and program credits	82% of MAX with good-time and program credits	Good-time credits plus program completion credits, the latter capped at 60 days per sentence	Yes
Maine	77% of MAX with good-time and program credits for most prisoners convicted of general-rules offenses	86% of MAX with good-time and program credits for prisoners convicted of sexual assault or designated serious violent offenses	Good conduct and program credits combine into one monthly earning rate	No (all life sentences are LWOP)
Minnesota	67% of MAX	67% of MAX	Presumptive release dates are set at beginning of prisoners' terms: serious disciplinary violations can result in penalties of "extended incarceration"	Yes (Commissioner of Corrections is discretionary release decisionmaker)
New Mexico**	35% of MAX with credits for program participation and completion; 50% with program participation credits alone	63% of MAX credits for program participation and completion; 88% with program participation credits alone	Time-based credits for periods of enrollment in programs plus lump-sum credits for program completion	Yes

	Earliest release dates for nonviolent or less serious offenders	Earliest release dates for violent or more serious offenders	Requirements for credits to get earliest release date	Are some life sentences parolable?
North Carolina	83% of MAX	83% of MAX	Earning criteria are within DOC discretion, but good time model likely	No (all life sentences are LWOP except some juvenile life sentences)
Ohio	82% of MAX; mandatory release with full good time and earned time credits	Parole eligibility at 55% of MAX for serious violent offenders with parolable sentences (with full good time and earned time credits); mandatory release at 82% of MAX with full credits	Good time credits capped at 8% deductions plus earned time credits capped at 10% deductions	Yes
Oregon	80% of MAX for nonviolent and some violent offenders	100% of MAX for violent and sexual offenses designated as "Measure 11" offenses (nearly half of all prisoners)	Good-time credits capped at 20% reductions from MAX; earning formulas within discretion of DOC	Yes
Virginia	87% of MAX (scheduled to be reduced to 67% for some offenders by legislation effective in 2022)	87% of MAX	Good-time credits	No (all life sentences are LWOP except some juvenile life sentences)
Washington	67% of MAX for nonviolent and some violent offenses	90% of MAX for statutorily designated serious violent offenses	Good-time credits	Yes
Wisconsin* **	From 10% to 75% of MAX depending on felony class and total MAX sentence selected by court. Judges have discretion to set separate "confinement terms" and "extended supervision terms" in various ratios per eight separate statutory formulas for different felony grades; MAX sentences are the combination of the two, called the "total bifurcated sentence"	From 10 to 75% of MAX depending on felony class and total MAX sentence selected by court	Bad-time system: "confinement term" can be extended for disciplinary violations but not beyond expiration of total bifurcated sentence	Yes (sentencing courts are discretionary release decisionmakers for life sentences instead of a parole board)
District of Columbia**	87% of MAX; 67% of MAX for some nonviolent offenders who complete drug treatment program	87% of MAX	Good-time credits; program completion credits only for eligible nonviolent offenders	Yes

	Earliest release dates for nonviolent or less serious offenders	Earliest release dates for violent or more serious offenders	Requirements for credits to get earliest release date	Are some life sentences parolable?
Federal System	87% of MAX	87% of MAX	Good-time credits	Yes

Sources: 52 State Reports prepared for this project
Note: "Non-paroling" jurisdictions are defined in this project as those that do not offer discretionary parole release in the vast majority of their prison sentences. MAX means the judicial maximum sentence. MIN means the judicial minimum sentence.

*Prison sentences for some nonviolent offenders include discretionary parole release.
**Earliest release dates estimated for realistic credit earnings. When needed to generate percentage estimates, we assume sentences with 5-year maximum terms.
***Wisconsin sentencing courts have substantial power to vary the degrees of indeterminacy in their prison sentences through selection of separate "confinement" and "extended supervision" terms in lengths of varying ratios.

Key Policy Options: The structure of non-paroling system

Policy issue 22: How much indeterminacy should there be in non-paroling prison-sentencing systems?

Non-paroling systems rely exclusively on conduct-based credits to determine actual lengths of term for the vast majority of prisoners. Corrections officials thus hold concentrated power—at the back end of the system—to make decisions that will affect time served and prison population size. There are no checks and balances or offsetting forms of release discretion, as we sometimes find in paroling jurisdictions. When weighing the "right" amount of indeterminacy in the design of a non-paroling system, it is important to recognize that virtually all discretionary releasing power will flow to prison officials.

Tight focus on credit-based indeterminacy has implications for individual prison sentences. In contrast with discretionary parole release, which is a highly discretionary process with few restrictions on the factors that may be considered, credit-based release systems offer a narrowed slate of decision criteria. Heavy reliance on good-time and earned-time credits reflects a belief that policymakers know with reasonable specificity what kinds of behaviors should be encouraged in prisoners in order to obtain release. It also reflects the assumption that credit-earning levels can be calibrated to create the necessary incentives.

While we see no consensus across American non-paroling jurisdictions on how to structure credit-based systems, the merits of different philosophies concerning desired behaviors and effective incentives are empirically testable. There is room for evidence-based inquiry into best practices and workable system designs.[74]

Policy issue 23: Should there be separate rules and formulas for the obtaining of credits for violent versus nonviolent offenders (or prisoners with more and less serious offenses of conviction)?

While many states apply different credit-earning rates to prisoners convicted of less serious and more serious offenses, what are the rationales for differential treatment? We wonder if it is coherent policy to offer the lowest credit-earning rates to violent and other serious offenders. Research suggests that rehabilitative programming can have its greatest positive effects on high-risk and high-needs participants. In non-paroling systems, where credit discounts are the major instrument of back-end discretion, this question comes into especially clear focus.

74 For example, see Elizabeth K. Drake, Robert Barnoski & Steve Aos, *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs, Revised* (Washington State Institute for Public Policy, 2009).

Policy issue 24: What is the relationship between varying degrees of indeterminacy in non-paroling systems and the generation of prison population size?

One leading policy issue to be weighed when setting credit-discount levels in non-paroling systems is the amount of front-end control and back-end predictability that is desired by policymakers. As mentioned earlier in this chapter, some non-paroling states have designed prison-sentencing systems with the express purpose of moving control over time served heavily toward the front end. In non-paroling jurisdictions, this result can be furthered or avoided through the single "hinge" of credit formulas.

In non-paroling jurisdictions, the scope of the DOC's power to influence time served has direct whole-system effects. As DOC power shrinks (that is, as degrees of indeterminacy dwindle), more and more prison-sentencing discretion shifts to the front end of the system. When back-end officials have less to do, front-end actors such as sentencing commissions, judges, and prosecutors become dominant players in the determination of actual time served and the resulting effects on prison population size.

This study has not investigated the relative advantages of systems that place a great amount of time-served authority at the back end of their prison sentencing systems and those that do not. This is a complex question of enormous importance. The point we stress here is that, whatever overall policy a non-paroling jurisdiction decides to pursue with respect to front-end versus back-end power, the desired result must be reflected in the "size" of the DOC's authority to influence sentence length.

Policy issue 25: How easy or difficult should it be for prisoners to earn the credits needed to win deductions from their maximum terms?

We have already discussed this policy issue in general terms in Chapter 6. Here we make the additional point that the practical ease or difficulty of accumulating credits against sentence are especially important in non-paroling systems because credits are the only major variable in the setting of prisoners' release dates.

CHAPTER 9

Life Sentences

The subject of life sentences is enormously important nationally and internationally. A large literature has grown up around it.[75] In this chapter, we do not engage with the subject in its broadest terms, nor do we survey or comment on preexisting discussions. Rather, our goal is to offer observations about the degrees of indeterminacy found in different kinds of life sentences. We limit ourselves to insights gained in this project in the hope they may add new perspectives to a much-discussed set of issues.

From the point of view of this project, the story of American life sentences since the mid-20th century has been one of dramatically shrinking indeterminacy. This has occurred through growth in the numbers of life sentences without parole (LWOP) along with the near-universal lengthening of minimum terms attached to parolable life sentences. Within this context of diminishing indeterminacy, there is evidence that, over the past several decades, it has become increasingly difficult for back-end decisionmakers to make use of the reduced release discretion they still possess for life prisoners. In other words, parole boards have felt increasingly impelled to use their release-*denial* discretion rather than their *release* discretion.[76]

There are many different types of life sentences. Some offer little or no prospect of release during prisoners' natural lives, while most contemplate the possibility of release with various eligibility formulas, decisional processes, and practical odds of success. Nationally in 2020, about 12 percent of people in US state prisons were serving life sentences, but the proportions varied widely across individual states. For example, life sentences made up roughly one-third of the total prison populations in California and Utah, 27 percent in Massachusetts, less than seven percent in Texas, and less than one percent in Connecticut.[77]

The DOIs of life sentences

Under our definitions, the degree of indeterminacy (DOI) in a life sentence depends on the amount of unpredictability, at the time the judicial sentence is imposed, of the actual date on which the prisoner will be released. On the day of sentencing, actual *time-to-be-served* is unknown. But for most life sentences, we can generate broad estimates of the range of possibilities.

