



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

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

*STATE REPORT: WEST VIRGINIA*

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## **State Report: West Virginia**

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### Definitions and Concepts

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

Scaling up to the systemwide level, the project explores the degree to which prison population size in each state is placed under the jurisdiction of decision makers who exercise time-served discretion after judicial sentences have been finalized. Higher degrees of indeterminacy across 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 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 different 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 this 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” (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.

## Prison-Release Discretion and Prison Population Size

### State Report: West Virginia<sup>1</sup>

#### *Executive Summary*

Overall, West Virginia’s prison-sentencing system operates with a *high degree of indeterminacy*, in the ranking system developed for this project. The state has two main forms of prison sentences, which are called “definite” and “indeterminate” sentences. “Definite” sentences carry a high degree of indeterminacy by default. The prison-release formulas for “indeterminate” sentences vary from offense to offense, but range from extremely high to moderate indeterminacy, with a center of gravity of high indeterminacy.

The formula for good time reductions in West Virginia is relatively uniform. Most prisoners earn one day of credit for each day served so long as they stay out of serious trouble. Credits are deducted from judicial maximum terms to produce earlier mandatory release dates (MRDs). This is an approach seen in many other states that we call “movable MRDs.” If we assume that most prisoners receive most or all of the good time on offer, the department of corrections has more authority over actual time served in the state than the parole board.

#### *Terminology note*

This report will refer to the West Virginia Parole Board as the “parole board.” The West Virginia Division of Corrections and Rehabilitation will be referred to as the “department of corrections.”

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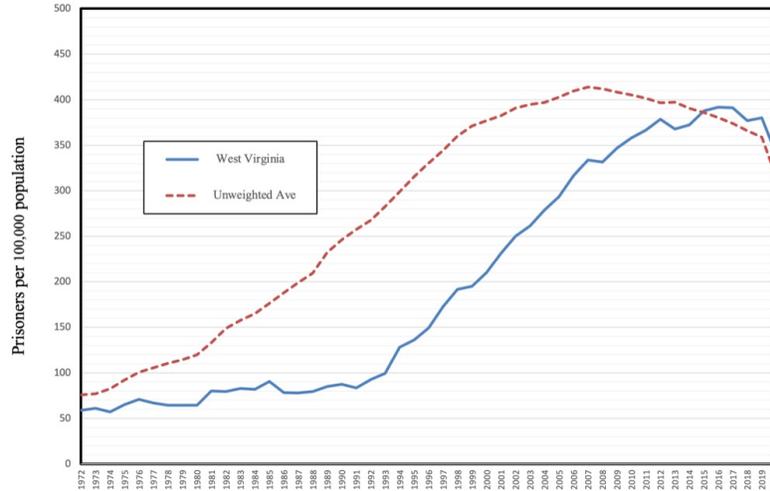
<sup>1</sup> This report was prepared with support from Arnold Ventures. The views expressed are the authors’ and do not necessarily reflect the views of Arnold Ventures. For a broad overview of the law of parole release and supervision in West Virginia, see Alexis Lee Watts, Brendan Delaney, Edward E. Rhine, Mike McBride, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: West Virginia* (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**

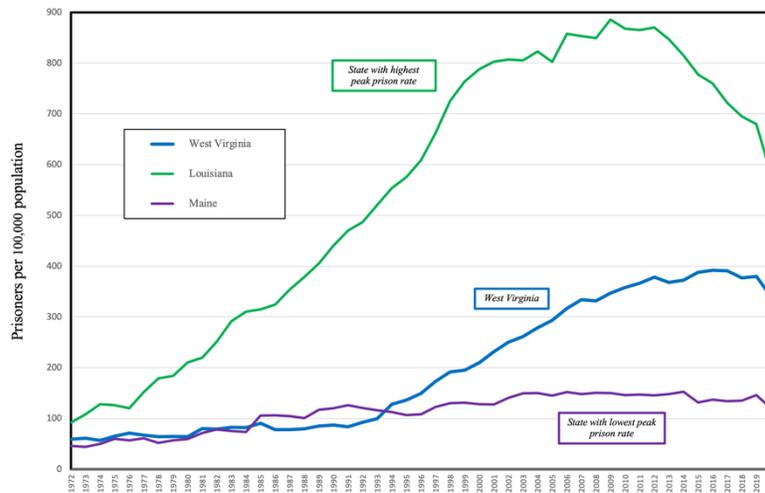
*West Virginia’s prison-rate history, 1972 to 2020*

In 2020, West Virginia’s prison rate was 340 per 100,000 general population, with a yearend prison population of 6,044.<sup>2</sup> West Virginia’s prison rate was 20<sup>th</sup> highest among all states.

