



**ROBINA INSTITUTE**  
OF CRIMINAL LAW AND CRIMINAL JUSTICE

---

# **PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE**

***STATE REPORT: MASSACHUSETTS***

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

---

July 2022

# **Prison-Release Discretion and Prison Population Size**

## **State Report: Massachusetts**

### **Table of Contents**

*Executive Summary*

*Introduction*

*1. General rules of prison release in Massachusetts*

*2. Life sentences in Massachusetts*

*a. Adults*

*b. Juvenile life sentences*

*3. Infrequently used forms of prison release in Massachusetts*

*a. Compassionate release*

*b. Clemency*

*c. Release during overcrowding emergencies*

*4. Overall assessment of Massachusetts' prison-sentencing system*

### Definitions and Concepts

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

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

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

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

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

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

### ***Rankings of “Degrees of Indeterminacy”***

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

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

***Benchmarks for rankings of “degrees of indeterminacy”***

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

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

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

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

## Prison-Release Discretion and Prison Population Size

### State Report: Massachusetts<sup>1</sup>

#### *Executive Summary*

We classify Massachusetts’s prison-sentencing system as operating with a *moderate degree of indeterminacy* on the scale developed for this project (see p. iv). Although all general-rules prisoners are statutorily eligible for discretionary parole release, the length of minimum terms in relation to judicial maximum sentences is entirely a matter of discretion vested in sentencing courts. For purposes of this report, we analyze the Massachusetts system according to current judicial practices. In recent history, Massachusetts judges have imposed sentences with minimum terms that are a high percentage of maximum terms.

Through the administration of the state’s system of “good conduct deductions,” the department of corrections has substantial power to affect prisoners’ minimum terms and mandatory release dates (MRDs). Credit-based deductions from both minimum and maximum terms are statutorily capped at 35 percent. All credit awards are dependent on prisoners’ participation in or completion of educational, work, or rehabilitative programming.

If we assume that credits up to the statutory cap are realistically available to some prisoners—at least to high-achieving prisoners with reasonably good luck in program availability—then the long minimum terms preferred by judges may be reduced to yield significantly earlier dates of parole release eligibility. If such high credit earnings are not realistically attainable by Massachusetts prisoners, however, we would be required to modify our evaluation of the prison-sentencing system as a whole. It is conceivable that the system as it currently operates is one with a low degree of indeterminacy overall.

#### *Terminology note*

This report will refer to the Massachusetts Parole Board as the “parole board.” The Massachusetts Department of Correction will be referred to as the “department of corrections.”

---

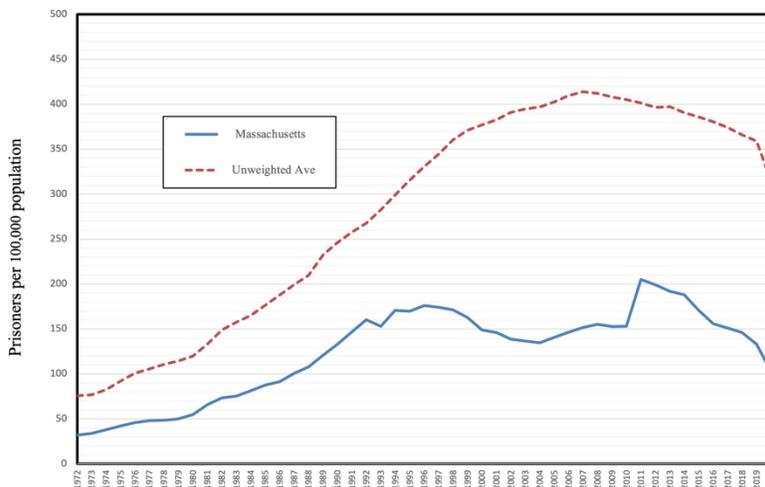
<sup>1</sup> This report was prepared with support from Arnold Ventures. The views expressed are the authors’ and do not necessarily reflect the views of Arnold Ventures. For a broad overview of the law of parole release and supervision in Massachusetts, see Alexis Lee Watts, Edward E. Rhine, & Catherine McDonough, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Massachusetts* (Robina Institute of Criminal Law and Criminal Justice, 2019) (including surveys of parole-release criteria, procedures for release decisions, laws relating to parole supervision and revocation, and the institutional attributes of the parole board).

**Introduction**

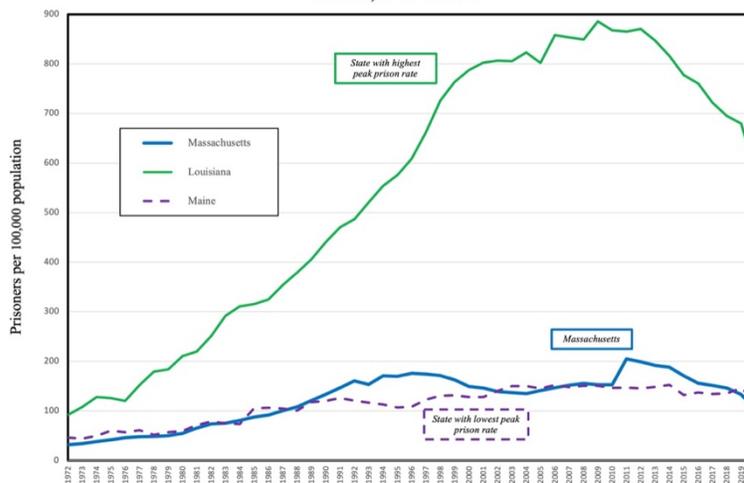
*Massachusetts’s prison-rate history, 1972 to 2020*

In 2020, Massachusetts’s prison rate was 103 per 100,000 general population, with a yearend prison population of 6,195.<sup>2</sup> Massachusetts’s prison rate was the lowest among all states.

