



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: NEW YORK

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Table of Contents

Executive Summary	1
Introduction	2
I. General Rules of Prison-Release Discretion	6
A. General rules of release eligibility	6
1.1. Prisoners with determinate sentences	6
1.2. Prisoners with indeterminate sentences (other than life sentences)	8
1.3. Administrative release for nonviolent offenders.....	9
1.4. Presumptive parole release.....	11
1.5. Reconsideration after denial of release	12
B. General rules on the effects of good time, earned time, and other discounts	13
1.6. Generally-available credits: types and amounts	13
1.7. Loss of earned credits.....	14
II. Prisoners Outside the General Rules	16
2.1. Life without parole	16
2.2. Life sentences with possibility of parole	16
2.3. Juvenile life sentences	17
III. Other Forms of Prison-Release Discretion (not routinely used).....	18
3.1. Medical or “compassionate” release.....	18
3.2. Executive clemency	18
3.3. Emergency release for prison overcrowding.....	19
3.4. Pandemic relief efforts	19
IV. Modeling the Relationship Between Prison-Release Discretion and Prison Population Size in New York	20
4.1. Determinate sentences	20
4.2. Indeterminate sentences	23
4.3. Allocation of discretion	26
4.4. Overall assessment.....	26

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: New York¹

Executive Summary

New York's prison-sentencing system is a dramatically mixed system. Substantial numbers of prisoners are distributed across two schemas that are near opposites in their degrees of indeterminacy. Sixty percent of prisoners have sentences that fall solidly into the category of low or extremely-low indeterminacy, while approximately one-quarter have sentences of high indeterminacy that sometimes verge on extremely-high indeterminacy.

For the majority of prisoners with determinate sentences, the only back-end actor with discretion to affect length of term is the department of corrections through its abilities to grant, withhold, and remove good time and merit time allowance credits. At their greatest reach, such credits can reduce maximum lengths of stay by 29 percent. For the minority of prisoners with indeterminate sentences, there is a relative balance of authority between the parole board and department of corrections, but in no case can the department ever eclipse the board's share of control over actual time served. For indeterminate sentences, minimum terms can be no longer than one-third the maximum term, and credit awards can reduce maximum lengths of stay by as much as one-third.

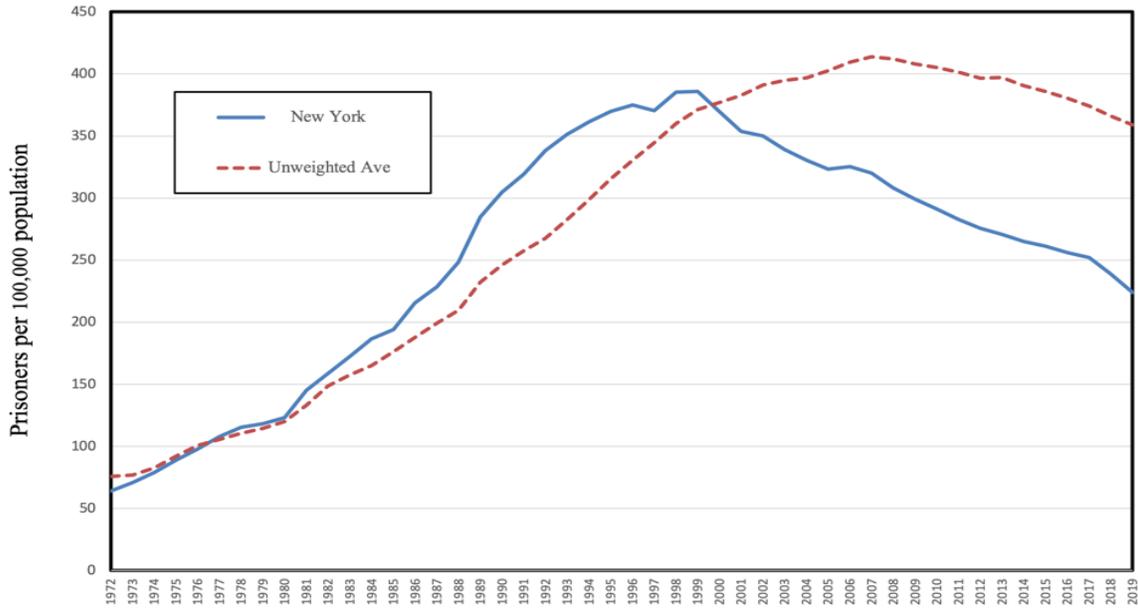
¹ This report was prepared with support from Arnold Ventures. The views expressed are the authors' and do not necessarily reflect the views of Arnold Ventures. We thank Norman Effman for his review of an earlier draft.

Introduction

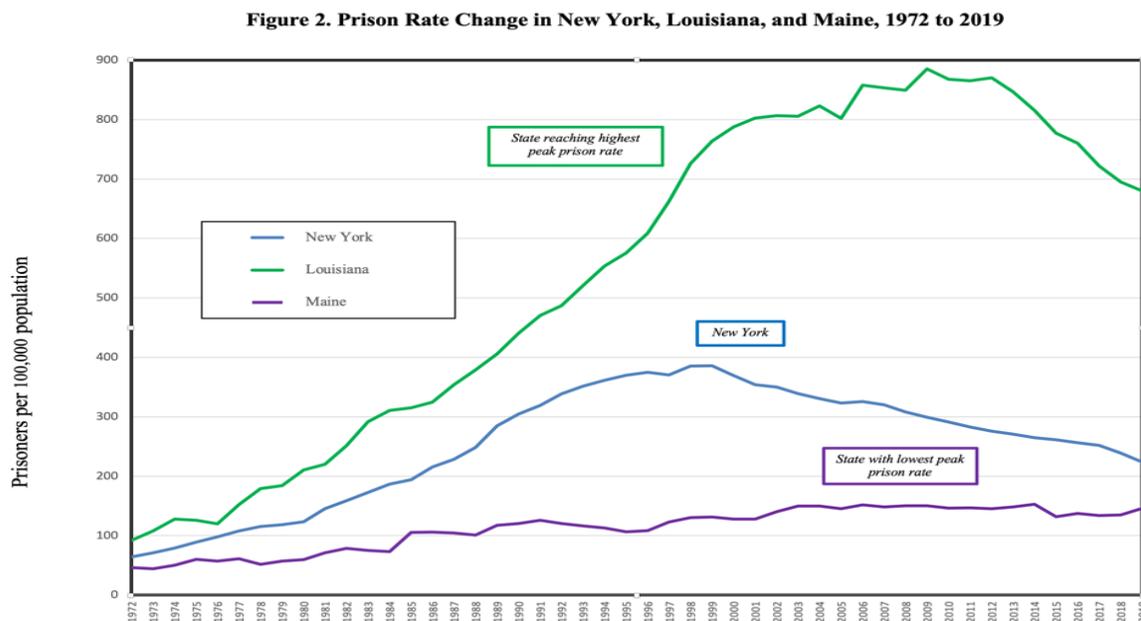
New York’s prison-rate history, 1972 to 2019

In 2019, New York’s prison rate was 224 per 100,000 general population, with a yearend prison population of 43,439.² New York’s prison rate was 41st highest among all states.

