



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: NEW HAMPSHIRE

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Prison-Release Discretion and Prison Population Size

State Report: New Hampshire

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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, New Hampshire’s prison-sentencing system operates with a *high degree of indeterminacy* on the scale developed for this project (see pp. iii-iv). Although sentences of extremely high indeterminacy are permitted under state law, our best guess is that they are outnumbered by sentences in the high determinacy category.

New Hampshire is one of several states in which, to an important extent, judges are gatekeepers of the degrees of indeterminacy that are built into their sentences. New Hampshire judges have the power to vary their sentences from high to extremely high indeterminacy within a wide range of possibility. Among other things, this means that the overall level of indeterminacy of the state’s prison-sentencing system can change continuously with shifts in judicial sentencing norms. The full degree of indeterminacy in New Hampshire sentences is not solely a function of judicial minimum terms, however. Significant credit earnings—both good conduct and earned time credits—are needed to advance parole release eligibility to the earliest possible junctures.

Overall, the parole board has more influence over prison population size than any other actor in the prison-sentencing system, at least with respect to general-rules sentences. While sentencing courts can calibrate the amount of control passed forward to parole boards in individual cases, the range of possibility is between a parole board with a great deal of power and a board with still more authority. While New Hampshire allows for reductions of maximum terms through the accrual of earned time credits, the reductions are not generous in comparison with other states. Mandatory release dates do not function as a powerful check on the release-denial discretion of the parole board.

Terminology note

This report will refer to the New Hampshire Adult Parole Board as the “parole board.” The New Hampshire Department of Corrections will be referred to as the “department of corrections.”

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. For a broad overview of the law of parole release and supervision in New Hampshire, see Alexis Lee Watts, Brendan Delaney, & Cecelia Klingele, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: New Hampshire* (Robina Institute of Criminal Law and Criminal Justice, 2018) (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

New Hampshire’s prison-rate history, 1972 to 2020

At yearend 2020, New Hampshire’s prison rate was 172 per 100,000 general population, with a prison population of 2,352.² New Hampshire’s prison rate was 43rd highest among all states.

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

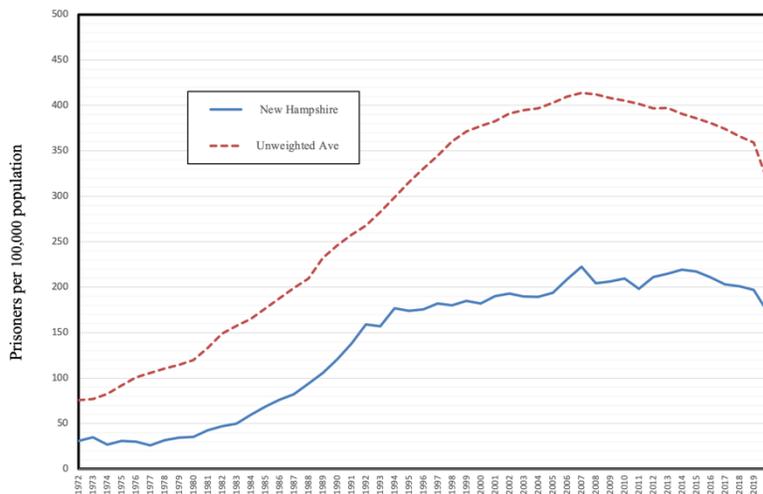
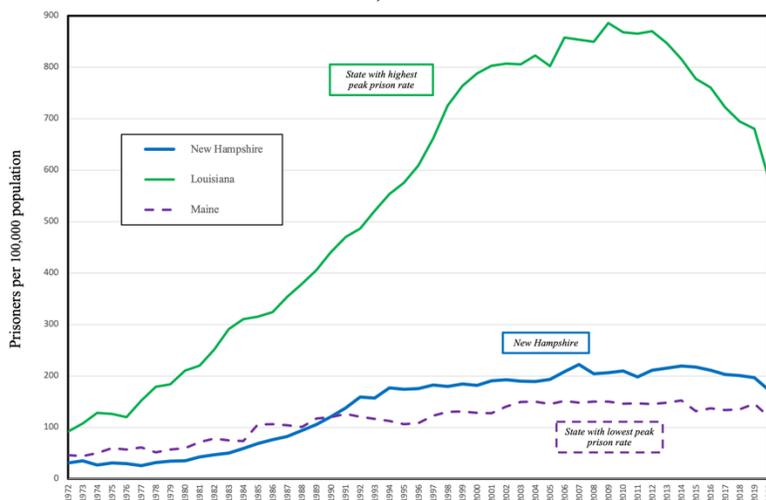


Figure 2. Prison Rate Change in New Hampshire, Louisiana, and Maine, 1972 to 2020



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

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

sentenced prisoners under jurisdiction of State and Federal correctional authorities on December 31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991) (for 1972-1977); E. Ann Carson, *Imprisonment rate of sentenced prisoners under the jurisdiction of state or federal correctional authorities per 100,000 U.S. residents, December 31, 1978-2016* (Bureau of Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), at <https://csat.bjs.ojp.gov/>; 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 12 table 7 (for 2018); E. Ann Carson, *Prisoners in 2020 – Statistical Tables* (Bureau of Justice Statistics, 2021), at 15 table 7 (for 2019-2020).

New Hampshire reached its peak prison rate in 2007 at 222 per 100,000, which dropped to 217 per 100,000 in 2019. This is a net difference of -50 per 100,000, which was the 45th largest prison-rate drop of all states from their peak positions (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.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-four 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).

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), at 8 figure 1 (finding that nine states released 0 to 150 prisoners in response to the pandemic from March 2020 through December 2021, while only four 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 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.