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



**Figure 2. Prison Rate Change in West Virginia, 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 December 31: By

<sup>2</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 12 table 4, 16 table 7. Preliminary information about changes in West Virginia’s imprisonment rates after 2020 is presented below in the section on “The COVID period in West Virginia.”

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).

West Virginia reached its peak prison rate in 2016 at 392 per 100,000, which dropped to 340 per 100,000 in 2019.<sup>3</sup> This is a net difference of -52 per 100,000, which was the 43<sup>rd</sup> largest (8<sup>th</sup> lowest) prison-rate drop of all states from their peak rates (in various years) through 2020.

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>4</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> E. Ann Carson, *Prisoners in 2016* (Bureau of Justice Statistics, 2017), at 9 table 7; E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020), at 7 table 4.

<sup>4</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>5</sup> We believe this was the largest one-year decline in state prison rates in American history.<sup>6</sup>

In calendar year 2021, U.S. prison rates did not continue to descend at the same dramatic pace. 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. Prison populations actually rose in 19 states.<sup>7</sup>

Given the focus of this project and the unprecedented size of prison-rate change during COVID's first year, 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 have 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>8</sup>

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<sup>5</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>6</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>7</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>8</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>9</sup>

### *The COVID period in West Virginia*

The state-specific experience of West Virginia does not suggest a large mobilization of new or old prison-release processes in the early COVID period.

In calendar year 2020, West Virginia's prison rate fell from 380 to 340 per 100,000—a one-year decline of -40 per 100,000. This was the 39<sup>th</sup> largest one-year drop reported among all 50 states for that year.<sup>10</sup> Measured in percentage terms, it was a 10.5 percent reduction in the state's prison rate. The state's total prison population fell by 756 people, from 6,800 to 6,044.<sup>11</sup>

COVID releases made up only a small portion of this drop. In a separate study, the Robina Institute found only 70 COVID-influenced releases in West Virginia from March 2020 through

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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>9</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>10</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>11</sup> *Id.*, at 12 table 4.

December 2021. This number was the equivalent of about one percent of West Virginia’s pre-COVID prison population (at yearend 2019).<sup>12</sup>

Falling admissions appear to have been the dominant factor in West Virginia’s reduction of prison population in 2020. The number of prison admissions in the state dropped by 36 percent in 2020 compared with the previous year (from 4,169 to 2,673). Total numbers of releases did not grow in 2020, but fell by 17 percent from 2019 (from 4,143 to 3,429).<sup>13</sup>

From yearend 2020 to December 2021, the Vera Institute reported that West Virginia saw a significant increase in its prison population, from 3,833 to 4,326—or 12.8 percent. Vera’s total prisoner count for yearend 2020 is dramatically lower than that reported by BJS, however (3,833 versus 6,044), indicating serious error or a fundamental incompatibility in the two datasets.<sup>14</sup>

### ***1. General rules of prison release in West Virginia***

West Virginia is one of 14 states that do not have an organized scheme for the grading of felonies and misdemeanors.<sup>15</sup> Instead, statutorily authorized punishments are laid out separately for each offense, which are often subdivided into different levels of seriousness. Adding complication to the statutory scheme, different rules of prison release are assigned to separate offenses or different levels of the same offense, including separate legal conceptions of “indeterminate sentences” and “definite sentences.”<sup>16</sup> (As explained below, the term

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<sup>12</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>13</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 18 table 8, 20 table 9.

<sup>14</sup> We suspect an error of some kind because Vera’s West Virginia prison population total for yearend 2019 is identical to BJS’s. 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>15</sup> See American Law Institute, *Model Penal Code: Sentencing* (forthcoming 2022), Section 6.01, Reporters’ Note b.

<sup>16</sup> See West Virginia Law Institute, *Report to the Legislature: Recommendations for Criminal Sentencing Law Reform For the State of West Virginia* (2010), at 33:

“indeterminate sentences” is not used in West Virginia as defined in this project; and most “definite sentences” in Virginia are highly indeterminate in our ranking system.)

### *“Indeterminate” sentences*

So-called “indeterminate” sentences in West Virginia carry minimum and maximum terms that are specified in statute and cannot be varied by the court when imposing a prison sentence. For example, the authorized prison sentence for first degree sexual assault is an “indeterminate” prison term of “not less than fifteen nor more than thirty-five years.”<sup>17</sup> Every prison sentence for a single count of this offense must therefore include a minimum term to parole release eligibility of 15 years and a maximum of 35 years. The judge has no discretion to select a different minimum or maximum.<sup>18</sup>

There is no standard ratio between minimum and maximum terms among West Virginia’s “indeterminate” sentences. A random survey of offenses with such sentences includes examples of parole eligibility dates (PEDs) as early as seven percent of the maximum term and as late as 50 percent:

- For manufacture, delivery, or possession with intent to manufacture or deliver a Schedule I or II controlled substance that is a narcotic drug or methamphetamine, the required “indeterminate sentence” is a prison term of “not less than one year nor more than 15 years” (PED at seven percent).<sup>19</sup>
- For grand larceny, forgery of a check, or credit card fraud of more than \$1,000, it is one to ten years (PED at 10 percent).<sup>20</sup>

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West Virginia’s criminal sentencing laws are a combination—a hodgepodge, really .... They combine indeterminate and determinate sentences, sometimes even in the same statute. They reflect no overall design, lack consistency, and present undue risks for unequal treatment and inappropriate sentencing. As noted above, the State’s sentencing laws should be scrapped in favor of a modern, cohesive criminal code that classifies and standardizes penalties according to the relative seriousness of the applicable crimes.

<sup>17</sup> W. Va. Code, § 61-8B-3(2)(b).

<sup>18</sup> See *Iseli v. Ames*, 2021 WL 2580710 (W. Va. S. Ct. App. 2021), at \*2 (following guilty plea to first degree sexual assault, the court stated, “Mr. Iseli entered a plea to a single count of a two-count indictment for a criminal offense for which the indeterminate sentence is mandated by statute. Upon the entry of Mr. Iseli’s guilty plea, no sentencing judge had discretion to pronounce a sentence other than that decreed by Judge Keadle: a term of incarceration in the state penitentiary for fifteen to thirty-five years.”).

<sup>19</sup> W. Va. Code § 60A-4-401(a)(i).

<sup>20</sup> W. Va. Code § 61-3-13(a) (grand larceny); *id.*, § 61-4-5(a) (forging or uttering other writing); *id.*, § 61-3-24a(b)(3) (fraudulent use of credit cards). For all three offenses, judges have the alternative of not choosing a prison sentence and instead imposing a jail term of less than one year.

- For third degree sexual assault, it is one to five years (PED at 20 percent).<sup>21</sup>
- For first degree sexual assault involving victims under age 12, it is 25 to 100 years (PED at 25 percent).<sup>22</sup>
- For manufacture, delivery, or possession with intent to manufacture or deliver a Schedule IV controlled substance, the required “indeterminate sentence” is a prison term of “not less than one year nor more than three years” (PED at 33 percent).<sup>23</sup>
- For second degree sexual assault, it is 10 to 25 years (PED at 40 percent).<sup>24</sup>
- For bank robbery it is 10 to 20 years (PED at 50 percent).<sup>25</sup>

Within the above sample, West Virginia’s “indeterminate” sentences span the categories of *extremely high to moderate* indeterminacy, as defined in this project.<sup>26</sup>

### *“Definite” sentences*

Offenses that carry “definite” sentences (West Virginia’s terminology) operate according to their own distinct set of rules. They allow judges to choose a judicial maximum sentence within an authorized statutory range, but no minimum. For example, a person convicted of voluntary manslaughter “shall be punished by a definite term of imprisonment in the penitentiary which is not less than three nor more than fifteen years.”<sup>27</sup> Because this provision uses the words “definite term,” under West Virginia law the judge is given discretion to select a judicial maximum term anywhere in the range of three to 15 years.<sup>28</sup>

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<sup>21</sup> W. Va. Code, § 61-8B-5(b).

<sup>22</sup> W. Va. Code, § 61-8B-3(2)(c).

<sup>23</sup> W. Va. Code § 60A-4-401(a)(iii).

<sup>24</sup> W. Va. Code § 61-8B-4(b).

<sup>25</sup> W. Va. Code § 61-2-12(c)(1).

<sup>26</sup> See the explanation at p. iv of this report.

<sup>27</sup> W. Va. Code § 61-2-4.

<sup>28</sup> “Definite” sentences are also indicated by statutes that make no mention of minimum and maximum terms. See W. Va. Code § 61-2-12(a) (person convicted of first degree robbery “shall be imprisoned in a state correctional facility not less than ten years”). The required sentence for second degree robbery is an *indeterminate* sentence, however, of five to 18 years—set forth in the next subsection of the same statute. *Id.*, § 61-2-12(b). As noted by the West Virginia Law Institute, this juxtaposition often results in more severe punishment of second degree robbery than first degree:

It is not uncommon for those sentenced to second degree robbery to spend more time in prison than those sentenced to the minimum of ten years for armed robbery. A person sentenced to a ten year determinate sentence for first degree is parole eligible in two and a half years and can discharge with good time after five years, but the indeterminate term of five to eighteen years has the offender serving

