

ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: MINNESOTA

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Prison-Release Discretion and Prison Population Size

State Report: Minnesota

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This report is part of a larger *Prison Release: Degrees of Indeterminacy Project* funded by Arnold Ventures. For other publications from the project, including additional state-specific reports, go to the Robina Institute of Criminal Law and Criminal Justice's website at <https://robinainstitute.umn.edu>.

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”

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

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.

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Overall, we rank Minnesota’s prison-sentencing-system as one of *low indeterminacy*—or *high determinacy* (see pp. v-vi). Because there is no parole board in Minnesota, the most important back-end decisionmaker with prison-release discretion in ordinary cases is the department of corrections through its administration of Minnesota’s disciplinary system. With maximum disciplinary penalties, time served can be extended as much as 50 percent. The overwhelming majority of all prisoners are subject to this regime. For life sentences (other than life without possibility of release), the Commissioner of Corrections is the sole back-end decisionmaker empowered to exercise release discretion, playing a role that is assumed by parole boards in most other states.

In the above summary we exclude release mechanisms such as medical release, pardons, and commutations, which are used so infrequently that they have no material impact on the prison-sentencing system as a whole.

Terminology note

Minnesota has no parole board. The Minnesota Department of Corrections will be called the “department of corrections” or “DOC.”

¹ This report was prepared with support from Arnold Ventures. The views expressed are the authors’ and do not necessarily reflect the views of Arnold Ventures.

Introduction

Minnesota’s prison-rate history, 1972 to 2020

At yearend 2020, Minnesota’s prison rate was 145 per 100,000 general population, with a prison population of 8,236.² Minnesota’s prison rate was 46th largest (5th lowest) among all states.

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

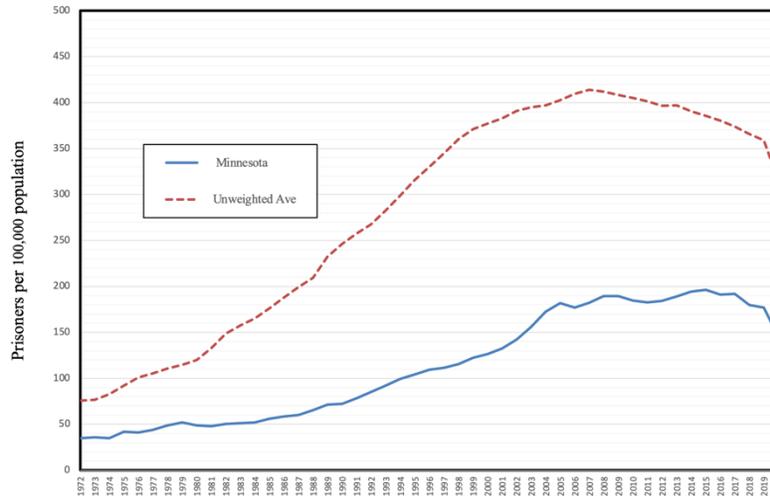
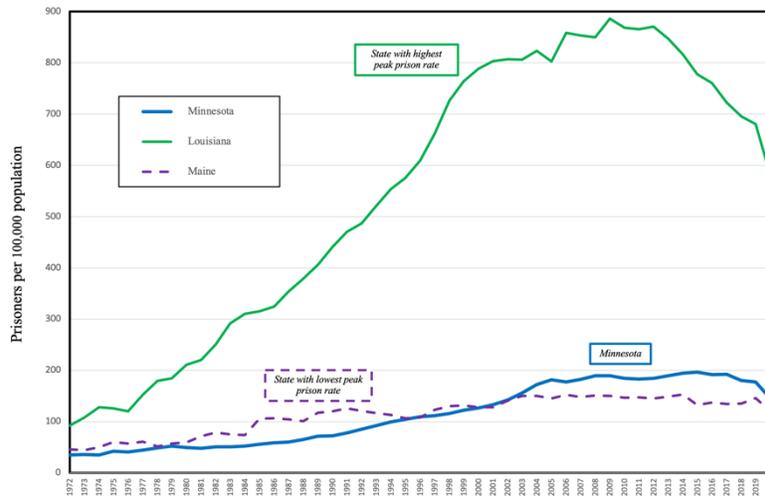


Figure 2. Prison Rate Change in West Virginia, Louisiana, and Maine, 1972 to 2020



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

² 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 Minnesota’s imprisonment rates after 2020 is presented below in the section on “The COVID period in Minnesota.”