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



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



Sources: Timothy J Flanagan, Kathleen Maguire & Michael J. Hindelang, *Sourcebook of Criminal Justice Statistics, 1990*, at 605 table 6.56, Rate (per 100,000 resident population) of sentenced prisoners under jurisdiction of State and Federal correctional authorities on

<sup>2</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 11 table 4, 15 table 7. Preliminary information about changes in Massachusetts’ imprisonment rates after 2020 is presented below in the section on “The COVID period in Massachusetts.”

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

Massachusetts reached its peak prison rate in 2011 at 205 per 100,000, which dropped to 103 per 100,000 in 2020. This is a net difference of -102 per 100,000, which was the 23<sup>rd</sup> largest prison-rate drop of all states.

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

### *The COVID period*

We view American prison rates following the arrival of the COVID pandemic in March 2020 as discontinuous with earlier rates and trends. Whatever factors were at work to determine state prison rates in the “before times,” the pandemic introduced a major new causal force that, at least temporarily, diverted the course of prison-rate change nationwide.<sup>3</sup>

In calendar year 2020, most states saw unusually large drops in their prison rates. Prison rates fell in 49 states, the District of Columbia, and the federal system. The aggregate 50-state prison rate for the U.S. dropped by about 15 percent in a single year. From yearend 2019 to yearend 2020, the (unweighted) average state prison rate fell from 359 to 308 prisoners per 100,000

<sup>3</sup> In Figures 1 and 2 above, the COVID period arrives in the very last year of data that has been reported by the Bureau of Justice Statistics (BJS) as of this writing—from yearend 2019 to yearend 2020. Figures 1 and 2 rely exclusively on BJS data covering the years 1972-2020. For a tentative update, the Vera Institute of Justice has collected state imprisonment counts reaching into December 2021, which are not fully compatible with BJS reports. See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022).

general population, for an average incremental downturn of -51 per 100,000.<sup>4</sup> We believe this was the largest one-year decline in state prison rates in American history.<sup>5</sup>

In calendar year 2021, U.S. prison rates did not continue downward at the same dramatic speed. Preliminary data from the Vera Institute indicate that the aggregate 50-state prison population fell by about 1.8 percent from January to December 2021, with considerable variation across the states. Prison populations actually rose in 19 states.<sup>6</sup>

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

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

---

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

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

<sup>6</sup> Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2 (reporting a decrease of 15.8 percent in the state prison population overall in 2020 followed by a decrease of 1.8 percent in 2021). The states reported to have had increases in prison populations in 2021 were: Alaska (up 7.7 percent), Arkansas (up 5.8 percent), California (up 3.9 percent), Connecticut (up 3.4 percent), Delaware (up 2.0 percent), Idaho (up 8.8 percent), Iowa (up 9.1 percent), Kentucky (up 0.2 percent), Missouri (up 1.5 percent), Montana (up 9.8 percent), Nebraska (up 5.9 percent), North Carolina (up 0.9 percent), North Dakota (up 20.6 percent), Ohio (up 0.04 percent), Rhode Island (up 2.1 percent), South Dakota (up 2.4 percent), Utah (up 8.4 percent), West Virginia (up 12.9 percent), and Wyoming (up 3.7 percent). *Id.* at 3-4 table 2.

<sup>7</sup> For a survey of state releasing practices in response to COVID, see Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, forthcoming 2022) (finding that 24 states released 0 to 150 prisoners in response to the pandemic from March 2020 through December 2021, while only five states and the federal system released more than 3,000

The available data suggest that the 2020 plunge in state prison rates was primarily due to reduced *admissions* caused by a number of factors, including fewer arrests, fewer new court commitments, fewer revocations from community supervision, and some prisons' embargoes on receiving prisoners from local jails. The number of all state prison admissions in the U.S. dropped by an astonishing 40 percent in a single year from 2019 to 2020.<sup>8</sup>

### *The COVID period in Massachusetts*

The state-specific experience of Massachusetts suggests some special mobilization of prison-release processes in the immediate period of COVID shock, but the total impact of these efforts is unclear.

In calendar year 2020, Massachusetts' prison rate fell from 133 to 103 per 100,000—a one-year decline of -30 per 100,000. This was the 43rd largest one-year drop reported among all 50 states for that year.<sup>9</sup> Measured in percentage terms, it was a 22.6-percent reduction in the state's prison rate. The state's total prison population fell by 1,308 people, from 7,503 to 6,195.<sup>10</sup>

COVID releases made up only a fraction of this drop. In a separate study, the Robina Institute found as many as 1,156 releases in Massachusetts from March 2020 through December 2021 that *might have been* accelerated in response to the pandemic. This number is the equivalent of

---

prisoners). The effects on annual imprisonment rates were even less than the absolute numbers of releases would suggest. Mitchell et al. found that one of the most common criteria applied by states for COVID release decisions was “short time left on sentence.” Thus, some of the accelerated COVID releases in 2020 and 2021 were of prisoners who would have been released in the same year anyway, albeit somewhat later.