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



² E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020) at 8 (table 4), 12 (table 7).



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

New York achieved its peak prison rate of the prison buildup period in the year 1999 at 386 per 100,000. From that peak to yearend 2019, the state's prison rate dropped by -162 per 100,000, which was the 9th largest drop among all states from their peak rate through 2019.³

During the 1980s and into the 1990s, New York's prison rate grew at a faster year-by-year pace than the average across all states, see Figure 1. For many years, this placed the state in

³ Interestingly, New Jersey's prison-rate history has taken a nearly identical course, also turning downward after 1999. New Jersey experienced the 8th largest prison drop among all states from its peak prison rate through 2019 (from 377 to 210 per 100,000, or -167 per 100,000). New Jersey had the 43rd highest prison rate at yearend 2019—but the state had previously ranked as high as 20th position in 1991.

the “above-average” group in comparative prison rates. At year end 1993, for example, New York’s prison rate was 17th highest among all states.

In the latter part of the 1990s, prison growth in New York slowed to a below-average rate, and New York turned the corner toward declining prison rates years earlier than most states. Moreover, since 2007, the slope of New York’s prison drop has been steeper than the average state’s. The average U.S. state in 2019 had “returned” to a prison rate comparable to that of 1998. By 2019, New York’s prison rate had reached a low point not seen since 1986-87.

Across our state reports, we pose the question of whether each state’s prison-release system might have played an important role in the historical course of prison-rate change. In New York, other causal forces may have been more important. A large part of the story of New York’s prison drop was a vast change in prison policy concerning people convicted of drug crimes. The state’s department of corrections reported that:

On January 1, 1997, there were 24,085 drug offenders out of a total custody population of 70,209 (34%). This compares with 6,901 drug offenders (14%) under custody on January 1, 2018. Between 1997 and 2018, there was a 17,184 (-71%) reduction in the number of drug offenders held under custody.⁴

One question still worth asking is whether the decisionmaking norms of New York’s parole board and department of corrections have been relatively generous in recent decades when using their discretion to influence prisoners’ release dates. If this were a longstanding pattern, it could be a “dog-that-didn’t-bite” story. That is, compared with other states, it is possible that prison-release practices have not turned stingy enough to drive prison populations upward or inhibit their decline.

Organization of this report

This report is divided into four parts. Parts I through III describe the contours of New York’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 New York 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

⁴ New York Department of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2018* (2018) at 16.

included, this allows for broad observations about the New York system as a whole. The overarching goal of Part IV is to explore the relationship between the various forms of prison-release discretion in New York and the size of the state’s prison population.

Terminology note

This report will generally refer to New York’s Department of Corrections and Community Supervision as the “department of corrections.” It will generally refer to the New York Board of Parole as the “parole board.”

We should warn New York readers that our sections on “administrative release” and “presumptive parole release” programs (sections 1.3 and 1.4) use terminology that is different from the professional usage in New York. Indeed, when the official New York sources refer to “presumptive parole,” they are referring to what we call “administrative parole,” and vice versa. We apologize for this 180-degree source of confusion. Our report hews to the uniform terminology we have developed across all of our state reports.



I. General Rules of Prison-Release Discretion

A. General rules of release eligibility

New York’s prison-sentencing system is a mixed system in which most prisoners are serving “determinate” sentences but a substantial number are serving “indeterminate” sentences. In general, the offenses punishable by determinate sentences are of higher levels of seriousness than those that receive indeterminate sentences. However, the determinate sentencing scheme does not cover *all* high-severity offenses in the criminal code. Class A felonies, which include the most serious violent and sexual offenses, have maximum sentences of life imprisonment. Many of these carry the prospect of parole release (see section 2.2), while a few carry authorized or mandatory sentences of life without parole (see section 2.1).⁵

The predominance of determinate sentences in New York is a new development. As recently as the early 1990s, the vast majority of New York’s prisoners were serving indeterminate sentences with eligibility for discretionary parole release at some point during their terms. Several waves of legislation, from 1995 to 2004, converted the system into one of determinate sentencing for violent offenders, drug offenders, and nonviolent sex offenders.⁶

1.1. Prisoners with determinate sentences

As of January 1, 2018, 60 percent of New York’s prisoners were serving determinate sentences, with no possibility of discretionary parole release.⁷ The offense categories that carry

⁵ See N.Y. Penal Law § 70.00(3)(a). It is interesting that New York law adopts indeterminate sentencing for lower-level felony offenses as well as many of the most serious. Determinate sentences are used for serious offense classes that are sandwiched in between.

⁶ New York State Permanent Commission on Sentencing, *A Proposal for “Fully Determinate” Sentencing for New York State* (2014) at 3. This report recommended new legislation providing that the remainder of offenses also receive determinate sentences, but the recommendation has not been acted upon.

⁷ New York Department of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2018* (2018) at 23; N.Y. Penal Law § 70.40(1)(a)(ii).

determinate sentences include class B to E felony violent crimes,⁸ nearly all class B to E felony sex offenses,⁹ and class B to E felony drug offenses.¹⁰

In such cases, courts impose judicial maximum terms within statutorily-authorized ranges, but no minimum terms. In the normal course, the judicial maximum term of a determinate sentence is reducible only by the award of “good time allowance” and “merit time allowance” credits (see section 1.6).¹¹ The credits are deducted from the maximum to create a *mandatory release date*. For most prisoners with determinate sentences, credits can produce a reduction of roughly 14 percent of their judicial maximum terms.

For prisoners with determinate sentences, the judicial maximum term does not define their full time-served exposure. New York judges are required to impose “an additional period of post-release supervision,” usually of one to five years. Longer supervision terms of up to 20 years are available for some sex offenses. The length of the supervision term is unaffected by the amount of the judicial maximum prison term that was served or left unserved by the prisoner upon release. For releasees, even those who have served their full determinate terms in prison, a violation of the terms of supervision could result in “a further period of imprisonment up to the balance of the remaining period of post-release supervision.”¹² Thus, in theory, a defendant who receives a four-year prison sentence followed by a two-year postrelease supervision term could spend as much six years in prison (if the prisoner “maxes out” the prison term and then violates his conditions of supervision immediately after release).

