



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: ARKANSAS

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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.

Prison-Release Discretion and Prison Population Size

State Report: Arkansas¹

Executive Summary

We assess the Arkansas prison-sentencing system as operating with a *high degree of indeterminacy* overall (see pp. v-vi). Prisoners subject to the general rules of prison release serve sentences that are 17 percent determinate or 25 percent determinate, depending on which of two “seriousness” classifications their offenses place them in. This results in a population-multiplier potential across the majority of prisoners that falls somewhere between 5.9:1 and 4:1. The exercise of prison-release discretion at the back end of the Arkansas prison-sentencing system exerts tremendous control over the actual size of the state’s prison population.

Nearly all prison-release discretion at the back end of the system is concentrated in the parole board. The department of corrections plays a secondary role through the administration of good-time credits which has comparatively little impact on time actually served by prisoners. Most notably, good-time credits do not act to advance prisoners’ mandatory release dates in Arkansas. Thus, the parole board’s release-denial discretion always extends across the full length of the judicial maximum term. To the extent that back-end decisionmakers have the power to drive prison population size in Arkansas, that power is consolidated almost entirely in the parole board.

Arkansas maintains a system of administrative parole release (called “transfer release”) that streamlines the procedural steps that must be followed by the parole board when authorizing the releases of substantial numbers of prisoners. In many cases, hearings are not required, and the parole board’s review is restricted to specific considerations, such as prisoners’ risk and needs assessments. We know little about the operational impact of Arkansas’s version of administrative parole release. The system includes no legally-enforceable presumption of release. Also, transfer release must be aborted at the request of crime victims.

Terminology note

This report will refer to the Arkansas Parole Board as the “parole board.” The Arkansas Department of Corrections will be referred to as 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. For a broad overview of the law of parole release and supervision in Arkansas, see Alexis Lee Watts, Edward E. Rhine, & Brendan Delaney, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Arkansas* (Robina Institute of Criminal Law and Criminal Justice, 2017).

Introduction

Arkansas's prison-rate history, 1972 to 2020

At yearend 2020, Arkansas's prison rate was 529 per 100,000 general population, with a prison population of 16,052.² Arkansas's prison rate was 4th highest among all states.

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

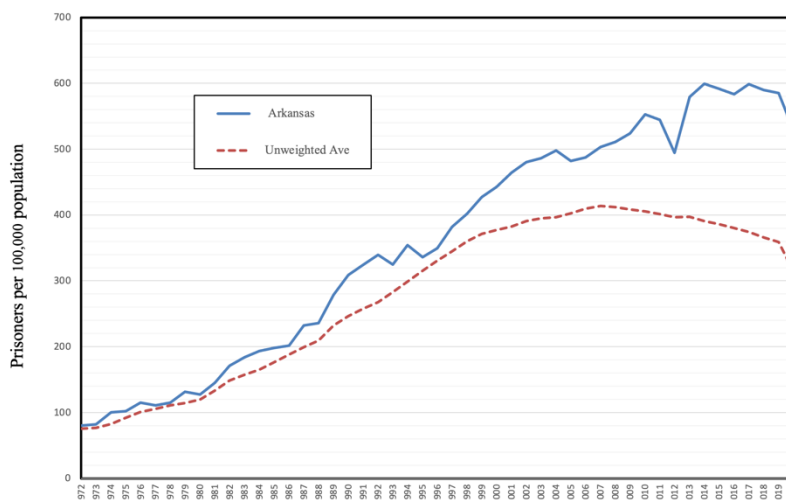
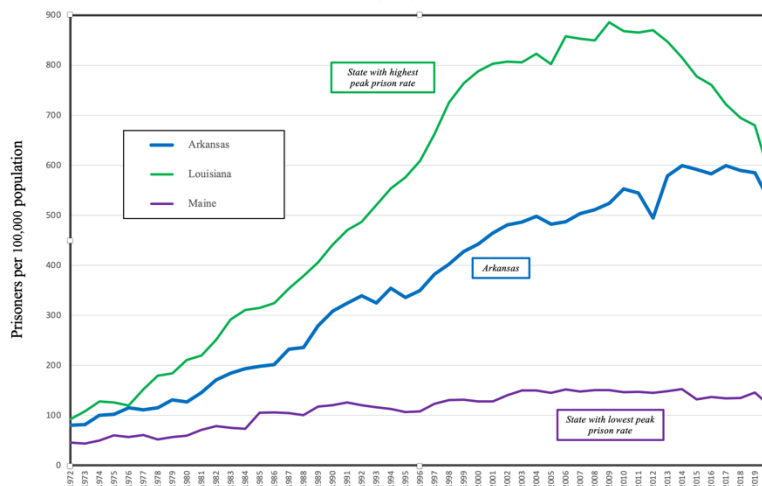