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).

Minnesota achieved its peak prison rate of the prison buildup period in 2015 at 196 per 100,000. From 2015 through 2020, the state's prison rate dropped by -51 per 100,000 to 145 per 100,000. This was the 44th largest (7th smallest) prison-rate decline across all states in the post-prison-buildup era, as measured from their peak rates—in varying 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.³

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

³ 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 100,000.⁴ We believe this was the largest one-year decline in state prison rates in American history.⁵

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.⁶

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.⁷

⁴ 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.

⁵ 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).

⁶ 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.

⁷ 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, 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 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

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 2020.⁸

The COVID period in Minnesota

The Minnesota Department of Corrections (DOC) implemented three programs aimed at reducing the prison population because of the COVID-19 pandemic. The first program, which ran from April 16 through August 24, 2020, was the COVID-19 Conditional Medical Release Program. To be granted release under this program, an inmate's application was first reviewed to determine medical eligibility using health risk assessments that were developed based on guidance from the Center for Disease Control and Prevention and the Minnesota Department of Health. Following review, a public safety assessment was conducted. Finally, the DOC Commissioner made the final decision in all applications that made it through the first two steps. 161 inmates were approved for conditional medical release, but ultimately only 156 were released because five inmates were disciplined after approval. Some other reasons listed for denying inmates' applications were community safety, no residence, medical condition deemed not serious enough, and life sentence (automatically ineligible for the program).

The Minnesota DOC also developed a Sanction Reduction Program during the pandemic. This involved a review of individuals who had been returned to prison due to technical violations to determine who could be released early. 28 people were released through this program. Finally, DOC expanded its work release program during the pandemic. This was done by

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.

⁸ 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, 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.

broadening the eligibility criteria: individuals further away from their supervised release date, with higher recidivism risk scores, and with previously excluded offenses were made eligible for work release because of the pandemic. No start or end date was listed for this program, but as of September 7, 2021, 264 individuals were released through the expanded work release program.⁹

In calendar year 2020, Minnesota's prison rate fell from 177 to 145 per 100,000—a one-year decline of -32 per 100,000. This was the 41st largest (10th smallest) one-year drop reported among all 50 states for that year.¹⁰ Measured in percentage terms, it was an 18 percent reduction in the state's prison rate. The state's total prison population fell by 1,746 people, from 9,982 to 8,236.¹¹

COVID releases contributed somewhat to this drop. In a separate study, the Robina Institute found 448 COVID-influenced releases in Minnesota from March 2020 through December 2021.¹²

A dramatic fall in admissions was the most salient factor in Minnesota's reduction of prison population in 2020. The number of prison admissions in the state dropped by 42.7 percent in 2020 compared with the previous year (from 6,894 to 3,949).¹³ Total numbers of releases did not increase in COVID's first year, but instead fell by 16.4 percent (from 7,032 in 2019 to 5,876 in 2020).¹⁴

From yearend 2020 to December 2021, the Vera Institute reported that Minnesota saw a modest decrease in its prison population, from 7,593 to 7,511—or 1.1 percent.¹⁵ As of July 1,

⁹ The preceding two paragraphs are quoted directly from 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, 2022), at 72-73. The sources for the information are: COVID-19 Updates, Minn. Dep't of Corr. (last visited Mar. 29, 2020), <https://mn.gov/doc/about/covid-19-updates/>; Mgmt. Analysis and Dev., *Research summary: Prison population management* (Dec. 21, 2020), https://mn.gov/obfc/assets/Appendix%20A%20Ombuds%20for%20Corrections%20COVID%20Report_tcm1157-470275.pdf.

¹⁰ 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 15 table 7.

¹¹ *Id.*, at 11 table 4.

¹² 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, 2022), at 34 Appendix A.

¹³ E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 17 table 8.