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

<sup>9</sup> The largest single-state drop from yearend 2019 to yearend 2020 was in Kentucky, from 515 to 414 per 100,000. E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 16 table 7.

<sup>10</sup> *Id.*, at 12 table 4.

about 14 percent of Massachusetts’s pre-COVID prison population (at yearend 2019). However, the bulk of the releases were parole releases (1,055 of them), and the Robina report stated that “it is unclear whether these releases were directly related to COVID-19.”<sup>11</sup> Thus, the number of actual COVID-related releases may have been as few as 100.

Falling admissions appear to have been the dominant factor in Massachusetts’ reduction of prison population in 2020. The number of prison admissions in the state dropped by 52.6 percent in 2020 compared with the previous year (from 1,950 to 924). Total releases did not grow in 2020, but fell by 4.3 percent from 2019 (from 2,312 to 2,212).<sup>12</sup>

From yearend 2020 to December 2021, the Vera Institute reported that Massachusetts saw an additional drop in its prison population, from 6,886 to 6,255—or 9.2 percent.<sup>13</sup> This was a significantly larger decrease than the average among all states (reported by Vera as a drop of 1.8 percent). As of May 1, 2022, the Massachusetts Department of Correction reported a total prison population of 6,180.<sup>14</sup>

## ***1. General rules of prison release in Massachusetts***

### ***Minimum and maximum terms***

Massachusetts does not have a general scheme for the grading of felony offenses.<sup>15</sup> Instead, authorized penalties are prescribed separately for each offense in the state’s criminal code. The judicial maximum sentence (as selected by the court in an individual case) may not be longer than the statutory maximum penalty fixed by law for the controlling offense, but judges may

---

<sup>11</sup> Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, forthcoming 2022), Appendix A. Mitchell et al. report that all 70 releases were of people who were serving short terms on parole revocations. *Id.*, Appendix E.

<sup>12</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 18 table 8, 20 table 9.

<sup>13</sup> Vera’s prisoner counts are inconsistent with those reported by BJS. For example, BJS reports a yearend prison population in Massachusetts of 7,593, while Vera gives the number as 8,205. See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2. As a general matter, Vera’s *People in Prison* reports should not be treated uncritically as “updates” of BJS’s annual *Prisoners* series. Vera does not always gather prisoner counts from the same dates as BJS, nor does it calculate state prison rates in the same way. For example, BJS calculates yearend prison rates using yearend population estimates for each state from the Census Bureau, while Vera uses the Census Bureau’s July 1 estimates (six months earlier). Occasionally, the absolute numbers of state prisoners reported by Vera are dramatically different from those in BJS reports, suggesting basic differences in counting rules. Because of such incompatibilities, we do not attempt to integrate data from the two sources in any of our state reports for this project.

<sup>14</sup> Massachusetts Department of Correction, *Quick Statistics*, at <https://www.mass.gov/service-details/quick-statistics> (visited on July 1, 2022).

<sup>15</sup> Massachusetts is one of 14 states without a comprehensive grading scheme for felonies and misdemeanors. See American Law Institute, *Model Penal Code: Sentencing* (forthcoming 2022), Section 6.01, Reporters’ Note b.

choose judicial maximum sentences that are shorter than the statutorily-authorized maximum.<sup>16</sup>

In most cases, Massachusetts sentencing courts also have discretion to choose minimum terms without limitation. There is no statutory formula or other rule that limits the ratio between minimum and maximum terms.<sup>17</sup> In other words, courts may select minimum terms of any length from zero up to the full duration of the judicial maximum sentence.<sup>18</sup> As explained by the Massachusetts Sentencing Commission:

Under current sentencing laws, judges are generally not constrained when setting the ratio or difference between the minimum and maximum sentences to state prison. Thus, a judge might impose a sentence of 60 to 180 months (5 to 15 years) where the minimum sentence is 33% of the maximum sentence and where the difference between the minimum and maximum sentence is 120 months (10 years). Alternatively, a judge might impose a sentence of 60 months to 60 months and 1 day (5 years to 5 years and 1 day), where the minimum sentence represents about 99% of the maximum sentence and the difference between the minimum and maximum sentence is 1 day.<sup>19</sup>

---

<sup>16</sup> For example, the statutorily-authorized penalty range for manslaughter is “imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two and one half years.” Mass. Gen. Laws ch. 265 § 13. For ordinary larceny, the authorized penalty range is “imprisonment in the state prison for not more than five years or in jail for not more than two and one-half years.” Mass. Gen. Laws ch. 266 § 25(b).

<sup>17</sup> Massachusetts has advisory sentencing guidelines for judges. See Massachusetts Sentencing Commission, *Advisory Sentencing Guidelines* (2017). The guidelines have no legally-binding effect on sentencing courts, however. Their legal stature is further ambiguous because they have not been approved by the legislature. See Sentencing Guidelines Resource Center, *Jurisdiction Profile: Massachusetts* (Robina Institute of Criminal Law and Criminal Justice, 2019), at <https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-05/Massachusetts%20SGRC%20Profile%202019.pdf>.

<sup>18</sup> Mass. Gen. Laws ch. 279 § 24. Sentencing courts do not enjoy such open-ended discretion for offenses that carry mandatory minimum prison terms. For example, drug trafficking offenses carry mandatory minimum sentences in Massachusetts. See Mass. Gen. Laws ch 94C § 32E. Anyone convicted of a drug trafficking offense under 94C § 32E will be eligible for parole after serving one-half of the maximum term of their sentence if their sentence is to the house of correction, except if there is an aggravating factor present. Mass. Gen. Laws ch 94C § 32E(d).