⁸ N.Y. Penal Law § 70.02(2)(a). Authorized sentence lengths for violent crimes depend on the class of the felony, with some crime types carved out for longer authorized penalties. For example, a determinate sentence for a class B violent felony must be at least five years and not more than 25 years, unless the conviction was for the crime of aggravated assault upon a police officer or peace officer *or* aggravated manslaughter in the first degree, in which case the determinate sentence must be between 10 and 30 years. N.Y. Penal Law § 70.02(3)(a).

⁹ N.Y. Penal Law § 70.80(1). Authorized sentence lengths for sex offenses vary with felony class and whether the offense is deemed a “violent felony sex offense” or if the defendant is a “predicate felony sex offender.”

¹⁰ N.Y. Penal Law § 70.70. Authorized sentence lengths for such drug offenses vary with felony class and the offender’s prior drug offense convictions and violent felony convictions.

¹¹ Outside “the normal course” are the possibilities of release such as the clemency power, medical parole, retroactive changes in penalties, or some other mechanism that operates in a tiny percentage of all cases (see Part III).

¹² N.Y. Penal Law §§ 70.45(1)-(2a).

1.2. Prisoners with indeterminate sentences (other than life sentences)

This section deals with indeterminate sentences other than those with life maximum terms (covered separately in section 2.2). We estimate that this group adds up to roughly one-quarter of the total New York prison population.¹³

In such cases, sentencing courts in New York have discretion to impose judicial maximum and minimum terms within ranges set by statute. In contrast with some other states, there is no fixed statutory ratio between maximum and minimum terms in individual cases.

Prisoners serving indeterminate sentences are eligible for parole “at any time” after the expiration of their minimum sentences, which may be advanced by as much as 17 percent for merit time credits.¹⁴

The judicial maximum term for an indeterminate sentence must be at least three years.¹⁵ Within that constraint, the sentencing court has discretion to impose a judicial maximum term up to the statutory maximum penalty authorized for each grade of offense as follows: class B felony (25 years); class C (15 years); class D felony (7 years); and class E felony (4 years).¹⁶

For class B, C, D, and E felonies, indeterminate sentences are also required to have minimum terms of at least one year but which may be as long as one-third of the judicial maximum sentence.¹⁷ Judges have discretion to select a minimum term within that authorized range.¹⁸ Table 1 summarizes the possibilities.

¹³ New York Department of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2018* (2018) at 16 (table 12A) (reporting that 72.3 percent of all prisoners were convicted of “violent” or “other coercive” felonies and 26.1 percent were convicted of drug, property, or “other” offenses). New York’s department of corrections reported that 40 percent of all prisoners were serving indeterminate sentences in 2018, but this includes prisoners with indeterminate life sentences. *Id.* at 23.

¹⁴ N.Y. Penal Law § 70.40(1)(a)(i).

¹⁵ N.Y. Penal Law § 70.00(2).

¹⁶ N.Y. Penal Law §§ 70.00(2)(b)-(e). Class A felonies carry a maximum term of life in prison and are subject to their own sets of rules depending on type of case. *Id.*, §§ 70.00(2)(a),(3)(a).

¹⁷ N.Y. Penal Law § 70.00(3)(b).

¹⁸ N.Y. Penal Law §§ 70.00(2)(b)-(e).

Table 1. New York’s Statutory Ranges for Judicial Maximum and Minimum Terms in Indeterminate Sentences*

	Authorized Judicial Maximum Terms	Authorized Judicial Minimum Terms
Class B Felony	3 to 25 years	1 year to 1/3 the judicial maximum term
Class C Felony	3 to 15 years	1 year to 1/3 the judicial maximum term
Class D Felony	3 to 7 years	1 year to 1/3 the judicial maximum term
Class E Felony	3 to 4 years	1 year to 1/3 the judicial maximum term

Source: N.Y. Penal Law § 70.00(2)(b)-(e).

* Class A felonies, which carry maximum terms of life imprisonment, are discussed separately in sections 2.1 and 2.2 of this report.

1.3. Administrative release for nonviolent offenders

New York has an administrative parole program for nonviolent offenders serving indeterminate sentences.¹⁹ The program authorizes the department of corrections to release eligible prisoners at the expiration of their minimum terms (with reductions for merit time credits) without a hearing or other proceedings before the parole board.²⁰ In the terminology of this project, we call this *administrative release*.²¹ The parole board plays no role unless the department of corrections has first denied administrative release. If that occurs, the prisoner’s case moves into the discretionary parole process under the aegis of the parole board.

¹⁹ N.Y. Corr. Law § 806. This is called the “presumptive parole program” in New York law, but this is incompatible with the terminology of this project. In the text of this report, we will keep our usage consistent with that in other reports in the project—but it should be noted that New Yorkers might experience confusion.

²⁰ Regulations provide that “[p]resumptive release determinations shall be made by the commissioner or designee after central office review.” N.Y. Admin. Code § 2200.5(b)(1).

²¹ We define administrative release as “[a] process under which prisoners are released without a hearing before the parole board, usually based on compliance with behavioral requirements set by the department of correction.” See Final Report.

To obtain administrative release, prisoners must first win a “certificate of earned eligibility,” which is granted in the discretion of the department of corrections to prisoners who have complied with the “work and treatment programs” assigned to them soon after admission.²² In addition, prisoners must receive their merit time allowances, also awarded in the discretion of the department (see section 1.6).²³ This is sometimes called a “merit time certificate.”²⁴ Finally, after these two prerequisites, the department of corrections still retains discretion to grant or deny administrative release:

No person shall have the right to demand or require presumptive release authorized by this section. ... The commissioner may deny presumptive release to any inmate whenever the commissioner determines that such release may not be consistent with the safety of the community or the welfare of the inmate.²⁵

The department’s decisions to grant or deny administrative release are considered final, although the department is authorized to “revoke” a favorable decision prior to a prisoner’s actual release.²⁶ The criteria for revocation are:

A presumptive release allowance may be revoked at any time prior to an inmate's release on parole if the inmate commits a serious disciplinary infraction ..., fails to continue to perform and pursue his or her assigned program plan or earned eligibility plan or if information that would have affected the central office review subsequently comes to light and indicates that the parole release decision can best be made after an appearance by the inmate before the Board of Parole.²⁷

Although we lack relevant statistics, New York’s administrative release program would appear to extend to most nonviolent offenders, who make up as much as a quarter of New York’s total

²² N.Y. Corr. Law §§ 805, 806(1). A certificate of earned release is also critical to New York’s “earned eligibility program,” which is considered in section 1.4 under the heading *presumptive parole release*.