¹⁴ *Id.*, at 19 table 9.

¹⁵ Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 4 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

2022, the Minnesota Department of Corrections reported a total prisoner count of 7,833, indicating growth of nearly seven percent during the first half of 2022, but still well below the pre-COVID total.¹⁶

I. General Rules of Prison-Release Discretion in Minnesota

Minnesota abolished parole release discretion effective in 1980 and, at the same time, instituted the nation’s first judicial sentencing guidelines. Minnesota retains a form of indeterminate sentencing for most prisoners with life sentences (see section 2.2).

A. Determination of release date

1.1. General rules of presumptive release

In Minnesota, most people begin their prison sentences with presumptive release dates marked at two-thirds of their judicial maximum sentences.¹⁷ Release may be postponed only if “the defendant commits [a] disciplinary offense in prison that results in the imposition of a disciplinary confinement period.”¹⁸ At the extreme, the accumulation of disciplinary violations can postpone a prisoner’s release to the full judicial maximum term.¹⁹

In the absence of findings of disciplinary violations, prisoners’ dates of presumptive release function as mandatory release dates (MRDs). When the date is reached without incident, no official or agency has discretion to block release.²⁰

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.

¹⁶ Minnesota Department of Corrections, *Adult Prison Population Summary as of 07/01/2022*, at 1, https://mn.gov/doc/assets/Adult%20Prison%20Population%20Summary%207-1-2022_tcm1089-534656.pdf.

¹⁷ Minn. Stat. § 244.101, subd. 1 (“When a felony offender is sentenced to a fixed executed sentence ..., the executed sentence consists of two parts: (1) a specified minimum term of imprisonment that is equal to two-thirds of the executed sentence; and (2) a specified maximum supervised release term that is equal to one-third of the executed sentence.”).

¹⁸ Minn. Stat. § 244.101, subd. 2. *See also* Johnson v. Fabian, 735 N.W.2d 295, 299 (Minn. 2007) (“[A]n inmate’s term of imprisonment can be extended if the inmate commits any disciplinary offenses while in prison. Such extensions can result in the inmate serving as much as the entire executed sentence in prison.”) (citation omitted).

¹⁹ Minn. Stat. § 244.101, subd. 2.

²⁰ For a comparison of the use of MRDs across the states, *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”).

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

1.2. Minnesota’s “bad time” system

Minnesota does not have a system of good time or earned time credits that accrue or must be earned during a prison term. Instead, prisoners are admitted with presumptive release dates that can be delayed for misconduct or refusal to participate in required programming.²¹ In other words, behavioral credits are awarded to most prisoners by default, but may be lost through “bad conduct.” Like most good time and associated forfeiture procedures in other states, the Minnesota bad time system is administered at the level of individual prisons: “[T]he procedure for imposing the disciplinary confinement period and the rights of the inmate in the procedure shall be those in effect for the imposition of other disciplinary sanctions at each state correctional institution.”²²

Psychologically, Minnesota’s prisoner-conduct-incentive system employs “sticks” rather than “carrots.” It is similar to the approach used in some other states that calculates release dates soon after admission based on a projection of the good-time credits prisoners will be eligible to earn during their terms. Functionally, credits are awarded in advance. In such systems, delays in release occur through the prison-disciplinary and forfeiture process. Such states have “movable MRDs” which, at first, can only move “backwards” to later dates of release.

In Minnesota, bad time manifests as additional increments of time-to-be-served. A disciplinary confinement period is added as “extended incarceration” to a prisoner’s former presumptive release date.²³ Thus, if a prisoner is admitted with a presumptive release date of January 1, 2025, a disciplinary penalty of six months of extended incarceration would push back the expected release date to July 1, 2025.