<sup>19</sup> Massachusetts Sentencing Commission, *Survey of Superior Court Sentencing Practices FY2018* (2019), at 13.

The degree of indeterminacy in general-rules sentences is thus largely within the control of the sentencing court. The degree of indeterminacy for the system as a whole is likewise dependent on aggregate patterns of judicial decisions, which can be expected to change with time.<sup>20</sup>

Statistics reported by the Massachusetts Sentencing Commission provide insight into current judicial preferences and decision patterns when setting the relationship between minimum and maximum terms in individual sentences. In Fiscal Year 2018, as shown in the Table 1 below, 96 percent of all judicial sentences contained minimum terms that were at least 60 percent of their accompanying judicial maximum sentences. More than 40 percent had minimum terms that were at least 90 percent of the judicial maximum.<sup>21</sup>

**Table 1. Minimum to Maximum Term Ratios in Massachusetts General-Rules Sentences, FY 2018**

Minimum-to-Maximum Ratio	Grid Offenses		Mandatory (Non-Grid Offenses)		Total	
	N	%	N	%	N	%
1% to 9%	0	0.0%	0	0.0%	0	0.0%
10% to 19%	0	0.0%	0	0.0%	0	0.0%
20% to 29%	1	0.1%	0	0.0%	1	0.1%
30% to 39%	4	0.3%	0	0.0%	4	0.2%
40% to 49%	4	0.3%	0	0.0%	4	0.2%
50% to 59%	49	3.8%	11	2.6%	60	3.5%
60% to 69%	232	18.1%	59	14.0%	291	17.1%
70% to 79%	222	17.3%	79	18.8%	301	17.7%
80% to 89%	254	19.8%	80	19.0%	334	19.6%
90% and over	516	40.2%	191	45.5%	707	41.5%
Total	1,282	100.0%	420	100.0%	1,702	100.0%

Source: Massachusetts Sentencing Commission, *Survey of Superior Court Sentencing Practices FY2018* (2019), at 15 table 8.

Parole denials must be reviewed: (1) once annually for offenders who are not habitual offenders, have not been civilly committed as sexually dangerous persons, and are not serving

<sup>20</sup> It would be simplistic to ascribe effective decisionmaking power solely to sentencing courts, however. It is likely that the form of many or most sentences is narrowed down or settled in plea agreements prior to judicial sentencing proceedings. Indeed, the minimum-maximum ratio of a sentence could be a matter of considerable importance in plea negotiations.

<sup>21</sup> Massachusetts Sentencing Commission, *Survey of Superior Court Sentencing Practices FY2018* (2019), at 15 table 8. For Fiscal Year 2018, the Massachusetts Sentencing Commission reported that the mean minimum prison sentence imposed by sentencing courts statewide was 53.5 months and the median was 42 months. For maximum sentences, the mean was 64.8 months, and the median was 48.03 months. These statistics suggest that the average percentage ratio between minimum and maximum was 83 percent (using reported mean sentences) or 87 percent (using reported median sentences). Massachusetts Sentencing Commission, *Survey of Superior Court Sentencing Practices FY2018* (2019), at 12-13 & table 7.

a life sentence; (2) every two years for habitual criminals; (3) three years after the initial parole hearing for civilly committed sexually dangerous offenders; and (4) at least once every five years for offenders serving a life sentence.<sup>22</sup>

### *The effects of good conduct deductions*

Prisoners may earn “good conduct deductions” from both their minimum and maximum terms according to criteria and earning rates set by statute.<sup>23</sup> In the terminology of this project, both minimum and maximum terms are “movable” sentence milestones. Movement of a parole eligibility date to an earlier position activates the parole board’s release discretion at an earlier juncture than that specified in the judge’s sentence. Deductions from judicial maximum terms create mandatory release dates (MRDs) that precede expiration of the maximum term. The position of these “movable MRDs” depends on the amount of credits accumulated.<sup>24</sup>

“Good conduct credits,” as they are called in Massachusetts law, are available only on an earned-time model. That is, they are awarded for participation in or completion of programs. They are not awarded merely for good behavior and the avoidance of disciplinary infractions.

*Participation credits.* Credits are available for “satisfactory completion of an educational program leading to the award of a high school equivalency certificate, satisfactory performance of said prisoner in completion of any other educational sequence or any vocational training program established within or without the institution, satisfactory performance of said prisoner while the prisoner is employed on work-release or in a prison industry, or satisfactory performance of said prisoner in any other program or activity which the superintendent of the institution shall deem valuable to said prisoner's rehabilitation.” Credits are also available to prisoners who are “working in a state hospital or school, on work-release or working in a prison industry.” Credits for participation in the above activities accrue at a rate of 7.5 days per month per program, but there is a statutory cap on total participation credits of 15 days per month.<sup>25</sup> Credit earnings at the highest amount permitted by this cap would result in 33-percent reductions of prisoners’ minimum and maximum terms.<sup>26</sup>

*Completion credits.* In addition, prisoners may earn a “deduction of sentence of up to 10 days for a prisoner's successful completion of a program or activity, as designated by the

---

<sup>22</sup> 120 Mass. Code Regs. 301.01(2)-(5).

<sup>23</sup> Mass. Gen. Laws ch. 127 § 129D.

<sup>24</sup> See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), Ch. 7 (“Highlighted topic: Movable mandatory release dates”).