²³ N.Y. Corr. Law §§ 806(1),(2). If the department decides not to grant a “presumptive merit allowance” to a prisoner, this is deemed a “presumptive release denial.” See N.Y. Admin. Code § 2200.6(c).

²⁴ See *Wallman v. Travis*, 794 N.Y.S.2d 381, 384 (N.Y. App. Div. 2005) (“[The prisoner] also qualified for a merit time certificate, which allowed him to appear before a Merit Board for parole release consideration after serving five-sixths of his minimum term of imprisonment.”).

²⁵ N.Y. Corr. Law § 806(5).

²⁶ *Id.*

²⁷ N.Y. Admin. Code § 2200.5(b)(4).

prison population.²⁸ Eligibility is determined in large part by the nature of prisoners' offenses and criminal record.²⁹ The program excludes prisoners with current or prior convictions of:

an A-I felony; a violent felony offense; manslaughter in the second degree; vehicular manslaughter in the first or second degree; criminally negligent homicide; incest; an offense defined in article 130 of the Penal Law (sex offense); an offense defined in article 263 of the Penal Law (use of a child in a sex performance); a hate crime as defined in article 485 of the Penal Law; an act of terrorism as defined in article 490 of the Penal Law; or aggravated harassment of an employee by an inmate; or any out-of-state conviction which has all of the essential elements of any of the offenses listed above.³⁰

Also excluded are prisoners with serious disciplinary infractions and prisoners who brought litigation found by a court to have been frivolous.³¹

Crime victims have no right to block prisoners from New York's administrative release program by lodging an objection, but any victims' statements must be considered by the department of corrections before granting release.³²

1.4. Presumptive parole release

Presumptive parole release in New York is created under the state's "earned eligibility program." The statute defines circumstances in which release "shall" be granted by the parole

²⁸ New York Department of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2018* (2018) at 16 (table 12A).

²⁹ N.Y. Corr. Law § 806(1)(i).

³⁰ N.Y. Admin. Code §§ 2200.3(b)(1)-(12). Convictions of attempts or conspiracies to commit the enumerated crimes are also included.

³¹ N.Y. Corr. Law §§ 806(1)(ii),(iii). The importance of a judicial finding is stated as follows:

[A prisoner may be eligible for presumptive release if] there has been no judicial determination that the person while an inmate commenced or continued a civil action, proceeding or claim that was found to be frivolous ..., or an order has not been issued by a federal court pursuant to rule 11 of the federal rules of civil procedure imposing sanctions in an action commenced by the inmate against a state agency, officer or employee.

³² N.Y. Admin. Code § 2200.5(a)(3)(ii). The administrative release programs in many other states give victims a "veto" in the process. That is, if a victim files an objection the prisoner is no longer eligible. See, for example, Arkansas, Maryland, and Oklahoma reports.

board “unless” the board makes certain determinations.³³ Consistent with other reports in this project, we refer to this as a shall-unless form of *presumptive parole release*.³⁴

In order to gain the benefit of the shall-unless presumption, prisoners must obtain a certificate of earned eligibility (see previous section). In addition, the program extends only to prisoners serving indeterminate sentences with minimum terms of eight years or less.³⁵

Eligible prisoners with certificates of earned eligibility are entitled to the following presumption at discretionary parole-release proceedings:

An inmate who has been issued a certificate shall be granted parole release by the board unless the board determines that there is a reasonable probability that, if the inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society.³⁶

The “unless” determination in the statute is not much different from the main criterion for release in most discretionary parole systems. However, the shall-unless formulation gives the prisoner a Due Process liberty interest and shifts the burden of persuasion to the parole board if it decides to deny release. Appeals from denials of presumptive release are numerous and sometimes successful.³⁷

1.5. Reconsideration after denial of release

Following a denial of discretionary parole release, the parole board must set a date within two years for reconsideration of the prisoner’s case.³⁸ Eligible prisoners who are denied administrative release by the department of corrections are shifted into the discretionary parole process and are not reconsidered for administrative release.³⁹

³³ N.Y. Penal Law § 805.

³⁴ Again, we are concerned that New York readers may be confused by our project terminology, which we try to keep consistent across numerous state reports. We define “presumptive parole” as “[a] setting in which prisoners must be released unless specific determinations are made. Presumptions of release can be overcome by affirmative action on the part of the parole board or other designated agency or official, supported by findings that are legally defined as sufficient to overcome the presumption.” See Final Report.

³⁵ N.Y. Penal Law § 805.

³⁶ *Id.*

³⁷ See, e.g., *Wallman v. Travis*, 794 N.Y.S.2d 381 (N.Y. App. Div. 2005) (reversing the parole board’s decision to deny presumptive release and remanding the case for a new release hearing).

³⁸ N.Y. Exec. Law § 259-i (2)(a).

³⁹ N.Y. Penal Law § 806(6).

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

1.6. Generally-available credits: types and amounts

There are two types of credits available to most prisoners. The first is “good time allowance” awarded for “good behavior and efficient and willing performance of assigned duties.” Good time credits are subtracted from prisoners’ judicial maximum terms to produce earlier dates of mandatory release. For prisoners with indeterminate sentences, good time credits may deduct as much as one-third from their maximum sentences. For most prisoners with determinate sentences, deductions may be as much as one-seventh of their maximum terms. Good time credits are not available for prisoners with maximum terms of life.⁴⁰

The second type of credit is “merit time allowance,” available to most prisoners serving indeterminate sentences, and some prisoners with determinate sentences, provided their judicial maximum terms are at least one year.⁴¹ The majority of prisoners with determinate sentences are ineligible, however, because those convicted of violent felonies and sex offenses are excluded.⁴²

Merit time credits are awarded for “good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program.”⁴³ Such credits may be granted “when an inmate successfully participates in the work and treatment program ... and when such inmate obtains a general equivalency diploma, an alcohol and substance abuse treatment certificate, a vocational trade certificate following at least six months of vocational programming or performs at least four hundred hours of service as part of a community work crew.”⁴⁴

⁴⁰ N.Y. Corr. Law §§ 803(1)(a),(b),(c).

⁴¹ N.Y. Corr. Law § 803(1)(d)(i).

⁴² Merit time allowance credits are not available to inmates serving an indeterminate sentence for an A-1 felony offense, any sentence imposed for a violent felony offense, or sentences for convictions of manslaughter in the second degree, vehicular manslaughter in the second degree, criminally negligent homicide, any sex offense, incest, abandonment of a child, or aggravated harassment of an employee by an inmate. N.Y. Corr. Law § 803(1)(d)(ii). There is also a statute permitting certain offenders who are not eligible for traditional merit time to earn a one-time six-month credit against their sentence to be applied to their parole eligibility date or conditional release date. *Id.* § 803-b. Eligible offenders must have successfully completed one or more significant programmatic accomplishment, must not have committed serious disciplinary infractions, and must not have received a disqualifying judicial determination. *Id.* § 803-b(2).