75 *See, e.g.*, Marc Mauer & Ashley Nellis, The Meaning of Life: The Case for Abolishing Life Sentences (The New Press, 2018); Dirk van Zyl Smit, Life Imprisonment: A Global Human Rights Analysis (Harvard University Press, 2019); Christopher Seeds, *Life Sentences and Perpetual Confinement*, 4 Ann. Rev. Criminol. 287 (2021).

76 Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment* (Sentencing Project, 2021), at 13 figure 1 (reporting a total of roughly 30,000 prisoners serving life sentences in 1984, which increased to more than 150,000 by 2019); Christopher Seeds, *Life Sentences and Perpetual Confinement*, 4 Ann. Rev. Criminol. 287 (2021).

77 These figures are based on a 2020 survey of American jurisdictions reported in Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment* (The Sentencing Project, 2021), at 10 table 1.

Life without parole

We consider sentences of life without parole (LWOP)[78] to be nearly 100 percent determinate, with a DOI approaching zero. An LWOP sentence would be entirely predictable if we were fully certain a particular prisoner will never be released. However, in every state there are at least one or two extraordinary avenues of release that could be applied to LWOP prisoners. These include executive clemency, compassionate release (especially medical and geriatric parole), and any future prospect of retroactive softening of LWOP penalties by the legislature. Throughout this project, we have treated such infrequently-used release mechanisms as nonfactors in our analysis of the DOI of individual sentences or classes of sentences. For analytic consistency, when comparing LWOP sentences with all other classes of prison sentences analyzed in this project, we will treat them as having a DOI of zero (with an asterisk).

Under the current laws in 13 states and the federal system, LWOP sentences are the only type life sentences that may be imposed on adult defendants. In other words, these jurisdictions do not authorize parolable life sentences under their current laws. See Table 11 below, first column. Interestingly, six of the LWOP-only states authorize discretionary parole release for the majority of their non-life prisoners: Arkansas, Iowa, Louisiana, Pennsylvania, South Dakota, and Wyoming. And six LWOP-only states are non-paroling jurisdictions for most prisoners: Arizona, Florida, Illinois, Indiana, Maine, North Carolina, and Virginia (plus the federal system). In short, states that have ruled out discretionary release for life prisoners do not necessarily take the same view with respect to sentences for terms of years.[79]

Life with the possibility of parole

The DOIs of sentences with the possibility of parole (LWP) are difficult but not impossible to model using the general methods of this project. Nearly all such sentences have a date of earliest possible release, usually called a "minimum term." There is no numerical judicial maximum sentence, however, short of the end of a prisoner's natural life. For our timeline models, we use life expectancy as a stand-in for LWP maximum terms. We have chosen 45 years to represent the average life expectancy of newly-admitted prisoners.[80] This allows us to make DOI estimates for different classes of LWP sentences.

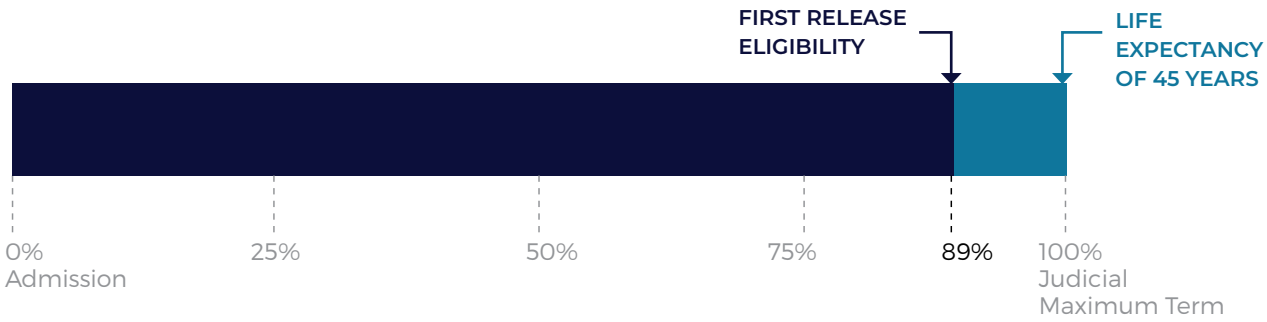
For example, suppose *State A* were to authorize LWP sentences with 40-year minimum terms for designated offenses. Our mathematical expression of the DOI of these sentences would be 11 percent, see Figure 33 below. Such sentences on average are 89 percent determinate. Alternatively, suppose the case of LWP sentences with 15-year minimum terms. In our mathematical model, such sentences as a class would have a DOI of nearly 67 percent, as shown in Figure 34. By our estimate, they are 33 percent determinate.

78 We refer to all life sentences without the prospect of release as LWOP sentences. This allows the abbreviation to be applied to state systems in which life sentences *with* the prospect of release are subject to the release discretion of an official actor other than a parole board.

79 The same inconsistency of philosophy the treatment of life sentences exists in states that have abolished parole release discretion for ordinary prison terms. Looking to the 18 American "non-paroling" jurisdictions, ten retain the possibility of parole release for most life sentences (California, Delaware, Kansas, Minnesota, New Mexico, Ohio, Oregon, Washington, Wisconsin, and the District of Columbia).

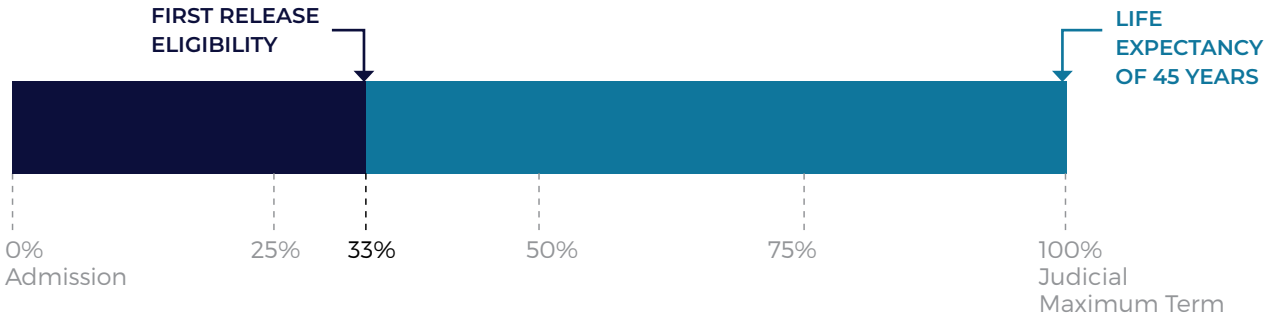
80 This assumes an average age at admission of 30-35 and a life expectancy to age 75-80. The "fit" with demographic statistics from any particular state will only be approximate. Also, there is evidence that life expectancy for long-term prisoners is significantly shorter than for the general population. See Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State*, 1989–2003, 103 American Journal of Public Health 523, 526 (2013) (estimating, "for somebody who spent 5 years in prison … a loss of approximately 10 years in the expected life expectancy at age 30 years."). If so, our analysis of different classes of life sentences will tend to overstate their degrees of indeterminacy.

Figure 33. Prison Release Timeline for Parolable Life Sentence with 40-Year Minimum Term



Variations in state laws

Figure 34. Prison Release Timeline for Parolable Life Sentence with 15-Year Minimum Term



To make standardized comparisons among the states, we have surveyed the lengths of minimum terms for murder convictions that carry parolable life sentences as authorized penalties. In most states, the most aggravated forms of murder are punishable by LWOP or even the death penalty. Our focus here is on the degree of indeterminacy in life sentences that fall immediately below this "most-aggravated" level. These are the most severe LWP penalties available in each jurisdiction—at least if we assume a single rather than multiple convictions.[81]

Table 11, second column, collects this information for 52 jurisdictions as of 2021. We have not looked back to the applicable laws in earlier decades, but we know that minimum terms for parolable life sentences were generally shorter in the mid-20th century than they are today. The original Model Penal Code,

81 Some states allow the "stacking" of minimum terms when two or more life sentences are imposed consecutively. We did not include this practice in the project's 52-jurisdiction survey

approved in 1962, contemplated life sentences with minimum terms no longer than ten years.[82] Among the 37 American jurisdictions that allow parolable life sentences (36 states and the District of Columbia), 26 currently require minimum terms of 25 years or more for the most severe of those sentences. Eleven impose minimum terms of 20 years or less. Only two states authorize minimum sentences as low as 10 years for the most serious classes of LWP sentences.[83] Marc Mauer and Ashley Nellis collected several examples of individual states that have increased minimum terms for life prisoners:

> For example, a 1994 law in Missouri extended the initial wait time before parole consideration from thirteen years to twenty-three years. … In Georgia, persons serving life sentences for serious violent felonies committed before 1995 were eligible for parole after seven years. In 1995 the legislature doubled this period to fourteen years. The statute was revised again in 2006, requiring a thirty-year period before initial parole review on a life sentence for persons convicted of any of seven serious, violent felonies …. Similarly, a life sentence with the possibility of parole in Tennessee now requires that a minimum of fifty-one years be served before meeting with the parole board.[84]

Juvenile life sentences

The DOIs of life sentences imposed on juvenile offenders (those who were under age 18 at the time of their crimes) is a special category in American law.[85] Compared with other Western democracies, the U.S. imposes large numbers of juvenile life sentences. Such sentences have been regulated by a relatively new subfield of constitutional law beginning with the Supreme Court's 2010 decision in *Graham v. Florida*, holding LWOP an unconstitutional penalty when applied to juvenile offenders for non-homicide offenses.[86] Under *Graham* and later cases, certain findings must be made at sentencing before a juvenile defendant may be given an LWOP sentence (often abbreviated "JLWOP").[87] Although

82 *See* American Law Institute, Model Penal Code: Proposed Official Draft (American Law Institute, 1962), Section 6.07(1) (extended sentence for first degree felony; minimum term can be no longer than 10 years).

