ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: CALIFORNIA

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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 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 greatly across U.S. jurisdictions. One goal is to inform state governments how they may deliberately adjust their laws and practices of prison-release authority to achieve desired policy goals, such as reductions of prison populations in a manner consistent with public safety

Note on the project's rankings of "degrees of indeterminacy"

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

Each of the five categories can be expressed in alternative terms: either the *degree of indeterminacy* or *degree of determinacy* thought to be present. Our five tiers are based on the variations we observe in current American sentencing systems, not any absolute or theoretical conceptions of degrees of indeterminacy that could be imagined in hypothetical systems.

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

Rankings of "Degrees of Indeterminacy"

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

Prison-Release Discretion and Prison Population Size

State Report: California[1]

Executive Summary

California's prison-sentencing system operates with a *high degree of determinacy* in time served. We make this judgment despite a steady drift toward greater indeterminacy effected through several changes in the law and practice of prison release in the last ten years. Despite rising numbers of discretionary parole releases, California's prison system is dominated by determinate sentences and parolable sentences with long minimum terms. In the wake of Realignment, with most lower-level offenders shifted from state prisons to the jurisdiction of the counties, the average person remaining in California's prisons has been convicted of one or more serious crimes. Most cases that come before the parole board present high offense-based hurdles to release—and the numbers of releases are correspondingly low. In 2019, for example, only about three percent of all prison releases in California were the product of discretionary grants of parole—a low number despite that fact that it was a twenty-fold increase in the numbers of releases in 2000.

The state's shift toward greater indeterminacy must be understood in perspective: Twenty years ago discretionary parole release in California was a microscopic phenomenon; today it remains small but can now be seen by the naked eye. Parole grants may well continue to rise, but the numbers would have to jump a great deal in order to change the highly determinate character of the system.

Today, California's system of good-time and earned-time credits is a more important source of systemwide indeterminacy in sentence length than parole-release discretion. In the 2010s, available credits were increased and new forms were instituted. For many prisoners, credits are applied to advance mandatory release dates—a benefit not afforded in most state systems. This relatively straightforward release mechanism can assume heightened importance when discretionary release rates are low. For some prisoners convicted of nonviolent offenses, albeit a minority of all prisoners, credit-earning rates are quite generous by national standards. If there are pockets of moderate or high indeterminacy within the system's general milieu of high determinacy, they exist primarily for nonviolent offenders and are chiefly the product of conduct and programming credits.

We note that geriatric parole has been growing quickly in California, including a substantial expansion of eligibility effective January 1, 2021. "Elderly parole" made up a quarter of all

[1] This report was prepared with support from Arnold Ventures. We thank Jennifer Shaffer and Kristen Bell for their feedback on an earlier draft.

discretionary releases in 2019 and could increase under the new rules. If so, California's program of geriatric release may be among the most robust in the country.

Introduction

California's prison-rate history, 1972 to 2019

In 2019, California's prison rate was 310 per 100,000 general population, with a yearend prison population of 122,417.[2] California's prison rate was 32nd largest among all states.

Figure 1. Prison Rate Change in California and (Unweighted) Average Among All States, 1972 to 2019

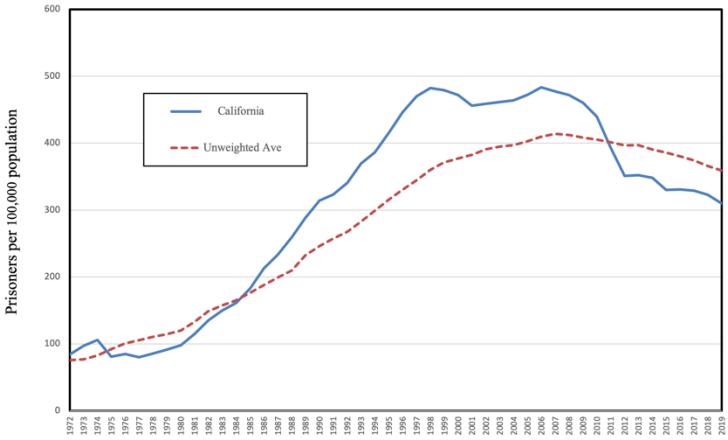
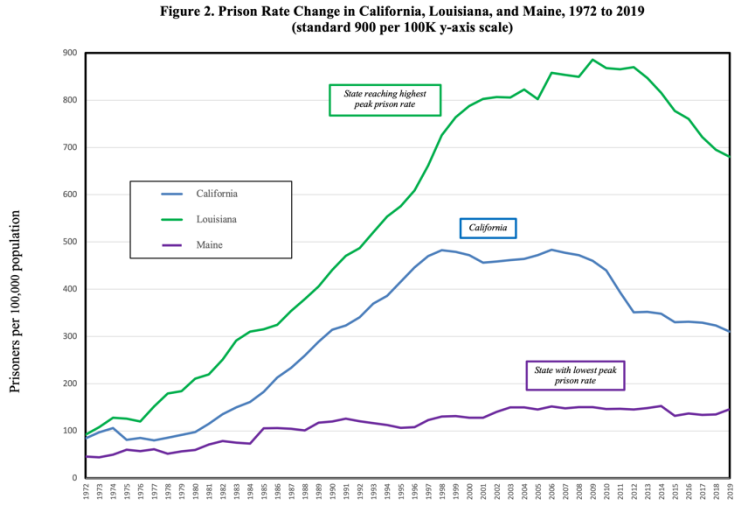


Figure 2. Prison Rate Change in California, Louisiana, and Maine, 1972 to 2019 (standard 900 per 100K y-axis scale)



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

[2] E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020), at 7 table 4, 11 table 7.

December 31, 1978-2016 (Bureau of Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), at https://www.bjs.gov/index.cfm?ty=nps (visited May 24, 2020); E. Ann Carson, Prisoners in 2018 (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2017); E. Ann Carson, Prisoners in 2019 (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2018-2019).

California reached its peak prison rate during the national buildup period in 2006 at 483 per 100,000, which dropped to 310 per 100,000 by the end of 2019. This is a net difference of -173 per 100,000, which was the 6th largest prison-rate drop of all states (measured from each state's peak through 2019).

Figures 1 and 2 span two important periods in American criminal-justice history. From 1972-2007, the United States lived through 35 years of uninterrupted growth in the nationwide prison rate. This might be called the Great Prison Buildup. Since 2007, prison rates have been dropping in the average American state, although each state has charted its own course.

California was a high-imprisonment state through much of the 1990s. As shown in Figure 2, throughout most of the 1980s and 1990s, California's yearly prison-rate growth was keeping pace with Louisiana's, albeit starting from a lower base. California was never in the top 10 percent of high-prison-rate states along with Alabama, Louisiana, Oklahoma, South Carolina, and Texas, but, by the late 1990s, California was solidly in the top 20 percent.

In most years since 1998, California's prison-rate curve has tilted less upward or more downward than the average state's. See Figure 1. In 1998, California's prison rate was 9th highest among all states, but fell to 33rd by 2012—a position it has roughly maintained through 2019.

Realignment and its aftereffects

The most important force in the recent history of California's prison-sentencing system has been the impact and aftereffects of federal constitutional litigation, including the Supreme Court's 2011 decision in *Brown v. Plata,* which came amidst years of oversight by a three-judge panel in the cases of *Coleman v. Brown* and *Plata v. Brown*.[3] In its bombshell *Plata* ruling, the

[3] *Brown v. Plata*, 563 U.S. 493 (2011). For a succinct history of the underlying litigation in the federal district court cases of *Coleman v. Brown* and *Plata v. Brown* dating back to the 1990s, including the convening of the three-judge panel in 2007 to conduct a trial and determine appropriate remedies, see James Austin, *Regulating California's Prison Population: The Use of Sticks and Carrots*, 664 The ANNALS 84, 92-93 (2016). In the years after the Supreme Court's ruling in *Brown v. Plata*, major developments such as the passage of Proposition 57 by California's voters were driven by the ongoing federal litigation. See The Public Safety and Rehabilitation Act of 2016, Gen. Elec. (Cal. 2016) (approved by the voters, Nov. 8, 2016), codified in Cal. Const. Art. 1, § 32(a) ("The

Supreme Court upheld an order by the three-judge panel requiring California to reduce its prison population by roughly 40,000 people in a two-year period (more technically, to cut down the population to 137.5 percent of the system's design capacity).[4]

Plata and continuing federal court oversight spurred a massive reorganization of California's institutions of sentencing and corrections, including prisons, jails, and community supervision. The most far-reaching of these changes was the state's Public Safety Realignment Act of 2011 (often referenced as "AB 109").[5] The main strategy of Realignment was to quickly achieve massive reduction of the state's prison population through the reassignment of tens of thousands of prisoners to the jurisdiction of California's 58 counties. The prisoners relocated to the counties included felony offenders with no current or prior convictions of a "serious felony," "violent felony," or registrable sex offense as defined by California law.[6] Offenders in this group are often called "non-non-nons" or "triple nons." In general, this can be seen as the state carving off a large hunk of its prison population, shedding prisoners with the least serious convictions and criminal records.

It is hard to overstate the scale and swiftness of the changes wrought by Realignment. In 2011 through 2012, California's prison population fell from about 165,000 to 135,000.[7] Correcting for population, the state's prison rate fell from 440 to 351 per 100,000, for an incremental

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following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order"); *In re McGhee*, 34 Cal. App. 5th 902, 911 (Cal. App. 2019) ("Proposition 57 undoubtedly was intended to maintain the inmate population at a level that complies with the federal court order").

[4] *Brown v. Plata*, 563 U.S. at 541-42 (noting that the state could petition the three-judge panel for justified extensions of the two-year deadline).

[5] The Realignment Act added, amended, or repealed hundreds of statutory provisions across the California Penal Code, Business and Professions Code, Civil Code, Corporations Code, Education Code, Elections Code, Financial Code, Fish and Game Code, Food and Agriculture Code, Government Code, Harbors and Navigation Code, Health and Safety Code, Insurance Code, Labor Code, Military and Veterans Code, Public Contract Code, Public Resources Code, Public Utilities Code, Revenue and Taxation Code, Vehicle Code, Water Code, and Welfare and Institutions Code. See A.B. 109, 2011 Leg., Reg. Sess. (Cal. 2011), at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB109.

For an overview of Realignment's reordering of California's sentencing and corrections institutions, see Lisa T. Quan, Sara Abarbanel, and Debbie Mukamal, *Reallocation of Responsibility: Changes to the Correctional System in California Post-Realignment* (Stanford Criminal Justice Center, 2014). On the effects of Realignment, see Robert Weisberg, *The Wild West of Sentencing Reform: Lessons from California*, *in* Michael Tonry ed., 48 Crime and Just. 35-77 (2019).

[6] See Cal. Penal Code § 1170(h)(3).

[7] As reported to the Bureau of Justice Statistics, California's prison population at yearend 2010 was 165,062, falling to 134,534 at yearend 2012. See E. Ann Carson & William J. Sabol, *Prisoners in 2011* (Bureau of Justice Statistics, 2012), at 3 table 2; E. Ann Carson, *Prisoners in 2013* (Bureau of Justice Statistics, 2014), at 3 table 2.

change of -89 per 100,000 in just two years, a percentage drop of more than 20 percent.[8] Across the five decades shown in Figures 1 and 2, no other state can match this dramatic plunge.

The Realignment prison drop should not automatically be equated with statewide decarceration. Many of the people who formerly would have been in the state's prisons were moved into county jails. Realignment gave county officials new powers to set the balance of whether the reassigned prisoners would be confined or would be shifted to community-based punishments.[9] This was, in effect, a massive transfer of time-served discretion to the counties, with the 58 counties given flexibility to form their own policies.[10]

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[8] E. Ann Carson, *Imprisonment rate of sentenced prisoners under the jurisdiction of state or federal correctional authorities per 100,000 U.S. residents, December 31, 1978-2016* (Bureau of Justice Statistics, Corrections Statistical Analysis Tool), at https://www.bjs.gov/index.cfm?ty=nps.