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 New Hampshire

In a separate study, the Robina Institute found no (zero) releases in New Hampshire from March 2020 through December 2021 that were accelerated in response to the pandemic. New Hampshire was one of 14 states that made no COVID-related releases.⁹

In calendar year 2020, New Hampshire's prison rate fell from 197 to 172 per 100,000—a one-year decline of -25 per 100,000. This was the 45th largest (sixth lowest) one-year drop reported among all 50 states for that year.¹⁰ Measured in percentage terms, it was a 12.7-percent reduction in the state's prison rate. The state's total prison population fell by 339 people, from 2,691 to 2,352.¹¹

Falling admissions were the leading cause of New Hampshire's 2020 decline in prison population, and not rising releases. The number of prison admissions in the state dropped by

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), at 28 (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 41,070 “non-routine COVID releases” from state prisons nationwide. *Id.* at 28. 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.

⁹ 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 35 Appendix A.

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.

31.6 percent in 2020 compared with the previous year (from 1,292 to 884). Total releases in 2020 fell by 6.9 percent over 2019 (from 1,339 to 1,246).¹²

New Hampshire's prison-rate drop continued beyond calendar year 2020. From yearend 2020 to December 2021, the Vera Institute reported that New Hampshire saw a decrease in its prison population, from 2,286 to 2,065—or 9.7 percent.¹³ As of August 1, 2022, the New Hampshire Department of Corrections reported a total prison population of 2,055.¹⁴

1. General rules of prison release in New Hampshire

Most prison sentences in New Hampshire include judicial minimum and maximum terms. By statute, judicial minimum terms of more than one year are increased by a “disciplinary period” of 150 days per year, which may be reduced or eliminated through the earning of good conduct credits.¹⁵

¹² E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 17 table 8, 19 table 9.

¹³ See 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 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.

¹⁴ New Hampshire, Department of Corrections, *NH DOC Monthly Facility Population Summary Report* (August 2022), at <https://www.nh.gov/nhdoc/documents/population-summary.pdf>.

¹⁵ See N.H. Rev. Stat. § 651:2(II-e), which provides:

To the minimum sentence of every person who is sentenced to imprisonment for a maximum of more than one year shall be added a disciplinary period equal to 150 days for each year of the minimum term of the sentence, to be prorated for any part of the year. ... This additional disciplinary period may be reduced for good conduct as provided in [N.H. Rev. Stat. §] 651-A:22 and for earned time as provided in [N.H. Rev. Stat. §] 651-A:22-a.

See also N.H. Rev. Stat. § 651-A:22(III) (providing that a prisoner “may reduce the additional disciplinary period provided in RSA 651:2, II-e of such prisoner by up to 12-½ days for each month during which the prisoner has exhibited such good conduct.”). Earned time credits in New Hampshire are applied as reductions from both the judicial minimum and maximum terms, see N.H. Rev. Stat. § 651-A:22-a(I), but are limited to total reductions of 21 months, N.H. Rev. Stat., § 651-A:22-a(IV).

Judges may select and impose judicial maximum prison sentences in individual cases that do not exceed the statutorily-authorized maximum penalties for different offense classes,¹⁶ as follows:

- Life imprisonment for murder in the second degree¹⁷
- Fifteen years for a class A felony
- Seven years for a class B felony
- One year for a class A misdemeanor

For felony sentences other than life sentences, the judicial minimum term may not exceed one-half of the maximum term.¹⁸

Parole reconsideration hearings are conducted at the discretion of the parole board according to conditions specific to each inmate: “If parole is denied at the initial hearing, the board shall advise the inmate, in writing via a copy of the minutes of the hearing, what the inmate shall be required to do to be granted another hearing.”¹⁹

Credits

New Hampshire inmates can earn up to 12.5 days per month for good conduct, as determined by the commissioner on a monthly basis.²⁰ Good conduct credits may eliminate the disciplinary period entirely if all credits are earned. Good conduct credits reduce the disciplinary period and so move inmates closer to parole eligibility, though they do not accrue at a high enough rate to ever reduce the judicial minimum sentence.²¹ Good conduct credits do not affect the judicial maximum term.²²

¹⁶ Effective January 1, 2023, individuals may receive enhanced penalties for certain driving offenses where the offense was also based on facts involving the prohibited use of a mobile electronic device. N.H. Rev. Stat. § 651:2(II)(h). 2021 New Hampshire Senate Bill No. 306.

¹⁷ N.H. Rev. Stat. § 651:2(II)(a)-(d). First degree murder carries a mandatory prison sentence of life without parole (LWOP). N.H. Rev. Stat. § 630:1(III).

¹⁸ N.H. Rev. Stat. § 651:2(II)(d) (providing that, if a prison sentence is imposed, court shall impose, “in the case of a felony only, a minimum which is not to exceed ½ of the maximum, or if the maximum is life imprisonment, such minimum term as the court may order.”). See *State v. Peabody*, 438 A.2d 305, 308 (N.H. 1981) (“[A] minimum felony sentence can be no greater than one-half the maximum sentence.”).

¹⁹ N.H. Code Admin. R. Par 203.02.

²⁰ N.H. Rev. Stat. § 651-A:22(I),(III).

²¹ N.H. Rev. Stat. § 651-A:22(III).

²² See N.H. Rev. Stat. § 651-A:22(III) (describing the effect of good conduct credits, which is to reduce the disciplinary period, not the maximum term).