83 One of these two states, Hawaii, places the length of the minimum term for the most severe parolable life sentences within the discretion of sentencing courts, with no stated limitation. We classify this approach as allowing for minimum terms of 10 years of less in individual cases.

84 Marc Mauer & Ashley Nellis, The Meaning of Life: The Case for Abolishing Life Sentences (The New Press, 2018), at 31-32. Our research shows that Tennessee has increased minimum terms for the most serious class of life sentences to 60 years.

85 There is a large literature on the specialized topic of juvenile life sentences in the U.S. See, e.g., Stuti S. Kokkalera & Simon I. Singer, *Discretionary Release Practices for Juveniles Facing Life: A Review of State Parole and Resentencing Procedures*, in Cassia Spohn & Pauline K. Brennan eds., Handbook on Sentencing Policies and Practices in the 21st Century (Routledge 2019); Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 Harv. Civ. Rts.-Civ. Lib's L. Rev. 455 (2019); Kathryn Monahan, Laurence Steinberg, and Alex R. Piquero, Juvenile Justice Policy and Practice: A Developmental Perspective, in Michael Tonry ed., 44 Crime and Justice 577 (2015); Perry L. Moriearty, The Trilogy and Beyond, 62 SD. L. Rev. 539 (2017) (discussing the Supreme Court's decisions in *Roper v. Simmons; Graham v. Florida; and Miller v. Alabama); Ashley Nellis, The Lives of Juvenile Lifers: Findings from a National Survey* (Sentencing Project, 2012).

86 560 US 48 (2010) (holding life without parole an unconstitutional penalty when applied to a juvenile offender for a non-homicide offense).

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

new JLWOP penalties have not been ruled out by the Court for homicide, this line of cases had the effect of invalidating a large share of previously-imposed JLWOP sentences.[88] In addition, the *Miller* decisions have helped spur 26 states to abolish JLWOP as a matter of state constitutional or statutory law—a trend that is likely to continue.[89]

Table 11 summarizes the current approaches of 52 American jurisdictions. Oddly, in several states, minimum terms for parolable juvenile life sentences (JLWP) are longer than those authorized for the most serious LWP sentences for adults. We assume this is because some states have replaced some or all JLWOP sentences with JLWP sentences, while LWOP remains a viable sentence for adults.

Apart from the reduced numbers of JLWOP sentences that remain on the American landscape, the Supreme Court has required that all other juvenile lifers must be afforded a "meaningful opportunity to obtain release" during their lifetimes.[90] So far the Supreme Court and the lower courts have not given precise definition to this requirement. We cannot yet say if any particular DOI is required to supply a "meaningful opportunity" of release, nor do we know what manner of process or decision rules are adequate to meet the Court's requirement.

Indeterminacy and juvenile life sentences

Using this project's terminology, the Supreme Court's jurisprudence in this area has focused on the DOIs of juvenile life sentences. So far the Court has placed no restrictions whatever on life prison terms as maximum sentences for juveniles. Rather, the Court has been concerned with time-served determinations within the high ceiling of a possible lifetime prison term.

Our chief observation in this domain is that, while the Court's rulings focus on the DOIs of juvenile life sentences, the Court has created no conceptual framework or language to permit meaningful analysis. Only one thing is clear. We know that, for many juvenile lifers, a DOI of zero is not permissible. Beyond that, the leading decisions give little guidance as to how much indeterminacy is needed to supply a "meaningful opportunity for release."

Mississippi, No. 18–1259, 141 S. Ct. 1307 (2021) (holding that sentencing courts are not required to make a factual finding of "permanent incorrigibility" before sentencing a juvenile offender to life without parole so long as court has considered the defendant's youth before imposing the LWOP sentence).

88 *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) (holding Miller's prohibition on mandatory LWOP for juvenile offenders must be given retroactive effect).

89 See Josh Rovner, *Juvenile Life Without Parole: An Overview* (The Sentencing Project, 2020); Campaign for the Fair Sentencing of Youth, *29 States and DC Ban or Have No One Serving Life Without Parole for Children*, at https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/, visited July 26, 2021. We base our count on the individual state reports prepared for this project.

90 *Graham v. Florida*, 560 U.S. 48, 75 (2010) ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.").

Table 11. Indeterminacy in Life Sentences: Current Laws in 50 American States, DC, and Federal System

	No parolable life sentences for adults	Longest minimum term for parolable life sentence for murder	Longest minimum term for juveniles with parolable life sentences	Life without parole for juveniles abolished	Comments
Alabama		30 years	30 years		
Alaska	NA	NA	NA	√	Alaska is the only state that does not authorize life sentences for any offense, although sentences of up to 99 years are authorized for first-degree murder. For aggravated first-degree murder, 99-year sentences carry no prospect of parole release—the functional equivalent of LWOP sentences.
Arizona	√	NA	NA		Imposition of new sentences of life with parole eligibility was barred by statute in 1994, but continued to be imposed by sentencing courts with MIN terms of 25 or 35 years. Arizona's legislature awarded retroactive effect to such sentences imposed prior to August 3, 2018, but all life sentences must be LWOP from that date forward.
Arkansas	√	NA	30 years	√	Parolable life sentences have been unavailable in Arkansas since 1969
California		25 years	24 years	√	
Colorado		40 years	40 years	√	Minimum terms for juvenile life sentences are reducible by earned-time credits to as low as 20 years
Connecticut		30 years	30 years	√	Juvenile offenders with non-life sentences longer than 50 years become eligible for parole after 30 years (while adults must serve 85% of their maximum terms)
Delaware		45 years	30 years	√	Juvenile lifers may petition sentencing court for sentence modification after 30 years
Florida	√	NA	25 years		
Georgia		30 years	30 years		

	No parolable life sentences for adults	Longest minimum term for parolable life sentence for murder	Longest minimum term for juveniles with parolable life sentences	Life without parole for juveniles abolished	Comments
Hawaii		In discretion of parole board	In discretion of parole board	√	After LWOP prisoners have served 20 years, parole board must offer recommendation to governor on advisability of commuting LWOP sentence to a parolable life sentence.
Idaho		At least 10 years, or more in discretion of sentencing court	Juvenile LWOP sentences reviewed case-by-case by Idaho Supreme Court		
Illinois	√	NA	NA	√	Longest maximum sentences for juveniles capped at 40 years.
Indiana	√	NA	No statute or caselaw on point		Offenders may be sentenced to LWOP for murder if the state proves beyond a reasonable doubt the existence of at least one aggravating circumstance during the sentencing hearing. Generally, the sentencing hearing for murder is held before a jury, and the procedural requirements necessary to sentence an offender to death are also required to sentence an offender to life without parole.
Iowa	√	NA	In discretion of parole board unless set by sentencing court	√	As a matter of state constitutional law, mandatory MIN penalty laws cannot be applied to juveniles; courts have discretion to impose shorter minimum terms or suspend sentences
Kansas		25 years	25 years	√	
Kentucky		25 years	25 years	√	Kentucky Supreme Court held in 1968 that JLWOP sentences were unconstitutional under state constitution
Louisiana	√	NA	25 years		Generally, no inmate serving a life sentence is eligible for parole consideration unless the sentence has been commuted to a term of years.
Maine	√	NA	NA		Although JLWOP not abolished, Maine has never imposed such a sentence

	No parolable life sentences for adults	Longest minimum term for parolable life sentence for murder	Longest minimum term for juveniles with parolable life sentences	Life without parole for juveniles abolished	Comments
Maryland		25 years	25 years		Prisoners with JLWOP sentences may only be released through pardon or remission of sentence by governor
Massachusetts		25 years	30 years	√	
Michigan		20 years	25 years		
Minnesota		30 years	30 years		Commissioner of Corrections is discretionary release decisionmaker for prisoners with life sentences rather than a parole board.
Mississippi		20 years	20 years		
Missouri		15 years	25 years		
Montana		30	No statute or caselaw on point		
Nebraska		20 years	40 years		
Nevada		20 years	20 years	√	MIN terms for juveniles can be no longer than 15 years in cases in which no victim has died.
New Hampshire		18 years	18 years		
New Jersey		25 years	NA	√	Longest maximum sentences for juveniles capped at 25 years.
New Mexico		30 years	30 years		New Mexico Supreme Court held in 2018 that a juvenile defendant's 91 and one-half year term did not deprive the defendant of a meaningful opportunity to obtain release because the defendant could become eligible for release through meritorious deductions as early as age 62
New York		20 years	20 years	√	Sentencing courts have discretion to set longer minimum terms within statutory ceilings