[9] See Magnus Lofstrom & Steven Raphael, *Impact of Realignment on County Jail Populations* (Public Policy Institute of California, 2013), at 9 ("Realignment … affords counties considerable discretion in exercising their new responsibilities. They are free to rely heavily on the use of local jails, effectively transferring their realigned populations from prisons to local jails. But they are also free to choose from a wide variety of less severe alternatives that rely on community corrections"). One important new tool given to local judges was the power to order "split sentences" in realigned felony cases, authorizing courts to carve up their sentences into a period of jail confiment followed by a period of community supervision, with no limitation on the ratio between the two. Cal. Penal Code § 1170(h)(5)(A) ("Unless the court finds that, in the interests of justice, it is not appropriate in a particular case, the court, when imposing a sentence … shall suspend execution of a concluding portion of the term for a period selected at the court's discretion."). For an account of one California county that has made extensive use of split sentences through the cooperative effort of local courtroom workgroups, see James Austin, *Regulating California's Prison Population: The Use of Sticks and Carrots*, 664 The ANNALS 84, 99 (2016) ("[T]here was an early consensus among the judges, prosecutors, and public defender to maximize the use of "split sentencing." … An important related factor was the level of respect and credibility that the Probation Department enjoyed with the court. … For these reasons, the County allocated the majority of its Realignment funds to community-based programs and services."). In contrast, Austin reports that Los Angeles County chose to make little use of the split-sentence option in favor of adding realigned prisoners to their jail population. See id., at 98 ("Los Angeles adopted a plan to use its AB 109 funds to continue incarcerating the formerly sentenced state prisoners but in its jail system. … The Los Angeles courts and especially the district attorney preferred this proincarceration model.").

[10] In the early days of Realignment, there were concerns that the state's total incarceration rate would not be significantly reduced. See ACLU of California, *California Prison Realignment One-Year Anniversary: An American Civil Liberties Union Assessment* (2012), at 2 ("At its worst, realignment will reveal itself to be nothing more than a shell game, simply moving bodies out of California's dangerously and unconstitutionally overcrowded prisons to local jail facilities."). To date, these fears have not been realized. One study found that, although jail confinement rates swelled in the immediate wake of Realignment, by 2015 they had nearly returned to their 2010 levels. See Franklin E. Zimring, *The Insidious Momentum of American Mass Incarceration* (Oxford University Press, 2020), at 93 (concluding that "almost all of the sharp decline in prison population over the period was also a net decline in prison and jail population."); Magnus Lofstrom & Steven Raphael, *Impact of Realignment on County Jail Populations* (Public Policy Institute of California, 2013), at 8 ("Between June 2011 and June 2012, the state prison population declined by 26,600 inmates. Concurrently, California's county average daily jail population grew by about 8,600 inmates …. [T]he increase in the overall jail population amounts to roughly one third of the decline in the state prison system.").

While Realignment is a phenomenon of overriding importance in California's criminal justice history, it is not the focus of this project. We are here concerned with issues of *prison-release* discretion. Therefore, in the pages that follow, our analysis is limited to rules and institutions that affect those people who remain in California's prisons post-Realignment. Somewhat artificially, Realignment is treated as a *fait accompli* in most of this report.

There have been a number of important developments in California's prison-release machinery over the past ten years. These have largely been occurring below the radar of national attention. While the system had famously operated with a high degree of determinacy from 1976 into the 2010s, it has since moved in the direction of expanded parole-release discretion and more generous good-time and earned-time allowances. There have been numerous measures pushing toward greater indeterminacy, including legislation, court orders, and voter initiatives. Directly relevant to this project, the major impetus of these changes has been the desire to reduce prison population size.

Organization of this report

This report is divided into four parts. Parts I through III describe the contours of California's prison-release system in some detail, with extensive citations and statutory analysis. Part I surveys the prison-release rules that apply to most prisoners. Part II then covers a number of important subgroups of prisoners who are not subject to the general rules. Part III catalogues some additional prison-release mechanisms that exist in California but are infrequently used, such as medical release and the clemency power.

Part IV draws on the raw research in Parts I through III to analyze and model the degrees of indeterminacy that exist for the most important subgroups of prisoners who are serving different classes of sentences. Ultimately, if a large enough percentage of all prisoners are included, this allows for broad observations about the California system as a whole. The overarching goal of Part IV is to explore the relationship between the various forms of prison-release discretion in California and the size of the state's prison population.

Terminology note

This report will refer to the California Board of Parole Hearings as the "parole board." The California Department of Corrections and Rehabilitation will be referred to as the "department of corrections" or the "CDCR."

I. General Rules of Prison-Release Discretion

In 1976, California enacted the Determinate Sentencing Law (DSL), which abolished discretionary parole release for most prison sentences. Prior to the DSL, California had one of the most indeterminate prison-sentencing systems in the country.[11]

Under the DSL, judges' prison sentences are generally expressed as "determinate terms" that operate as judicial maximum sentences.[12] Most determinate sentences carry no parole-release eligibility, but are reducible by conduct-based credits of one kind or another (see sections 1.1a and 1.5).[13]

Before 2014, the only California prisoners who were eligible for discretionary parole release were those serving "indeterminate" sentences of life with the possibility of parole. Changes in

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[11] Sheldon L. Messinger & Phillip E. Johnson, *California's Determinate Sentencing Statute: History and Issues*, 1 Determinate Sentencing:Reform or Regression 13, 13 (1978) ("Before 1976, California was famous or notorious as the state whose laws seemed most thoroughly committed to the idea that sentences should be indeterminate. … The [DSL] seems to be based on the opposite assumptions in every respect."). The authors described the former indeterminate sentencing system as follows:

> Under the indeterminate system, California judges did not fix the sentence for convicted felons committed to prison; instead, they sentenced the offender to "the term prescribed by law." An administrative agency known as the "Adult Authority" determined the amount of time a convict actually served by "fixing" the sentence at some point between the statutory minimum and maximum. …
>
> To appreciate the full extent of Adult Authority discretion, one must realize that the statutory maxima were extremely long in relation to the time normally served in practice. Such common felonies as second-degree murder, robbery, rape, and burglary of a dwelling each carried a maximum term of life in prison. Yet in 1965, the median time served in prison by prisoners released on parole for these offenses ranged from a high of 5.4 years (second-degree murder) to a low of three years (burglary). …
>
> In short, the California indeterminate sentence system left the determination of the length of imprisonment and the parole period to an appointed board which was given an almost awesome freedom from legislative or judicial control.

Id. at 15-16. A small handful of states, including Hawaii, Iowa, and Utah, still work with extremely indeterminate prison-sentencing systems that resemble California's under the Adult Authority (see the relevant state reports prepared for this project).

[12] Under the DSL, when judges elect to sentence defendants to prison, they must impose one of three alternative maximum terms as specified for each offense of conviction. This is something of a "multiple-choice" approach. See Cal. Penal Code § 1170(b) ("When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court."). For example, the statute prescribing the penalty for robbery states that the penalty for robbery of the first degree is normally "imprisonment in the state prison for three, four, or six years" and for robbery in the second degree is "two, three, or five years." Cal. Penal Code § 213(a)(1)(B),(2). Under the original DSL there was a legally-enforceable presumption in favor of the middle of the three prison-term options unless there were identifiable mitigating or aggravating circumstances in the case to justify the shorter or longer choice, but this legally-constrained approach was declared unconstitutional in *Cunningham v. California*, 549 U.S. 270 (2007).

[13] 15 Cal. Code Regs. § 3043.2(b).

the law since 2014 have expanded the classes of prison sentences that carry parole-release eligibility, including some "determinate" sentences for nonviolent crimes imposed under the DSL (see section 1.1b).[14] In addition, many prisoners with long sentences who committed their offenses while age 25 or younger have been given new parole release eligibility after serving 14, 19, or 24 years (see section 1.1d). Altogether, as of October 2020, roughly 48 percent of California prisoners were serving sentences that at some point will allow for discretionary parole release.[15] The percentage of parole-eligible prisoners would be even larger if we took eligibility for "elderly parole" into account—another form of release that has grown significantly since 2014 (see section 3.1).[16]

Proposition 57, passed by California voters in 2016, authorized expanded credit discounts against maximum terms for most prisoners with determinate sentences (see section 1.5).[17] In California's prison-sentencing system today, good-time and earned-time credits are a greater source of indeterminacy in actual time served than parole release discretion. California's current credit system is quite generous for some classes of prisoners—among the most generous

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[14] See generally Jennifer P. Shaffer, *Discretionary Parole in California: Report for the Committee on Revision of the Penal Code* (California Board of Parole Hearings, 2020), at 9-10:

> [P]rior to 2014, only persons sentenced to life with the possibility of parole were eligible for parole consideration by the Board and only after they served the minimum sentence imposed by the court. Since 2014, however, a series of legislative measures, ballot initiatives, and court cases have both expanded the number of persons eligible for a parole hearing and made many persons eligible for a parole hearing earlier in their incarceration period.

By court order in the *Plata* and *Coleman* class-action litigation, parole-release eligibility was expanded for nonviolent "second strikers" serving sentences under California's two-strikes law. *Coleman v. Brown*, No. 2:90-CV-0520 KJM DAD (PC) (E.D. Cal. Oct. 29, 2014); Shaffer, *Discretionary Parole in California*, supra, at 31 (three-judge panel ordered parole review for nonviolent second strikers who had served 50 percent of their maximum terms); Prison Law Office, *Information re: California's Three-Strikes Law* (2015), at 5. In 2017, this holding was supplemented by the more generous terms of Proposition 57, which greatly broadened the classes of sentences for nonviolent offenders that were required to carry the opportunity of discretionary parole release. Shaffer, *Discretionary Parole in California*, supra, at 28. Proposition 57 was extended in 2018 when the California Court of Appeals interpreted it to apply to prisoners convicted under the state's three-strikes law if their third strike was a nonviolent offense. *In re Edwards*, 26 Cal.App.5th 1181, 1190 (Cal. App. 2018) (invalidating a contrary regulation promulgated by the California Department of Corrections and Rehabilitation). See also Emily Moon, *California Will Offer Parole for 4,000 "Three-Strike" Prisoners Facing Life Sentences*, Pacific Standard, Oct. 19, 2018 (reporting that the state would not appeal the *Edwards* ruling).

[15] See Jennifer P. Shaffer, PowerPoint Presentation, *Discretionary Parole in California* (California Board of Parole Hearings, 2020), at 7 (reporting that, out of about 100,000 total prisoners in October 2020, about 14,000 would be eligible for parole review without a hearing and more than 34,000 would be eligible for parole release hearings).

[16] Elderly parole in California is a more important release mechanism than geriatric parole in other states. In 2019, 24 percent of all parole releases in California were elderly-parole releases and, starting in 2021, the scope of elderly-parole eligibility will be greatly expanded (see section 3.1).

[17] See The Public Safety and Rehabilitation Act of 2016, Gen. Elec. (Cal. 2016), now codified in Cal. Const. Art. 1, § 32.

earning rates in the country today. Importantly, those credits are generally applied to reduce prisoners' maximum terms and set earlier dates of mandatory release.

A. Determination of release eligibility

1.1. Determinate sentences without parole-release eligibility

Most California prisoners are serving "determinate terms" under the Determinate Sentencing Law (DSL).[18] Many such sentences carry no parole-release eligibility (for exceptions, see sections 1.1b and 1.1d). Generally, prisoners with determinate sentences must serve their full judicial maximum terms minus reductions for any conduct and programming credits they have earned (for the variety of available credits, see section 1.5).[19] While earning rates vary across classes of prisoners, meaningful numbers of prisoners can earn 50-percent reductions in their maximum terms through good time alone, and the highest earning rate (in minimum security facilities) allows for 67-percent reductions. Additional credits for program participation and educational achievements are available to most prisoners.