“Definite sentences” include terms to parole release eligibility that are set by statutory formula rather than the judicial sentence. By default, “definite sentences” carry parole-release eligibility after 25 percent of the judicial maximum term has been served.<sup>29</sup> For some offenses, there are additional statutory constraints. For example, for prisoners convicted of voluntary manslaughter, the minimum term must be at least three years—or 25 percent of the judicial maximum, if longer than three years.<sup>30</sup>

For voluntary manslaughter, discussed above, the judge could effectively impose a three-to-three year prison sentence, or three-to-four years, and so on (with PEDs at the 100-percent or 75-percent marks of the maximum). The judge could also choose sentences such as three-to-12 years or 45-months-to-15 years (with PEDs at the 25-percent mark). The possible sentence configurations for voluntary manslaughter thus run from *extremely low* to *high indeterminacy* for the same offense.<sup>31</sup>

By default, so-called “definite sentences” in West Virginia are 75 percent indeterminate with a PMP of 4:1. In the project’s ranking system, they carry a *high degree of indeterminacy*. For purposes of this report, we will assume that most “definite” sentences in West Virginia follow the default configuration, although there is almost certainly irregularity in actual sentencing patterns. (The amount of irregularity depends on how many offenses with “definite” sentences include minimum-term requirements that override the default rules under some conditions, how often the default rules are overridden in practice, and the resulting representation of such sentences in the state’s prison population.)

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five years before he or she can become parole eligible and requiring at least nine years until discharge using good time.

West Virginia Law Institute, *Report to the Legislature: Recommendations for Criminal Sentencing Law Reform for the State of West Virginia* (2010), at 39.

<sup>29</sup> W.Va. Code § 62-12-13(b)(1)(A) (“Any inmate of a state correctional institution [is eligible for parole if he or she: ... Has served the minimum term of his or her indeterminate sentence or has served one fourth of his or her definite term sentence, as the case may be.]”).

<sup>30</sup> W.Va. Code, § 61-2-4. These statutory constraints always work in the direction of lowering the degree of indeterminacy that would otherwise exist under the default rule.

<sup>31</sup> For some offenses, the peak severity of definite sentences is unregulated by statute. The punishment for first degree robbery involving violence of threat of deadly force requires at least a ten year minimum sentence but does not prescribe a maximum authorized penalty. See W.Va. Code § 61-2-12(a); West Virginia Law Institute, *Report to the Legislature: Recommendations for Criminal Sentencing Law Reform For the State of West Virginia* (2010), at 37-38 (“The absence of a maximum [for first degree robbery] enables sentencing judges to impose terms of years that are excessively long, in some instances in excess of one hundred years.”); see also *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (W.Va. 2007) (212 year sentence); *State v. Adams*, 565 S.E.2d 353 (W.Va. 2002) (rejecting proportionality challenge to 90-year sentence for robbery); *Brewster v. Kirby*, 954 F. Supp. 1155, 1160 (N.D.W.Va. 1997) (upholding 125-year sentence).

### *Reconsideration after denial of parole release*

If parole is denied, the board “shall” at least once a year reconsider and review the case of every inmate who was denied parole and is still eligible. In the case of inmates serving a life sentence with the possibility of parole, the parole board “may” reconsider and review parole eligibility at any time within three years following denial of parole.<sup>32</sup>

### *Good time credits*

Most prisoners in West Virginia are eligible to receive one day of good time for every day of incarceration. The only requirement is “good conduct.”<sup>33</sup> Good time earned and not forfeited is deducted from the maximum term of “indeterminate” sentences and from the fixed term of “definite” sentences.<sup>34</sup> Good time advances an inmate’s “maximum discharge date,” such that if the amount of good time accumulated plus the inmate’s time served equals their maximum sentence, they shall be discharged.<sup>35</sup> In the terminology of this project, this is a movable mandatory release date (MRD).<sup>36</sup> Good time does not impact the inmate’s parole eligibility date (PED).

### *Accelerated parole program (earned time)*

Some prisoners may advance their dates parole release consideration through West Virginia’s accelerated parole program. This is essentially an earned time program that offers a limited benefit for program completion. It requires formal application by the prisoner and acceptance by the department of corrections. Accelerated parole has no effect on mandatory release dates; it affects only the timing of discretionary release consideration by the parole board.

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<sup>32</sup> W.Va. Code § 62-12-13(e).

<sup>33</sup> W.Va. Code § 15A-4-17(a), (c). The commissioner has the sole discretion to award extra good time for “meritorious service or performing extra assigned duties during emergencies.” W.Va. Code § 15A-4-17(i)(1). Inmates serving a life sentence are not eligible to earn good time. W.Va. Code § 15A-4-17(d). Prisoners subject to extended supervision for sex offenders are also ineligible. W.Va. Code § 15A-4-17(a); W. Va. Code § 62-12-26.