	No parolable life sentences for adults	Longest minimum term for parolable life sentence for murder	Longest minimum term for juveniles with parolable life sentences	Life without parole for juveniles abolished	Comments
North Carolina	√	NA	25 years		MIN no longer than 20 years for prisoners who were juveniles at time of offense provided no death occurred, even for multiple counts, this MIN reducible by good time credits.
North Dakota		30 years	30 years	√	Juvenile lifers may petition courts for reduction of sentence after 20 years
Ohio		30 years	25 years	√	
Oklahoma		38 years	38 years		
Oregon		30 years	15 years	√	15-year MIN term for juveniles applies to all long sentences, not just life sentences; also, sentencing courts have "second look" responsibility to review all juvenile sentences after 50 percent of MAX
Pennsylvania	√	NA	35 years		Juvenile offenders under age 15 at the time of their offenses receive minimum terms of 25 years with life sentences
Rhode Island		25 years	25 years		Imposition of LWOP requires findings of aggravating factors at sentencing much like death penalty procedures in many states; JLWOP not abolished but Rhode Island currently has no prisoners with such a sentence
South Carolina		30 years	30 years		
South Dakota	√	NA	No statute or caselaw on point	√	Juvenile life sentences converted to term of years subject to state's matrix of parole eligibility formulas (longest MIN term is 75% of MAX)
Tennessee		51 years	51 years		Life sentences with prospect of release are counted as sentences with 60-year MAXs and the potential of 15% discount from credit earnings; this is a movable MRD approach rather than discretionary parole release
Texas		30 years	40 years	√	

	No parolable life sentences for adults	Longest minimum term for parolable life sentence for murder	Longest minimum term for juveniles with parolable life sentences	Life without parole for juveniles abolished	Comments
Utah		25 years	25 years	√	LWOP sentences are effectively abolished in Utah; parole board has authority to grant release if it finds by clear and convincing evidence that the person is permanently incapable of being a threat to the safety of society
Vermont		35 years	35 years	√	
Virginia	√	NA	20	√	MIN terms for non-life sentences are never longer than 20 years for prisoners who were juveniles at time of offense.
Washington		25 years	25 years	Abolished for those under 16 at the time of offense	MIN never longer than 20 years for most prisoners who were juveniles at time of offense no matter how long their maximum terms; exceptions for aggravated murder and serious sex offenders with indeterminate sentences
West Virginia		10 years	15 years	√	
Wisconsin		20 years	20 years		At sentencing, courts have discretion to set longer minimum terms with no statutory ceiling. Sentencing courts decide upon discretionary release of life prisoners rather than a parole board.
Wyoming	√	NA	25 years	√	Life sentences for adults become parolable only through commutation by the governor; LWOP sentences may not be commuted but are subject to full pardons.
District of Columbia		30 years	Determined by sentencing court	√	
Federal System	√	NA	No statute or caselaw on point		

Sources: 52 State Reports prepared for this project, Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment* (Sentencing Project 2021); Campaign for the Fair Sentencing of Youth, *29 States and DC Ban or Have No One Serving Life Without Parole for Children*, at https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/, visited July 26, 2021.
Note: MAX means the judicial maximum sentence. MIN means the judicial minimum sentence.

Key Policy Options: Life Sentences and Other Extremely Long Sentences

Policy issue 26: What degrees of indeterminacy should be included in life sentences for adults?

If we assume sentences with maximum terms equal to prisoners' natural lives are permissible and appropriate in some circumstances, questions about their degrees of indeterminacy depend on the lengths of their minimum terms. For DOI policy analysis, we find it useful to fill in an estimated term of years that tracks the average life expectancy of prisoners with life sentences at their admissions to prison. For individual cases, it may be more fruitful to substitute the life expectancy of the particular person whose punishment is under discussion. The best approach may depend on the question one is asking: for general systemwide evaluations, we think average life expectancy is a useful benchmark.

Over the past several decades and across the states, there has been a sharp rise in the duration of minimum terms for LWP sentences. We know of no sustained policy analysis that supports longer versus shorter minimums for different classes of parolable life sentences. We suspect that the lengthening of minimum terms in the late 20th century was largely a retributive impulse. If so, it should be reexamined periodically. Retributive emotions in some U.S. jurisdictions may not be the same today as they were during the years of prison buildup to mass incarceration. We would also encourage future analyses of the utilitarian bases for extremely long minimum terms in LWP sentences. Given the 21st century's heightened concern with questions of prison population size, it is fair to inquire into LWP's crime-reduction benefits.

We note that the questions raised above are equally applicable to maximum sentences expressed in terms of years in the range of 45 or more years. Depending on the age of the defendant at time of sentencing, maximum sentences in this ballpark are the functional equivalents of life terms.

We do not comment on the propriety of LWOP sentences. Life sentences that are 100 percent determinate raise the questions discussed above: When does today's society require such punishments for retributive purposes? On utilitarian grounds? We believe the growth of LWOP in the late 20th century had much to do with supplying an alternative to the death penalty, which may not be a rationale that stands the test of time.

Policy issue 27: How long should waiting periods be for eligible lifers between denial of release and the date of reconsideration?

As mentioned in Chapter 4, important policy questions are raised when setting the waiting period between a denial of release at first eligibility and subsequent reconsiderations. In some states, waiting periods for lifers are considerably longer than for prisoners with shorter sentences. Given the existence of lengthy minimum terms in the first instance, greater thought should be given to the necessity for elongated waiting periods. Are there sound retributive or utilitarian justifications for such policies?

Policy issue 28: What degrees of indeterminacy should be included in life sentences for juveniles? How much indeterminacy is necessary to furnish juvenile lifers with a "meaningful opportunity for release?"

Putting aside the ongoing debate over juvenile life sentences, we restrict ourselves to insights that flow directly from this project. First, we think translation of life maximum sentences into estimated life expectances yields larger spans of time for juvenile offenders than for adults. We would propose that 10 or 15 years be added to the life expectancy estimates for adults. Juvenile life sentences should be envisioned as the equivalent of 55–60-year maximum terms. For this reason alone, life sentences for juveniles are automatically harsher for juveniles than for adults.

Within this higher maximum ceiling, the Supreme Court has required that JLWP sentences must provide a "meaningful opportunity for release." This legal standard will continue to be litigated and refined in the coming years. The question will turn to some degree on lengths of minimum terms. Under our analysis, minimum terms of 55-60 years convert JLWP sentences into the functional equivalent of JLWOP. At some point, based on average life expectancy statistics or those applied to specific defendants, JLP sentences directly implicate the concerns of *Graham v. Florida* and later decisions. Short of this, the Supreme Court has not yet ruled whether minimums as long as 30 or 40 years will be found constitutionally permissible. The Court has said, however, that the "meaningful prospect" standard must allow for "release based on demonstrated maturity and rehabilitation." In our minds, this raises a timeline question: At what point do minimum JLWP terms become so long that they violate this constitutional standard?

Policy issue 29: What is the relationship between varying degrees of indeterminacy in life sentences and prison population size?

For prisoners with LWOP sentences, their numbers in the prison population are entirely determined by decisionmakers at the front end of the prison-sentencing system. Prosecutors, judges, and sometimes juries are the key actors. For LWP sentences, control of prison population size is divided across the front and back ends. The lower the degree of indeterminacy in such sentences (that is, the longer the minimum terms), the greater the amount of control that resides at the front end of the system. Systems that desire to place resource controls on prison population size must look to the parts of the system in which the determinative decisions are made. For LWOP sentences, for example, such controls would have to be entirely at the front end through such means as statutory limitations, prosecutorial guidelines, judicial sentencing guidelines, judicial "departure authority" from mandatory LWOP sentences, and heightened procedural prerequisites for the imposition of LWOP sentences.

We see release-denial discretion as a salient consideration in the context of LWP sentences and their impact on prison population size. Even when minimum terms have expired, predictably high rates of release denials effectively make life sentences more determinate than they appear on paper. For example, if lifers with 25-year minimum terms are almost never released until they have served 35 years, there is little meaningful indeterminacy in between years 25 and 35. The court's sentence was a virtual guarantee of 35 years of time served. The softening of inflexible release-denial discretion for lifers will ultimately carry effects on prison population size, especially in jurisdictions with large numbers of lifers. We have been intrigued to see that California has steadily increased the chances of release for life prisoners over the past 20 years.[91]

91 *See* Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine, *Prison-Release Discretion and Prison Population Size, State Report: California* (Robina Institute of Criminal Law and Criminal Justice, 2021), at https://robinainstitute.umn.edu/publications/prison-release-discretion-and-prison-population-size-state-report-california.

Policy issue 30: For eligible lifers should state prison-sentencing systems rely on good-time credits, earned-time credits, or a combination of both? What sentence milestones should credits be counted towards for lifers? Should credits advance minimum parole-eligibility dates, mandatory release dates, or both?

Some states allow prisoners with life sentences to accumulate good-time or earned-time credits that may be applied to shorten their minimum terms to parole eligibility. As we discussed in Chapter 4, we regard this as a relatively weak form of release discretion.

The other major use of credit-based discounts is to apply them as deductions from maximum terms, so that prisoners' mandatory release dates (MRDs) advance earlier and earlier as credits accumulate (provided they are not forfeited). We devoted all of Chapter 5 to highlighting the different approaches of implementing of the use of "movable MRDs."