While there is no statutory formula that measures bad-time sanctions in days or months, the total extension of time served for an individual prisoner can be as much as 50 percent of their original presumptive sentence. For example, a prisoner with a six-year judicial sentence starts their term with an initial presumptive release date after four years. That four-year term can be extended to as long as six years if the requisite findings and decisions are made by the department of corrections. Prison officials have multiple layers of discretion that extend across: (1) the creation of rules for prisoner conduct, (2) the initiation of the disciplinary process against prisoners, (3) the fact-finding component of the process, and (4) the choices of sanctions

²¹ See Minn. Stat. § 244.05, subd. (1b)(b) (authorizing postponement of release date as sanction for prisoner who “violates a disciplinary rule or refuses to participate in a rehabilitative program as required under section 244.03”). Minn. Stat. § 244.03 provides that the commissioner of corrections “shall provide appropriate mental health programs and vocational and educational programs with employment-related goals for inmates [and] ... may impose disciplinary sanctions upon any inmate who refuses to participate in rehabilitative programs.”

²² Minn. Stat. § 244.05, subd. (1b)(b)

²³ See Minn. Dep’t of Corr., *Policy Manual: Offender Discipline* (effective 2021), § 303.010 (defining “extended incarceration”).

to be imposed for rule violations. These multi-layered discretions, in theory, add up to a substantial amount of time-served discretion.

Mathematically, Minnesota's bad-time system operates in the same way as a good-time system that grants 15 days of credits against judicial maximum sentences for each month prisoners serve without committing serious disciplinary infractions.²⁴

The department of corrections' discretion to assess bad-time penalties is regulated to some extent by the state courts. The Minnesota Supreme Court has stated that the extension of incarceration beyond the presumptive release date should be regarded as a serious matter with high threshold conditions. In its 2005 decision *Carrillo v. Fabian*, the Court emphasized that there is a "presumption" a prisoner will be released at the two-thirds mark.²⁵ The *Carrillo* Court characterized the postponement of a prisoner's release date as "a significant departure from the basic conditions of the inmate's sentence" and went on to hold that, "under the Due Process Clause of the United States Constitution, [a prisoner] has a protected liberty interest in his [presumptive] release date that triggers a right to procedural due process before that date can be extended."²⁶ According to *Carrillo*, if the department of corrections seeks to extend a prisoner's presumptive release date then it must hold a hearing at which it must show that the prisoner committed a disciplinary infraction by a preponderance of the evidence. "Some evidence" is not enough to prove a disciplinary infraction.²⁷

The Minnesota Courts' role in regulating the department of corrections' uses of its time-served discretion is highly unusual compared with other jurisdictions. Usually, the state and federal courts take a "hands off" approach to prison discipline. We know of no other state court system that has declared that prisoners have a Due Process liberty interest in prison disciplinary decisions.

II. Prisoners Outside the General Rules in Minnesota

2.1. Life sentences without possibility of release

"Life imprisonment without possibility of release" is the mandatory sentence for the most serious subcategories of first-degree murder in Minnesota and for certain sex offenders classified as "egregious first-time and repeat offenders" whose crimes involved multiple

²⁴ Some states' good-time systems operate to advance prisoners' first eligibility dates for discretionary parole release, but there is no discretionary-release milestone in prison sentence timelines in the Minnesota system.

²⁵ *Carrillo v. Fabian*, 701 N.W.2d 763, 772 (Minn. 2005) ("[U]nder Minnesota's current sentencing scheme, there is a presumption from the moment that a court imposes and explains the sentence that the inmate will be released from prison on a certain date—and that presumption is overcome only if the inmate commits a disciplinary offense.").

²⁶ *Id.* at 773.

²⁷ *Id.* at 777.

“heinous elements” or at least one heinous element plus a prior conviction of a serious sex offense.²⁸ Prisoners with such sentences are not eligible for discretionary release, in contrast with prisoners given ordinary life sentences (see next section).²⁹

2.2. *Life sentences with possibility of supervised release*

Most prisoners with life sentences become eligible for discretionary release at some point during their terms. Minimum sentences vary depending on the offense of conviction. For the classes of first-degree murder that are not carved out for life sentences without possibility of release, the minimum term is 30 years.³⁰

Life sentences with release eligibility also exist for some sex offenders. For defendants who meet the statutory definitions of “egregious first-time offenders” or “repeat” sex offenders, minimum terms are to be fixed in each case by sentencing courts “based on” Minnesota’s judicial sentencing guidelines and any applicable mandatory minimum terms.³¹