1.2. Proposition 57: parole-release eligibility for prisoners convicted of nonviolent offenses

Proposition 57, passed by California voters in 2016, provided in part that "[a]ny person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense."[20] The true operational scope of this part of Proposition 57 turns on how its broad constitutional language has been translated into statutes, court interpretations, and regulations promulgated by the California Department of Corrections and Rehabilitation (CDCR).

Because of the changes set in motion by Proposition 57, in 2020 about a quarter of prisoners with "determinate" sentences under the DSL could look forward to the possibility of discretionary parole release at some point during their terms.[21] Statutory and regulatory

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[18] Codified at Cal. Penal Code § 1170 et seq. At midyear 2019, the CDCR reported that 41 percent of all California prisoners were serving DSL sentences. California Department of Corrections and Rehabilitation, *Offender Data Points: Offender Demographics for the 24-Month Period Ending June 2019* (2020), at 10 table 1.10.

[19] 15 Cal. Code Regs. § 3043.2(b) ("the award of Good Conduct Credit shall advance an inmate's release date if sentenced to a determinate term"). The date determinately-sentenced offenders will be released, based on the sentence imposed by the court less any applicable credits, is called the "earliest possible release date." Jennifer P. Shaffer, *Report for the Committee on Revision of the Penal Code* (California Board of Parole Hearings, 2020), at 3.

[20] See The Public Safety and Rehabilitation Act of 2016, Gen. Elec. (Cal. 2016), now codified in Cal. Const. Art. 1, § 32.

[21] Despite the prospect of parole release, prisoners with such sentences are still referred to as "*determinately*-sentenced nonviolent offenders." 15 Cal. Code Regs. § 3490(a) (defining "determinately-sentenced nonviolent offender"); id., § 3491(a) ("A determinately-sentenced nonviolent offender … shall be eligible for parole

exclusions define the size of this group. In addition, the California courts have extended Proposition 57 to "indeterminate" life sentences under California's three-strikes law when a prisoner's third strike was conviction of a nonviolent crime.[22]

The CDCR has developed streamlined release procedures for parolable nonviolent offenders under Proposition 57. The parole board's decisions are to be based on a file review of "all relevant and reliable information" concerning eligible prisoners—but no formal hearing.[23] In California's official terminology, this process is called "parole review" as distinguished from the more elaborate "parole hearing" process that is provided other prisoners with indeterminate sentences.[24] Significantly, prisoners have no right to appointed counsel for parole review.[25]

Eligible prisoners. CDCR regulations currently define the pool of parole-eligible prisoners under Proposition 57 in the negative.[26] Eligibility extends to prisoners with determinate sentences who are *not in one of the following categories*:

- Prisoners convicted of a "violent felony" (see definition below).[27]
- Prisoners sentenced to death, life without the possibility of parole, or life with the possibility of parole.[28]

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consideration"). The estimated size of this population is taken from Jennifer P. Shaffer, PowerPoint Presentation, *Discretionary Parole in California* (California Board of Parole Hearings, 2020), at 7.

[22] The inclusion of nonviolent three-strikers under Proposition 57 was ordered by the court in *In re Edwards*, 26 Cal. App. 5th 1181, 1190 (Cal. App. 2018) (holding that "[t]here is no question that the voters who approved Proposition 57 intended [prisoners] serving Three Strikes indeterminate sentences to be eligible for early parole consideration.").

[23] 15 Cal. Code Regs. § 2449.4(b).

[24] Jennifer P. Shaffer, *Discretionary Parole in California: Report for the Committee on Revision of the Penal Code* (California Board of Parole Hearings, 2020), at 5-8, 28-31 (summarizing different procedures).

[25] California law provided the right to appointed counsel to all parole-eligible prisoners before Proposition 57, when discretionary parole release was limited to prisoners with indeterminate life sentences. Lifers with parolable sentences still enjoy this right (see sections 2.2 and 2.3).

[26] Proposition 57 expressly provided that its terms would be implemented through regulations to be adopted by the department of corrections. See Cal. Const. Art. 1, § 32(b) ("The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety."). Accordingly, the eligibility criteria outlined above are subject to change through regulatory amendments.

[27] See Cal. Code Regs. § 3490(a)(5).

[28] See Cal. Code Regs. § 3490(a)(1)-(3). Also excluded are prisoners serving a determinate term for a nonviolent offense prior to beginning a separate term for a violent felony or of life without parole; or after completing a concurrent term for a violent felony. 15 Cal. Code Regs. § 3490(a)(4),(6).

- Prisoners convicted of sex offenses requiring registration under California's Sex Offender Registration Act.[29]

The "violent felony" exclusion is currently defined by statute to include the following offenses and enhancements:

> Murder or voluntary manslaughter, mayhem, rape, sodomy, oral copulation, lewd or lascivious act, any felony punishable by death or imprisonment in the state prison for life, any felony in which the defendant inflicts great bodily injury on any person other than an accomplice in the commission of a felony, any felony in which the defendant uses a firearm in the commission of a felony or sex offense, any robbery, arson, sexual penetration, attempted murder, igniting or exploding a destructive device with intent to commit murder, willfully and maliciously exploding or igniting destructive device causing bodily injury, willfully or maliciously exploding destructive device causing death, mayhem or great bodily injury, kidnapping, assault with intent to commit a specified felony, continuous sexual abuse of a child, carjacking, rape, spousal rape, or sexual penetration, extortion, threats to victims or witnesses, any burglary in the first degree wherein it is charged and proven that another person, other than an accomplice, was present in the residence during the commission of the burglary, any felony enhanced for persons who use firearms in commission of their crime, and deploying against another person a weapon of mass destruction that may cause widespread, great bodily injury, disabling illness, or death.[30]

Timing of parole-release eligibility. Under Proposition 57, the "full term" for the "primary offense" functions as the minimum term to first parole-release eligibility. This is a term of art in California, abbreviated here as "FTPO."[31] In cases of multiple convictions, the "primary offense" is the most serious among the separate counts, that is, the count on which the court imposed the longest prison sentence. The FTPO for an individual prisoner is calculated by "excluding all [sentencing] enhancements, alternative sentences, and consecutive sentences" that may have been added to the prison term for the primary offense.[32]

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[29] See Cal. Code Regs. § 3491(b)(3). The registration act is found at Cal. Penal Code § 290 et seq.

[30] Cal. Penal Code § 667.5(c). This definition is incorporated into the regulations effectuating Proposition 57, see 15 Cal. Code Regs. § 3490(c).

[31] Within California, this is referred to as the "Nonviolent Parole Eligible Date."

[32] 15 Cal. Code Regs. § 3490(d) (defining "primary offense" to mean "the single crime for which any sentencing court imposed the longest term of imprisonment, excluding all enhancements, alternative sentences, and consecutive sentences."). The date that marks the expiration of the FTPO is called the "nonviolent parole eligible date." See Cal. Code Regs. § 3490(f).

More than most states, the California legislature has enacted a large variety of sentencing enhancements, including the state's three-strikes law. See Robert Weisberg, *The Wild West of Sentencing Reform: Lessons from*

The Prison Legal News provided examples of what may not be included in the FTPO:

> Examples of enhancements … include the following: weapons use (+1 [years]), prior prison term (+1 to +5), gang allegation (+2 to +10), excessive loss (+1 to +4), drug quantity (+3 to +25), elderly or vulnerable victim (+1 to +5), sex crime with AIDS (+3) and hate crime (+2 to +4). …
>
> Alternative sentences are ones where a fact, if proved, doesn't add more time but instead changes the sentence for the underlying offense, usually to a life sentence. Some examples of alternative sentences … include: Three Strikes (25 to life), gang enhancement (7-life to 15-life) and habitual sexual offenders (25 to life).[33]

Proposition 57 is not as expansive as it looks. In order for the FTPO to function as a minimum term, a prisoner must face a period of time-served exposure beyond the FTPO. Often, this is not the case. Some prisoners are convicted of primary offenses that fall within Proposition 57 but their sentences do not include any sentencing enhancements, alternative sentences, or consecutive sentences. In such cases, the FTPO serves as the judicial maximum sentence and last possible release date; the prisoner is not helped if the law also makes the FTPO the first eligibility date for discretionary release.

California, in Michael Tonry ed., 48 Crime and Just. 35, 43 (2019) ("California law currently provides for at least 153 enhancements, spread across the Penal Code, Health and Safety Code, Insurance Code, and Vehicle Code.").

[33] Kent A. Russell, *Rundown on California Propositions 57 and 64*, Prison Legal News, Jan. 10, 2017. The article included the following detailed illustrations:

> For example, a defendant who was convicted of (a) 3 counts of burglary with (b) one prior strike and (c) one prison prior. Before Prop 57, he would face a six-year sentence for the first burglary count, doubled due to the second strike for 12 years, plus the two other burglaries merit consecutive sentences for another 5 years and four months, and the prior adds 5 years for a total of 22 years and 4 months. Under the old parole eligibility criteria with 20% credits, the defendant would be eligible for parole after serving 17.86 years.
>
> However, under Prop 57 only the longest term for the principal offense is counted. Therefore, parole eligibility is based only on the primary offense. In this example, for the primary offense of burglary the maximum term would be six years with no additions for consecutive sentences or prior prison terms, with parole eligibility after six years (less credits).
>
> As another example, consider a defendant who was convicted of assault with a knife plus a gang allegation, a prison prior and a prior strike. Before Prop 57, he would face a maximum prison term of 4 years for the knife assault, doubled due to the second strike for 8 years. The gang enhancement would add 5 years and the prison prior would add another 5 years, for a total sentence of 18 years and parole eligibility (with 15% credits) after 15 years and four months.
>
> But under Prop 57 only the longest term for the principal offense is counted. Therefore, the primary offense of the knife assault would carry a prison term of 4 years with parole eligibility after serving four years (less credits).

1.3. Youth offender parole for prisoners who were age 26 at the time of their offenses

A series of legislative enactments in the 2010s changed the prison-release rules for some prisoners with long sentences who committed their offenses when they were under age 26. Many such prisoners are now eligible for "youth offender parole" before the expiration of their determinate sentences, and some with indeterminate life sentences have been given accelerated release eligibility dates.[34] Youth offender parole has no effect on prisoners with determinate sentences of less than 14 years or life prisoners with minimum terms shorter than 19 years.

The timing of release eligibility varies with the nature of prisoners' "controlling offense," defined as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment."[35] Dates of release eligibility, called "youth parole eligible dates," are as follows:

- If the sentence for the controlling offense is a determinate sentence, the prisoner becomes eligible for parole release after serving 14 years.[36]
- If the sentence for the controlling offense is a life sentence with a minimum term of less than 25 years, the prisoner becomes eligible for parole release after serving 19 years.[37]
- If the sentence for the controlling offense is a life sentence with a minimum term of 25 years, the prisoner becomes eligible for parole release after serving 24 years.[38]
- For prisoners who were under age 18 at the time of their offenses, the most severe available sentence is a life term with release eligibility after 24 years (see section 2.3).

By statute, youth offender parole hearings "shall provide a meaningful opportunity to obtain release." The parole board must "give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."[39]

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[34] For summaries of the successive statutes, see Jennifer P. Shaffer, *Discretionary Parole in California: Report for the Committee on Revision of the Penal Code* (California Board of Parole Hearings, 2020), at 37-39.

[35] Cal. Penal Code § 3051(a)(2)(B).

[36] Cal. Penal Code § 3051(b)(1) ("The youth parole eligible date for a person eligible for a youth offender parole hearing under this paragraph shall be the first day of the person's 15th year of incarceration.").

[37] Cal. Penal Code § 3051(b)(2) ("The youth parole eligible date for a person eligible for a youth offender parole hearing under this paragraph shall be the first day of the person's 20th year of incarceration.").