We think it is worth considering whether such a mechanism could be imported into the domain of life sentences. Such a scheme would require conversion of life maximum sentences into terms of years for purposes of establishing the initial milestones for moving MRDs. As we have done in this report, one could posit a proxy value of 45 years or something similar, with the opportunity of movable MRDs that would advance earlier than the 45-year mark with the accrual of credits. If no credits are earned or all are forfeited, the maximum sentence would remain or revert to a life term.

In Chapter 5, we were intrigued by the fact that advancing MRDs can be designed to introduce checks and balances into the prison-release system. Instead of placing all decisional pressure on parole boards, prison officials would gain meaningful and unilateral release discretion all their own. This is an approach that some states may wish to consider in the domain of life sentences.

Conclusion

This report offers new methods, models, and measurements for the study of indeterminacy in prison-sentencing systems. It creates and refines terminology to better support policy-relevant analysis. It breaks down time-served discretion into its constituent parts, and follows such authority as it rises and falls across the full chronology of a prison sentence. The report also highlights numerous findings from a comprehensive survey of the institutional frameworks for prison-release discretion all 50 U.S. states, the District of Columbia, and the federal system. Standing by itself, this project casts new light on many aspects of American prison-sentencing policy. Yet it is only a beginning. We regard it as a first foray into a new subfield of criminal sentencing policy.

If we are correct about the importance of the subject matter, the study of indeterminacy in prison sentencing merits continuing interest among researchers and responsible government officials. This report has raised numerous policy questions without presuming to supply easy answers. Indeed, we can see that each separate policy issue presented in this report could support a full study or academic article all its own.

There is much more work to be done in the policy examination of prison release discretion. No doubt there are questions to be posed and insights to be offered well beyond those that we have thought of. There are a variety of philosophical points of view that could be brought to bear, each opening distinctive doorways. The actual operation and outcomes of indeterminacy in prison sentencing must be examined by researchers across disciplines, including some with quantitative skills and experience in the untangling of criminal justice data. Single-site and comparative studies will be needed. Because there are so many autonomous prison-sentencing systems in America, no one can see across them all. A new subfield of "indeterminacy studies" could accommodate many interested parties.

Marvin Frankel once said that the work of criminal sentencing reform is "not for the short-winded." Indeed, it is a never-ending endeavor that requires the energies and commitment of successive generations of lawmakers, practitioners, academics, and reformers. This report represents one new offering toward the longer-term improvement of American incarceration policy. We very much hope it is not the last word on the subject.

Appendices

Appendix Table A-1. Major Sources of Back-End Release Discretion in 50 American States, DC, and Federal System

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
Alabama	**Parole board**	**DOC**	**Legislature** makes most clemency decisions. **Governor** has clemency power for death sentences only.	**Commissioner of Corrections** has discretion to issue medical furloughs.	No	
Alaska	**Parole board**	**DOC**	**Governor**	**Parole board** may grant medical and geriatric release per statutory criteria. Prisoners age 60 or older are eligible for geriatric release if they have served 10 years.	No	**Sentencing courts** have discretion to lengthen defendants' minimum sentences or order them ineligible for parole release
Arizona		**DOC**	**Governor,** but only on recommendation of **Board of Clemency**	**DOC** has authority to authorize temporary medical relief	Emergency release power for overcrowding limited to first-time offenders convicted of certain low-level offenses who have served at least six months	
Arkansas	**Parole board**	**DOC**	**Governor,** following investigation by Parole board	**Parole board** has authority to release prisoners to medical parole following notification by the Director of the DOC or Director of the Division of Community Correction	During overcrowding emergency, release eligibility or mandatory release dates can be moved up for prisoners designated by DOC by as much as 90 days	**Sentencing commission**. For majority of all offenses, sentencing guidelines sort offense classes into seriousness levels to determine applicable parole release eligibility formula
California	**Parole board** (for small groups of non-life prisoners)	**Dept. of Corrections & Rehabilitation (CDCR)**	**Governor,** subject to review by California Supreme Court for "abuse of power."	**Parole board** has authority to release prisoners to medical parole or "elderly parole" (for 50+ who have served 20 years)	No	Discretionary parole release is available for non-LWOP life sentences, some nonviolent offenders, and some prisoners whose crimes were committed while under age 25. Governor has final parole release discretion in murder cases. Eligibility for "elderly parole" has been significantly expanded in recent years.

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
Colorado	**Parole board**	**DOC**	**Governor.** Executive Clemency Advisory Board may make recommendations.	**Parole board** has authority to release prisoners to "special needs parole" (medical needs) or authorize parole for a "special needs offender" which includes geriatric provision	Early consideration of limited classes of prisoners for release by parole board; prisoners must be low risk and close to mandatory release	
Connecticut	**Parole board**	**DOC**	**Parole board**. Governor's powers limited to "temporary reprieves" after conviction	**Parole board** has authority to release prisoners to medical parole	No	
Delaware		**DOC**	**Governor.** Governor has authority to issue commutations and pardons only if recommended by a majority of the **Board of Pardons**.	**Parole board** has broad authority to release prisoners for physical or mental conditions.	No, but see comment	Delaware grants judicial sentencing modification power for most prisoners throughout their terms, requires prior approval of DOC and parole board, specifically includes prison overcrowding
Florida		**DOC**	**Governor** may grant pardons, restore civil rights, commute punishments	**Parole board** has discretionary authority to grant conditional medical release	No	
Georgia	**Board of Pardons & Paroles**		**Board of Pardons and Paroles** has power of executive clemency, granted by the state constitution	**Board of Pardons and Paroles** may issue medical reprieve for "debilitating terminal illness" as well as to any person age 62 or older	If **Governor** declares state of emergency for overcrowding, **Board of Pardons and Paroles** must parole a sufficient number of non-dangerous prisoners to reduce prison population to 100% capacity.	

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
Hawaii	**Hawaii Paroling Authority**		**Governor.** The governor may request the DOC & parole board furnish all info concerning the prisoner along w/ a nonbinding recommendation	**Hawaii Paroling Authority** may reduce prisoners' minimum terms for serious medical conditions. **Department of Public Safety** may also recommend medical release for prisoners with seriously debilitating and irreversible mental or physical conditions, are too cognitively impaired to participate in rehabilitation or be aware of punishment, or have a disease or condition that requires a complex treatment or level of care	No	
Idaho	**Commission of Pardons & Paroles**		**Commission of Pardons and Paroles.** Commutation or pardon of any sentence or conviction requires a majority decision by the Commission and a full hearing. The Governor also has power to temporarily grant respites or reprieves until Commission can ultimately render a clemency decision	**Commission of Pardons and Paroles** may release inmates to medical parole if they have served their minimum period of confinement.	No	
Illinois		**DOC**	**Governor.** All applications filed w/ Prisoner Review Board which makes a written recommendation.	None	No	

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
Indiana		**DOC**	**Governor.** The parole board must submit recommendations, but these are not binding on the governor	Special medical clemency ordinarily requires favorable action by three decisionmakers: **Governor** may make award upon recommendation of **Parole Board**, which acts only upon recommendation of **Commissioner of Corrections.** Temporary leave of prisoners with terminal illness may be granted by **Prison wardens.**	No	
Iowa	**Parole board**	**DOC**	**Governor,** but clemency awards are dependent on **parole board** recommendations	None. A prisoner's deteriorating health may be considered as a relevant factor by the parole board under its general parole-release authority	No	
Kansas		**DOC**	**Governor**. The governor cannot commute LWOP sentences.	**Parole board** has authority to release prisoners who are functionally incapacitated or terminally ill with condition likely to cause death in 30 days	**Sentencing commission** must propose amendments to judicial sentencing guidelines to the **legislature** when notified by **Secretary of Corrections** that prison populations are at 90 percent of overall prison capacity	
Kentucky	**Parole board**	**DOC**	**Governor.** The governor may request that parole board conduct investigation, report findings, but Governor is not bound by board's recommendations	**Parole board,** with written consent of a majority of the full board, may parole prisoners to medical parole	No	

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
Louisiana	**Louisiana Board of Pardons & Parole**	**DOC**	**Governor,** but can only commute sentences or pardon upon recommendation of the Board of Pardons	**Parole board** may release prisoners to medical parole upon referral by the **DOC**. Geriatric parole available to some prisoners convicted of nonviolent offenses who reach age 45 having served at least 20 years or who reach age 60 having served at least 10 years. Prisoners must have low-risk designation to be eligible.	No	
Maine		**DOC**	**Governor,** who may request the parole board investigate and offer recommendations	**DOC** may transfer prisoners to "supervised community confinement" for terminal or severely incapacitating medical conditions	No	
Maryland	**Parole board**	**DOC**	**Governor**	**Parole board** may release prisoners to medical parole and certain repeat offenders to geriatric parole at age 60	No	Parole board has open-ended authority to release at any time certain prisoners who are expecting a child or have a newborn child
Massachusetts	**Parole board**	**DOC**	**Governor,** with advice and consent of the Governor's Council. Every pardon petition must be filed w/ Parole Board, acting as "Advisory Board of Pardons," before being presented to governor	**Commissioner of Corrections** may grant medical parole upon recommendation by **Prison warden**	No	
Michigan	**Parole board**		**Governor,** must inform the legislature yearly of each pardon, reprieve, or commutation granted	**Parole Board & Bureau of Health Care Services** within the DOC collaborate to determine eligibility to medical parole	No, only at county jail level	