Although the word “parole” is sometimes used to describe Minnesota’s discretionary-release process for life sentences,³² the authorized decision maker is the Commissioner of Corrections rather than a parole board, subject to rules promulgated by the Commissioner.³³ The relevant

²⁸ Minn. Stat. § 609.106, subd. 2 (life without release as mandatory penalty for specified types of first-degree murder, in some cases in conjunction with prior convictions of “heinous crimes”); Minn. Stat. § 609.3455, subd. 2 (mandatory life sentence without release for some sex offenders depending on the existence of multiple “heinous elements” in the commission of the crime or at least one heinous element and a prior conviction of criminal sexual conduct in the first, second, or third degree). “Heinous elements” are defined in Minn. Stat. § 609.3455, subd. 1(d) (including torture of the victim, intentional infliction of great bodily injury or mutilation, use or threat of use of a dangerous weapon, more than one victim or perpetrator, and failure to release victim in a safe place).

²⁹ Minn. Stat. § 244.05, subd. 4(a) (“An inmate serving a mandatory life sentence under section 609.106 or 609.3455, subdivision 2, must not be given supervised release under this section.”).

³⁰ Minn. Stat. § 244.05, subd. 4(b). The statute also mandates life sentences with release eligibility after 17 years for the crime of treason, but we imagine such prosecutions are rare. See Minn. Stat. § 244.05, subd. 4(c).

³¹ Minn. Stat. § 609.3455, subd. 5 (“At the time of sentencing under subdivision 3 or 4, the court shall specify a minimum term of imprisonment, based on the sentencing guidelines or any applicable mandatory minimum sentence, that must be served before the offender may be considered for supervised release.”). The Minnesota Supreme Court interpreted the phrase “any applicable mandatory minimum sentence” to refer to mandatory minimums for predicate offenses required for conviction under Minn. Stat. § 609.3455, subs. 3 and 4. Those presumptive minimums are 144 months for a first-degree criminal sexual conduct conviction and 90 months for a second-degree criminal sexual conduct conviction. *State v. Hodges*, 784 N.W.2d 827, 832 (Minn. 2009).

³² See Minnesota Department of Corrections, *Life Sentence Review*, at <https://mn.gov/doc/about/life-sentence-review/> (last visited August 8, 2022) (“The Commissioner of Corrections is given the authority to assign life-sentenced offenders to parole after they have served their minimum term of imprisonment.”).

³³ The statutory provision governing the discretionary-release process is found in Minn. Stat. § 244.05, subd. 5. For a description of life sentence review procedures, see Minn. Dep’t of Corr., *Policy Manual: Life Sentence Review Process* (effective 2015), § 203.060. In 2019, Minnesota Commissioner of Corrections Paul Schnell endorsed a proposal to create a new parole board to share responsibility for such discretionary release decisions. See Liz Sawyer, *Could parole board make a comeback in Minnesota?*, Star Tribune, March 24, 2019 (“The proposed new

statute specifies release criteria for sex offenders with life sentences, but not for prisoners convicted of murder.³⁴ In all cases, a “community investigation report” must be prepared and considered by the Commissioner, which must include “the views of the sentencing judge, the prosecutor, [and] any law enforcement personnel who may have been involved in the case.” The report must also contain “the views of the victim and the victim's family unless the victim or the victim's family chooses not to participate.”³⁵ In addition, the Commissioner must in every case exert reasonable efforts to notify victims or victims’ decedents of the release proceedings, give them the opportunity to submit oral or written statements, and consider any such statements when making release decisions.³⁶

As a matter of department of corrections practice, initial reviews of the “readiness for release” of prisoners with life sentences are begun three years before their dates of first release eligibility. Any later reviews are done “at intervals determined by the Commissioner.”³⁷

2.3. Juvenile life sentences

Following the U.S. Supreme Court’s 2012 ruling in *Miller v. Alabama*,³⁸ the Minnesota Supreme Court held that the sentences of juveniles who had previously received mandatory sentences of life without possibility of release must be converted to life sentences with release eligibility after 30 years.³⁹

board would award equal voting power to five members, with the commissioner as chair.”) At least for any Commissioner who contemplates allowing the release of a prisoner who has been serving a life term, it is a thankless job. See Paul McEnroe, *Roy Defends Parole Decision*, Star Tribune, November 3, 2011 (“State Corrections Commissioner Tom Roy told a panel of legislators Thursday morning that parole hearings for murderers are the ‘dark, dark days in my life,’ but defended his recent decision to parole a cop killer as consistent with state law and the practice of his predecessors. ... ‘I would have abused my authority [by denying parole] because he has met the conditions,’ Roy said. ‘I would have had to abandon the statute and my ethics.’”).