<sup>25</sup> Mass. Gen. Laws ch. 127 § 129D(a).

<sup>26</sup> Additional credits for good conduct are available to prisoners confined in prison camps at the rate of 2.5 days per month, Mass. Gen. Laws ch. 127 § 129C, but total deductions from prisoners’ maximum sentences under §§ 129C and 129D(a) are statutorily capped at 35 percent. Mass. Gen. Laws ch. 127 § 129D(b).

commissioner, to be deducted in the month during which successful completion of the designated program or activity is achieved.”<sup>27</sup> Effective in 2019, the total number of completion credits prisoners can earn in a single month was increased by 80 days, for a total of 90 credits per month.<sup>28</sup> However, this high earning rate can only be claimed in “bursts.” It is not available to prisoners across their entire terms. There is a statutory cap that completion credits by themselves may not result in more than a 17.5-percent reduction from prisoners’ maximum sentences. (This cap would be reached by prisoners who steadily earned 6.4 days of completion credits per month over their entire terms.)

There is also a statutory cap on the combined effect of participation and completion credits, which together cannot result in more than 35-percent reductions from prisoners’ minimum and maximum sentences.<sup>29</sup> (Spread evenly over prisoners’ entire terms, this limits average monthly earnings to about 16 days of credits.)

In Massachusetts, the program participation and completion credits discussed in this section cannot be forfeited once they have been earned. This rule is a matter of DOC regulation rather than statutory command.<sup>30</sup> It is exceptional. We are aware of no other state that operates with a similarly comprehensive ban on the forfeiture of credits.

---

<sup>27</sup> Mass. Gen. Laws ch. 127 § 129D(a).

<sup>28</sup> Mass. Gen. Laws ch. 127 § 129D(c).

<sup>29</sup> Mass. Gen. Laws ch. 127 § 129D(b),(d). There is ambiguity in the literal language of the statute concerning the statutory cap on reductions from maximum terms. The interpretation in the text above is consistent with the legislative history of revisions to § 129D. See Council of State Governments, *Justice Reinvestment in Massachusetts Policy Framework* (February 2017), at 10: “To maintain transparency and truth in sentencing, the maximum amount of time that can be earned through completion credits will be capped at 17.5 percent of a person’s maximum sentence, and the maximum amount of time that can be earned through the combination of both program participation and completion credits will be capped at 35 percent of a person’s maximum sentence.”

<sup>30</sup> 103 Mass. Code Regs. 411.11(2) (“Deductions from sentence under [Mass. Gen. Laws] c. 127, §§ 129C and 129D, once earned, shall not be forfeited.”).

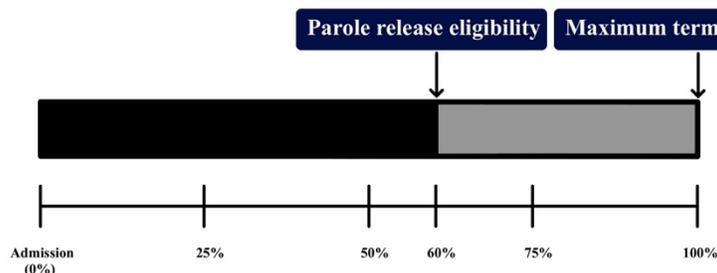
In this project, we use the term “population-multiplier potential” (or PMP) to express the amount of influence over prison population size that is ceded by law to back-end decision makers such as parole boards and prison officials. To give a simplified example, if all prisoners in a hypothetical jurisdiction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

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

### Timeline Diagrams

Prisoners who arrive at the back end of the prison-sentencing system can be grouped according to the degrees of indeterminacy (DOIs) of their particular sentences. For purposes of our analysis, we ignore sentences with minimum terms that are shorter than 60 percent of judicial maximum sentences. According to the evidence above in Table 1, such sentences are imposed on only a tiny percentage of all prisoners. Figures 3 and 4 below explore the prison-release timeline for sentences with the shortest minimum terms actually imposed by Massachusetts judges, showing minimum terms set at exactly the 60-percent mark.

Massachusetts Figure 3. Prison-Release Timeline for General-Rules Sentences with Shortest Judicial Minimum Terms and No Earned Time Deductions



Massachusetts Figure 4. Prison-Release Timeline for General-Rules Sentences with Shortest Judicial Minimum Terms and Most Allowable Earned Time Reductions