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
Minnesota		**DOC**	**Board of Pardons,** consisting of the governor, chief justice of the supreme court, and attorney general; unanimous vote required	**Commissioner of Corrections** may release any prisoner to conditional medical release if certain conditions met	No	Commissioner of Corrections has discretionary release authority for life sentences. Minnesota Supreme Court has placed legal limits on the DOC's ability to extend prison terms for disciplinary violations.
Mississippi	**Parole board**	**DOC**	**Governor**	**Commissioner and medical director** may approve medical release	√	Mississippi's Prison Overcrowding Emergency Powers Act is set for automatic repeal on July 1, 2022
Missouri	**Parole board**	**DOC**	**Governor,** first referred to **parole board** for investigation and recommendation	**Parole board** may release prisoners to medical parole only if they are already eligible for parole release	No	
Montana	**Parole board**		**Governor.** If the hearing board votes to hold a hearing on the application, it will conduct investigation and make nonbinding recommendation to governor	If application is approved by **DOC**, the **Parole board** may grant medical parole. If a prisoner's sentencing judge restricted the possibility of parole, medical parole requires **sentencing court** approval	**DOC Director,** in overcrowding emergency, may temporarily suspend admissions to individual prisons or the system as a whole; DOC must reimburse local jurisdictions for costs of detention	
Nebraska	**Parole board**	**DOC**	**Board of Pardons,** consisting of governor, attorney general, and secretary of state. Parole board may advise the Board of Pardons, but advice is not binding	**Parole board** has authority to grant medical parole	When **DOC** certifies that prisoner population exceeds 150 percent of capacity, parole board must grant releases among eligible prisoners until population returns to operational capacity	
Nevada	**Parole board**	**DOC**	**State Board of Pardons Commissioners,** consisting of governor, state supreme court justices, and attorney general	**DOC** has power to release to medical confinement; **parole board** may release prisoners over age 65 who have served half of their MAXs		

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
New Hampshire	**Parole board**	**DOC**	**Governor,** with advice of executive council, composed of 5 elected councilors	**Parole Board** may release inmates to medical parole	No	
New Jersey	**Parole board**	**DOC**	**Governor,** with investigation and nonbinding recommendation made by parole board	**Parole board** has authority to release prisoners to medical parole	No	
New Mexico		**DOC**	**Governor.** Upon request of governor, parole board may investigate and report	**Parole board** has authority to grant both medical and geriatric parole (geriatric parole requires chronic illness or infirmity)	No	
New York	**Parole board** (for nonviolent offenses); Administrative parole release (APR) program for most nonviolent offenders places sole release discretion at first eligibility in **DOC** through decision whether to certify prisoners qualified for APR	**DOC**	**Governor,** with the assistance of the Executive Clemency Bureau within the DOC	**Parole board** has authority to release prisoners to medical parole	No	
North Carolina		**DOC**	**Governor**	**Post-Release Supervision and Parole Commission** has authority to grant medical or geriatric (65+) release after referrals by DOC		**DOC** has discretion to set earning criteria and rates for credits against sentence length, but within low statutory cap on total reductions
North Dakota	**Parole board**	**DOC**	**Governor,** with the initial review of applications performed by the Pardon Advisory Board which issues nonbinding recommendations	**Parole board** has authority to release prisoners to medical parole	No	

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
Ohio	**Parole board** (only for "indefinite" sentences for serious violent offenses)	**DOC**	**Governor,** with nonbinding recommendations made by the parole board	**Governor** has authority to order release to medical parole upon recommendation by the **DOC**	**Governor** may reduce terms by as much as 90 days for prisoners identified by correctional **Institution Inspection Committee** following declaration of overcrowding emergency by director of **DOC**	**Sentencing courts** have wide discretionary "judicial release" powers for most prisoners with non-life sentences; eligibility periods vary (in irregular patterns) by length of MAX term, but are sometimes substantially earlier than routine formulas of release eligibility; prisoners may initiate process but courts are empowered to dismiss petitions without hearing
Oklahoma	**Parole board** for nonviolent offenders; for violent offenders, upon release recommendation by parole board, **governor** has final release discretion.	**DOC**	**Governor,** provided there has been a favorable recommendation by the **parole board**	**Parole board** has authority to release prisoners to medical parole upon request of **DOC; parole board** has independent authority to release nonviolent offenders who reach age 60 having served 10 years or one-third of MAX (whichever is shorter)	**State Board of Corrections** must certify overcrowding; prisoners within six months of parole eligibility may be released on recommendation of **parole board** with ultimate decision by **governor**	
Oregon	**Parole board** has discretionary release authority for small group of prisoners sentenced to 30-year MAX terms as "dangerous offenders" (MIN terms vary)	**DOC** has authority to grant good time credits to roughly half of all prisoners not serving "Measure 11" sentences (not eligible for credits)	**Governor**	**Parole board** has authority to grant medical and geriatric release	No	**Parole board** has release authority for prisoners under age 18 at time of their crimes: 15-year MIN term for all juveniles with long sentences, including life sentences; in addition, sentencing courts have "second look" responsibility to review all juvenile sentences after 50 percent of MAX
Pennsylvania	**Parole board**		**Governor,** upon written recommendation of a majority of the **Board of Pardons**	**DOC** has authority to grant medical release	No	

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
Rhode Island	**Parole board**	**DOC**	**Governor,** by and with the advice and consent of the **Senate**	**Parole board** has authority to grant medical parole	Elaborate multi-stage process to be navigated by legislative **Criminal Justice Oversight Committee;** if all else fails, **Governor** may issue emergency good time credits	
South Carolina	**Parole board**	**DOC**	**Governor**'s clemency power limited to commutation of death sentences to life imprisonment. Governor may request nonbinding opinion from parole board.	**Parole board** has authority to grant geriatric and medical parole	No	
South Dakota	**Parole board** for prisoners not released through administrative parole process	**DOC** through determination of compliance with requirements for administrative parole release; also through grants of earned time credits	**Governor,** upon review and nonbinding recommendation of the **Parole board**	**Parole board** has authority to grant medical or geriatric (70+) parole	No	Most prisoners are eligible for administrative parole release at expiration of MIN term if DOC certifies compliance with "individual program directives "established by DOC; parole board gains release discretion for remainder of term if DOC fails to certify compliance
Tennessee	**Parole board**	**DOC**	**Governor,** nonbinding recommendations by the **Parole Board**	**DOC** has authority to grant medical furlough	**Governor** must declare overcrowding emergency, may then direct parole board to accelerate parole eligibility dates and/or direct DOC to slow new admissions	
Texas	**Parole board**	**DOC**	**Governor,** dependent upon parole board recommendations	**Parole board** has authority to release prisoners to medical parole	**Attorney general** must declare prison overcrowding crisis; parole eligibility accelerated for some prisoners	DOC has marginal power as credits have no binding effects on release dates

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
Utah	**Parole board** (especially powerful because of early MIN terms required by statute and near absence of time-served discretion by DOC and sentencing courts)	**DOC** may award earned time credits but there is no legally binding effect on sentence milestones; credits to be counted against release dates if already set by parole board, but advanced release dates may be overridden by the board	**Parole board** makes all final clemency decisions; governor can grant temporary reprieves	**Parole board** authorized to grant medical release upon receipt of written request from **DOC**; release date may be accelerated 120 days for death in immediate family	**Director of DOC** must give notice of overcrowding emergency; if emergency permits, **parole board** given emergency release powers to release sufficient numbers of prisoners to return population to within operational capacity	
Vermont	**Parole board**	**DOC**	**Governor;** parole board may act as an advisor upon board's request	**Parole board** has authority to grant medical parole	No	
Virginia		**DOC**	**Governor;** governor may request the parole board to investigate and present recommendations	No medical parole. **Parole board** has authority to release prisoners to geriatric release (60 or older, having served 10 years; 65 or older, having served five years)	No	
Washington		**DOC**	**Governor**	**Secretary of Corrections** may authorize release to extraordinary medical placement	**Governor** must find state of overcrowding emergency, then call upon sentencing commission or Clemency and Pardons Board for recommendations	**Parole board** has release discretion after 20 years for most prison sentences of those who were under age 18 at the time of their offenses; and for sex offenders with full statutory maximum sentences imposed under "Determinate Sentencing Plus" law
West Virginia	**Parole board**	**DOC**	**Governor,** must record reasons for each parole or pardon granted in the journal of executive proceedings and provide it to legislature	**Governor** may grant an executive pardon for an inmate suffering from an extreme life-threatening medical condition if certified by prison medical staff	No	

	Discretionary parole release for large percentage of prisoners (excluding life sentences)	Credit discounts against sentence for most prisoners	Authority with clemency power	Compassionate release (medical, geriatric, both, neither)	Emergency release (for overcrowding, COVID, or other emergencies)	Comments
Wisconsin		**DOC**	**Governor**	**Parole board** has authority to modify sentences in order to release prisoners to extended supervision for geriatric (60/65+) or medical parole	No	Throughout their terms, defendants may petition **sentencing courts** to modify a sentence on the grounds that it is "unduly harsh or unconscionable" or that a "new factor" justifies alteration of original sentence; **sentencing courts** are also discretionary release decisionmakers for life sentences
Wyoming	**Parole board**	**DOC** awards good time credits; parole board awards "special good time credits" counted only against MIN terms	**Governor,** upon nonbinding recommendation by parole board	**Parole board** has authority to release prisoners to medical parole	No	
District of Columbia		**Bureau of Prisons**	**President of the United States,** with recommendations from a clemency board within the DC mayor's office	**Parole board** may consider prisoners for geriatric and medical parole	No	
Federal System		**Bureau of Prisons**	**President of the United States**	**Court** may reduce a term of imprisonment if extraordinary and compelling circumstances so warrant, upon motion of the Director of the Bureau of Prisons or upon motion of the prisoner	No	

Sources: 52 "state reports" prepared for this project, including 50 states, the District of Columbia, and the federal system.