³⁴ See Minn. Stat. § 244.05, subd. 5(d) (specifying factors that, “at a minimum,” must be considered by the Commissioner of Corrections for sex offenders with life sentences).

³⁵ Minn. Stat. § 244.05, subd. 5(b).

³⁶ Minn. Stat. § 244.05, subd. 5(c),(e).

³⁷ See Minn. Dep’t of Corr., *Policy Manual: Life Sentence Review Process* (effective 2015), § 203.060. No timelines for the review of life prisoners’ cases, or for the reconsideration of their cases after a first denial, are set out in statute.

³⁸ 567 U.S. 460 (holding mandatory sentences of life without parole unconstitutional when imposed on juvenile offenders, even in murder cases, unless procedures are followed to individualize the sentence and take account of mitigating factors associated with the defendant’s youth). The *Miller* Court defined juvenile offenders as those who were under age 18 at the time of their crimes.

³⁹ *Jackson v. State*, 883 N.W.2d 272, 282 (Minn. 2016). The *Jackson* court noted the following in its holding:

“[The statutory provisions mandating life imprisonment without release (LWOR)] are severed as applied to Jackson and any other juvenile offenders who received mandatory LWOR sentences that were

As of 2020, the Minnesota legislature had not definitively abolished the availability of life sentences without possibility of release for juveniles in future cases, which could conceivably be imposed subject to federal constitutional limitations and required procedures.⁴⁰

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

3.1. Medical or “compassionate” release

Minnesota allows the DOC commissioner to order the “conditional medical release” of “any offender” if the prisoner “suffers from a grave illness or medical condition and the release poses no threat to the public.” Conditional medical release “may be rescinded without hearing by the commissioner if the offender's medical condition improves to the extent that the continuation of the conditional medical release presents a more serious risk to the public.”⁴¹

3.2. Executive clemency

The clemency power in Minnesota is placed in a Board of Pardons consisting of the governor, the chief justice of the supreme court, and the attorney general.⁴² All pardons or commutations require a unanimous vote of the board.⁴³

final before the *Miller* rule was announced, and that the most recent constitutional versions of those statutes are revived. Under the revised statutes that apply to Jackson's conviction of first-degree premeditated murder, we remand to the district court for the imposition of a sentence of life imprisonment with the possibility of release after 30 years, *see* Minn. Stat. §§ 609.106, subd. 2, 244.05, subds. 4–5 (2004).”

Jackson, 883 N.W.2d at 275.

⁴⁰ See Alina Yasis, *Second Chances: Minnesota Should Ban De Facto Life Sentences for Juvenile Offenders*, Minn. L. Rev. De Novo Blog (Apr. 16, 2020), <https://minnesotalawreview.org/2020/04/16/second-chances-minnesota-should-ban-de-facto-life-sentences-for-juvenile-offenders/> (arguing that “Minnesota should join Washington D.C. and the twenty-two other states that have banned juvenile LWOP sentences and enact legislation prohibiting de facto life sentences”) (footnote omitted).

⁴¹ Minn. Stat. § 244.05, subd. 8.

⁴² Minn. Stat. § 638.01.

⁴³ Minn. Stat. § 638.02, subd. 1. The board also has the power to grant “pardons extraordinary” to ex-offenders who have remained crime-free for extended periods after their sentences were discharged (10 years for those who had been convicted of a violent crime; five years for nonviolent crimes). A pardon extraordinary has the effect of “setting aside and nullifying the conviction and of purging the person of it, and the person shall never after that be required to disclose the conviction at any time or place other than in a judicial proceeding or as part of the licensing process for peace officers.” Minn. Stat. § 638.02, subd. 2.