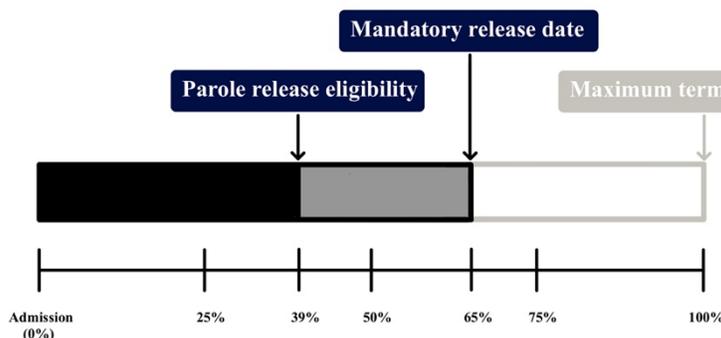


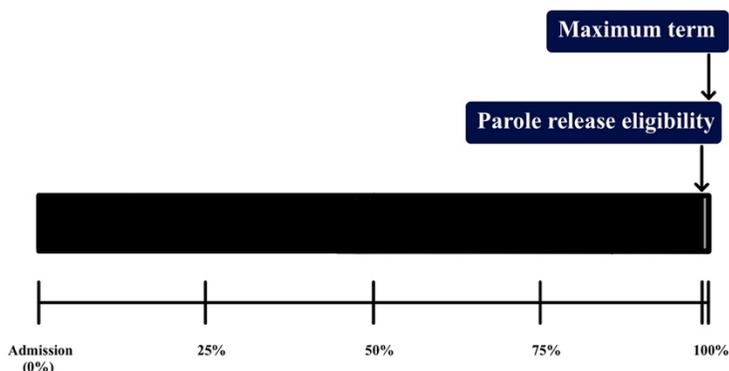
Figure 3 shows the position of first parole release eligibility under judicial sentences with minimum terms set at the 60-percent mark. This figure includes no adjustments for “good conduct deduction.” Figure 4 illustrates the same judicial sentence as affected by “earned time” deductions up to the full statutory limit of 35-percent discounts against both the judicial minimum and maximum terms (this counts both program participation and completion credits).

We treat this as the most indeterminate sentence class that reaches the back end of Massachusetts’ prison-sentencing system. Looking to Figure 4, the sentence is 39 percent determinate and 61 percent indeterminate. Its PMP is nearly 2.6:1. This is a sentence with a *high degree of indeterminacy* according to the scale developed for this project—but it is very close to the cut-off for “moderate” indeterminacy (which occurs for sentences that are more than 40 percent determinate).<sup>31</sup>

<sup>31</sup> Indeed, using analysis similar to that shown in Figure 4, a sentence with a judicial minimum term set at 62 percent of the maximum would, with full allowable credits, produce a date of first parole release eligibility that

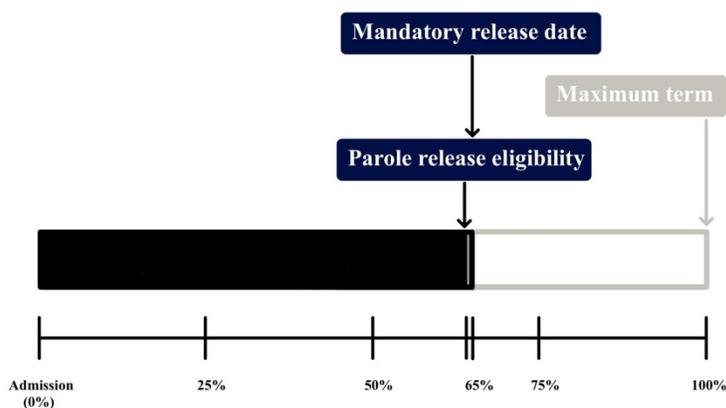
At the other end of the spectrum of possibility, varying with the percentage-length of judicial minimum terms, are sentences with judicial minimum terms that are essentially the same length as judicial maximum terms. In Massachusetts, minimum terms that are only one day shorter than judicial maximum sentences are commonplace. Figures 5 and 6 illustrate the timelines for such sentences, with and without full allocations of good conduct deductions.

**Massachusetts Figure 5. Prison-Release Timeline for General-Rules Sentences with Judicial Minimum Terms One Day Short of Maximum and No Earned Time Deductions**



Note: Date of parolee release eligibility shown as one day short of expiration of maximum sentence

**Massachusetts Figure 6. Prison-Release Timeline for General-Rules Sentences with Judicial Minimum Terms One Day Short of Maximum and Most Allowable Earned Time Reductions**



Note: Date of parolee release eligibility shown as one day short of mandatory release date

occurs slightly after the 40-percent mark of the timeline. Just after this 62-percent threshold, judicial sentences have a moderate degree of indeterminacy.

With credits up to the statutory cap of 35 percent, prisoners can move their MRDs back to the 65-percent mark of the timeline, with first parole release eligibility one day earlier. We treat these sentences as 65 percent determinate and 35 percent indeterminate. They carry a PMP of 1.54:1. In the ranking system developed for this project, such sentences have a *low degree of indeterminacy*.

Because judges have unfettered discretion to choose the relative percentage-lengths of the minimum and maximum terms in their sentences, every permutation in between Figures 3/4 and Figures 5/6 are possible under Massachusetts law. We sometimes picture our rankings of overall systems as an averaging-out of major sentencing classes. This is normally a subjective judgment call in our reports, based on our educated guesses as to the representation of different sentence classes within the prison population as a whole. In Massachusetts, we have actual data to work with.

If we base our evaluation of the system as a whole on the distribution shown earlier in Table 1, more than half of all sentences fall into the moderate indeterminacy range (with a small fraction that are high in indeterminacy). At most, 41.5 percent of all judicial sentences might be classified as low in indeterminacy.<sup>32</sup> In its most recent statistical report, the Massachusetts Sentencing Commission found that: “In 38.6% of all state prison sentences [in FY 2018], the difference between the minimum and maximum sentences was one day.”<sup>33</sup> From this evidence, we offer the rough estimates displayed in Table 2.<sup>34</sup>

**Table 2. Estimated Breakdown of Massachusetts General-Rules Sentences by Degrees of Indeterminacy**

<i>Degrees of indeterminacy in individual general-rules sentences</i>	<i>Percentage of all general-rules sentences</i>
High indeterminacy	5 percent
Moderate indeterminacy	55 percent
Low indeterminacy	40 percent

<sup>32</sup> Allowing for full credits, DOIs transition from moderate to low with 93-percent MINs and higher.