Appendix Table A-2. Degrees of Indeterminacy in 52 American Prison-Sentencing Systems (General-Rules Sentences Only)

	Degree of indeterminacy ranking for system as a whole	Degrees of indeterminacy under general rules for major classes of sentences (excluding life sentences)	Population Multiplier Potential (PMP) for major classes of sentences (excluding life sentences)
Alabama	Extremely high indeterminacy	Extremely high indeterminacy for sentences with MAXs up to 15 years; high indeterminacy for most sentences with MAXs greater than 15 years; extremely low indeterminacy for sentences for selected serious violent offenses	Greater than 100:1* for sentences with MAXs up to 5 years; over 5:1 for sentences with MAXs greater than 5 years up to 10 years; over 8:1 for sentences with MAXs greater than 10 years up to 15 years; 3:1 for most sentences with MAXs greater than 15 years; 1.18:1 for sentences for selected serious violent offenses
Alaska	High indeterminacy	High indeterminacy for general-rules sentences	4:1 for general-rules sentences
Arizona	Extremely low indeterminacy	Extremely low indeterminacy for nearly all prisoners; low indeterminacy for prisoners convicted of low-level drug possession offenses	1.16:1 for nearly all prisoners; 1.43:1 for prisoners convicted of low-level drug possession offenses
Arkansas	High indeterminacy	High indeterminacy for great majority of offenses; low indeterminacy for small group of statutorily designated serious offenses	5.9:1 for less serious offenses; 4:1 for most offenses of higher severity; 1.4:1 for small group of statutorily designated serious offenses
California	Low indeterminacy	Moderate indeterminacy for most prisoners convicted of nonviolent offenses; low indeterminacy for larger group of prisoners convicted of violent offenses	2.5:1 for most prisoners convicted of nonviolent offenses; 1.5:1 for larger group of prisoners convicted of violent offenses
Colorado	High indeterminacy	High indeterminacy for most general-rules prisoners; extremely high indeterminacy for some sex offenders with life sentences	3.4:1 for general-rules prisoners; extremely variable for sex offenders with life sentences ranging from higher than 20:1 to nearly 1:1
Connecticut	Low indeterminacy	Moderate indeterminacy for sentences for less serious offenses; extremely low indeterminacy for sentences for more serious offenses	2.3:1 for sentences for less serious offenses; 1.18:1 for sentences for more serious offenses
Delaware	Low indeterminacy	Low indeterminacy for all general-rules prisoners	1.45:1 for general-rules prisoners
Florida	Extremely low indeterminacy	Extremely low indeterminacy for all general-rules prisoners	1.18:1 for general-rules prisoners

	Degree of indeterminacy ranking for system as a whole	Degrees of indeterminacy under general rules for major classes of sentences (excluding life sentences)	Population Multiplier Potential (PMP) for major classes of sentences (excluding life sentences)
Georgia	High indeterminacy	High indeterminacy for most sentences with MAXs below 21 years; High to moderate indeterminacy for sentences with MAXs below 27 months; High or extremely high indeterminacy for sentences with MAXs of 21 years or more	3:1 for most sentences with MAXs below 21 years; but PMP ratios decline as MAXs fall below 27 months (eventually as low as 1:1); variable PMPs for MAXs of 21 years and above, from 3:1 to more than 6:1
Hawaii	Extremely high indeterminacy	Extremely high indeterminacy for all general-rules sentences	Greater than 100:1* for all general-rules sentences
Idaho	Moderate indeterminacy	Broad continuum of high to low indeterminacy in general-rules sentences depending on MIN-MAX ratio imposed in the discretion of sentencing courts	Wide range of possibility from greater than 100:1* at the high end to 1:1 at the low end, depending on MIN-MAX ratio imposed in the discretion of sentencing courts
Illinois	High indeterminacy (bordering on moderate indeterminacy)	High indeterminacy for the majority of general-rules sentences; low and extremely low indeterminacy for statutorily designated serious offenses	3.33:1 for the great majority of general-rules sentences; 1.66:1 and 1.18:1 for the largest groups of statutorily designated serious offenses;
Indiana	Moderate indeterminacy	Degrees of indeterminacy for the majority of general-rules prisoners varies depending on classification by DOC into four earnings classifications. Prisoners in the lowest classification earn no credits. Among the three groups eligible to receive credits, DOIs are high, low, and extremely low. Most prisoners may be reclassified throughout their terms	PMPs range from 4:1, 1.6:1, and 1.18:1 for prisoners classified in groups eligible to receive credits
Iowa	Extremely high indeterminacy	Extremely high indeterminacy for most general-rules sentences; for designated serious offenses or especially serious criminal histories DOIs vary from high to extremely low	Greater than 100:1* for most general-rules sentences; for designated serious offenses or especially serious criminal histories, PMPs vary from 5:1 to 1:1
Kansas	Extremely low indeterminacy	Low indeterminacy for general-rules prisoners convicted of lower-severity offenses (but close to the cutoff for extremely low indeterminacy); extremely low indeterminacy for those convicted of more serious offenses	1.3:1 for general-rules prisoners convicted of lower-severity offenses; 1.2:1 for those convicted of higher-severity offenses

	Degree of indeterminacy ranking for system as a whole	Degrees of indeterminacy under general rules for major classes of sentences (excluding life sentences)	Population Multiplier Potential (PMP) for major classes of sentences (excluding life sentences)
Kentucky	High indeterminacy	High indeterminacy (bordering on extremely high) for most general-rules prisoners; extremely high indeterminacy for lowest-level nonviolent offenses; extremely low indeterminacy for designated serious violent and sex offenses	5:1 for most general-rules prisoners; 6.7:1 for lowest-level nonviolent offenses; 1.18:1 for designated serious violent and sex offenses
Louisiana	Moderate indeterminacy	High indeterminacy for general-rules prisoners convicted of nonviolent offenses; low indeterminacy for those convicted of violent offenses; low or extremely low indeterminacy for prisoners convicted of sex offenses or repeat convictions of violence	4:1 for general-rules prisoners convicted of nonviolent offenses; 1.5:1 for those convicted of violent offenses; as high as 1.3:1 or as low as 1:1 for prisoners convicted of sex offenses or repeat convictions of violence
Maine	Extremely low indeterminacy	Low indeterminacy (bordering on extremely low) for most prisoners convicted of general-rules offenses; extremely low indeterminacy for prisoners convicted of sexual assault or designated violent offenses	1.3:1 for most prisoners convicted of general-rules offenses; 1.16:1 for prisoners convicted of sexual assault or designated violent offenses
Maryland	High indeterminacy (bordering on moderate indeterminacy)	High indeterminacy for prisoners with general-rules sentences convicted of nonviolent offenses; moderate indeterminacy for those convicted of violent offenses	4:1 for prisoners with general-rules sentences convicted of nonviolent offenses; 2:1 for those convicted of violent offenses
Massachusetts	Moderate indeterminacy	Broad continuum of high to low indeterminacy in general-rules sentences depending on minimum terms imposed in the discretion of sentencing courts, with most sentences in the range of moderate indeterminacy	2.6:1 for the shortest minimum terms imposed by judges; 1.54:1 for the longest minimum terms; estimated average PMP of about 1.8:1
Michigan	High indeterminacy	Degrees of indeterminacy for most sentences are set within discretion of sentencing courts in individual cases; can vary from extremely high indeterminacy to low indeterminacy	Wide range of possibility from greater than 100:1* at the high end to 1.5:1 at the low end, depending on where judges set MIN terms in individual cases
Minnesota	Low indeterminacy	Low indeterminacy for all general-rules sentences	1.5:1 for general-rules sentences
Mississippi	High indeterminacy (bordering on moderate indeterminacy)	High indeterminacy for most nonviolent offenses; moderate indeterminacy for most violent offenses	4:1 for most nonviolent offenses; 2:1 for most violent offenses