Earned time credits may be awarded to inmates who successfully complete various programming, including educational degrees, vocational programming, mental health treatment, substance abuse treatment, and parenting programs.²³ Awards range from 60 days for vocational, mental health, substance abuse, and parenting programs to 180 days for completion of a postsecondary degree.²⁴ To be eligible for earned time credits, inmates must have been granted this option by the judge at sentencing.²⁵ Such inmates must also be in “the least restrictive security classifications of general population and minimum security.”²⁶ Earned time awards reduce an inmate’s minimum sentence up to a total limit of 21 months off.²⁷ Earned time credits reduce an inmate’s judicial maximum term up to a total limit of 21 months off.²⁸

Good conduct credits may be lost for “[a]ny serious act of misconduct or insubordination.”²⁹ All such credits are automatically forfeited upon an escape from custody.³⁰ Credits vest and cannot be forfeited, however, once an inmate is released on parole.³¹ Lost credits may be subsequently restored by the commissioner for “exemplary behavior.”³² Earned time credits may be lost for “involvement or membership in a security threat group, attempted escape, escape, or commission of any category A offense listed in the department of corrections policy and procedure directives.”³³

Timeline diagrams

The degrees of indeterminacy in general-rules sentences in New Hampshire depend largely on the length of the judicial minimum term in relation to the judicial maximum term (or the

²³ N.H. Rev. Stat. § 651-A:22-a.

²⁴ N.H. Rev. Stat. § 651-A:22-a(I).

²⁵ N.H. Rev. Stat. § 651-A:22-a(II). For those who were already incarcerated at the time of the statute’s enactment in 2014, they may become eligible for earned time credits if the inmate petitions for it, along with recommendation by the commissioner and approval by the sentencing court. *Id.*

²⁶ N.H. Rev. Stat. § 651-A:22-a(III).

²⁷ N.H. Rev. Stat. § 651-A:22-a(I),(IV).

²⁸ N.H. Rev. Stat. § 651-A:22-a(I),(IV).

²⁹ N.H. Rev. Stat. § 651-A:22(IV)(b).

³⁰ N.H. Rev. Stat. § 651-A:22(IV)(a).

³¹ N.H. Rev. Stat. § 651-A:22(IV)(d).

³² N.H. Rev. Stat. § 651-A:22(IV)(c).

³³ N.H. Rev. Stat. § 651-A:22-a(III).

“minimum-maximum” ratio). For most felonies, judges have discretion to set minimum terms anywhere from zero to 50 percent of the maximum.

For purposes of our analysis of the New Hampshire prison-sentencing system, we are forced to make assumptions about judicial sentencing patterns. In the absence of data, our best guess is that judges will generally choose minimum terms that are at or near the ceiling of 50 percent of the judicial maximum sentence.³⁴ Accordingly, in the models we present below, we will first explore the prison-release timeline for New Hampshire prison sentences with judicial minimum terms that expire at the 50-percent mark of the maximum. Afterward, we will explore an alternative scenario in which judges have selected minimum sentences that are 25 percent of the maximum. We will assume that judicial minimum terms approaching zero are rarely chosen by New Hampshire judges.

Figure 3 illustrates cases in which the minimum term imposed by the judge is 50 percent of the judicial maximum term. For minimum terms longer than one year, New Hampshire law adds a “disciplinary period” of 150 days (five months) to the minimum term for every year in the minimum as pronounced by the judge. This has the effect of increasing the judicial minimum by about 41 percent, which moves first parole release eligibility back to the 71-percent mark of the maximum in the Figure 3 scenario.

With full good conduct credits of 12.5 days per month, accrued continuously and without forfeiture, prisoners can erase the entire “disciplinary period” that was added to their judicial minimum terms. Figure 4 shows such a case, again specifying that the judge has chosen to impose a minimum term at the 50-percent mark of the maximum sentence. With uninterrupted earnings of good conduct credits, parole release eligibility is restored to the 50-percent mark. (Good conduct credits do not count against prisoners’ maximum terms in New Hampshire.)

In addition, New Hampshire law offers earned-time credits to be awarded in lump sums of 60 days for in-prison program completion and 90, 120, or 180 days for different levels of educational achievement. (The most common educational attainment, a GED, receives 90 days of credits.) Earned-time credits that are earned and not forfeited are subtracted from prisoners’ minimum and maximum terms. Reductions from minimum terms establish earlier parole eligibility dates. Reductions from maximum terms create earlier mandatory release dates (MRDs).

³⁴ This reflects an expectation that judges will usually want their sentences to include a substantial degree of *determinacy*, so that their sentencing decisions will control a meaningful share of time actually served. See Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine, *Prison-Release Discretion and Prison Population Size: State Report: Pennsylvania* (Robina Institute of Criminal Law and Criminal Justice, 2022) (some available data supportive of this assumption); Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine, *Prison-Release Discretion and Prison Population Size: State Report: Massachusetts* (Robina Institute of Criminal Law and Criminal Justice, 2022) (regularly-reported data from recent years supportive of this assumption).

To illustrate the possible effects of good conduct and earned time credits, we stipulate a judicial maximum term of five years in New Hampshire Figure 5.³⁵ Figure 5 assumes that full good-conduct credits have been earned, erasing the “disciplinary period” that was added to the judicial minimum. Mathematically, good conduct credits bring the minimum term back to the 30-month mark of the 60-month maximum sentence.

We must make further assumptions about the total earned time credits it would be possible to amass in the time it would take prisoners to reach their first parole eligibility dates. If we are wrong in our suppositions, then our timeline models will be skewed accordingly. (We would not be surprised to be in error, but we doubt we are catastrophically off the mark in our assumptions.)