Figure 2. Prison Rate Change in Arkansas, Louisiana, and Maine, 1972 to 2020



Sources: Timothy J Flanagan, Kathleen Maguire & Michael J. Hindelang, *Sourcebook of Criminal Justice Statistics, 1990*, at 605 table 6.56, Rate (per 100,000 resident population) of sentenced prisoners under jurisdiction of State and Federal correctional authorities on December 31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991) (for 1972-1977); E. Ann Carson, *Imprisonment*

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 Arkansas's imprisonment rates after 2020 is presented below in the section on "The COVID period in Arkansas."

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).

Arkansas reached its peak prison rate in 2009 at 599 per 100,000, which dropped to 529 per 100,000 in 2020. This is a net difference of -70 per 100,000, which was the 40th 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.

As suggested in Figures 1 and 2, Arkansas's longterm prison-growth history has been one of a relatively middle-of-the-road state rising up into the "highest-prison-rate" bracket among all 50 states.

As shown in Figure 1, Arkansas's prison rates were only a little higher than the average state's through the 1970s and 1980s. Afterward, Arkansas broke from the pack. Especially from 1995-2017, Arkansas prison rates rose at a faster pace than in the average state. In 1995, Arkansas had the 19th highest prison rate in the country. By 2014, Arkansas moved into the "top" five states with the highest prison rates nationwide.

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

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).

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 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).

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 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 Arkansas

The Arkansas DOC used the state's existing law to respond to prison overcrowding emergencies to bring about the early release of a substantial number of prisoners in the Spring and Summer of 2020.⁹ The releases were made possible by the governor's executive order in March 2020, which allowed the DOC to suspend ordinary release requirements under the emergency release act.¹⁰

In a separate study, the Robina Institute found 730 releases in Arkansas from March 2020 through December 2021 that were accelerated in response to the pandemic.¹¹ This number is the equivalent of about four percent of Arkansas's pre-COVID prison population (at yearend 2019). In March 2020, Arkansas Governor Asa Hutchinson issued an executive order (and later an extension of that order) permitting state agencies to temporarily suspend statutory and regulatory requirements in response to the COVID crisis. As reported by the Robina Institute:

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.

⁹ See Ark. Code § 12-28-603, discussed further in Section 3.3 below.

¹⁰ Ark. Exec. Order No. 20-06 (Mar. 17, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-06_.pdf.

¹¹ 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.

The Arkansas Department of Corrections (ADC) used these executive orders to suspend two eligibility requirements for people in prison being considered for early release due to a prison overcrowding state of emergency (these requirements can be found in Ark. Code § 12-28-604). Specifically, ADC suspended the requirements (found in Section (b)(1)) that eligible people in prison have been incarcerated for six months and be Class I or Class II. After those requirements were suspended, 300 people were released from prison on May 12, 2020. Then, between May 12 and July 3, 2020, 430 more people were released. All those released from prison had been incarcerated for nonviolent and non-sexual offenses.¹²

In calendar year 2020, Arkansas's prison rate fell from 585 to 529 per 100,000—a one-year decline of -56 per 100,000, or 9.6 percent reduction in the state's prison rate. This was the 20th largest one-year drop reported among all 50 states for that year (tied with Tennessee).¹³ The state's total prison population fell by 1,661 people, from 17,713 to 16,052.¹⁴

Accelerated COVID releases were responsible for less than half of the state's reduction in prison population in 2020. Falling admissions were a more important factor than annual releases. The number of prison admissions in the state dropped by 18.9 percent in 2020 compared with the previous year (from 10,268 to 8,328). Total releases in 2020 fell by 0.1 percent over 2019 (from 9,768 to 9,760).¹⁵

Arkansas's prison-rate drop reversed after calendar year 2020. From yearend 2020 to December 2021, the Vera Institute reported that Arkansas saw an increase in its prison

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, 64 Appendix E.

¹³ The largest single-state drop from yearend 2019 to yearend 2020 was in Kentucky, from 515 to 414 per 100,000. E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 16 table 7.

¹⁴ *Id.*, at 11 table 4.