[38] Cal. Penal Code § 3051(b)(3) ("The youth parole eligible date for a person eligible for a youth offender parole hearing under this paragraph shall be the first day of the person's 25th year of incarceration.").

[39] Cal. Penal Code § 4801(c).

Youth offender parole is not available to prisoners sentenced to life without parole for crimes committed after they had reached age 18. It is also unavailable to prisoners sentenced under California's two- and three-strikes laws and repeat offenders with mandatory consecutive sentences.[40]

1.4. Reconsideration after denials of parole release

When lifers with indeterminate sentences and prisoners eligible for youth offender parole are denied release, the parole board may set the date for subsequent release consideration at various intervals from three to 15 years, after "consideration of the public and victim's safety."[41] The board may set an earlier reconsideration date, "after considering the views and interests of the victim, … when a change in circumstances or new information establishes a reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration."[42]

For nonviolent offenders serving determinate sentences with parole-release eligibility under Proposition 57, a denial of release must be followed by annual review by the department of corrections for possible referral to the parole board for renewed release consideration.[43]

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

1.5. Generally-available credits: types and amounts

An important component of Proposition 57 was its authorization of increases in the conduct and programming credits prisoners may earn against their sentences.[44] In 2018, the California Department of Corrections and Rehabilitation (CDCR) adopted new regulations increasing good conduct and milestone completion credits and creating two new types of credits:

[40] Cal. Penal Code § 3051(h). This subsection contains an additional exclusion for "an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison."

[41] Cal. Penal Code §§ 3041.5(b)(3)(A)-(C), 3051(g).

[42] Cal. Penal Code §§ 3041.5(b)(4), 3051(g).

[43] Cal. Code Regs. §§ 2449.4(h), 3492(b).

[44] See The Public Safety and Rehabilitation Act of 2016, Gen. Elec. (Cal. 2016), codified in Cal. Const. Art. 1, § 32(a)(2) ("Credit Earning: The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements."). Proposition 57 required the Department of Corrections and Rehabilitation to "adopt regulations in furtherance of [its] provisions." Cal. Const. Art. 1, § 32(b).

rehabilitative achievement and educational merit credits.[45] Prisoners sentenced to death or life without the possibility of parole are ineligible for all five types of credits.[46]

a. Good conduct credits

Good conduct credits are awarded to prisoners who "comply with departmental regulations and local rules of the prison and perform the duties assigned on a regular and satisfactory basis."[47] Earning rates vary across classes of prisoners, from one day of credit for every four days of incarceration (yielding a potential 20 percent reduction of the prisoner's maximum term) to two days of credit for every day of confinement (a potential 67 percent reduction of maximum term).[48] Examples of different earning classes include:

- One day of credit per day of confinement is the default earning rate for prisoners convicted of nonviolent offenses.[49]
- Two days of credit per one day of confinement for prisoners convicted of nonviolent offenses who are given minimum-security custody designations.[50]
- One day of credit per four days of confinement for most prisoners convicted of violent offenses.[51]
- One day of credit per two days of confinement for prisoners sentenced under the three strikes law when their third strike was a nonviolent offense.[52]

b. Milestone completion credits

Milestone completion credits are awarded to prisoners for "the achievement of a distinct objective of approved rehabilitative programs."[53] Earning rates are set out in "Milestone

[45] Cal. Code Regs. §§ 3043(a); 3043.2-3043.6. For a chart comparing conduct and programming credits available before and after Proposition 57, see Prison Law Office, *Information on Proposition 57: Prison Credit Rules and Nonviolent Offender Parole Consideration* (2019), at 3 table.

[46] Cal. Code Regs. §§ 3043.2(b)(1), 3043.3(c), 3043.4(b), 3043.5(b), 3043.6(a).

[47] Cal. Code Regs. § 3043.2(a).

[48] Cal. Code Regs. § 3043.2(b) (containing numerous subsections).

[49] Cal. Code Regs. § 3043.2(b)(4)(A). Prisoners with convictions of violent offenses may win this earning rate through work as a firefighter. Id., § 3043.2(b)(4)(B),(C).

[50] 15 Cal. Code Regs. § 3043.2(b)(5)(A). For the rules concerning inmate custody designations, see id., § 3377.1. Prisoners with convictions of nonviolent offenses may win this earning rate through work as a firefighter. Id., § 3043.2(b)(5)(B),(C).

[51] 15 Cal. Code Regs. § 3043.2(b)(2). The definition of "violent offense" is contained in Cal. Penal Code § 667.5(c). For the list of offenses, see section 1.1b(i).

[52] 15 Cal. Code Regs. § 3043.2(b)(3).

[53] 15 Cal. Code Regs. § 3043.3(a) (including "academic programs, substance abuse treatment programs, social life skills programs, Career Technical Education programs, Cognitive Behavioral Treatment programs, Enhanced

Completion Credit Schedules" maintained by the CDCR, and total earnings are capped at 84 days per year.[54]

c. Rehabilitative achievement credits

Rehabilitative achievement credits are awarded to prisoners for "verified attendance and satisfactory participation in approved group or individual activities which promote the educational, behavioral, or rehabilitative development of an inmate."[55] The standard earning rate is 10 days of credit for every 52 hours of participation, with an annual earnings cap of 40 days.[56]

d. Educational merit credits

Educational merit credits are awarded are awarded for "the achievement of a significant academic accomplishment which will provide inmates with life-long rehabilitative benefits." These include high school degrees or equivalency, college or advanced degrees, and "a professional certificate as an Alcohol and Drug Counselor."[57] Credits are awarded at the rate of 180 days per academic accomplishment, with no cap on cumulative earnings.[58]

e. Extraordinary conduct credits

Extraordinary conduct credits in amounts of up to one year may be awarded to prisoners who have "performed a heroic act in a life-threatening situation or … provided exceptional assistance in maintaining the safety and security of a prison."[59]

Outpatient Program group module treatment programs, or other approved programs with similar demonstrated rehabilitative qualities.").

[54] 15 Cal. Code Regs. § 3043.3(c),(d). For the Milestone Completion Credit Schedules in force in 2020, see https://www.cdcr.ca.gov/wp-content/uploads/sites/171/2019/06/MCCS-Rev-7-2018.pdf?label=Milestone%20Completion%20Credit%20Schedule%20(MCCS)%20(Rev.%2007/18)&from=https://www.cdcr.ca.gov/regulations/cdcr-regulations/dom-appendices/.

[55] Cal. Code Regs. § 3043.4(a).

[56] Cal. Code Regs. § 3043.4(c)(2). Credits exceeding the annual cap may be rolled forward into the next confinement year. Id., § 3043.4(e)(2).

[57] Cal. Code Regs. § 3043.5(a),(b).

[58] Cal. Code Regs. § 3043.5(b).

[59] Cal. Code Regs. § 3043.6(a).

1.6. Effect of credits on determinate sentences

Credits advance mandatory release dates (MRDs) for most prisoners sentenced to determinate terms.[60] Each day of credit is deducted from the judicial maximum sentence to move the MRD forward.

1.7. Effect of credits on indeterminate sentences

Credits advance the first date of eligibility for discretionary parole release for prisoners sentenced to indeterminate life terms. They are not applied to advance dates of discretionary-release eligibility for prisoners with parolable determinate sentences, including nonviolent offenders with parolable determinate sentences under Proposition 57 and youth offenders with determinate sentences for crimes committed before age 25. Nor do they affect eligibility dates for elderly parole.[61]

1.8. Loss of good-time credits

Good conduct credits, milestone completion credits, and rehabilitative achievement credits may be forfeited for serious rule violations.[62] Educational merit credits and extraordinary conduct credits are not forfeitable once earned.[63] If forfeited, good conduct credits may sometimes be restored in accordance with CDCR regulations.[64]

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[60] 15 Cal. Code Regs. § 3043(a) (" The award of these credits … shall advance an inmate's release date if sentenced to a determinate term or advance an inmate's initial parole hearing date … if sentenced to an indeterminate term with the possibility of parole.").

[61] 15 Cal. Code Regs. § 3043(a). By its express terms, this provision only affects the timing of parole hearings "pursuant to subdivision (a)(2) of section 3041 of the Penal Code." Section 3041 does not apply to prisoners who were sentenced under the DSL, see Cal. Penal Code §§ 3041(a)(1) (excluding prisoners sentenced under Cal. Penal Code § 1170 et seq.). Read literally, the effect of this regulation is that credits do not advance the parole eligibility dates of nonviolent offenders affected by Proposition 57, who still have "determinate" sentences under the DSL. For further discussion, see Prison Law Office, *Information on Proposition 57: Prison Credit Rules and Nonviolent Offender Parole Consideration* (2019), at 2 ("although CDCR conduct and programming credits apply toward the Earliest Possible Release Date for determinate sentences and the Minimum Eligible Parole Date (MEPD) for indeterminate (life with the possibility of parole) sentences, they do not apply toward a Youth Offender Parole Eligible Date (YPED), Elderly Parole Eligible Date (EPED), or Nonviolent. Parole Eligible Date (NVPED).").

[62] Cal. Code Regs. §§ 3043.2(d), 3043.3(h), 3034.4(i).

[63] Cal. Code Regs. §§ 3043.5(f), 3043.6(d).

[64] Cal. Code Regs. § 3043.2(d), cross-referencing id., §§ 3327-3329.5 (concerning "restoration of credits").

II. Prisoners Outside the General Rules

2.1. Life sentences without parole

Life imprisonment without the possibility of parole (LWOP) is the mandatory penalty for first-degree murder when one or more statutory "special circumstances" have been found by the trier of fact, unless the death penalty is imposed.[65] It is also mandatory for first-degree murders that are hate crimes or involve the killing of transportation personnel; and for second-degree murders when the victim is a peace officer.[66] It is an authorized punishment for defendants convicted of second-degree murder who have prior convictions of either first- or second-degree murder.[67]

Prisoners with LWOP sentences are not eligible for discretionary parole release, except those who were under age 18 at the time of their crime.

The CDCR reported that, at midyear 2019, California's prisons held 5,079 persons serving LWOP sentences out of a total prison population of 125,472. This amounted to about four percent of the prison population.[68]

2.2. Life sentences with possibility of parole

a. Indeterminate life sentences for murder

California has a wide portfolio of parolable life sentences, with varying minimum terms before first release eligibility. For first-degree murders, when the death penalty and LWOP are not imposed, the penalty is 25 years to life.[69] A sentence of 15 years to life is available for defendants convicted of second-degree murder who have prior convictions of either first- or second-degree murder.[70] For lifers who were under age 26 at the time of their offenses, their minimum terms could be 19 or 24 years (see section 1.3).

b. Indeterminate life sentences for other crimes

Defendants convicted of a third strike under California's three strikes law are sentenced to life sentences with minimum terms that are the greater of: 25 years or "[t]hree times the term

[65] Cal. Penal Code § 190.3.

[66] Cal. Penal Code §§ 190.03, 190.25, 190(c).

[67] Cal. Penal Code § 190.05(a).

[68] California Department of Corrections and Rehabilitation, *Offender Data Points: Offender Demographics for the 24-Month Period Ending June 2019* (2020), at 10 table 1.10.

[69] Cal. Penal Code § 190(a).

[70] Cal. Penal Code § 190.05(a).

otherwise provided as punishment for each current felony conviction."[71] A sentence of 15 years to life is available for those convicted of aggravated sexual assault of a child under 14.[72]

c. General information

When prisoners are convicted of two or more offenses carrying parolable life sentences, the court may impose consecutive sentences in which the minimum terms are "stacked" to be served separately, one after the other.[73] Such stacking is required for three-strikes sentences.[74]

In contrast with most other states, prisoners with indeterminate life sentences have the right to appointed counsel at any hearing for the purpose of setting, postponing, or rescinding their parole release dates.[75]

Under the California Constitution, the governor must review all parole-release decisions for prisoners who are serving indeterminate life sentences for murder. Within 30 days of the parole board's decision in such cases, the governor must "affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider."[76] For other indeterminate life sentences, the governor's powers are limited to returning the board's initial decision for *en banc* reconsideration by a majority of all commissioners.[77]

In the last 30 years, different governors have had far different practices in approving or denying release to prisoners serving life sentences for murder convictions.[78]

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[71] Cal. Penal Code § 667(e)(2)(A).