⁴³ N.Y. Corr. Law § 803(1)(a).

⁴⁴ N.Y. Corr. Law § 803(1)(d)(iv).

Merit time-allowance credits can reduce the minimum term for prisoners with indeterminate sentences by as much as one-sixth.⁴⁵ For eligible prisoners serving determinate sentences, such credits can reduce the judicial maximum sentence by as much as one-seventh in addition to any reductions for good time credits.⁴⁶

a. Effects of earned credits on parole-release eligibility

Merit time credits are deducted from the minimum terms of prisoners serving indeterminate sentences, advancing their initial parole eligibility dates. The prisoners may become parole eligible as early as five-sixths of their judicial minimum terms.⁴⁷

b. Effects of earned credits on the judicial maximum term

Prisoners with determinate sentences can earn both good time credits and, if eligible, merit time credits that are subtracted from their judicial maximum terms to produce earlier dates of mandatory release.⁴⁸ With full earnings of both types of credits, judicial maximum sentences can be reduced by two-sevenths, or about 28 percent. Prisoners convicted of violent or sex offenses, however—a majority of those with determinate sentences—may earn only good time credits, which offer a one-seventh reduction of their maximum terms, or about 14 percent.⁴⁹

For prisoners with indeterminate sentences, good time credits are deducted from their maximum terms to produce earlier dates of mandatory release. With full earnings, maximum sentences can be reduced by one-third.⁵⁰

1.7. Loss of earned credits

Good time credits may be withheld, forfeited, or cancelled in whole or in part for “bad behavior, violations of institutional rules, or failure to perform properly in the duties or program assigned.”⁵¹ Merit time credits may be withheld for “any serious disciplinary infraction, upon a judicial determination that the inmate commenced a frivolous civil action,

⁴⁵ Such credits can reduce the minimum term for prisoners convicted of A-1 controlled substance felony offenses by as much as one-third.

⁴⁶ N.Y. Corr. Law § 803(1)(d)(iii).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ In 2018, prisoners convicted of violent or sex crimes made up 77 percent of all prisoners serving determinate sentences. See New York Department of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2018* (2018) at 23 & figure 17.

⁵⁰ N.Y. Corr. Law § 803(1)(b).

⁵¹ N.Y. Corr. Law § 803(1)(d)(iv).

or due to an order of a federal court pursuant to rule 11 of the federal rules of civil procedure imposing sanctions in an action commenced by an inmate against a state agency, officer, or employee.”⁵²

⁵² N.Y. Corr. Law § 803(1)(a).

II. Prisoners Outside the General Rules

2.1. Life without parole

Class A felonies are divided into subclasses A-I and A-II.⁵³ All class A felonies have mandatory judicial maximum sentences of life imprisonment. Judges are given no discretion to set lower maximum terms.⁵⁴

Several class A-I felonies carry authorized or mandatory sentences of life imprisonment without parole (LWOP). LWOP is the mandatory sentence for aggravated murder or the intentional killing of a victim under age 14 during a sexual assault. LWOP is an authorized penalty for first-degree murder, which is also punishable by an indeterminate life sentence.⁵⁵

Prisoners sentenced to LWOP are ineligible for discretionary parole release and cannot earn dates of mandatory release through the accrual of good time or merit time credits.⁵⁶

As of January 1, 2018, 281 prisoners out of a total of 47,197 were serving non-parolable life sentences, or 0.6 percent of New York's prison population.⁵⁷

2.2. Life sentences with possibility of parole

Depending on the offense, minimum terms for parolable life sentences in New York fall into a variety of permissible ranges, from three to 40 years.

For class A-I felonies, judges ordinarily have discretion to choose a minimum term between 15 and 25 years, with certain exceptions. For first-degree murder, the minimum term must be set within the range of 20 to 25 years. For certain attempted murders, the minimum must be between 20 and 40 years.⁵⁸

⁵³ N.Y. Penal Law § 55.05(1).

⁵⁴ N.Y. Penal Law § 70.00(2)(a).

⁵⁵ N.Y. Penal Law § 70.00(3)(a)(i).

⁵⁶ N.Y. Penal Law § 70.00(5).

⁵⁷ New York Department of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2018* (2018) at 15 (table 11B).

⁵⁸ N.Y. Penal Law § 70.00(3)(a)(i).

For class A-II felonies, judges must ordinarily impose a minimum term between three years and eight years four months. However, the minimum must be between 10 and 25 years for predatory sexual assault and predatory sexual assault against a child.⁵⁹

As of January 1, 2018, 8,410 prisoners out of a total of 47,197 were serving parolable life sentences, or 17.4 percent of New York’s prison population.⁶⁰

2.3. Juvenile life sentences

New York has abolished juvenile LWOP and has no prisoners who have received such sentences.⁶¹ Defendants who were under age 18 at the time of their offenses may be sentenced to “the applicable indeterminate sentence with a maximum term of life imprisonment.”⁶²

⁵⁹ N.Y. Penal Law § 70.00(3)(a)(ii).

⁶⁰ New York Department of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2018* (2018), at 15 (table 11B).

⁶¹ Josh Rovner, *Juvenile Life Without Parole: An Overview* (The Sentencing Project, 2020) at 2.

⁶² N.Y. Penal Law § 70.00(5).

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

3.1. Medical or “compassionate” release

Prisoners eligible for medical parole are those certified to be suffering from a significant, permanent non-terminal condition, disease or syndrome that has so physically or cognitively debilitated or incapacitated the inmate as to create reasonable probability that they do not present any danger to society.⁶³ Offenders convicted of murder in the first degree or attempt or conspiracy to commit murder in the first degree are not eligible for medical parole. Offenders with convictions of murder in the second degree, manslaughter in the first degree, or any sexual offense must have served one half of their sentence prior to becoming eligible for medical parole.⁶⁴ The board must consider a number of factors in making a medical parole determination, including the nature and seriousness of the offender’s crime, the inmate’s disciplinary, behavioral and rehabilitative record whilst incarcerated, and the offender’s medical condition.⁶⁵ The parole board must notify the sentencing court, the district attorney, the inmate’s attorney, and the crime victim that the prisoner is being considered for release to medical parole, and may not release the prisoner until a thirty day comment period has elapsed.⁶⁶ Medical parole is granted only for a period of six months before there is a new hearing, where the board can decide to renew the grant of medical parole or require the releasee to be returned to prison.⁶⁷

Medical parole is not an important determinant of prison population size in New York. In the five-year period 2013-2017, a total of only 67 prisoners were granted medical parole.⁶⁸

3.2. Executive clemency

The governor of New York has the power to grant reprieves, commutations and pardons for all offenses except treason and impeachment.⁶⁹ There is also a unit within the New York State

⁶³ N.Y. Exec. Law § 259-s (1)(a).