¹⁵ E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 17 table 8, 19 table 9.

population, from 16,094 to 17,023—or 5.8 percent.¹⁶ As of June 30, 2022, the Arkansas Department of Corrections reported a total prison population of 17,129.¹⁷

I. General Rules of Prison-Release Discretion

A. Determination of release date

1.1. General rules of first release eligibility

Most prisoners in Arkansas become eligible for parole release—called “*transfer* to community correction” in Arkansas statutes—after serving minimum terms of one-third or one-half of their judicial maximum sentences, which may be reduced by “meritorious good time” credits.¹⁸ The sorting of prisoners into the one-third and one-half categories is based on “the seriousness determination made by the Arkansas Sentencing Commission” in the Arkansas Sentencing

¹⁶ See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2. As a general matter, Vera’s *People in Prison* reports should not be treated uncritically as “updates” of BJS’s annual *Prisoners* series. Vera does not always gather prisoner counts from the same dates as BJS, nor does it calculate state prison rates in the same way. For example, BJS calculates yearend prison rates using yearend population estimates for each state from the Census Bureau, while Vera uses the Census Bureau’s July 1 estimates (six months earlier). Occasionally, the absolute numbers of state prisoners reported by Vera are dramatically different from those in BJS reports, suggesting basic differences in counting rules. Because of such incompatibilities, we do not attempt to integrate data from the two sources in any of our state reports for this project.

¹⁷ Arkansas Department of Corrections, *Division of Correction Board Report: July 2022*, at 13, https://doc.arkansas.gov/wp-content/uploads/2022/07/Division-of-Correction-Directors-Board-Report_July2022_FINAL.pdf.

¹⁸ The term “transfer” may be a euphemism to soften the lenient connotations of the word “release.” It emphasizes that the releasee is still serving the same judicial sentence as before release, with a “transfer” from one correctional setting to another. Arkansas allows jury sentencing in noncapital cases. See Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885 (2004) (study of jury sentencing in Arkansas, Kentucky, and Virginia). Jury sentences are treated as “judicial maximum sentences” for purposes of our analysis.

Standards Grid and Seriousness Reference Table.¹⁹ Nationwide, Arkansas is the only jurisdiction to delegate such a function to a state sentencing commission.²⁰

a. Transfer-eligible prisoners

Arkansas has two distinct release procedures for prisoners eligible for parole release, which are called “transfer release” and “discretionary transfer release.” “Transfer release” in Arkansas is a version of the streamlined *administrative parole release* (APR) programs found in eleven other states. It allows prisoners to be released without a hearing on their first dates of release eligibility, after the board has made only a truncated review of their files.²¹ Prisoners convicted of certain serious offenses enumerated by statute are not eligible for APR (that is, not “transfer eligible”)²² (see the list in section 1.1b below).

Transfer-eligible prisoners can lose their opportunity for release without a hearing if certain negative conditions are met. Hearings are required for prisoners who have received a major disciplinary report resulting in the loss of good time. In addition, the parole board is required to perform a “review” of “information such as the result of the risk-needs assessment to inform the decision of whether to release a person on parole by quantifying that person's risk to reoffend.” Release without a hearing is foreclosed if there are “indications” in the parole

¹⁹ Ark. Code § 16-93-614(c)(3)(A); Arkansas Sentencing Commission, *Arkansas Sentencing Standards Grid & Seriousness Reference Table* (2017). The Sentencing Standards place different categories or subcategories of offenses into ten levels of “seriousness ranking.” Arkansas Sentencing Commission, *Arkansas Sentencing Standards Grid & Seriousness Reference Table* (2017), at 5-32 (“Offense Seriousness Ranking Table for all Criminal Offenses”). Those with a ranking of seven or more must serve minimum terms of one-half the judicial maximum term “minus good time” while those ranked six and below receive minimum terms of one-third minus good time. *Id.* at 3 (“Revised Arkansas Sentencing Standards Grid” effective for offenses committed on or after January 1, 2018).

The Arkansas Sentencing Commission was originally an independent agency when created in 1993, *see* 1993 Ark. Acts 532, § 4(a), but became a division of the Arkansas Department of Corrections in 2019. The commission’s voting membership is made up of gubernatorial appointees. *See* Arkansas Department of Corrections, *Arkansas Sentencing Commission*, at <https://doc.arkansas.gov/sentencing-commission/about-the-commission/>, visited August 17, 2022.

²⁰ The ratio of minimum to maximum terms in most states is established by statutory rule or formula, although sentencing courts in 11 states have the authority to vary the ratio in individual cases within statutory limitations. *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. 4 (“Variations in the structure of parole-release discretion”).