Here and in later timeline diagrams, we posit that a high-achieving prisoner in New Hampshire could complete two programs per year throughout a prison term, and we are willing to round up for partial years that clear the halfway mark. Without data, this seems a realistic scenario for high-achieving prisoners.³⁶ Average and below-average prisoners would probably earn less, but our timeline diagrams are intended to explore the outer boundaries of indeterminacy for every sentence class, albeit within reason.³⁷

Figure 5 applies the above calculus. It posits that, in roughly two years, a high-achieving prisoner might complete a GED (90 days of credit) and three additional programs (60 days of credit each) for a total earned-time reduction of nine months. Reduced by nine months, parole release eligibility would occur at the 21-month mark of the timeline. (Because 21 months is only three months shy of two years, we round up to “award” two years of credits.) Under this estimate, earliest release eligibility comes at 35 percent of the full maximum term. The resulting sentence is 35 percent determinate and 65 percent indeterminate. In this project’s rankings, it is a *highly indeterminate* sentence. The PMP is 2.9:1.

Figure 5 also applies nine months of earned time credits as deductions from the judicial maximum sentence to establish an earlier mandatory release date (MRD) after 51 months. Unlike good conduct credits, earned time in New Hampshire is deducted from both minimum and maximum terms. However, we do not attach great importance to the MRD as shown in Figure 5. If prisoners with such sentences were consistently denied parole release after they

³⁵ In this project, we consistently assume a five-year maximum term when needed to gauge the effect of lump-sum credits.

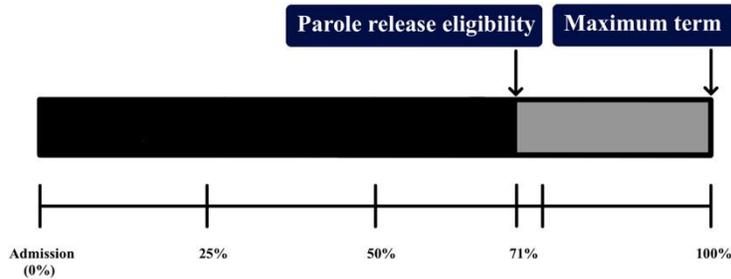
³⁶ Program completion requires not just the requisite effort on the part of the prisoner, but the availability of program slots and the administrative capacity to move prisoners into programs as needed. We have heard repeatedly through this project that program shortages, waiting lists, and other bottlenecks are endemic problems in the administration of earned time systems.

³⁷ We hypothesize that very few prisoners would be able to surpass the high-achiever earning rate of two completions per year for any length of time. Those outliers would be small enough in numbers that they should not be used as a gauge of the system’s typical operation.

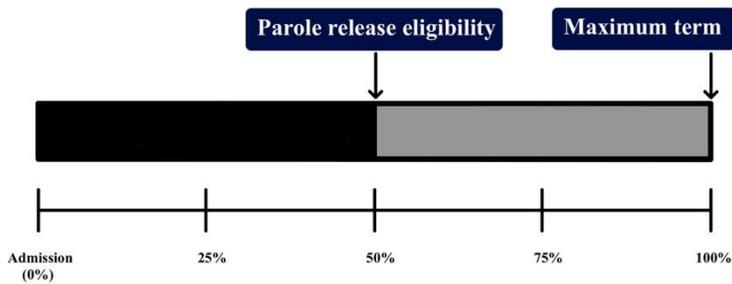
became eligible at 21 months, they would have additional time to accumulate earned time credits; the eventual totals could greatly exceed realistic earnings after only 21 months. (We will estimate the full effects of movable MRDs separately in connection with Figures 9, 10, and 11.)

Figure 5 also applies nine months of earned time credits as deductions from the judicial maximum sentence to establish an earlier mandatory release date (MRD) after 51 months. Unlike good conduct credits, earned time in New Hampshire is deducted from both minimum and maximum terms. However, we do not attach great importance to the MRD as shown in Figure 5. If prisoners with such sentences were consistently denied parole release after they became eligible at 21 months, they would have additional time to accumulate earned time credits; the eventual totals could greatly exceed realistic earnings after only 21 months. (We will estimate the full effects of movable MRDs separately in connection with Figures 9, 10, and 11.)

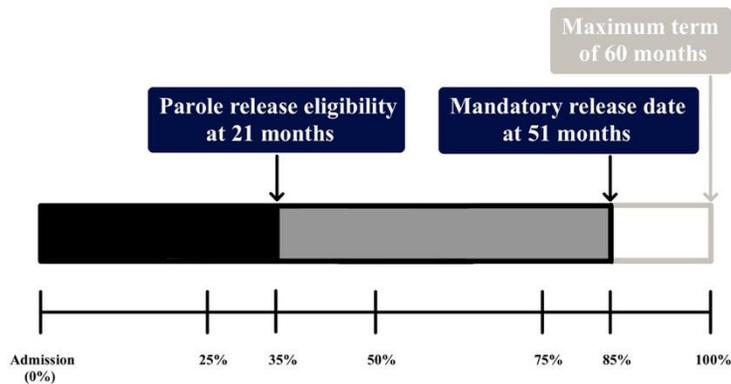
New Hampshire Figure 3. Prison-Release Timeline for General-Rules Sentences with 50-Percent Minimum Term Imposed by Court and No Credits



New Hampshire Figure 4. Prison-Release Timeline for General-Rules Sentences with 50-Percent Minimum Term Imposed by Court and Full Good Conduct Credits



New Hampshire Figure 5. Prison-Release Timeline for General-Rules Sentences with 5-Year Maximum and 50-Percent Minimum Term Imposed by Court, Full Good Conduct Credits, One Educational Achievement Credit (90 days), and 3 Program Completion Credits (180 days)



Figures 6, 7, and 8 repeat the sequence of Figures 3, 4, and 5, but now assume that the sentencing court has chosen a judicial minimum term that is only 25 percent of the maximum term. We perform this exercise to give one example of the different sentence configuration that would result if we are wrong in our supposition that New Hampshire judges are likely to impose the longest allowable minimum terms. Although it is legally permitted, we would be surprised if New Hampshire courts routinely selected minimum terms much shorter than 25 percent of their maximum sentences.