[72] Cal. Penal Code § 269(b).

[73] Cal. Penal Code § 3046(b).

[74] Cal. Penal Code § 667(e)(2)(B).

[75] Cal. Penal Code § 3041.7.

[76] Cal. Const. Art. V, § 8(b) ("No decision of the parole authority of this State with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider."); Cal. Penal Code § § 3041.2.

[77] Jennifer P. Shaffer, *Discretionary Parole in California: Report for the Committee on Revision of the Penal Code* (California Board of Parole Hearings, 2020), at 8.

[78] Kathryne M Young, Debbie A. Mukamal & Thomas Favre-Bulle, *Predicting Parole Grants: An Analysis of Suitability Hearings for California's Lifer Inmates*, 28 Fed. Sent. Rptr. 268, 270 figure 1 (2016) (showing, for example, that Governor Gray Davis denied over 90 percent of release recommendations from the parole board in the years 1999-2003, Governor Arnold Schwarzenegger denied between 60 and 85 percent from 2004-2010, and Governor Jerry Brown denied less than 20 percent from 2011-2015).

The CDCR reported that, at midyear 2019, California's prisons held 27,115 persons serving sentences of life with possibility of parole out of a total prison population of 125,472. This amounted to about 22 percent of the prison population.[79]

2.3. Juvenile life sentences

California has abolished LWOP sentences for prisoners who were under age 18 at the time of their crimes. For offenses that carry LWOP sentences for adults, the most severe penalty available for juvenile offenders is a life term with parole eligibility "*during* the person's 25th year of incarceration." That is, first parole eligibility occurs after prisoners have served 24 years, on the first day of their 25th year.[80]

Juvenile lifers have the right to appointed counsel at any hearing for the purpose of setting, postponing, or rescinding their parole release dates.[81]

III. Other Forms of Prison-Release Discretion (not routinely used)

3.1. Medical or "compassionate" release

a. Medical parole

Medical parole is available for most prisoners who are "permanently medically incapacitated with a medical condition that renders [them] permanently unable to perform activities of basic daily living" so that they require 24-hour care.[82] To grant release, the parole board must find that "that the conditions under which [the prisoner] would be released would not reasonably pose a threat to public safety." Initial eligibility must be determined by the "head physician of an institution in which a prisoner is incarcerated."[83] A prisoner released on medical parole

[79] California Department of Corrections and Rehabilitation, *Offender Data Points: Offender Demographics for the 24-Month Period Ending June 2019* (2020), at 10 table 1.10.

[80] Cal. Penal Code § 3051(b)(4) (providing that the date of first release eligibility "shall be the first day of the person's 25th year of incarceration."). For detailed analyses and critiques, see 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); Beth Caldwell, *Creating Meaningful Opportunities for Release*: Graham, Miller, *and California's Youth Offender Parole Hearings*, 40 N.Y.U. Rev. L. & Soc. Change 245 (2016).

[81] Cal. Penal Code § 3041.7.

[82] Cal. Penal Code § 3550(a). Prisoners ineligible for medical parole include those serving sentences of death or life without possibility of parole, and those convicted of first-degree murder of a peace officer. Id., § 3550(b)(1),(3).

[83] Cal. Penal Code § 3550(a).

may be returned to custody if the board finds that "the person's medical condition has improved to the extent that the person no longer qualifies for medical parole."[84]

Between January 1, 2011 and September 9, 2020, the parole board approved 183 prisoners for medical parole, for an average of about 19 per year.[85]

b. Elderly parole

Effective January 1, 2021, most prisoners age 50 and older who have served at least 20 years are eligible for release under the "Elderly Parole Program."[86] The elderly parole program was created in 2014. Before 2021, it was limited to prisoners age 60 and older after they had served 25 years.[87] Exclusions include prisoners convicted of first-degree murder of a peace officer, under the three-strikes law, and those with LWOP and death sentences.

In deciding whether to grant release, "the [parole] board shall give special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate's risk for future violence."[88] If release is denied, the parole board may set the date for subsequent release consideration at various intervals from three to 15 years, after "consideration of the public and victim's safety."[89]

In 2019, the parole board reported 268 grants of elderly parole out of a total of 1,184 parole grants of all types. The elderly-parole grant rate for 2019 was 32 percent. The number of elderly-parole releases is likely to increase in 2021 and later years due to the lowering of age eligibility from 60 to 50 and minimum-term eligibility from 25 to 20 years. The new eligibility rules took effect January 1, 2021.[90]

3.2. Executive clemency

California's Constitution gives the governor authority to grant reprieves, pardons, and commutations of sentences in all cases except impeachment. Uniquely, the constitution provides that the governor "may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring."

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[84] Cal. Penal Code § 3550(h).

[85] Jennifer P. Shaffer, *Discretionary Parole in California: Report for the Committee on Revision of the Penal Code* (California Board of Parole Hearings, 2020), at 33.

[86] Cal. Penal Code § 3055(a). Prisoners ineligible for elderly parole include those serving sentences of death or life without possibility of parole, those convicted of first-degree murder of a peace officer, and those convicted under the three strikes law. Id., § 3055(g),(h).

[87] See former Cal. Penal Code § 3055(a) (prior to amendments effective January 1, 2021).

[88] Cal. Penal Code § 3055(c).

[89] Cal. Penal Code § 3055(f), incorporating the provisions of Cal. Penal Code § 3041.5(parolable).

[90] California Board of Parole Hearings, *2019 Report of Significant Events* (2020), at 1, 7, 9.

The California Supreme Court has taken the view that its proper role is only to review the governor's decisions for abuse of power.[91]

3.3. Emergency release for prison overcrowding

California has no statutory emergency-release mechanism to address circumstances of prison overcrowding.

3.4. COVID releases

During the first six months of the COVID period, California's total prison population in institutions and camps dropped by nearly 23,000—about a 19 percent reduction. This number cannot be attributed solely to COVID releases, as declining admissions have accounted for a major share of the change.[92]

By one report, California accelerated the release of an estimated 8,000 prisoners through the summer of 2020 in response to the coronavirus pandemic. The prisoners considered for release had a year or less remaining on their sentence and were incarcerated in institutions housing large populations of high-risk patients. Prisoners excluded from the COVID release program included those convicted of violent crimes and registrable sex offenses.[93]

In October 2020, the California Court of Appeals ordered the transfer or release of half of all prisoners from San Quentin State Prison.[94] The ruling was based on the court's finding that

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[91] Cal. Const. Art. V, § 8(a). See California Supreme Court, Admin. Order 2018–03–28, *Procedures for Considering Requests for Recommendations concerning Applications for Pardon or Commutation*, 417 P.3d 769, 769 (Cal. 2018) (establishing that "[t]he role of this court under article V, section 8, is not to express a substantive view on the merits of an application …. It is, rather, … to determine whether the applicant's claim has sufficient support that an act of executive clemency, should the Governor choose to grant it, would not represent an abuse of that power.").

[92] CDCR posts weekly population reports. The report for November 18, 2020 shows a total "In-Custody/CRPP Supervision" population of 97,891, of whom 94,478 were in "institutions/camps" as opposed to other categories including in-state contract beds, hospitals, or Community Rehabilitative Program Placements (CRPP). See California Department of Corrections and Rehabilitation,*Weekly Report of Population as of Midnight November 18, 2020*, at 1. Compare this to the weekly report for March 4, 2020, right before the COVID changes began. Then, there were 117,301 in "institutions/camps." See California Department of Corrections and Rehabilitation,*Weekly Report of Population as of Midnight March 4, 2020*, at 1. This sector of the population dropped by 22,823 from March 4 to November 18.

[93] Bill Chappell, *California will release up to 8,000 prisoners due to coronavirus*, National Public Radio, July 10, 2020.

[94] *In re Von Staitch*, 270 Cal.Rptr.3d 128, 154 (Cal. App. 2020) ("Respondents are also ordered to expedite the removal from San Quentin State Prison—by means of release on parole or transfer to another correctional facility administered or monitored by CDCR—of the number of prisoners necessary to reduce the population of that prison to no more than 1,775 inmates."). See Bruce Western & Emily Wang, *California must reduce jail and prison populations to fight COVID-19 — and racism*, Sacramento Bee, November 20 2020 (reporting that Court of Appeal's order will require San Quentin Prison to halve its inmate population).

the prison had shown deliberate indifference to prisoners' medical needs during the COVID pandemic. The court reasoned that prison officials possessed but had not used a statutory removal power sufficient to meet the crisis under the state's Emergency Services Act:

> In a life-threatening emergency like that posed by COVID-19 in San Quentin, respondents have the power to remove all persons incarcerated at San Quentin, not just inmates convicted only of nonviolent offenses. Pursuant to Government Code section 8658, "[i]n any case in which an emergency endangering the lives of inmates of a state . . . correctional institution has occurred or is imminent, the person in charge of the institution may remove the inmates from the institution. He shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to avoid the danger, or, if that is not possible, may release them. Such person shall not be held liable, civilly or criminally, for acts performed pursuant to this section." The removal section 8658 permits includes not just release from prison but also transfer to other correctional institutions and detention facilities.[95]

With the advent of COVID vaccines, we expect the brief era of COVID-fueled releases and system bottlenecks will recede.

3.5. Court-ordered population reductions

In the 1970s and 1980s, constitutional litigation was sporadically successful in prompting state prisons and local jails to reduce their inmate populations, often with the cooperation of corrections officials in the defendant jurisdictions.[96] This era receded in the 1990s, when Congress cut back significantly on the availability of such remedies.[97]

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[95] *In re Von Staitch*, 270 Cal.Rptr.3d 128, 147-48 (Cal. App. 2020). See also *California Correctional Peace Officers Association v. Schwarzenegger*, 163 Cal. App. 4th 802, 817 (Cal. App. 2008).

[96] The focus of much prison litigation in the 1970s and 1980s was the improvement of conditions of confinement, not necessarily the direct regulation of population size. Overcrowding and the impermissible treatment of prisoners are often intertwined, however. For a broad historical account and analysis, see Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge University Press, 1998). Feeley and Rubin document instances in which state corrections officials welcomed judicial intervention as a means to bring about budget increases or improvements in their institutions that were unavailable through ordinary political channels. In the authors' telling, for example, consent decrees were to some extent the product of negotiations among allies, rather than stereotypical litigation adversaries.

[97] See 42 U.S.C. § 1997e (Prison Litigation Reform Act).

California is the only state in the 21st century to fall under court order to make large reductions in its prison population on constitutional grounds (see introduction to this report).[98] We know of no comparable lawsuit gathering steam in any other American jurisdiction.[99]

In theory, judicial review could be an important engine of prison-release discretion for the regulation of prison-population size. The American history of the Great Prison Buildup from 1972 to 2007 suggests that court intervention never came close to stemming the tide of the nationwide buildup to mass incarceration, although it may have had substantial localized effects.

For purposes of this project, we classify judicial intervention as a form of prison-release discretion that is "not routinely used." Nonetheless, it can have great jurisdiction-specific consequences in rare and unpredictable circumstances. While the Supreme Court's 2011 decision in *Brown v. Plata* may seem a "one-off" anomaly, we doubt that California's prisons in 2011 were in worse shape or most overcrowded than many prisons across the country today.