⁶⁴ *Id.*

⁶⁵ N.Y. Exec. Law § 259-s (1)(b).

⁶⁶ N.Y. Exec. Law § 259-s (1)(c).

⁶⁷ N.Y. Exec. Law §§ 259-s (4)(a), (g).

⁶⁸ New York Board of Parole, *Legislative Report 2017* at 10.

⁶⁹ N.Y. Exec. Law § 15.

Department of Corrections and Community Supervision, called the Executive Clemency Bureau, that assists the Governor’s office with clemency applications.⁷⁰

Executive clemency is not an important driver of prison population size in New York. Governor Cuomo made no use of his clemency powers in 2019, but granted nine pardons and two commutations in early 2020.⁷¹

3.3. Emergency release for prison overcrowding

There is no statute that allows for the emergency release of prisoners due to overcrowding.

3.4. Pandemic relief efforts

As of April 2020, Governor Cuomo stated that the state government had “no measures to lessen crowding in state prison” in response to the COVID pandemic, but had implemented a number of regulations and rules in the prisons to reduce the risk of transmission.⁷²

⁷⁰ N.Y. Exec. Clemency Bureau, *Overview*, available at <https://www.ny.gov/services/apply-clemency> (accessed on Aug. 2, 2020).

⁷¹ Melissa Russo, *After Pressure, Gov. Cuomo Grants Pardons and Commutations to Prisoners*, NBC New York, Jan. 2, 2020. For a longer view, see Ben Notterman, *Taking Stock of Clemency in the Empire State: A Century in Review* 9 (Center on the Administration of Criminal Law: NYU Law School, 2020) (“Although the 21 commutations issued from 2015 to 2019 are certainly an improvement over the zero granted in Governor Cuomo’s first term, the frequency of grants remains low by historical standards”).

⁷² Courtney Gross, “With no plan to reduce population, inmates wait and hope they don’t get sick,” *NY1*, Apr. 6, 2020, available at <https://www.ny1.com/nyc/all-boroughs/news/2020/04/07/with-no-plan-to-reduce-population-inmates-wait-and-hope-they-don-t-get-sick>.

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

4.1. Determinate sentences

Figure 3 displays the timeline for determinate sentences in New York for prisoners convicted of violent and sex offenses. In 2018, this group made up 77 percent of prisoners serving determinate sentences and 46 percent of all prisoners.⁷³ The only means by which such prisoners may reduce their lengths of stay is through the earning of good time credits, with a possible deduction of one-seventh or about 14 percent of their maximum terms. To the extent such credits are not earned or are forfeited, prisoners could serve as much as 100 percent of their judicial maximum terms.⁷⁴

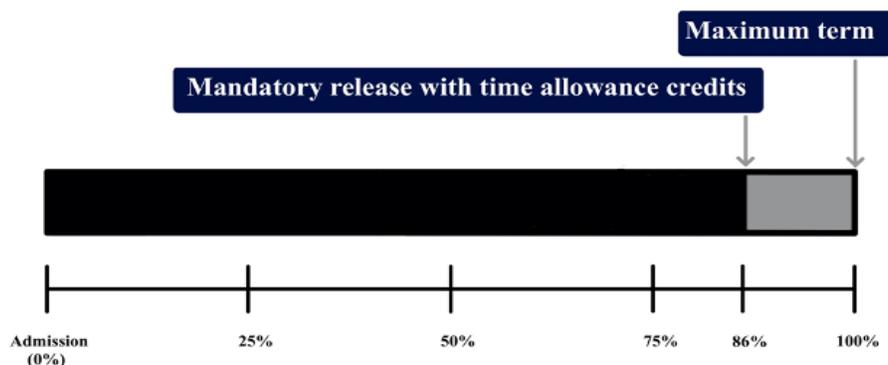
Among drug offenders serving determinate sentences, there is a greater degree of indeterminacy than shown in Figure 3 because they may earn two types of credits against sentence rather than one. At full extension, they may earn reductions of their maximum sentences of two-sevenths or about 28 percent. The timeline for drug offenders with determinate sentences is shown in Figure 4. This group was reported to make up about 14 percent of the total prison population in New York in 2018.⁷⁵

⁷³ New York Department of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2018* (2018) at 23 & figure 17.

⁷⁴ Drug offenders with determinate sentences are eligible for an additional reduction of one-seventh of their maximum terms through the award of merit time-served credits. Violent and sex offenders are ineligible for such reductions.

⁷⁵ New York Department of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2018* (2018) at 23 & figure 17.

New York Figure 3. Prison-Release Timeline for Determinate Sentences (Prisoners Convicted of Violent or Sex Offenses)



New York Figure 4. Prison-Release Timeline for Determinate Sentences (Prisoners Convicted of Drug Offenses)

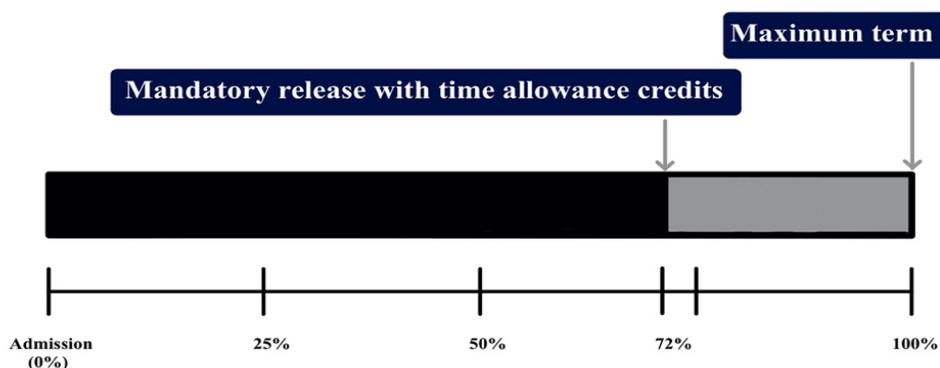


Figure 3 represents sentences with an extremely low degree of indeterminacy—perhaps better expressed as an extremely high degree of determinacy. Sentences depicted in Figure 3 are more determinate than general-rules sentences in “highly determinate” systems like Minnesota and Washington, which allow release at the two-thirds mark for prisoners without serious disciplinary infractions or program failures.⁷⁶ The degree of indeterminacy in Figure 3 is closer to that found in Virginia and the federal system—determinate (non-paroling) jurisdictions that generally allow only a 15 percent reduction of prisoners’ terms for good time credits.⁷⁷ These are telling comparisons because, as of late 2020, Virginia and the federal system had the two most determinate (least indeterminate) prison-sentencing systems in the country. They

⁷⁶ See Minnesota and Washington reports.