Figure 6 shows the timeline for a sentence with a 25-percent minimum term lengthened by 41 percent by the statutorily required “disciplinary period.” Figure 7 shows the effects of full good-conduct earnings on such a sentence, which would restore parole eligibility to the 25-percent mark.

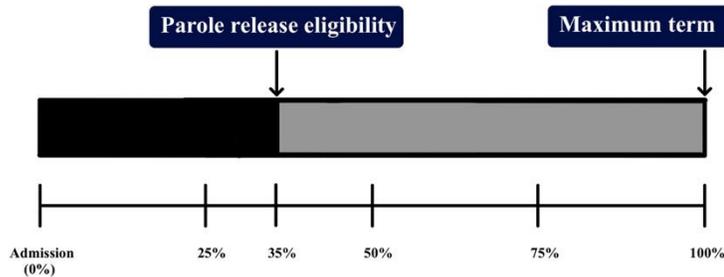
Figure 8 then adds estimated effects of earned time credits to the Figure 7 scenario. The figure assumes a five-year maximum sentence with a 15-month judicial minimum term. Given the shorter time until parole eligibility (in comparison with Figure 5), our judgment is that a high-achieving prisoner might win one educational credit of 90 days and one program completion credit of 60 days, for a total reduction of five months that is applied to both the minimum and maximum terms. The timeline in Figure 8 places parole eligibility at the 10-month or 17-percent mark of the maximum term.³⁸

Per these estimates, the sentence in Figure 8 is 17 percent determinate and 83 percent indeterminate. In this project’s ranking system, it carries an *extremely high degree of indeterminacy*. It has a PMP of 5.9:1.³⁹ Given the guesswork in our estimates, this is a plausible portrait of overall sentencing patterns in New Hampshire. We are fairly confident that aggregate sentence configurations fall in between Figures 5 and 8, and are probably closer to Figure 5.

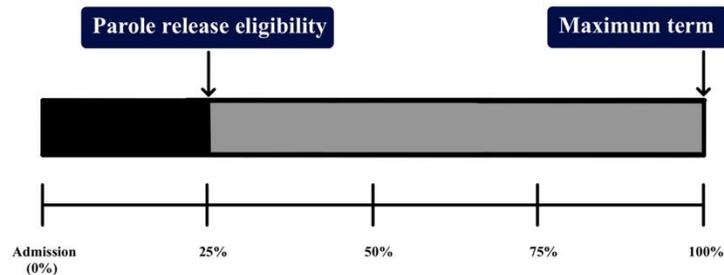
³⁸ The figure also shows an MRD that has moved back to the 55-month mark, or 92 percent of the maximum term. As with Figure 5, this information is not of great importance. A prisoner denied parole release after 10 months would have the opportunity to win additional earned time credits, which would carry further reductions to the MRD. As with Figure 5, we think it would be feasible for prisoners with five-year sentences to move their MRDs back to the 43-month mark.

³⁹ With smaller minimum-maximum ratios, sentences with higher degrees of indeterminacy than shown in Figure 8 are possible in New Hampshire.

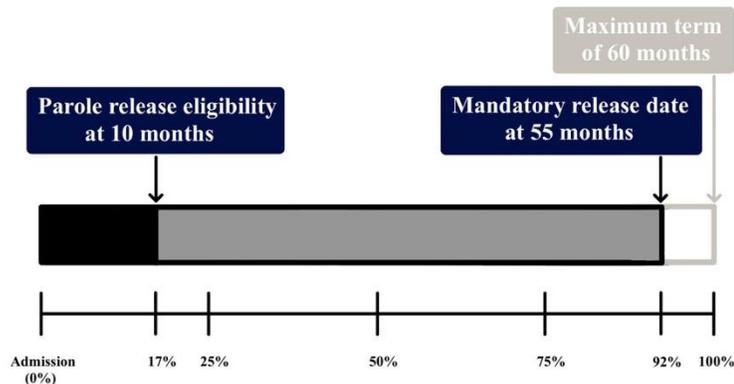
New Hampshire Figure 6. Prison-Release Timeline for General-Rules Sentences with 25-Percent Minimum Term Imposed by Court and No Credits



New Hampshire Figure 7. Prison-Release Timeline for General-Rules Sentences with 25-Percent Minimum Term Imposed by Court and Full Good Conduct Credits



New Hampshire Figure 8. Prison-Release Timeline for General-Rules Sentences with 5-Year Maximum and 25-Percent Minimum Term Imposed by Court, Full Good Conduct Credits, One Educational Achievement Credit (90 days), and 1 Program Completion Credit (60 days)



Figures 9, 10, and 11 explore cases in which general-rules sentences have been imposed but, regardless of the length of the judicial minimum term, parole release has been denied throughout the term and release occurs through the earliest-possible operation of the movable MRD. These figures explore the extent to which movable MRDs in New Hampshire operate as a check on the release-denial discretion of the parole board. Between the date of first parole release eligibility (no matter when it occurs) and the earliest possible MRD, the parole board holds unilateral release-*denial* authority. Afterward, prisoners (in theory) have two ways to win release and they must lose twice, with two different agencies and processes, to be denied release over this segment of the timeline.

The earliest possible MRD is in many cases a function of how many credits can realistically be earned in the finite amount of time between admission and the projected MRD. As before, we estimate that high-achieving prisoners could realistically complete two programs per year throughout their terms—rounding up credit earnings for partial years of six months or more.