	Degree of indeterminacy ranking for system as a whole	Degrees of indeterminacy under general rules for major classes of sentences (excluding life sentences)	Population Multiplier Potential (PMP) for major classes of sentences (excluding life sentences)
Missouri	High indeterminacy	High indeterminacy for violent and sex offenses; high indeterminacy for more serious nonviolent and drug offenses; extremely high indeterminacy for less serious nonviolent and drug offenses	3:1 for violent and sex offenses; 4:1 and 5:1 for more serious nonviolent and drug offenses (two separate classes); 6.7:1 for less serious nonviolent and drug offenses
Montana	High indeterminacy	High indeterminacy for all general-rules unless judge finds that protection of society requires extended MIN terms in individual cases	4:1 for general-rules sentences; lower PMPs down to 1:1 are possible in individual "protection of society" cases
Nebraska	Moderate indeterminacy	High indeterminacy for general-rules sentences for "more serious" felonies if judges impose the longest allowable MIN terms, greater indeterminacy up to extremely high if judges choose shorter MIN terms; low indeterminacy for general-rules sentences for "less serious" felonies	3.3:1 for general-rules sentences for "more serious" felonies if judges impose the longest allowable MIN terms, higher indeterminacy, potentially greater than 100:1* if judges choose shorter MIN terms; 1.6:1 for "less serious" felonies
Nevada	Extremely high indeterminacy	Extremely high indeterminacy for all general-rules sentences	5.9:1 to 50:1 depending on grade of offense and MIN-MAX ratio chosen by sentencing court
New Hampshire	High indeterminacy	High indeterminacy if courts typically impose longest statutory MIN terms; degrees of indeterminacy can be higher on case-by-case basis if courts choose shorter MIN terms (as short as 0% of MAX)	2.9:1 when sentencing courts impose longest allowable MIN terms; higher PMP ratios possible for shorter MIN term (with no statutory limit)
New Jersey	Moderate indeterminacy	High indeterminacy for general-rules sentences for nonviolent and some violent offenses; extremely low indeterminacy for serious violent and sex offenses	Between 4:1 and 5:1 for general-rules sentences for nonviolent and some violent offenses; 1.18:1 for serious violent and sex offenses
New Mexico	Moderate indeterminacy	High bordering on moderate indeterminacy for general-rules sentences for nonviolent offenses; low indeterminacy for general-rules sentences for violent offenses	2.9:1 for general-rules sentences for nonviolent offenses; 1.6:1 for general-rules sentences for violent offenses
New York	Moderate indeterminacy	High to extremely high indeterminacy for general-rules sentences for most nonviolent offenses; extremely low indeterminacy for violent offenses; low indeterminacy for serious drug offenses	3.6:1 to 33.3:1 for general-rules sentences for most nonviolent offenses, depending on courts' selection of MIN terms; 1.16:1 for violent offenses; 1.4:1 for serious drug offenses

	Degree of indeterminacy ranking for system as a whole	Degrees of indeterminacy under general rules for major classes of sentences (excluding life sentences)	Population Multiplier Potential (PMP) for major classes of sentences (excluding life sentences)
North Carolina	Extremely low indeterminacy	Extremely low indeterminacy for all prisoners	1.2:1 for most prisoners
North Dakota	High indeterminacy	Extremely high indeterminacy for most nonviolent and low-level violent offenses; extremely low indeterminacy for selected serious violent offenses	Greater than 100:1* for most nonviolent and low-level violent offenses; 1.18:1 for selected serious violent offenses
Ohio	Low indeterminacy	Extremely low indeterminacy for most general-rules sentences (with no parole release); moderate indeterminacy for selected serious violent offenses (with parolable sentences)	1.22:1 for most general-rules sentences (with no parole release); moderate indeterminacy for selected serious violent offenses; 1.8:1 for selected serious violent offenses (with parolable sentences)
Oklahoma	High indeterminacy	High indeterminacy for all general-rules sentences, including nonviolent and violent offenses	4:1 for all general-rules sentences, including nonviolent and violent offenses; 2.4:1 for nonviolent offenses based on credit reductions alone; 1.9:1 for violent offenses based on credit reductions alone
Oregon	Extremely low indeterminacy	Extremely low indeterminacy for general-rules prisoners; nearly half of all prisoners have "Measure 11" sentences that are not reducible by discretionary parole release or credit-based deductions	1.25:1 for general-rules prisoners; 1:1 for prisoners with "Measure 11" sentences that are not reducible by discretionary parole release or credit-based deductions
Pennsylvania	Moderate indeterminacy	Moderate indeterminacy if courts typically impose longest statutory MIN terms; degrees of indeterminacy can be higher on case-by-case basis if courts choose shorter MIN terms (as short as 0% of MAX)	2:1 under default statutory rules, although sentencing courts may impose shorter MIN terms potentially resulting in higher PMP ratios (with no statutory limit)
Rhode Island	High indeterminacy	High indeterminacy for general-rules prisoners, including those convicted of more serious offenses	3:1 for general-rules prisoners
South Carolina	High indeterminacy	Extremely high indeterminacy for general-rules sentences for nonviolent offenses; high indeterminacy for general-rules sentences for less serious violent offenses; low indeterminacy for sentences for more serious violent offenses	5.9:1 for general-rules sentences for nonviolent offenses; 4.5:1 for general-rules sentences for less serious violent offenses; 1.3:1 for sentences for more serious violent offenses
South Dakota	Moderate indeterminacy	High indeterminacy to low indeterminacy for general-rules prisoners depending on different formulas based on felony grade, violent versus nonviolent offense, and prior record	4:1 for general-rules sentences with shortest MIN terms; 1.33:1 for those with longest MIN terms; continuum between the two extremes due to staggered percentage formulas for MIN terms

	Degree of indeterminacy ranking for system as a whole	Degrees of indeterminacy under general rules for major classes of sentences (excluding life sentences)	Population Multiplier Potential (PMP) for major classes of sentences (excluding life sentences)
Tennessee	High indeterminacy	High indeterminacy for most general-rules prisoners; extremely high for some and moderate for others	For five separate categories of general-rules prisoners: 7.7:1, 4.8:1, 4:1, 3.1:1, and 2.4:1; Lower PMPs of 1.18:1 for designated serious offenses
Texas	High indeterminacy	Extremely high indeterminacy for general-rules sentences for less serious offenses; moderate indeterminacy for general-rules sentences for more serious offenses	10:1 for general-rules sentences for less serious offenses; 2:1 for general-rules sentences for more serious offenses
Utah	Extremely high indeterminacy	Extremely high indeterminacy for all general-rules sentences	Greater than 100:1* for third-degree felonies; 15:1 for second-degree felonies; 9:1 for first-degree felonies
Vermont	High indeterminacy	Broad continuum of high to low indeterminacy in general-rules sentences depending on MIN and MAX terms imposed in the discretion of sentencing courts, with most sentences in the range of high indeterminacy	Greater than 100:1* when courts set MIN term at zero; 1.23:1 when courts set MIN term at 100% of MAX; 6.3:1 estimated for sentences with median MIN and MAX terms
Virginia	Extremely low indeterminacy	Extremely low indeterminacy for all general-rules sentences	1.15:1 for all general-rules sentences
Washington	Low indeterminacy	Low indeterminacy for most general-rules sentences for nonviolent and some violent offenses; extremely low indeterminacy for statutorily designated serious violent offenses	1.5:1 for most general-rules sentences for nonviolent and some violent offenses; 1.11:1 for statutorily designated serious violent offenses
West Virginia	High indeterminacy	High indeterminacy for "definite" sentences; extremely high to moderate indeterminacy for "indeterminate" sentences (per specific formulas for individual offenses)	4:1 for "definite" sentences; from 14.3:1 to 2:1 for "indeterminate" sentences (per specific formulas for individual offenses)
Wisconsin	Low indeterminacy	Low indeterminacy if courts generally impose longest MIN terms in relation to MAX; high or extremely high indeterminacy if courts generally impose shortest available MIN terms in relation to MAX (ratios vary irregularly across eight felony grades)	1.33:1 if courts impose longest MIN terms in relation to MAX; up to 10:1 for some felony sentences if courts impose shortest available MIN terms in relation to MAX
Wyoming	High indeterminacy	Moderate indeterminacy if courts impose longest MIN terms in relation to MAX; up to high or extremely high indeterminacy if courts impose shorter MIN terms in relation to MAX	1.9:1 if courts impose longest MIN terms in relation to MAX; Greater than 100:1* when courts set MIN term at zero; all PMPs between these two extremes are possible

	Degree of indeterminacy ranking for system as a whole	Degrees of indeterminacy under general rules for major classes of sentences (excluding life sentences)	Population Multiplier Potential (PMP) for major classes of sentences (excluding life sentences)
District of Columbia	Extremely low indeterminacy	Extremely low indeterminacy for most prisoners; low indeterminacy for some nonviolent offenders who complete drug treatment	1.15:1 for most prisoners; up to 1.5 or more for some nonviolent offenders who complete drug treatment
Federal System	Extremely low indeterminacy	Same general rules for most sentences	1.15:1

Sources: 52 "state reports" prepared for this project, including 50 states, the District of Columbia, and the federal system.
*Alabama, Hawaii, Iowa, North Dakota, and Utah have no minimum terms before parole-release eligibility for some classes of general-rules sentences. In Idaho, Michigan, Pennsylvania, Vermont, and Wyoming, sentencing courts have discretion to impose sentences with no minimum terms in general-rules cases. Technically, under such sentences, the parole board may release prisoners at the moment of their admission. The PMP for such sentences, if calculated in the same way as in other states, is a nonsensical ratio of ∞:1. We prefer to use the "greater than 100:1" formulation to express the extreme indeterminacy and extremely large PMP associated with such sentence.
Note: MAX means the judicial maximum sentence. MIN means the judicial minimum sentence.