<sup>33</sup> Massachusetts Sentencing Commission, Survey of Superior Court Sentencing Practices FY2018 (2019), at 14.

<sup>34</sup> These estimates are biased in the direction of overestimating the degree of indeterminacy in the system as a whole. Based on Table 1, it is plausible to think that highly indeterminate sentences make up less than 5 percent of the total and that sentences with low indeterminacy make up more than 40 percent.

Based on these estimated breakdowns, we see Massachusetts as a “continuum system” that is weighted most heavily toward sentences with a *moderate degree of indeterminacy*.

This conclusion is reinforced by aggregate data. For Fiscal Year 2018, the Massachusetts Sentencing Commission reported that the mean minimum prison sentence imposed by sentencing courts statewide was 53.5 months and the median was 42 months. For maximum sentences, the mean was 64.8 months and the median was 48.03 months. These statistics suggest that the average percentage ratio between minimum and maximum was 83 percent (using reported means) or 87 percent (using reported medians).<sup>35</sup> If we visualize sentences with 83- or 87-percent minimum terms, reduced by the largest possible 35-percent credit discounts, average parole release eligibility would occur at the 54- or 57-percent marks of judicial maximum terms. Either calculation fits into our definition of moderate indeterminacy. The PMPs for these hypothetical average sentences would be 1.85:1 (using reported means) or 1.75:1 (using reported medians).

To summarize the above analysis in PMP terms: We see general-rules sentences with PMPs as high as 2.6:1 (Figures 3 and 4) and as low as 1.54:1 (Figures 5 and 6) with estimated average PMPs of about 1.8:1. The distribution of high to low PMPs is tilted toward lower PMPs.<sup>36</sup>

### *Sentences outside the general rules of prison release*

In Massachusetts, a “habitual criminal” is any person convicted of a felony who has two prior convictions that resulted in incarceration terms of at least three years. Individuals sentenced as habitual criminals must receive the statutory maximum prison term for their current felony conviction.<sup>37</sup> They are not eligible for discretionary parole release or good conduct deductions from their sentences.<sup>38</sup>

In 2018, Massachusetts reformed their mandatory minimum sentencing statutes so that the mandatory penalties still apply to drug traffickers but mostly no longer apply to lower level drug dealers.<sup>39</sup> A conviction of unlawful manufacture, distribution, dispensing or possession with intent to manufacture Class A controlled substances carries a mandatory minimum penalty of three and a half years if the offender had one or more prior convictions of the same

---

<sup>35</sup> Massachusetts Sentencing Commission, Survey of Superior Court Sentencing Practices FY2018 (2019), at 12-13 & table 7.

<sup>36</sup> According to Table 1, sentences with minimum terms between 60 and 80 percent of maximum terms make up about 35 percent of all general-rules sentences. Those with minimum terms between 80 and 100 percent of maximum terms make up about 61 percent of all general-rules sentences.

<sup>37</sup> Mass. Gen. Laws ch. 279 § 25(a).

<sup>38</sup> Mass. Gen. Laws ch. 279 § 25(b).

<sup>39</sup> William Brownsberger, Mandatory Minimum Sentences for Drug Crimes, (Mar. 24, 2018) retrieved from: <https://willbrownsberger.com/mandatory-minimums-for-drug-crimes-in-the-senate-criminal-justice-package/>.

offense.<sup>40</sup> Drug trafficking offenses also carry mandatory minimum penalties that range in length from two to twelve years dependent on the Class of drug and quantity sold or possessed with intent to sell.<sup>41</sup>

Unlawful possession of a firearm also carries mandatory minimum penalties. A first-time offense is punishable by at least two and a half and no more than five years in state prison, or alternatively at least 18 months and no more than two and a half years in a jail or house of correction.<sup>42</sup> An offender convicted of unlawful possession of a firearm must serve eighteen months of this sentence before they become eligible for parole.<sup>43</sup> A second offense is punishable by imprisonment in a state prison of five to seven years, third offense seven to ten years, and a fourth offense ten to fifteen years. Prisoners that have committed a second, third, or fourth offense are not eligible for probation or good conduct credit deduction.<sup>44</sup>

Prisoners convicted of certain drug offenses triggering mandatory minimum sentences are ineligible to receive good conduct deductions if they: (1) used violence or threats of violence or possessed a firearm, rifle, shotgun machine gun or a weapon during the commission of the offense; (2) engaged in a course of conduct whereby the offender directed the activities of others who committed any felony; or (3) the offense was committed during the commission of the sale of controlled substances to minors or abetting a minor to distribute controlled substances.<sup>45</sup>

## ***2. Life sentences in Massachusetts***

### ***a. Adults***

People convicted of murder in the first degree must be sentenced to life without parole (LWOP). Such sentences may be commuted by the governor with the advice and consent of the governor's council to become parole eligible.<sup>46</sup>

---

<sup>40</sup> Mass. Gen. Laws ch. 94C § 32(b).

<sup>41</sup> Mass. Gen. Laws ch. 94C § 32E.

<sup>42</sup> Mass. Gen. Laws ch. 269 § 10(6).

<sup>43</sup> *Id.*

<sup>44</sup> Mass. Gen. Laws ch. 269 § 10(6)(d).

<sup>45</sup> Mass. Gen. Laws ch. 94C § 32E(d).