There is also a statutory ceiling on earned-time credits of 21 months in New Hampshire, which cuts off total earnings no matter how long the maximum term. We estimate that this statutory cap could be reached most efficiently through the accrual of one 90-day educational achievement credit (a GED) and nine additional program completion credits of 60 days each. Under our assumptions, it would take a high-achieving prisoner about five years to reach the cap. After earning 21 months of credits as quickly as possible, no further time-served reductions are allowed.⁴⁰

Figure 9 estimates the effect of the earliest permitted MRD when the judicial maximum term is five years. We do not think a prisoner with this sentence could reach the statutory earnings cap. If we reduce the 60-month maximum term by 21 months, the MRD would occur after 39 months. Although legally allowable on paper, we doubt that such a large deduction is realistically possible. Building up the full 21-month reduction would seemingly require a superhuman effort and extraordinary good luck—all within three years and three months.

Using the high-achiever assumptions outlined earlier, we estimate that the MRD could move back as far as the 43-month mark for a prisoner who was able to complete two programs or slightly more per year. We reach this estimate by assuming one education completion credit of 90 days and seven program completion credits of 60 days each, for a total of 510 days or 17 months. We are willing to imagine a highly successful prisoner completing all of this within 43 months (rounding up 43 months to four years' worth of program completions).

Figures 10 and 11 show the diminishing importance of earned time credits and movable MRDs for sentences with ever-longer maximum terms. Figure 10 posits a ten-year maximum sentence. With the full allowable deduction of 21 months for earned-time credits, the MRD

⁴⁰ Further earnings would be allowed if some of the previously-earned credits were lost through forfeiture, but the restored total could never exceed 21 months.

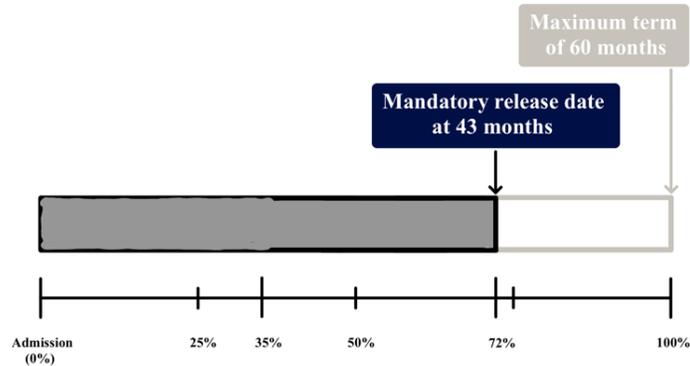
would move to the 99-month mark, or 83 percent of the 120-month maximum term. In contrast with Figure 9, we think total earnings at this level would be possible in 99 months.⁴¹ However, as a percentage share of the total ten-year maximum sentence, the movable MRD cuts off only 17 percent.

Figure 11 then shows the earliest possible placement of the MRD for a 20-year maximum sentence—at 219 months of a 240-month maximum term, or at the 91-percent mark.

Figures 9, 10, and 11 illustrate the effects of a movable MRD mechanism when credits are capped at a specific earnings level: in this case they are capped at 21 months no matter the length of the judicial maximum sentence. For prisoners with extremely long maximum terms, the movable MRD becomes less and less meaningful. This would seem to reduce long-term prisoners' incentives to participate in prison programming, but may reflect a retributive intuition that prisoners with long maximum terms are less deserving of opportunities to earn advancement of their release dates.

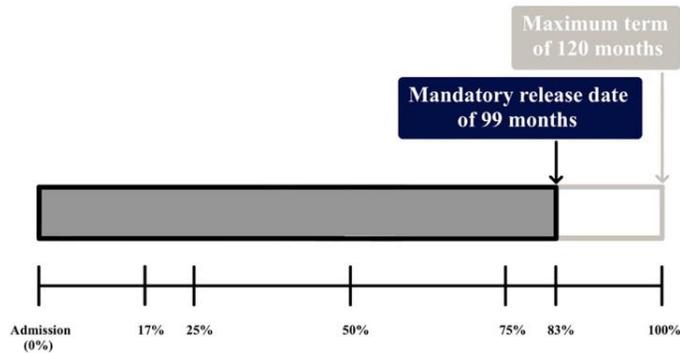
⁴¹ As noted earlier, we are guessing that the 21-month cap could be reached by a high-achieving prisoner in about five years.

New Hampshire Figure 9. Prison-Release Timeline for General-Rules Sentences with 5-Year Maximum, Parole Release Never Granted, with Most Feasible Earned Time Credits*

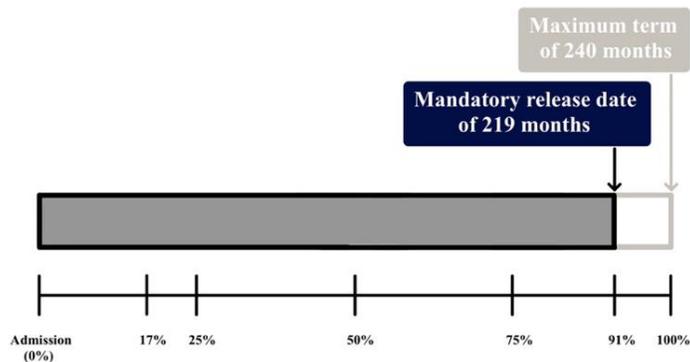


* Mandatory release date based on earned time credits for one educational achievement credit (3 months) and 7 program completion credits (14 months)

New Hampshire Figure 10. Prison-Release Timeline for General-Rules Sentences with 10-Year Maximum, Parole Release Never Granted, with Earned Time Credits Up to Statutory Cap (21 months)