<sup>34</sup> W.Va. Code § 15A-4-17(b). Violations of the rules and policies of the prison may result in part or all of the good time granted to the inmate being forfeited or revoked by the superintendent of the institution. The superintendent may restore any forfeited good time with the approval of the commissioner. W.Va. Code § 15A-4-17(f).

<sup>35</sup> W.Va. Parole Board, *Rules of the West Virginia Parole Board*, eff. Jul. 15, 2006 at pg. 8–9, retrieved from <https://paroleboard.wv.gov/SiteCollectionDocuments/West%20Virginia%20Parole%20Board%20Procedural%20Rules.pdf>. Prior to their calculated discharge date, inmates convicted of a felony crime of violence against the person, a felony offense where the victim was a minor child, or a felony offense involving the use of a firearm, will have one year deducted from the inmate’s accumulated good time to provide for one year of mandatory post-release supervision after the first instance in which the inmate reaches their calculated discharge date. W.Va. Code §15A-4-17(k).

<sup>36</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”).

To become eligible to participate in an accelerated parole program, the commissioner must determine that the inmate 1) does not have a prior criminal conviction for a felony crime of violence against the person, a felony involving the use of a firearm, or a felony where the victim was a minor child; 2) is not serving a sentence for a crime of violence against the person, or more than one felony for a controlled substance offense for which the inmate is serving a consecutive sentence, a felony involving the use of a firearm, or a felony where the victim was a minor child; and 3) has successfully completed a rehabilitation treatment program created with the assistance of a standardized risk and needs assessment.<sup>37</sup> By department of corrections policy directive, prisoners may receive initial parole-release consideration 90 days earlier than their original parole eligibility date under “indeterminate” and “definite” sentences. This is usually limited to a one-time benefit per sentence.<sup>38</sup>

### Timeline Diagrams

#### *“Definite” sentences*

The general rules for West Virginia’s “definite” sentences are easiest to summarize. As shown in West Virginia Figure 3, parole eligibility occurs at the 25-percent mark of the judicial maximum sentence. Without good time credits, the prisoner could serve any length of time between 25 percent and 100 percent of the maximum.

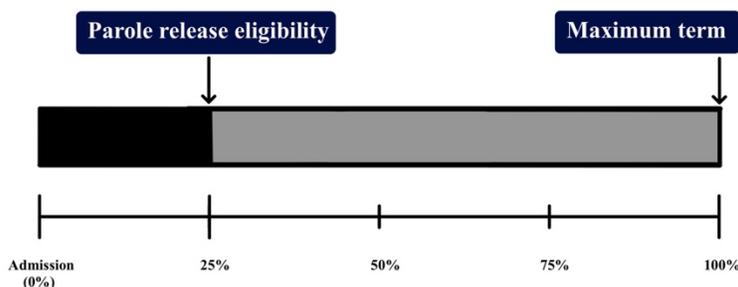
West Virginia Figure 4 shows the effect of full good time credits, earned at one day per day. Without forfeiture, this would result in a 50-percent reduction in time served before the mandatory release date (MRD). As a general rule, this good-time formula applies to “definite” and “indeterminate” sentences alike in West Virginia.

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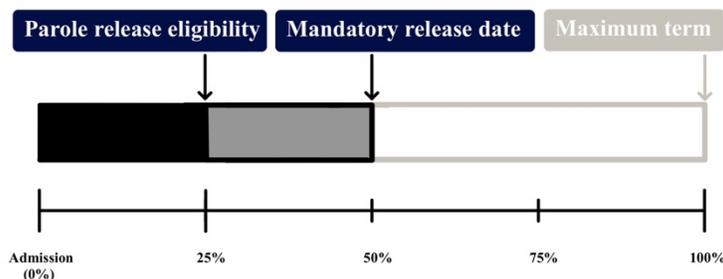
<sup>37</sup> W.Va. Code § 62-12-13(b)(1)(B).

<sup>38</sup> West Virginia Division of Corrections Policy Directive 454.07 (2015), § V(A)(6). Prisoners who have been denied parole may apply for accelerated parole, but “[a]n offender can only have one Accelerated Parole Hearing per incarceration unless the Parole Board makes a special finding that specifically permits it.” *Id.*, § V(A)(9).

West Virginia Figure 3. Prison-Release Timeline, General Rules for “Definite” Sentences with No Good Time



West Virginia Figure 4. Prison-Release Timeline, General Rules for “Definite” Sentences with Full Good Time



The general rules for “definite” sentences result in a high degree of indeterminacy. Sentences are 75 percent indeterminate and carry a PMP of 4:1.