<sup>46</sup> Mass. Gen. Laws ch. 265 § 2(a),(d).

Most prisoners serving life sentences in Massachusetts become parole eligible after the expiration of the minimum terms of their sentences.<sup>47</sup> The minimum sentence for a crime punishable by life imprisonment may range from 15-25 years.<sup>48</sup>

### *b. Juvenile life sentences*

Juvenile lifers become parole eligible at the expiration of their minimum terms. Offenders convicted of murder in the first degree between the ages of 14-18 receive minimum terms of 20 to 30 years.<sup>49</sup> Indigent prisoners serving a life sentence for an offense committed before the prisoner reached 18 years of age have the right to have appointed counsel at their parole hearings.<sup>50</sup>

## **3. Infrequently used forms of prison release in Massachusetts**

### *a. Compassionate release*

An inmate may be eligible for medical parole due to a terminal illness or permanent incapacitation. The superintendent of a correctional facility shall consider an inmate for medical parole upon a written petition by the inmate, inmate's attorney, inmate's next of kin, a medical provider of the correctional facility, or member of the department's staff. If the superintendent recommends the inmate for medical parole, the commissioner must notify in writing the district attorney in the jurisdiction where the inmate was convicted, the inmate, the person who petitioned for medical parole, and the victim or victim's family. The commissioner shall issue a written decision within 45 days ruling on the inmate's request for medical parole, taking into consideration the inmate's medical condition as well as whether the inmate's release would be compatible with the welfare of society.<sup>51</sup>

### *b. Clemency*

The Governor of Massachusetts has the power to grant pardons with the advice and consent of the Governor's Council.<sup>52</sup> Every pardon petition must be filed with the Parole Board, acting as the Advisory Board of Pardons, before it is presented to the governor. The Advisory Board must forward a copy of the petition for pardon to the attorney general, commissioner of

---

<sup>47</sup> This provision does not apply to prisoners serving a life sentence for murder in the first degree who were over 18 years of age at the time of the murder, prisoners serving more than one life sentence arising out of separate and distinct incidents, and prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater. Mass. Gen. Laws ch. 127 § 133A.

<sup>48</sup> Mass. Gen. Laws ch. 279 § 24.

<sup>49</sup> Mass. Gen. Laws ch. 279 § 24.

<sup>50</sup> Mass. Gen. Laws ch. 127 § 133A.

<sup>51</sup> Mass. Gen. Laws ch. 127 § 119A(b)-(e).

<sup>52</sup> Mass. Gen. Laws ch. 127 § 152.

correction, chief of police of the municipality in which the crime was committed, and the district attorney or justice of the court in which the sentence was imposed.<sup>53</sup> The petitioner must have demonstrated “good citizenship” as well as a specific, verified, and compelling need for a pardon. In making its recommendation to the governor, the Advisory Board views evidence including support for the petitioner in the institution and community, their accomplishments and achievements, and the nature and extent of opposition to the petition.<sup>54</sup>

### *c. Release during overcrowding emergencies*

There is no permanent statutory mechanism for response to overcrowding emergencies in Massachusetts prisons.

## **4. Overall assessment of Massachusetts’ prison-sentencing system**

We classify Massachusetts’ prison-sentencing system as operating with a *moderate degree of indeterminacy* overall. Although all general-rules prisoners are statutorily eligible for discretionary parole release, the length of judicial minimum terms in relation to judicial maximum sentences is entirely a matter of discretion vested in sentencing courts. In recent history, Massachusetts judges have imposed sentences with minimum terms that are a high percentage of maximum terms. Sentences with minimum terms that are one day shorter than maximum terms are surprisingly common, making up about 38 percent of all sentences in a recent reporting year.

The overall degree of indeterminacy in the Massachusetts prison-sentencing system is largely determined by judicial sentencing patterns, which may change without any alteration to the governing legislation or sentencing guidelines. Judges are gatekeepers of the degree of indeterminacy in their own sentences and, in the aggregate, for the system as a whole. For purposes of this report, we have analyzed the Massachusetts system in light of recent judicial practices as reported by the state sentencing commission.

Through the administration of the state’s system of “good conduct deductions,” the department of corrections appears to have substantial power to affect prisoners’ minimum terms and mandatory release dates (MRDs). Credit-based deductions from both minimum and maximum terms are statutorily capped at 35 percent. Importantly, however, all credit awards are dependent on prisoners’ participation in or completion of educational, work, or rehabilitative programming. To the extent such programs are in undersupply, the

---

<sup>53</sup> Mass. Gen. Laws ch. 127 § 154.

<sup>54</sup> Mass. Parole Board, Pardons and Commutations, <https://www.mass.gov/service-details/pardons-and-commutations> (last visited June 29, 2022).

department’s “discretion” to award sentence deductions may be overstated by the statutory allowances that appear “on paper.”<sup>55</sup>

If we assume that credit earnings up to the statutory cap are realistically available to some prisoners—at least to high-achieving prisoners with reasonably good luck in program availability—then the high-percentage-length minimum terms preferred by judges may be reduced to yield substantially earlier dates of parole release eligibility. If such high credit earnings are not realistically attainable by Massachusetts prisoners, however, we would be required to modify our evaluation of the state’s prison-sentencing system as a whole. It is conceivable that the system as it currently operates is one with a low degree of indeterminacy overall.

---

<sup>55</sup> The CSG materials include some relevant data, but before current earning rates and caps were adopted.