From 1992 until 2019, the board granted no pardons or commutations. The board granted two commutations and one pardon in 2020 and one commutation in 2021.⁴⁴

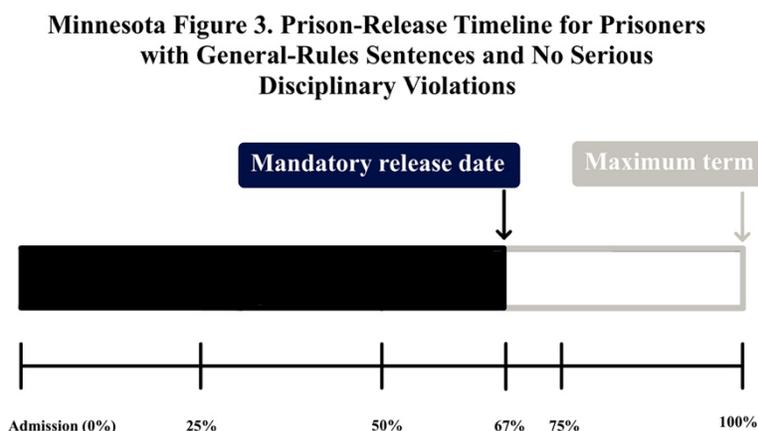
3.3. *Emergency release for prison overcrowding*

Like most states, Minnesota has no permanent statutory mechanism for emergency response to conditions of prison overcrowding.

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

4.1. *General-rules cases*

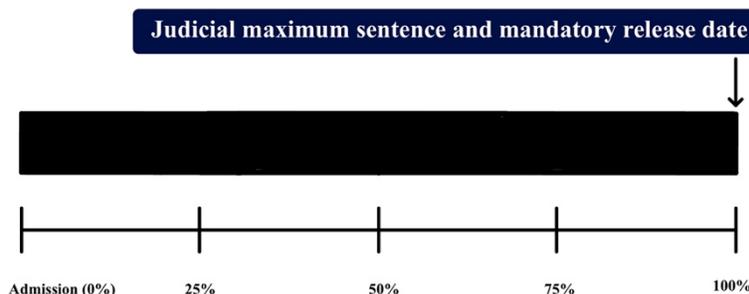
The vast majority of prisoners in Minnesota are serving sentences subject to the general rules of prison release, with minimum terms set at two-thirds of their judicial maximum sentences.⁴⁵ Such sentences are 67 percent determinate and 33 percent indeterminate, as illustrated in Figure 3 below. For the cohort serving such sentences, the population-multiplier potential (PMP) is 1.5:1. That is, in a *longest-time-served* regime (in which all prisoners are held until their mandatory release dates at the expiration of their full statutory maximum terms), the population would eventually grow to be 50 percent larger than in a *shortest-time-served* scenario (in which everyone is released on their original presumptive release dates). Figure 4 depicts cases in which prisoners have amassed sufficient bad-time penalties to postpone release for the full maximum term.



⁴⁴ Minn. Dep't of Corr., *Pardon Board: Annual Reports* (1992 to 2021), at <https://mn.gov/doc/about/pardon-board/annual-reports/>.

⁴⁵ The only exceptions are prisoners serving life sentences or with mandatory minimum terms set by statute.

Minnesota Figure 4. Prison-Release Timeline for General-Rules Cases in which Disciplinary Confinement Reaches or Exceeds the Judicial Maximum Sentence



4.2. Allocation of discretion at the back end of Minnesota's prison-sentencing system

Because there is no parole board in Minnesota, the most important back-end decision maker with prison-release discretion in ordinary cases is the department of corrections through its administration of Minnesota's bad-time system.⁴⁶ The overwhelming majority of all prisoners are subject to this authority.