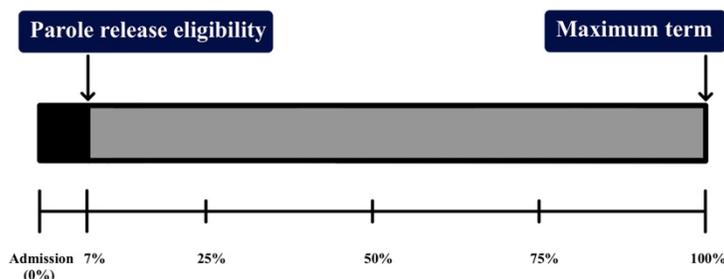
The default rules in West Virginia Figures 3 and 4 can be overridden for offenses that include mandatory minimum terms. In the discussion of “definite” sentences for voluntary manslaughter above, for example, there was a three-year mandatory minimum term (for all cases in which three years was a longer period than the default 25-percent rule would otherwise generate). Sentencing courts have freedom to choose maximum terms within statutory limits for “definite” sentences, with a statutory range of three to 15 years attached to voluntary manslaughter. Depending on the maximum imposed by the court, therefore, many different minimum-maximum ratios are possible. For example, if a court chose a maximum sentence of nine years, parole release eligibility would occur at the 33 percent mark of the maximum instead of the 25 percent mark. If the court chose a maximum of eight years, the PED would be at the 38 percent mark.

### *“Indeterminate” sentences*

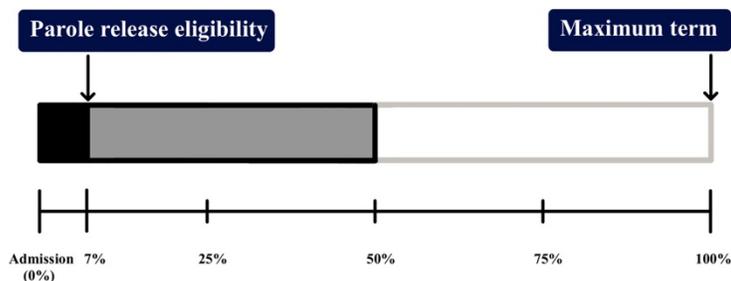
West Virginia’s so-called “indeterminate” sentences have prison-release configurations that are all over the map, although they share the good time reduction formula applied to “definite” sentences. West Virginia Figure 5 shows an instance of an “indeterminate” sentence with a short minimum term of only seven percent of the maximum term (the rule for convictions of

manufacture, delivery, or possession with intent to manufacture or deliver a Schedule I or II controlled substance that is a narcotic drug or methamphetamine, as noted earlier). The figure assumes that no good time credits have been earned, or all have been forfeited. West Virginia Figure 6 adds in the effect of good time reductions, observing the same “half-off” formula as in West Virginia Figure 4.

West Virginia Figure 5. Prison-Release Timeline for “Indeterminate” Sentences with Minimum Terms of 7% of Maximum with No Good Time



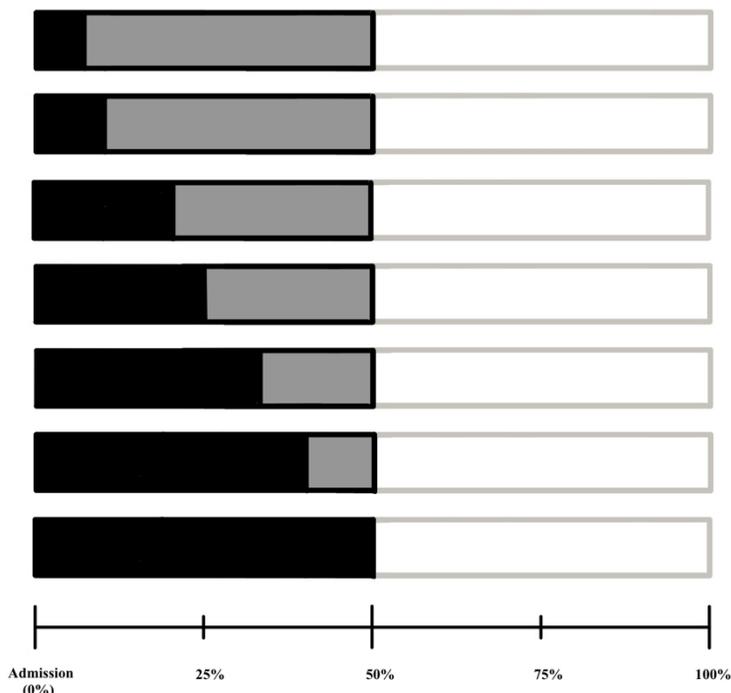
West Virginia Figure 6. Prison-Release Timeline for “Indeterminate” Sentences with Minimum Terms of 7% of Maximum with Full Good Time



The sentence shown above is 93 percent indeterminate. It has an *extremely high degree of indeterminacy* and a PMP of 14.3:1.