New Hampshire Figure 11. Prison-Release Timeline for General-Rules Sentences with 20-Year Maximum, Parole Release Never Granted, with Earned Time Credits Up to Statutory Cap (21 months)



2. Life sentences in New Hampshire

a. Adults

Those found guilty of first-degree murder or a third conviction of aggravated felonious sexual assault must serve a life sentence without the possibility of parole (LWOP).⁴² Upon a second conviction for “aggravated felonious sexual assault,” the defendant may be given an LWOP sentence if they meet statutory criteria for an extended term.⁴³ The extended term of life without parole is mandatory for those who commit subsequent sexual or violent offenses in certain cases.⁴⁴

Inmates sentenced for committing second-degree murder, attempted murder, violating the highest level controlled substance law after being convicted of any misdemeanor or felony drug offense, being a drug enterprise leader, strict liability for a drug-induced death, or a second offense of manufacturing child pornography may receive a maximum sentence of LWOP.⁴⁵ Before being eligible for parole-release consideration, any inmate serving a life sentence with the possibility of parole must serve a minimum term of 18 years⁴⁶ (plus the disciplinary period

⁴² N.H. Rev. Stat. §§ 630:1-a(III), 632-A:10-a(III).

⁴³ N.H. Rev. Stat. § 651:6(III)(e). “Extended terms” are enhanced sentences that may be imposed if a jury finds the offender is particularly dangerous or the crime was particularly cruel or if the conviction is the third (or in some cases, second) strike for the offender. N.H. Rev. Stat. § 651:6. The criteria that may subject defendants to an extended term include: a knowing devotion “to criminal activity as a major source of livelihood”; being “a serious danger to others due to a gravely abnormal mental condition”; “exceptional cruelty or depravity in inflicting death or serious bodily injury on the victim of the crime”; or, committing an “act of theft, destruction, or violence” in a safe school zone. N.H. Rev. Stat. §§ 651:6(I)(a)–(c), (i), 193-D:1(I).

⁴⁴ N.H. Rev. Stat. § 651:6(VII). The extended term applies when: (1) the earlier conviction was for aggravated felonious sexual assault on a victim less than 13 years old or a pattern of sexual assault with a victim less than 16 years old if one or more of the acts involved a victim less than 13 years old, and the defendant subsequently committed one or both of those offenses either while released on bail for the earlier offense or if the sentence for the earlier offense was “a term of incarceration, probation, parole, or other supervised release”; (2) the earlier conviction was for first-degree assault where the victim was less than 13 years old “where the serious bodily injury resulted in brain damage or physical disability to the child that is likely to be permanent” and a subsequent first-degree assault offense occurs while “released on bail on the earlier offense or the sentence for the earlier conviction involved a term of incarceration, probation, parole, or other supervised release”; or (3) both the earlier and current conviction are for second-degree murder and either the earlier conviction resulted in imprisonment, probation, or parole or the current offense was committed while released on bail for the earlier offense. N.H. Rev. Stat. § 651:6(VI).

⁴⁵ N.H. Rev. Stat. §§ 651:2(II)(d), 630:1-b(II), 629:1(IV), 318-B:26(I)(a), 318-B:26(VI), 318-B:26(IX), 649-A:3-b(II).

⁴⁶ One exception to the minimum term of 18 years is any inmate serving a life sentence for psycho-sexual murder that was committed before April 15, 1974. These inmates are subject to a 40-year minimum term (minus good conduct and pre-sentence confinement credits). N.H. Rev. Stat. § 651-A:8.

that may be erased by credit deductions) unless the sentencing court specifies a different term.⁴⁷

A life sentence with the possibility of parole is also a possible sentence for those subject to an extended term who commit murder or a third offense of felonious sexual assault.⁴⁸ The sentence is mandatory for those who commit second-degree murder against a victim under 13 years old.⁴⁹ Extended terms are presumed for adult offenders who (1) commit aggravated felonious sexual assault and the victim was less than 13 years old, (2) engage or attempt to engage in a pattern of sexual assault with a victim under 16 years old and one or more of the acts involved a victim under 13 years old, or (3) commit first-degree assault “against a person under 13 years of age where the serious bodily injury has resulted in brain damage or physical disability to the child that is likely to be permanent.”⁵⁰

b. Juvenile life sentences

LWOP sentences for juvenile offenders convicted as adults have not been abolished in New Hampshire, although federal constitutional restrictions on LWOP sentences imposed on people who were under 18 at the time of their offenses must be observed.⁵¹

3. Infrequently used forms of prison release in New Hampshire

a. Compassionate release

⁴⁷ N.H. Rev. Stat. § 651-A:7.

⁴⁸ N.H. Rev. Stat. § 651:6(III)(d),(f).

⁴⁹ N.H. Rev. Stat. § 651:6(V). The minimum term for such a conviction is at least 35 years, but the court can impose an even longer minimum term, in theory up to life. *Id.*

⁵⁰ N.H. Rev. Stat. § 651:6(IV),(I)(m)–(o).

⁵¹ See *Petition of State of New Hampshire (Retroactive Application of Miller v. Alabama)*, 103 A.3d 227, 231–32 (N.H. 2014) (“[T]he Court’s decision in *Miller* did ‘not categorically bar a penalty for a class of offenders or type of crime,’ Rather, the decision ‘mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.’”). For the relevant U.S. Supreme Court cases, see *Graham v. Florida*, 560 US 48 (2010) (robbery case; holding life without parole an unconstitutional penalty when applied to a juvenile offender for a non-homicide offense); *Miller v. Alabama*, 567 U.S. 460, 480 (2012) (holding mandatory sentences of life without parole unconstitutional when applied to defendants who were under age 18 at the time of their crimes; stating further that, “[a]lthough we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”). See also *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016) (stating that *Miller* required “a sentencer to consider a juvenile offender’s youth and attendant characteristics before determining that life without parole is a proportionate sentence”); *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (holding that sentencing courts are not required to make a factual finding of “permanent incorrigibility” before sentencing a juvenile offender to life without parole so long as court has considered the defendant’s youth before imposing the LWOP sentence).