3.6. Judicial review of parole-release decisions

More than any other state that we are aware of, California's appellate courts have been active in reviewing release-denial decisions by the state's parole board.[100] According to the parole board's data there were 239 successful legal challenges to parole board hearings in 2010 and 135 in 2011. From 2013 through 2019, however, there were an average of about 12 successful challenges per year.[101]

[98] *Brown v. Plata*, 563 U.S. 493 (2011). The *Plata* decision grew out of ongoing litigation in *Plata v. Brown*, No. C01–1351 TEH (N.D.Cal.), and *Coleman v. Brown*, No. 90–cv–520–LKK (E.D.Cal.). The courts' original population reduction order, affecting 33 separate prisons, came in *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D.Cal./N.D.Cal. Aug. 4, 2009). For a recounting of post-*Plata* developments, see *Coleman v. Brown*, 2014 WL 2889598 (E.D. Cal. 2014).

[99] Franklin E. Zimring, *The Insidious Momentum of American Mass Incarceration* (Oxford University Press, 2020).

[100] See, e.g., *In re Lawrence*, 190 P.3d 535 (Cal. 2008); *In re Prather*, 234 P.3d 541 (Cal. Ct. App. 2010).

[101] Jennifer P. Shaffer, PowerPoint Presentation, *Discretionary Parole in California* (California Board of Parole Hearings, 2020), at 15.

IV. Modeling the Relationship Between Prison-Release Discretion and Prison Population Size in California

California's prison sentences have a number of different forms, with varying amounts of prison-release discretion attached to each. Within the prison population, there are several "tiers" of prisoners with different sentence types. To assess the connections between back-end releasing authority and prison population size, it is necessary to work through the relevant subpopulations one at a time.

In October 2020, California's parole board offered the following rough breakdown: About 100,000 individuals were held in the prison system's "institutions."[102] About 60 percent of these were serving "determinate" sentences and roughly 34 percent had sentences of life with the possibility of parole. The remainder had LWOP or death sentences.[103]

Below, we will focus separately on the two largest subpopulations: those with "determinate" sentences (section 4.1) and those with parolable life sentences (section 4.2), which are the only "indeterminate" sentences in California terminology. In addition, we will take special note of the growing group of parole eligible prisoners under California's expanding system of "elderly parole" (section 4.3).

4.1. General rules for "determinate" sentences

About three-quarters of all "determinate" sentences in California carry no parole-release eligibility, with the remainder subject to parole-release discretion. California's usage of the term "determinate" is idiosyncratic and different from the definition adopted in this project. It is also different from conventional usage in the United States. (For example, the notion of parolable "determinate" sentences may strike some readers as an oxymoron.) Non-parolable "determinate" sentences will be considered in subsections 4.1a through 4.1c below. Section 4.1d will address parolable "determinate" sentences.

The degree of indeterminacy found in California's non-parolable "determinate" sentences is largely a function of the state's multi-layered credit system. Most prisoners with "determinate" sentences have the opportunity to advance their mandatory release dates (MRDs) through the accrual of several types of conduct-based credits (see section 1.5). Following Proposition 57 in 2016, the available credits have substantially increased for many prisoners. For some prisoners,

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[102] California differentiates between the total "in-custody" population and the smaller subset held in "institutions." The full in-custody population is reported annually to the Bureau of Justice Statistics. In addition to individuals in institutions, this includes more than 10,000 in fire camps, in-state contract beds, Department of State hospital beds, Community Rehabilitative Program Placements, and out-of-state correctional facility beds. See California Department of Corrections and Rehabilitation, *Offender Data Points: Offender Demographics for the 24-Month Period Ending June 2019* (2020), at 6 table 1.6.

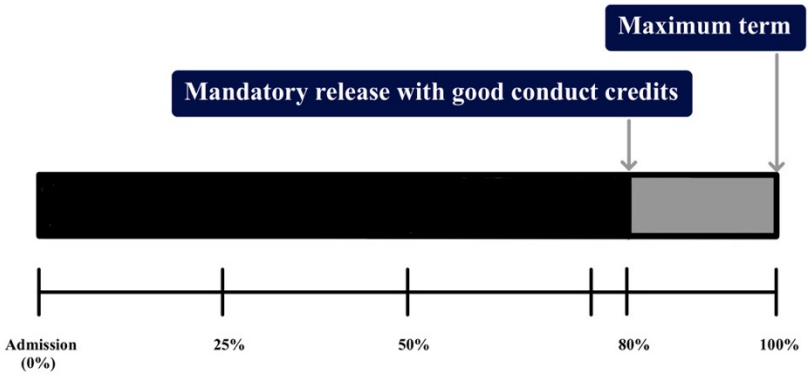
[103] The population breakdowns in text are from Jennifer P. Shaffer, PowerPoint Presentation, *Discretionary Parole in California* (California Board of Parole Hearings, 2020), at 7.

potential credit-based discounts against their maximum terms are the most generous in the country. Subsections 4.1a through 4.1c below separate out three groups of prisoners with substantially different credit earning rates under current law.

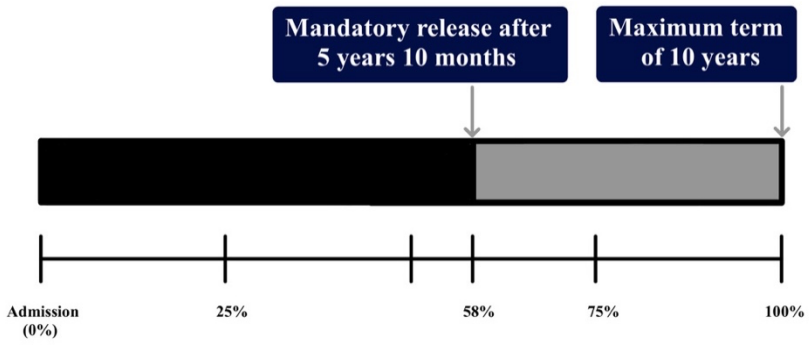
a. Determinate sentences (violent offenders)

We believe that most California prisoners with "determinate" sentences have been convicted of violent offenses.[104] We will use the shorthand "DTV" to refer to this group. DTV sentences carry no parole-release eligibility, but prisoners can earn *good conduct credits* at a rate of 7.5 days per month. As shown in Figure 3, full earnings of these credits produce MRDs at the 80-percent mark of prisoners' maximum terms. Figure 4 builds on Figure 3 and adds hypothetical earnings for three additional types of credits. In order to offer exact calculations, Figure 4 is based on a 10-year judicial maximum sentence.

California Figure 3. Prison-Release Timeline for Determinate Sentences (Violent Offenders) with Full Good Conduct Credits



California Figure 4. Prison-Release Timeline for Determinate Sentence of 10 Years: Violent Offender Who Earns Full Good Conduct, Milestone Completion, and Rehabilitative Achievement Credits plus One-Time Award for Educational Merit Credits

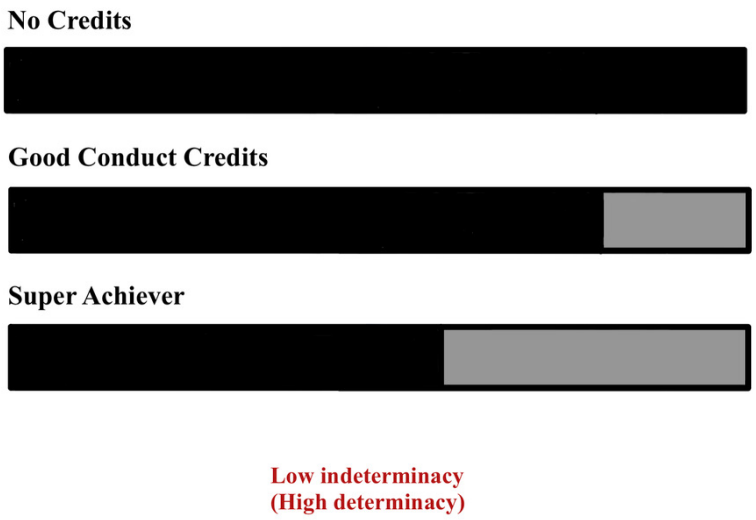


[104] This assumption is based on the fact that large numbers of nonviolent offenders are serving their sentences at the county level under Realignment. We do not have relevant statistics.

Figure 4 might be described as showing the earnings of an imaginary "super achiever" prisoner. To meet this high standard, a DTV prisoner must earn *milestone completion credits* at their annual limit of 84 days during every year of confinement and must do the same for *rehabilitative achievement credits*, which are limited to 40 days per year. In addition, the prisoner posited in Figure 4 has earned a single 180-day award of *educational merit credits* (for example, by completion of a GED). Figure 4 assumes a truly impressive earnings record. It is likely impossible to achieve for most prisoners due to shortages of program slots, imperfect treatment plans, downtime between end and start dates, administrative delays, etc.[105]

Figure 5 displays the range of possibilities for DTV prisoners more simply. It "stacks" three timelines. The first shows the amount of time served in relation to the maximum term for prisoners who earn no credits of any kind (or who lose all they have earned). The second timeline illustrates full earnings of good conduct credits but nothing more. The third represents the super achiever.

California Figure 5. Prison-Release Timelines for Determinate Sentences (Violent Offenders): No Credits, Good Conduct Credits, and Super Achievers



Realistic earnings for well-behaved DTV prisoners probably peak somewhere in between the "good conduct" and "super achiever" examples. We have no data on point. For almost everyone in the DTV group, however, including prisoners with poor records, we are willing to

[105] On the other hand, Figure 4 does not depict the highest conceivable earnings for DTV prisoners. Educational merit credits can be won more than once, and additional credits for *extraordinary conduct* (such as heroic acts) are in theory available to prisoners.

make an educated guess that actual MRDs span a "realistic" range of 65 to 100 percent of judicial maximum sentences. We will use that estimate going forward.

Under this project's subjective ranking system, we rate DTV sentences as having a *low degree of indeterminacy* or—perhaps it is more natural to say—a *high degree of determinacy*. If we adopt the 65-percent benchmark of what is reasonably possible, such sentences are on average 65 percent determinate and 35 percent indeterminate. That is, 65 percent of a DTV prisoner's length of stay is effectively "determined" by the judicial sentence and the remaining 35 percent is left undetermined by the judge, pending later discretionary decisions by back-end releasing authorities.[106] Post-sentencing discretionary decisions will place individual prisoners between the 65- and 100-percent milestones on a case-by-case basis.

> In this project, we use the term "population-multiplier potential" (or PMP) to express the amount of influence over prison population size that is ceded by law to back-end decision makers such as parole boards and prison officials. To give a simplified example, if all prisoners in a hypothetical jurisdiction were eligible for parole release after serving 25 percent of their maximum sentences, then the PMP attached to the parole board's release decisions is 4:1. That is, if the parole board were to deny release to all prisoners for as long as legally possible (a *never-release scenario*), the resulting prison population would be four times as large as it would be if the board were to release all prisoners at their earliest allowable release dates (an *always-release scenario*).

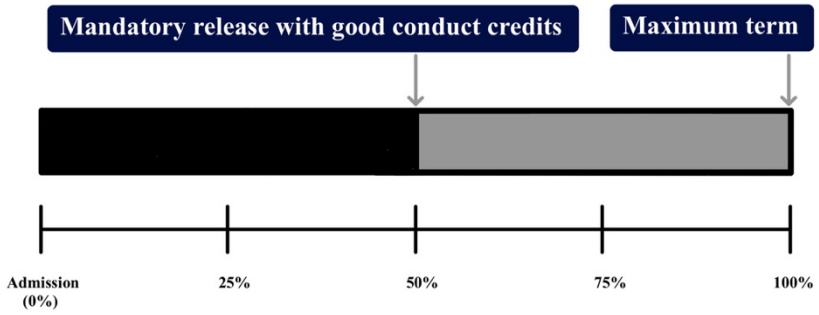
In California, for DTV prisoners, we estimate a PMP of 1.54:1. That is, in a never-release scenario (in which prisoners never receive credits of any kind and always serve their full maximum terms) this subgroup of the prison population would be 54 percent larger than in an always-release scenario (in which all prisoners earn enough credits to achieve the earliest possible release date in the realm of reasonable possibility). In this instance, the PMP is wholly within the control of the department of corrections. The parole board's release discretion is inoperative. The department's "control" is not a matter of free-wheeling discretion, however, because the administration of most types of credits is predicated on the availability of programming.