There are many other configurations possible among West Virginia’s “indeterminate” sentences, however, which vary offense-by-offense. It is illuminating to collect a number of them all in one place. Earlier, we identified examples of “indeterminate” sentences with minimum terms set at 7, 10, 20, 25, 33, 40, and 50 percent of their respective maximum terms. West Virginia Figure 7 shows all of these variations (although there are still more to be found in West Virginia’s criminal code).

West Virginia Figure 7. Prison-Release Timelines for  
 “Indeterminate” Sentences with Minimum Terms  
 of 7, 10, 20, 25, 33, 40, and 50% of Maximum  
 with Full Good Time



West Virginia Figure 7 includes sentences with widely different degrees of indeterminacy, including *extremely high indeterminacy* (minimum terms at seven and 10 percent), *high indeterminacy* (minimums at 20, 25, and 33 percent), and *moderate indeterminacy* (40 and 50 percent). For the timelines from top to bottom in the figure, PMPs are 14.3:1, 10:1, 5:1, 4:1, 3:1, 2.5:1, and 2:1.

One striking pattern in West Virginia Figure 7 is the steadily changing role of the parole board from top to bottom. If we assume full good time earnings, the release and release-denial powers of the parole board shrink steadily and then disappear as minimum terms increase to reach the 50 percent mark.

Obviously, the parole board would have more time-served discretion in cases where good time allowances have been withheld in whole or in part. For the largest numbers of prisoners, however, we expect West Virginia Figure 7 is reasonably close to actual experience.

## 2. Life sentences in West Virginia

### a. Adults

Offenders convicted of murder in the first degree must be sentenced to life without the possibility of parole.<sup>39</sup> Offenders sentenced to life without parole (LWOP) (also called “Life Without Mercy” in West Virginia) can apply for an executive pardon, however they must have served fifteen years before becoming eligible for pardon.<sup>40</sup>

Generally, inmates serving sentences of life with parole (also called “Life with Mercy” in West Virginia) may not be paroled until they have served ten years. Inmates sentenced to life with parole who have been previously convicted of two felonies may not be paroled until they have served 15 years.<sup>41</sup> Additionally, inmates serving life with parole for a conviction of first-degree murder must also serve 15 years before becoming parole eligible.<sup>42</sup>

### b. Juvenile life sentences

In 2014, West Virginia abolished life without parole sentences for offenders who were under the age of eighteen at the time of the offense.<sup>43</sup> Juvenile offenders sentenced to life imprisonment now become parole eligible after serving fifteen years. Additionally, the sentencing court must consider mitigating circumstances including the offender’s age, role in the crime, intellectual capacity, and history of trauma in making a sentencing determination.<sup>44</sup>

## 3. Infrequently used forms of prison release in West Virginia

### a. Compassionate release

An inmate suffering from “an extreme life-threatening medical condition” that has been certified by prison medical staff may apply for an executive pardon. Certain prisoners do not become eligible for pardon until they first become eligible for parole, including those serving

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<sup>39</sup> W.Va. Code § 62-3-15.

<sup>40</sup> West Virginia Parole Board, *Executive Clemency Guidelines*, accessed June 18, 2022 at <https://paroleboard.wv.gov/executiveclemency/pages/guidelines.aspx#:~:text=GUIDELINES%20FOR%20EXECUTIVE%20CLEMENCY&text=For%20those%20persons%20found%20guilty,he%20or%20she%20was%20pardoned.>

<sup>41</sup> W.Va. Code § 62-12-13(c).

<sup>42</sup> Rules of the West Virginia Parole Board, § 4.1.a.4, at pg. 6 (for crimes occurring on or after June 10, 1994). For crimes occurring prior to June 10, 1994, inmates convicted of first-degree murder serving life with parole must serve ten years of their sentence before becoming eligible for parole. *Id.*

<sup>43</sup> Equal Justice Initiative, *West Virginia Abolishes Death in Prison Sentences for Children*, Apr. 2, 2014, accessed at <https://eji.org/news/west-virginia-abolishes-juvenile-life-without-parole/>.