⁷⁷ See Virginia and Federal System reports.

serve as benchmarks for the most extreme forms of determinacy found in American prison-sentencing systems today.

For drug offenders serving determinate sentences as represented in Figure 4, their sentences are in the range of high determinacy (but not *extremely*-high determinacy) within the ranking system developed for this project. Credit allowances may result in reductions in maximum sentences of slightly more than 28 percent, which is in the same ballpark as the 33-percent reductions available in Minnesota and Washington—states that we treat as reference points for high determinacy/low indeterminacy.

There is another way to consider the degree of determinacy/indeterminacy in New York's determinate sentences. In this project, we use the term "population-multiplier potential" (or PMP) to express the amount of influence on prison-population size that is ceded by law to back-end decision makers such as parole boards and departments of corrections. To give an oversimplified 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*).⁷⁸

Unlike this simplified illustration, there is no real-world system in which all prisoners are serving sentences subject to the same prison-release formula. In every prison population, there are various subpopulations of prisoners who are serving different classes of prison sentences, including some who are serving revocation sentences. Each sentence class must be analyzed separately; there is no single PMP that reaches uniformly across the prison population.⁷⁹

In New York, the PMP for the group of violent and sex offenders serving determinate sentences is 1.16:1. That is, the segment of the prison population subject to these rules would be 16 percent larger under a *never-release regime* (in which no one ever received any credits) than in an *always-release regime* (in which everyone always received full credits).

For drug offenders serving determinate sentences, the PMP is 1.4:1. A constant never-release pattern would eventually produce a group with this class of sentence that is 40 percent larger than under a never-release regime.

⁷⁸ This simplified illustration does not consider the possible effects of good time or other discounts.

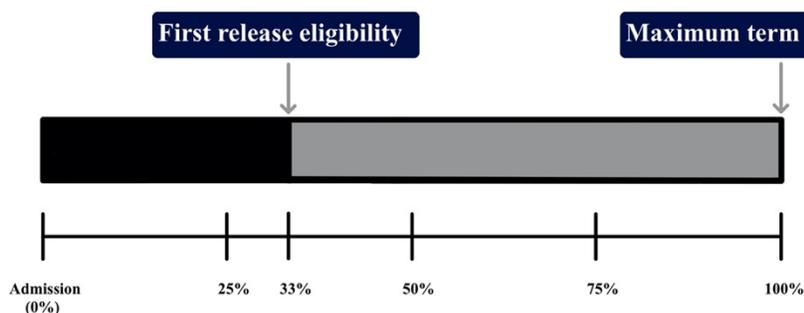
⁷⁹ It may be possible to calculate a single weighted average PMP for an entire prison system, but this would require fine-grained information about the composition of the prison population and the mix of sentences different groups of prisoners are serving. For a more complete discussion of the calculation and uses of the PMP measure, see this project's Final Report.

In New York, back-end decisions have some potential to influence the size of the prison population with determinate sentences, but not explosively in either direction.

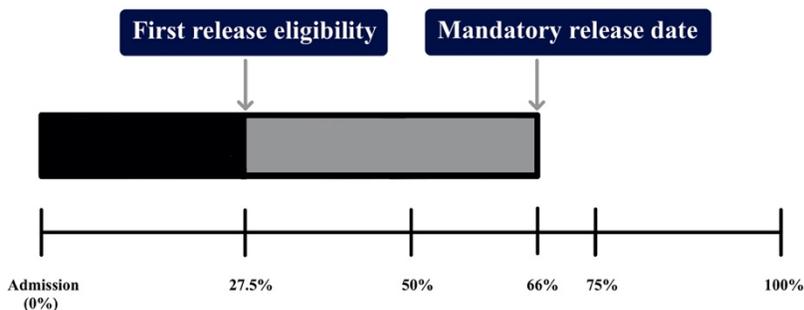
4.2. Indeterminate sentences

Indeterminate sentences in New York can take a number of forms, depending on sentencing courts' decisions concerning the lengths of minimum terms in individual cases. Figure 5 illustrates one possible case, in which the sentencing court has given the defendant the longest allowable minimum term. This can be no more than one-third of the maximum term under New York law. Figure 6 then shows the effects of full earnings of good time credits (subtracting as much as one-third from the maximum term) and merit time allowance credits (subtracting as much as one-sixth from the minimum term).

New York Figure 5. Prison-Release Timeline for Indeterminate Sentence with Longest Allowable Minimum Term and No Good Time or Merit Time Allowance Credits



New York Figure 6. Prison-Release Timeline for Indeterminate Sentence with Longest Allowable Minimum Term and Full Good Time and Merit Time Allowance Credits

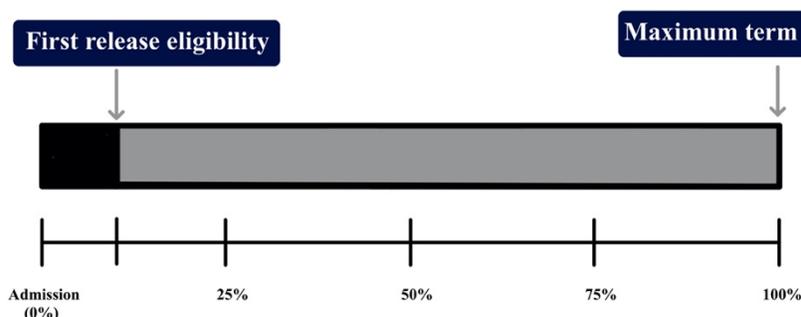


To suggest the range of variability in indeterminate sentences, Figure 7 displays the timeline for an indeterminate sentence in which the sentencing court has imposed the shortest

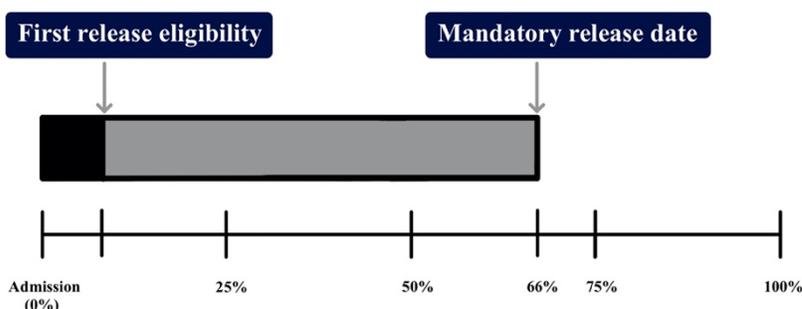
permissible minimum term of one year. In order to assign values on the diagram, the illustration in Figure 7 is based on a ten-year sentence and assumes the prisoner has earned no good time or merit time credits, so the prisoner will be eligible for discretionary parole release after serving one year.