Medical parole may be considered for any inmate who (1) is “[p]ermanently incapacitated or permanently debilitated”, (2) is “[t]erminally ill”, or (3) has a “[s]erious and complex medical condition”.⁵² Those sentenced to death or life without the possibility of parole are not eligible for release on medical parole.⁵³ A majority of the parole board must agree before release will be granted that “there is a reasonable probability the prisoner will not violate the law while on medical parole and will conduct himself or herself as a good citizen.”⁵⁴

Medical parole may be revoked if a physician determines that the “condition, disease, illness, or injury of the parolee has improved to the extent that the parolee no longer meets the criteria specified in paragraph I, or has violated the conditions of parole”; the parolee would be returned to custody in that case.⁵⁵

b. Clemency

The governor has the authority to commute sentences with advice of the Executive Council, which is composed of five elected councilors.⁵⁶ The only offense not pardonable by the governor is impeachment and subsequent conviction by the legislature.⁵⁷

Death sentences (though no longer a sentencing option in New Hampshire as of May 30, 2019⁵⁸) may be commuted by the governor to a life sentence or a term of years.⁵⁹

c. Judicial authority to suspend sentences during prison terms

Prisoners may petition the sentencing court for suspension of their sentences well into the execution of their prison sentences. If a prisoner has been sentenced to six years or more, they may bring a first “petition to suspend sentence” within 12 months of two thirds of their minimum sentence. If denied, they must wait at least three years before re-petitioning.⁶⁰ If the sentence is for less than six years, the inmate may petition the court after serving two-thirds

⁵² N.H. Rev. Stat. § 651-A:10-a(I).

⁵³ N.H. Rev. Stat. § 651-A:10-a(VI).

⁵⁴ N.H. Rev. Stat. § 651-A:10-a(III).

⁵⁵ N.H. Rev. Stat. § 651-A:10-a(IV).

⁵⁶ N.H. Const. arts. 52, 60.

⁵⁷ N.H. Const. art. 52.

⁵⁸ N.H. H.B. 455 (2019).

⁵⁹ N.H. Rev. Stat. § 4:23.

⁶⁰ N.H. Rev. Stat. § 651:20(I)(a).

of the minimum sentence.⁶¹ A petition to suspend a sentence may be brought at any time by the department of corrections commissioner if the prisoner is deemed “suitable” for suspension or by the attorney general for “substantial assistance by the inmate in the investigation or prosecution of a serious felony offense.”⁶² The New Hampshire Supreme Court has held that procedural due process does not apply to petitions filed under this provision, and they may be denied by the courts without a hearing.⁶³

d. Release during overcrowding emergencies

New Hampshire has no statutory release system to relieve prison overcrowding.

4. Overall assessment of indeterminacy in New Hampshire’s prison-sentencing system

Our overall assessment of the degree of indeterminacy in New Hampshire’s prison-sentencing system is based on Figures 3, 4, and 5—although we may be wrong that this is the dominant form of sentence selected by judges in the state. Our judgment is that the system operates with a *high degree of indeterminacy* overall. Although sentences of extremely high indeterminacy are permitted under state law (see Figures 6, 7, and 8), our best guess is that they are outnumbered by sentences in the high determinacy category.

In contrast with most other states, the full degree of indeterminacy in New Hampshire sentences is not solely a function of judicial minimum terms. Significant credit earnings—both good conduct and earned time credits—are needed to advance parole release eligibility to the earliest possible junctures, as illustrated in Figures 5 and 8 of this report. In most other paroling states, the earliest possible parole release date is more easily within reach of average prisoners.

For prisoners who achieve early release eligibility, release is not ensured. In such cases, the parole board holds a large expanse of release and release-denial discretion. The board’s release-denial discretion is partially cancelled out by movable mandatory release dates (MRDs) that are driven by earned time credits. The movable MRD mechanism is not generous in New Hampshire compared with other states, however. Most prisoners must serve at least 70 percent of their maximum terms before reaching their MRDs, and prisoners with long maximum sentences must wait longer than that. For maximum terms of 10 years or longer, the potential benefit of movable MRDs is minimal. See Figures 9, 10, and 11.

New Hampshire is one of several states in which, to an important extent, judges are gatekeepers of the degrees of indeterminacy that are built into their sentences. New Hampshire judges are precluded from imposing sentences with *low or moderate degrees of indeterminacy* in

⁶¹ *Id.*

⁶² N.H. Rev. Stat. § 651:20(I)(b)–(c).

⁶³ *State v. Duquette*, 893 A.2d 709, 711-12 (N.H. 2006).

general-rules cases, but they do have statutory discretion to vary their sentences from *high to extremely high indeterminacy* within a wide range of possibility. Among other things, this means that the overall level of indeterminacy of New Hampshire's prison-sentencing system can be expected to change continuously with shifts in judicial sentencing norms and practices.

Our modeling of New Hampshire's system indicates that the parole board has more influence over prison population size than any other actor in the prison-sentencing system, at least with respect to general-rules sentences. While sentencing courts have some power to calibrate the amount of control passed forward to parole boards in individual cases, the range of possibility is between a parole board with a great deal of power and a board with still more authority.