<sup>44</sup> W.Va. Code § 61-11-23(b),(c).

determinate or indeterminate sentences, life with mercy sentences, or habitual life sentences. Prisoners serving life without mercy sentences must serve fifteen years before becoming eligible for pardon.<sup>45</sup>

West Virginia also has a Medical Respite program for prisoners with a terminal illness or “extremely serious” medical condition that do not “pose a substantial risk to society if released.”<sup>46</sup> Zero inmates were released on Medical Respite from the West Virginia Division of Corrections and Rehabilitation in FY 2019.<sup>47</sup>

### ***b. Clemency***

The governor has the authority to grant reprieves, paroles, and pardons, remit fines and penalties, and commute capital punishment. The governor must record the reasons for every parole or pardon granted in the journal of executive proceedings and provide it to the legislature.<sup>48</sup>

Executive pardons are rarely granted in West Virginia. The governor’s office reportedly receives 50-100 applications for pardons each year, but only around 12 people have been pardoned since 1980. Governor Jim Justice has not granted a single pardon since taking office in 2017.<sup>49</sup>

### ***c. Release during overcrowding emergencies***

There is no statutory emergency release mechanism for prison overcrowding in West Virginia.

## ***4. Overall assessment of West Virginia’s prison-sentencing system***

Overall, West Virginia’s prison-sentencing system operates with a *high degree of indeterminacy*, in the ranking system developed for this project (see pp. iii-iv). The state has two main forms of sentences, which are called “definite” and “indeterminate” sentences. “Definite” sentences carry a high degree of indeterminacy by default, with parole eligibility dates (PEDs) at 25

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<sup>45</sup> West Virginia Parole Board, *Executive Clemency Guidelines*, accessed June 18, 2022 at <https://paroleboard.wv.gov/executiveclemency/pages/guidelines.aspx#:~:text=GUIDELINES%20FOR%20EXECUTIVE%20CLEMENCY&text=For%20those%20persons%20found%20guilty,he%20or%20she%20was%20pardoned.>

<sup>46</sup> *Families Against Mandatory Minimums, Compassionate Release: West Virginia*, (December 2021) at pg. 3, accessed at [https://famm.org/wp-content/uploads/West-Virginia\\_Final.pdf](https://famm.org/wp-content/uploads/West-Virginia_Final.pdf).

<sup>47</sup> W.Va. Division of Corrections and Rehabilitation, *FY 2019 Annual Report*, Jan. 2020 at pg. 35, retrieved from <https://dcr.wv.gov/resources/Documents/FY2019%20ANNUAL%20REPORT%20WVDCR.pdf>.

<sup>48</sup> W.Va. Const. art. VII, § 11; W.Va. Code § 5-1-16.

<sup>49</sup> Restoration of Rights Project, *West Virginia Restoration of Rights & Record Relief*, (updated Mar. 22, 2022) <https://ccresourcecenter.org/state-restoration-profiles/west-virginia-restoration-of-rights-pardon-expungement-sealing/>.

percent of the maximum term. “Indeterminate” sentences vary from offense to offense, but range from extremely high to moderate indeterminacy. In our survey, PEDs for such sentences varied from the 7- to 50-percent marks of prisoners’ maximum terms. We have no data about the actual distribution of these sentences in West Virginia’s prison population. In our judgment, however, the center of gravity for “indeterminate” sentences overall is probably high indeterminacy.

We cannot surmise any principle guiding West Virginia’s differentiation of authorized prison sentences into the categories of “indeterminate” and “definite.” Both are applied to serious and less-serious offenses alike.<sup>50</sup> In 2010, the West Virginia Law Institute reported that “West Virginia’s criminal sentencing laws are a combination—a hodgepodge, really ... They reflect no overall design [and] lack consistency.”<sup>51</sup> The division of prison sentences into two classes dates back to a statute originally enacted in 1882.<sup>52</sup> The patchwork pattern of West Virginia’s present-day provisions may simply be the product of accretion over this long history.

In contrast with West Virginia’s rules of parole release eligibility, the formula for good time reductions is relatively uniform. Most prisoners earn one day of credit for each day served so long as they stay out of serious trouble. Credits are deducted from their maximum terms to produce earlier mandatory release dates (MRDs). This is an approach seen in many other states; one that we call “movable MRDs.” West Virginia credit earning levels are generous by national standards, measured in percentage terms. Without forfeiture, they yield 50 percent reductions in maximum terms.<sup>53</sup> For the great majority of prison sentences in West Virginia, movable MRDs markedly reduce the parole board’s release and release denial discretion across the full timeline from admission to expiration of maximum term. *See* West Virginia Figures 4 and 7. If we assume that most prisoners receive most or all of the good time on offer, the department of corrections has more to say about actual time served in the state than the parole board.

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<sup>50</sup> For example, serious sex offenses receive “indeterminate” sentences while homicides and serious arson offenses carry “definite” sentences.

<sup>51</sup> West Virginia Law Institute, *Report to the Legislature: Recommendations for Criminal Sentencing Law Reform For the State of West Virginia* (2010), at 33.

<sup>52</sup> *See* W.Va. Code § 61-11-16.

<sup>53</sup> In our comparative analyses of movable MRDs across the states, we have classified reductions greater than 40 percent as “generous.” *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), at 88.