[106] Other systems we have ranked as highly determinate include Minnesota and Washington, which allow most prisoners to earn MRDs at the 67-percent mark of their maximum sentences. The PMP for such sentences is 1.5:1.

b. Determinate sentences (nonviolent offenders)

Many nonviolent offenders with "determinate" sentences (the "DTNV" group) are ineligible for discretionary parole release, but may still earn conduct-based credits as shown in Figures 6 and 7 (see sections 1.1 and 1,2). The default earning rate for *good conduct credits* for this group is one day per day. Full earnings produce MRDs at the 50-percent mark of prisoners' maximum terms, as illustrated in Figure 6. Figure 7 adds an array of credits that could in theory be won by a super-achiever DTNV prisoner.[107]

California Figure 6. Prison-Release Timeline for Determinate Sentences (Nonviolent Offenders) with Full Good Conduct Credits



California Figure 7. Prison-Release Timeline for Determinate Sentence of 5 Years: Nonviolent Offender Who Earns Full Good Conduct, Milestone Completion, and Rehabilitative Achievement Credits plus One-Time Award for Educational Merit Credits

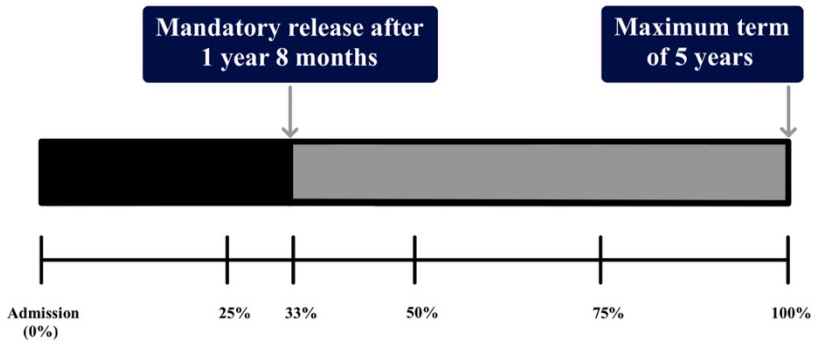
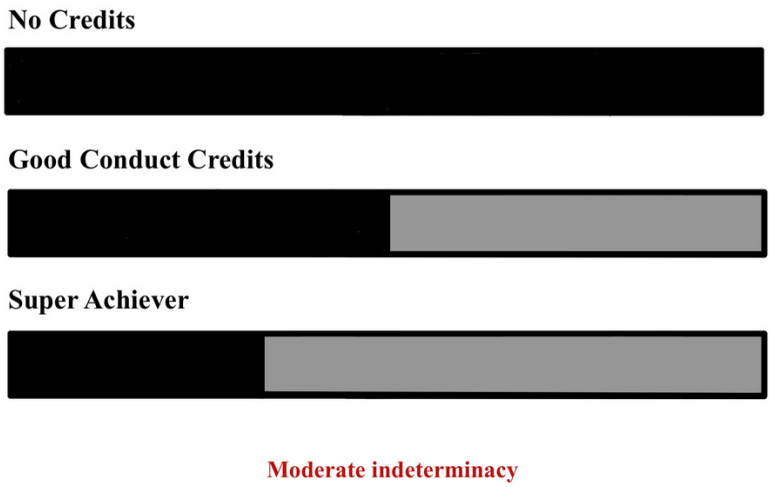


Figure 8 collates three timelines to help assess the realistic range of possible earnings for DTNV prisoners, including prisoners with the best and worst records. As in the previous section, our

[107] We posit a five-year sentence in order to offer exact calculations for Figure 7.

experience tells us that super-achiever earnings are not realistically achievable despite their availability "on paper." We are willing to postulate that actual lengths of stay for the vast majority of DTNV prisoners vary from 40 to 100 percent of their judicial maximum terms. Such sentences are 40 percent determinate, 60 percent indeterminate.

California Figure 8. Prison-Release Timelines for Determinate Sentences (Nonviolent Offenders): No Credits, Good Conduct Credits, and Super Achievers



The PMP for this class of sentences is 2.5:1, controlled entirely by credit awards. That is, the DTNV subpopulation in California's prisons would be 150 percent larger in a never-release regime than in an always-release regime.

In our subjective rankings of comparative degrees of indeterminacy across the states, this class of DTNV sentences in California carries a *moderate degree of indeterminacy*. Most indeterminate prison-sentencing systems feature higher DOIs, and most determinate systems have lower DOIs.[108]

One thing that is notable about the California system is that this moderate DOI is achieved through the availability of credits rather than the possibility of discretionary parole release. Normally, American criminal justice professionals do not think of "indeterminacy" as a function of good-time and earned-time credits. Instead, indeterminacy is generally associated

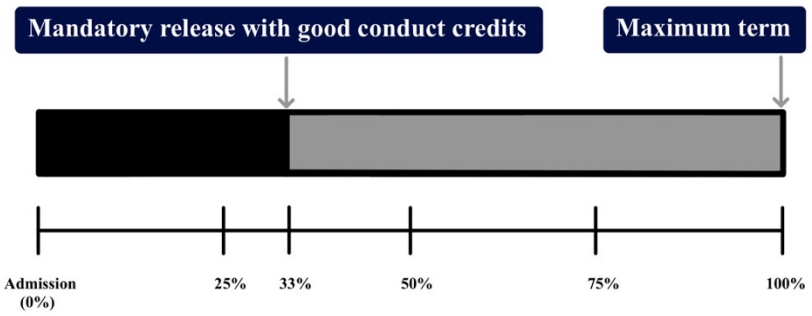
[108] Other systems with moderate indeterminacy in our subjective rankings include Colorado (PMP of 2.33:1 for most prisoners) and Maryland (average 3:1 PMP across both violent and nonviolent offenders).

with parole-release discretion. One important message of this project is that indeterminacy can be produced through a variety of different institutional configurations.

c. Determinate sentences (nonviolent offenders with minimum custody assignments)

There is a subset of DTNV prisoners who earn credits at a much higher rate than the default rate. Those who are assigned to minimum-custody status can earn two days of good conduct credits per day of confinement (see section 1.5a). If this earning rate holds constant, it produces an MRD at the one-third mark of the judicial maximum sentence, as shown in Figure 9. Figure 10 displays the additional earnings of a hypothetical super achiever, which would advance the MRD to the 20-percent mark of the maximum term.

California Figure 9. Prison-Release Timeline for Determinate Sentences (Nonviolent Offenders with Minimum Custody Assignments) with Full Good Conduct Credits



California Figure 10. Prison-Release Timeline for Determinate Sentence of 5 Years (Nonviolent Offender with Minimum Custody Assignment Who Earns Full Good Conduct, Milestone Completion, and Rehabilitative Achievement Credits plus One-Time Award for Educational Merit Credits)

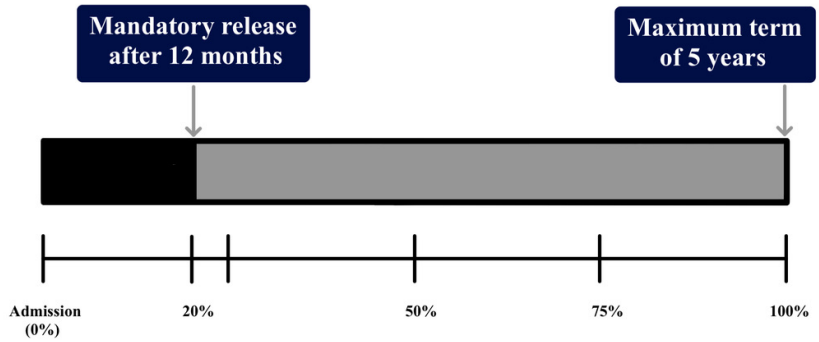
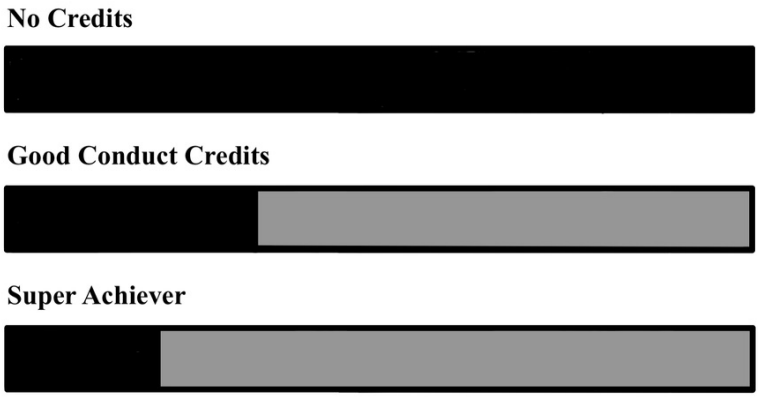


Figure 11 stacks three possible timelines for DTNV prisoners who have won minimum-custody assignments.

California Figure 11. Prison-Release Timelines for Determinate Sentences (Nonviolent Offenders with Minimum Custody Assignments) No Credits, Good Conduct Credits, and Super Achievers



High indeterminacy

We rate this class of sentences as *high in indeterminacy*. Looking only at the earnings of good conduct credits, DTNV (minimum custody) sentences are 33 percent determinate and 67 percent indeterminate. Suppose that a DTNV (minimum custody) prisoner with a five-year sentence were also to complete a GED while incarcerated. This would move the MRD back 180 additional days to the 23-percent mark of the five year maximum, and would produce a PMP of 4.3:1.[109] That is, the size of the DTNV (minimum custody) subpopulation of prisoners would be 4.3 times larger in a *never-release* regime than in an *always-release* regime.

d. Determinate sentences with eligibility for discretionary parole release

Among DTNV prisoners, some were given parole-release eligibility as a result of Proposition 57 in 2016. The parole-eligible group includes DTNV prisoners whose sentences were lengthened by sentence enhancements, alternative sentences, or consecutive terms (see section

[109] We have tended to treat the PMP of 3:1 as the borderline between moderate and high indeterminacy in our other reports, while also weighing other features of each state's system. See Maryland report. PMPs in the range of 4:1 remain far from systems we rank as *extremely* high in indeterminacy, some of which have no designated minimum terms at all for most prisoners. See Hawaii, Iowa, and Utah.

1.2). By the parole board's estimate, about one-quarter of all prisoners with "determinate" sentences fell into the DTNV (parole eligible) group in October 2020.[110]

We believe that DTNV (parole eligible) sentences are an important new source of indeterminacy in California, but we cannot estimate the size of the effect on the system as a whole. As explained in section 1.2, the calculation of minimum terms for the DTNV (parole eligible) group is a complicated exercise. We expect the ratio between minimum and maximum sentences within the group is highly variable depending on *which* primary offenses, *which* sentence enhancements, *which* alternative sentences, and *which* consecutive sentences an individual case presents. Certainly, we can imagine many particular sentences under which parole eligibility will arise at a small fraction of the full maximum term. Many will fall into our category of highly indeterminate sentences, with much of the indeterminacy loaded into the parole board's release discretion.

In 2020, the California parole board reported that it had "received 21,943 referrals for nonviolent offender parole review" between July 1, 2017 and August 31, 2020, and had "approved 3,680 persons for release."[111] This indicates a release rate of about 17 percent.

It is also important to note that the DTNV (parole eligible) group is also entitled to credit-based reductions in their maximum terms as discussed in sections 4.1b and 4.1c above. Thus, DTNV (parole eligible) prisoners have benefited doubly from Proposition 57, with new amplitudes of indeterminacy affixed to the milestones of both minimum and maximum terms.