Figure 8 then alters the case to posit that maximum credits of both kinds have been earned, resulting in parole-release eligibility after the prisoner has served 10 months of the 10-year maximum. The figure also includes a deduction of one-third from the maximum term due to good time credits, resulting in a mandatory release date at two-thirds of the maximum.

New York Figure 7. Prison-Release Timeline for Indeterminate Sentence with Shortest Allowable Minimum Term and No Good Time or Merit Time Allowance Credits (Illustration based on 10-Year Sentence)



New York Figure 8. Prison-Release Timeline for Indeterminate Sentence with Shortest Allowable Minimum Term and Full Good Time and Merit Time Allowance Credits (Illustration based on 10-Year Sentence)



Across indeterminate sentences in New York, the degree of indeterminacy is a moving target. In individual cases, courts have discretion to choose a minimum term whose length falls anywhere between the 33 percent ceiling shown in Figure 5 and the one-year floor illustrated in Figure 7. The degree of indeterminacy in any particular sentence slides up or down

depending on the judge's choice. For example, if we sum the discretionary powers of the parole board and department of corrections in Figures 5 and 6, a prisoner could serve anywhere from 27.5 to 100 percent of the judicial maximum term. Such a sentence is 27.5 percent determinate and 72.5 percent indeterminate. For all prisoners with such sentences, the population-multiplier potential is 3.6:1.

If, on the other hand, we analyze the ten-year sentence with the shortest possible minimum term depicted in Figures 7 and 8, the summed powers of the parole board and department of corrections create possible release dates anywhere from 10 months to 10 years. Such a sentence is 8.3 percent determinate and 91.7 percent indeterminate. The PMP for any group of offenders with such sentences is 12:1. This is an extremely high degree of indeterminacy. It should be noted that indeterminate sentences with judicial maximums longer than ten years are capable of reaching still higher degrees of indeterminacy so long as sentencing courts keep the minimum terms short. For a defendant convicted of a class B felony, for example, New York law allows for a sentence as indeterminate as 10-months-to-25-years. Such a sentence would be 97 percent indeterminate and would generate a PMP of 33.3:1.

In the terminology of this project, New York judges have some power to act as regulators of the degree of indeterminacy in the indeterminate sentences they impose. We lack aggregate data on the mix of minimum and maximum sentences that judges have imposed in such cases in recent years. Thus, we cannot with confidence estimate the degree of indeterminacy across the full subpopulation of prisoners who are serving indeterminate sentences. When judicial practices change, so does the systemwide scope of indeterminacy.

If we step back to survey the continuum of possibilities, even the least indeterminate sentences allowable under New York law (Figures 5 and 6) are still at least 72.5 percent indeterminate. This is already a high degree of indeterminacy. If judges are inclined to impose minimum sentences that are below the one-third ceiling, the degree of indeterminacy increases. We do not have to move terribly far into the continuum to reach sentences that are 80 to 90 percent indeterminate, which move across the border of high indeterminacy to extremely-high indeterminacy.

Our overall assessment of all indeterminate sentences in the New York prison-sentencing system is that they create a pocket of high indeterminacy in the prison population, verging in some cases on extremely-high indeterminacy. At any given point in time, the character of this collection of sentences depends on judicial sentencing practices.

4.3. Allocation of discretion

Overall, the department of corrections holds substantial time-served authority in New York. New York is not among the group of states that grant little or no releasing discretion to prison officials.⁸⁰ Looking across all sentence types, however, the parole board has been given somewhat more power over time served and prison population size.

For the majority of prisoners who are serving determinate sentences, the only back-end actor with discretion to affect length of term is the department of corrections through its abilities to grant, withhold, and remove good time and merit time allowance credits. The parole board has no role in the domain of determinate sentences. Any portrait of prison officials' dominance is qualified by the fact that, for most determinate sentences, there is only a small amount of time-served discretion at the back end of the system for anyone to make use of.

For indeterminate sentences, there is a relative balance of authority between the parole board and department of corrections, but in no case can the department eclipse the board's share of control over actual time served. Near equipoise is the most the department can ever claim. Combining the scenarios in Figures 5 and 6, for example, it is possible for an indeterminate sentence to distribute time-served discretion as follows: almost 28 percent to the sentencing court, nearly 39 percent to the parole board, and slightly more than 33 percent to the department of corrections. When judges choose the longest allowable minimum sentences, there is a roughly balanced three-way distribution of time-served authority.

In some configurations of indeterminate sentences, however, the parole board's time-served discretion grows in relation to other decision makers. Considering the 10-year sentence modeled in Figures 7 and 8, the sentencing judge controls 10 months of time served, the parole board governs the next 70 months, and the department of corrections has determinative power over the last 40 months. As judicially-selected minimum terms become shorter, time-served discretion flows to the parole board.

For the large cohort of New York prisoners serving indeterminate sentences, the parole board and department of corrections are both powerful players in their jurisdiction over actual lengths of terms, but the parole board is always the greater among equals. The exact relative powers of the two back-end agencies depend ultimately on judicial sentencing patterns.

4.4. Overall assessment

New York's prison-sentencing system is not merely a mixed system in its juxtapositioning of determinate and indeterminate sentences, it is a *dramatically mixed system*. Large numbers of prisoners are distributed across two schemas that are near opposites. Sixty percent of prisoners

⁸⁰ See, e.g., Georgia, Hawaii, Michigan, and Utah reports.

experience sentences that fall solidly into the category of low or extremely-low indeterminacy, while more than a quarter of prisoners have sentences of high indeterminacy that sometimes verge on extremely-high indeterminacy. The overall system is one of split personalities—perhaps more so than any other state surveyed in this project.⁸¹

⁸¹ This is not to say that there is no conceivable rationale that could account for New York’s radically mixed system. Perhaps different classes of offenders call for distinct types of sentences. It is also possible that the system grew haphazardly over the decades into its current fractured framework, with no guiding reasoning. This was the view of the New York sentencing commission in 2014. See New York State Permanent Commission on Sentencing, *A Proposal for “Fully Determinate” Sentencing for New York State* (2014) at 4 (concluding that, “[t]here is simply no logic to the current hybrid system”).