In its 2005 decision in *Carrillo v. Fabian*, the Minnesota Supreme Court gave the state courts a potentially important role in the prison-release system by holding that prisoners have a Due Process liberty interest in the workings of the bad-time system. There is no easy way to measure the impact of *Carrillo*. Since it was decided, no reported decisions have intervened in bad-time decisions on constitutional grounds.⁴⁷ The absence of litigation does not mean that the court's intervention has been meaningless, however. The *Carrillo* decision may have established or reinforced a culture in which bad-time assessments are handed out with greater care, and with less frequency, than they otherwise would be. At least one commentator, based

⁴⁶ In referring to "ordinary cases," we are setting aside release mechanisms applied in small percentages of all cases, such as pardons and commutations, discretionary release for prisoners serving life sentences, and medical parole.

⁴⁷ In the wake of *Carrillo*, a host of appellate court decisions in Minnesota have upheld the department of corrections' assessments of bad time against prisoner challenges. See, e.g., *Duwenhoegger v. Schnell*, 2020 WL 4280073 (Minn. App. 2020) (unpublished opinion); *Royball v. Schnell*, No. A20-0314, 2020 WL 4045385 (Minn. Ct. App. July 20, 2020), review denied (Oct. 20, 2020); *Morrow v. Roy*, No. A17-0169, 2017 WL 3013423 (Minn. Ct. App. July 17, 2017), review denied (Sept. 27, 2017); *Munn v. Roy*, No. A16-1225, 2017 WL 957724 (Minn. Ct. App. Mar. 13, 2017); *Oates v. Minn. Dep't of Corr.*, No. A16-1724, 2017 WL 3013237 (Minn. Ct. App. July 17, 2017); cf. *Bedell v. Roy*, 853 N.W.2d 827 (Minn. Ct. App. 2014) (holding that department of corrections violated Fifth Amendment's self-incrimination guarantee when it imposed bad time sanction on prisoner who refused to participate in drug treatment program while appeal of his conviction was still pending; program required participants to admit guilt). There is at least one ruling overturning a conviction from a prison disciplinary proceeding resulting in extended incarceration due to insufficiency of the evidence provided at the hearing. See *Shmelev v. Fabian*, No. A08-1121, 2009 WL 1374805 (Minn. Ct. App. May 19, 2009).

on suggestive evidence, has reported that Minnesota prisoners seem generally to be released at or near their original dates of presumptive release, and those whose releases are delayed typically serve modest extra increments of time.⁴⁸ Better data would be needed to draw confident conclusions about actual practices over time.

For life sentences, the Commissioner of Corrections is the sole back-end decisionmaker empowered to exercise release discretion. Prison officials have no authority to change time-served outcomes through the disciplinary process, although a life prisoner's disciplinary record is one consideration the Commissioner of Corrections must take into account in the discretionary release process.

4.3. Overall assessment

Overall, we rank Minnesota's prison-sentencing-system as one of *low indeterminacy*—or *high determinacy* on the scale developed for this project (see pp. v-vi). This evaluation may be contrasted with jurisdictions we place in the category of *extremely-low indeterminacy*, such as Virginia and the federal system. Both of these systems allow the earliest release of most prisoners after 85 percent of their judicial maximum terms have been served.

In practice, the Minnesota system might deserve characterization as an extremely-high determinate structure (one with an extremely low degree of indeterminacy) if the department of corrections is significantly constrained by the holding in *Carrillo v. Fabian*. Suppose that nearly all Minnesota prisoners were released at the two-thirds mark of their judicial sentences? If such a pattern were shown to be persistent and stable, and if there were reason to expect it to continue in the foreseeable future, this would lend an extremely high degree of predictability to time served by individual prisoners and across the system as a whole.

One side effect of Minnesota's system design is that large changes in prison-release practices cannot easily occur without formal amendments of the generally-applicable positive law such as the overall statutory framework, sentencing guidelines, controlling judicial precedent, or the rules, procedures, and practices attendant to prison discipline.⁴⁹ It would go too far to say that the amount of time served for particular classes of judicial sentences is "set in stone" in Minnesota, but there is far less play in the system than in paroling states. It is hard to imagine a large surge in the Minnesota prison population that would be attributable to low-visibility slippage in back-end releasing practices.

⁴⁸ Kevin R Reitz, *Prison-Release Reform and American Decarceration*, 104 Minn. L. Rev. 2741, 2766 (2020).

⁴⁹ To be sure, drastic changes in the practices of the Department of Corrections could also make a big difference.