Another class of newly-parolable determinate sentences are those (described in section 1.3) for youth offenders who committed their offenses while under age 26. This includes youth convicted of violent as well as nonviolent offenses. While we lack data, we believe this is a group that makes up a substantial fraction of California's total prison population. However, parole-release eligibility for such prisoners only arises after 14 years of time served—a minimum term that is reducible by credits.[112] Thus, only very long sentences are affected by youth offender parole, and prisoners face a long wait before they can be considered for release. Given the sheer length of the minimum term, most of these sentences would probably rank as moderate or low in indeterminacy on our scale.

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[110] See Jennifer P. Shaffer, PowerPoint Presentation, *Discretionary Parole in California* (California Board of Parole Hearings, 2020), at 7 (reporting that, out of about 100,000 total prisoners in October 2020, about 14,000 would be eligible for parole review without a hearing and more than 34,000 would be eligible for parole hearings).

[111] Jennifer P. Shaffer, *Discretionary Parole in California: Report for the Committee on Revision of the Penal Code* (California Board of Parole Hearings, 2020), at 31.

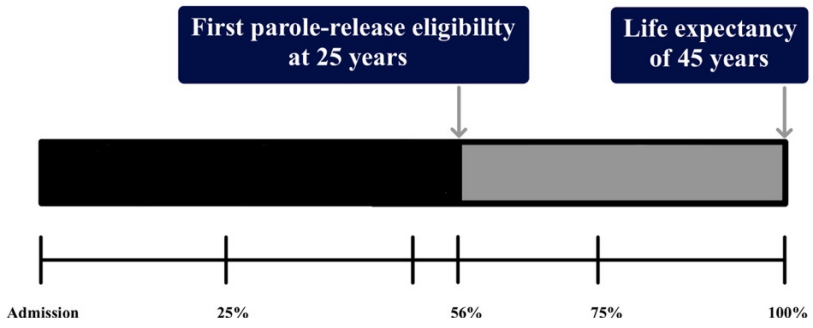
[112] Cal. Penal Code § 3051(j).

4.2. Indeterminate life sentences

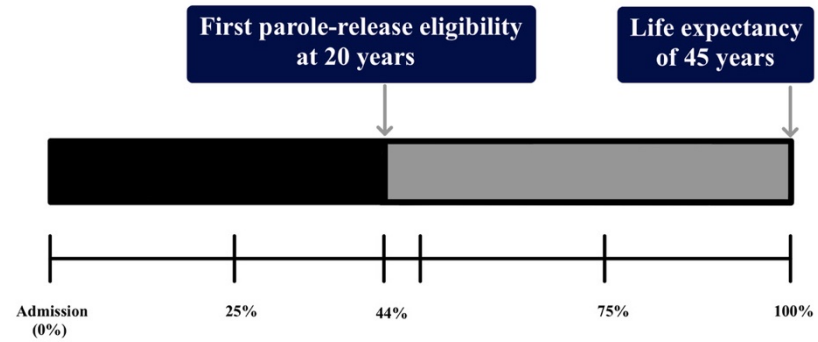
"Indeterminate" sentences, in California's terminology, are synonymous with parolable life sentences. (All other parolable sentences are classified as "determinate" in California law.) Compared with other states, prisoners with indeterminate life sentences make up an unusually large percentage of California's prison population.[113]

In contrast with "determinate" sentences in California, credits won by (most) prisoners with parolable life sentences are applied to advance their earliest dates of parole-release eligibility. Credits do not generate or accelerate MRDs. Figures 12, 13, and 14 lay out some of the possible scenarios. All three timelines are based on an assumed life expectancy of 45 years as a stand-in for the uncertain length of individual life sentences. Further, all figures assume an initial minimum term of 25 years, which is the minimum in California for first-degree murder or an ordinary three-strikes conviction. Shorter minimums are possible for less serious offenses or for youthful and juvenile offenders.

California Figure 12. Prison-Release Timeline for Life Sentences with 25-Year Minimums (No Credits of Any Kind)

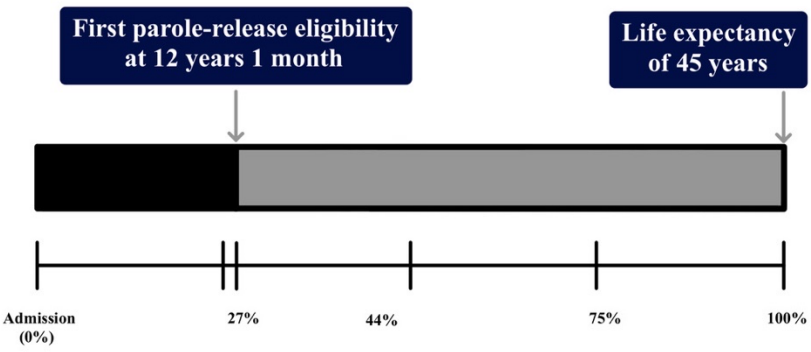


California Figure 13. Prison-Release Timeline for Life Sentences with 25-Year Minimums (with Good Conduct Credits)



[113] See Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences* (The Sentencing Project, 2017).

California Figure 14. Prison-Release Timeline for Life Sentences with 25-Year Minimums (with Full Good Conduct, Milestone Completion, and Rehabilitative Achievement Credits plus One-Time Award for Educational Merit Credits)



The figures show a moderate to high degree of indeterminacy in California's parolable life sentences, but it is important to remember that dates of *eligibility* for discretionary parole release—as marked off in Figures 12 to 14—are far different from the dates of *mandatory* release reflected in Figures 3 through 11. MRDs are definitive release milestones but, in California, parole eligibility a life prisoner is far from a guarantee of actual release.

For prisoners convicted of homicides one step below the level of LWOP sentences, California prisoners with parolable life sentences have short minimum terms compared with many other states, where 30- and 40-year minimum terms are common.[114] For many three-strikes offenders in California, on the other hand, a 25-year minimum term is probably a long minimum stay compared to prisoners with comparable offense and criminal history profiles in other states. On the whole, one cannot conclude that California's use of indeterminate life sentences is more lenient than in other states.

Yet the life-sentenced subpopulation in California's prisons appears to be a cite of increasing indeterminacy in recent years. From 2008 to 2019, the numbers of annual releases of life prisoners in California quintupled. Looking back further, across the years 2000 to 2019, the increase was tenfold. In 2017, the numbers of releases of prisoners with life sentences exceeded new admissions for the first time since 1982.[115] To some degree, these release statistics are attributable to the current parole board's policies and procedures—and recent governors' willingness to approve at least some parole releases for prisoners convicted of murder. These practices could change with turnover in the parole board and governor's office.

[114] See Final Report (forthcoming 2021).

[115] Jennifer P. Shaffer, *Discretionary Parole in California: Report for the Committee on Revision of the Penal Code* (California Board of Parole Hearings, 2020), at 2 figure 2

4.3. Elderly parole

Geriatric parole may be a gathering force in California. Effective January 1, 2021, eligibility will extend to prisoners 50 years or older who have served 20 years. Prior law, enacted in 2014, had reached prisoners 60 or older who had served 25 years. Under this more limited eligibility formula, nearly one-quarter of all discretionary parole grants in 2019 were for elderly parole (see section 3.1b). The 2019 statistics could reflect a short-term "bump" in geriatric releases due to a relatively new law that created an instant backlog of newly-eligible prisoners. Further data will be needed to assess the longer-term impact of the program. Elderly parole may become a continuing part of California's transition toward a more indeterminate system or, following a short-term surge, it may settle into a pattern of modest importance to the regulation of prison-population size.

4.4. Overall assessment

California's prison policy over the last decade is marked by roiling and ongoing change, set in motion by federal litigation, budgetary crisis, the changing politics of criminal punishment, a robust voter initiative tradition, and much creative experimentation. In broad perspective, California's current prison-sentencing system is one of a kind. No other state has experienced a thunderous Supreme Court decision demanding huge prison-population reductions. No other state has produced a legislative reordering of incarceration policy, across state and local levels, on the scale of Realignment. And the numerous aftershocks of these events—many detailed in this report—have not subsided.

Because of Realignment, California's prison population is more heavily weighted than other states with prisoners convicted of especially serious crimes.[116] Many people with lower-level felony convictions, whom one would expect to find in a state prison system, are elsewhere. The people who remain in California prisons tend to have long sentences and, in absolute terms, long waiting times to earliest possible release. The typical prisoners who appear before the California parole board are tough candidates for release by virtue of the seriousness of their original crimes. Whether a legitimate factor or not, we know that offense gravity is a difficult consideration for parole boards to look beyond.[117] We would also expect victim input to be

[116] For example, only 10 percent of California's prison population is made up of persons convicted of property crimes, and a full 77 percent have current convictions of violent offenses. See California Department of Corrections and Rehabilitation, *Offender Data Points: Offender Demographics for the 24-Month Period Ending June 2019* (2020), at 11 table 1.11. According to one recent report, California was tied with Utah for having the highest percentage of prisoners serving life or virtual life sentences life sentences, see Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences* (The Sentencing Project, 2017). This helps explain why the growing numbers of prisoners with parolable sentences in California's prisons tend to have long minimum terms. When comparing California's DOI with other states, it may be "fairest" to look only to the violent offender populations in the comparator states.

[117] Original offense gravity in California is an impermissible basis for the denial of parole release, see *In re Lawrence*, 190 P.3d 535 (Cal. 2008).

especially consequential. Compared with the parole dockets in most other states, relatively few release decisions in California carry low stakes.

Framed in this way, we see the California prison sentencing system as one that operates with a *high degree of determinacy* despite a steady drift toward greater indeterminacy than in the past. As for parole-release discretion, the system is dominated by determinate sentences and parolable sentences with long minimum terms. The statistics of prison release bear out this judgment. There were 1,184 discretionary parole releasees in 2019, against total prison releases exceeding 39,000.[118] Parole grants made up only three percent of all releases. This is strong evidence of a highly determinate system despite the fact that the numbers of discretionary parole releases have been rising since the turn of the century. In the year 2000, only 52 California prisoners were released via discretionary parole. Across the decade of the 2000s the numbers of parole releases were increasing but averaged only 204 per year. In the 2010s the yearly average quadrupled to 809 per year.[119]

While California has seen impressive percentage change in its parole release practices, the result is still a modest absolute number of discretionary releases. Twenty years ago discretionary parole release in California was a microscopic phenomenon; today it can be seen by the naked eye. It is reasonable to assume that parole grants will continue to rise in the wake of Proposition 57, the advent of youthful offender parole, and expansions in elderly parole eligibility, but the numbers would have to jump a great deal in order to change the highly determinate character of the system.

Taking a snapshot of current circumstances, California's system of good-time and earned-time credits is a more important source of systemwide indeterminacy than prison-release discretion. The range and quantity of available credits have been growing. For many prisoners, credits are applied to advance mandatory release dates—a benefit not afforded in most state systems. This relatively straightforward release mechanism can assume heightened importance when discretionary release rates are low. For some prisoners convicted of nonviolent offenses, albeit a minority of all prisoners, credit-earning rates are quite generous by national standards. If there are pockets of moderate or high indeterminacy within California's general milieu of high determinacy, they exist primarily for nonviolent offenders and the credit system is doing most of the work.

As with all highly determinate prison sentencing systems, prison population size in post-Realignment California is largely controlled by the actions of front-end decision makers including prosecutors and sentencing courts. The combined prison-release authorities of the parole board and department of corrections have increased dramatically by the standards of

[118] See California Department of Corrections and Rehabilitation, *Offender Data Points: Offender Demographics for the 24-Month Period Ending June 2019* (2020), at 54 table 4.3.

[119] See Jennifer P. Shaffer, *Discretionary Parole in California: Report for the Committee on Revision of the Penal Code* (California Board of Parole Hearings, 2020), at 17 figure 3.

the past, but the net effect has been incremental rather than revolutionary. So far, the result has been to push a system formally known for its extremely-high degree of determinacy into the less exceptional realm of high determinacy.