²¹ Ark. Code § 16-3-615. The parole board is required to begin its “preliminary review” no later than six months before a prisoner’s transfer eligibility date. Ark. Code § 16-93-615(a)(1)(C). For a comparative analysis of the APR programs in 12 states, including Arkansas, *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. 5 (“Highlighted topic: Administrative parole release”).

²² Ark. Code § 16-3-615(a)(1)(A).

board's "risk-needs assessment review that special conditions need to be placed on the inmate." Finally, a hearing is also required if there has been "a request by a victim to have input on transfer conditions."²³

If the parole board conducts a hearing for a transfer-eligible prisoner, it must take one of two actions: it must grant release or else deny release "on a set of established criteria and ... accompany the denial with a prescribed course of action to be undertaken by the inmate to rectify the Parole Board's concerns."²⁴ After a denial, a prisoner's release is delayed until a later date, "[u]pon completion of the course of action determined by the Parole Board and after final review of the inmate's file to ensure successful completion."²⁵ This may be considered a delayed form of APR, with no requirement of a second hearing. All that is needed is the parole board's "final review" of the prisoner's compliance with its prescribed course of action.²⁶ If the prisoner fails to fulfill the course of action, however, they must petition the board to obtain a discretionary release hearing.²⁷

b. Discretionary transfer release

Prisoners not eligible for APR (not "transfer eligible") are generally eligible for "discretionary transfer release" after serving one-third or one-half of their sentences, with credit for good time, depending on the seriousness determination made by the Arkansas Sentencing Commission.²⁸ Parole release is not automatic and requires a full review by the parole board.²⁹ The following offenses render an offender eligible for discretionary transfer release:

²³ Ark. Code § 16-93-615(a)(1)(B), (D). Of the states that allow administrative parole release, Arkansas, Maryland, Mississippi, and Oklahoma allow expedited procedures to be blocked or derailed at the request of crime victims. 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), at 49-51 table 7.

²⁴ Ark. Code § 16-93-615(a)(2)(B).

²⁵ Ark. Code § 16-93-615(a)(2)(C); Arkansas Parole Board, *Policy Manual* (2015) at 4. The prisoner will be released after completed of their required course of action and a final review of their file.

²⁶ Ark. Code § 16-93-615(a)(2)(C).

²⁷ See Ark. Code § 16-93-615(a)(3).

²⁸ Ark. Code § 16-93-615(b)(1).

²⁹ Ark. Code § 16-93-615(b)(2). The procedural requirements of discretionary transfer release are similar to those found in other states, and do not follow an administrative parole model. See, e.g., Ark. Code § 16-93-701(a)(1),(b)(1),(b)(2) (requiring an interview of the prisoner, a consideration of the prisoner's risk-needs assessments, and a board determination that "there is a reasonable probability that the inmate can be released without detriment to the community or himself or herself and is able and willing to fulfill the obligations of a law-abiding citizen" and that release is in "the best interests of society"). The board must also solicit recommendations on the question of release from victims of certain crimes and "the committing court, the prosecuting attorney, and the county sheriff of the county from which the inmate was committed." Ark. Code § 16-93-702(a),(b).

Capital or attempted capital murder, murder or attempted murder in the first degree, murder in the second degree, manslaughter, negligent homicide, an act of terrorism, kidnapping, aggravated robbery or attempted aggravated robbery, terroristic act, causing a catastrophe, arson, aggravated residential burglary, unlawful discharge of a firearm from a vehicle, any offense for which the offender is required to register as a sex offender, battery in the first degree, domestic battering in the first degree, engaging in a continuing criminal enterprise, and simultaneous possession of drugs and firearms.³⁰

c. 70 percent crimes

Offenders convicted of certain enumerated crimes do not become eligible for discretionary parole until they have served 70 percent of the imposed term.³¹ Certain offenses are still eligible to receive meritorious good time under this scheme, but others are made ineligible (listed below in section 1.4). Offenses triggering the 70 percent provision are:

Murder in the first degree, kidnapping as a Class Y felony, aggravated robbery, rape, trafficking of persons as a Class Y felony, causing a catastrophe, manufacturing methamphetamine, trafficking methamphetamine, and possession of drug paraphernalia with the purpose to manufacture methamphetamine.³²

d. 80 percent crimes

Offenders convicted of certain serious felonies involving violence³³ may be subject to delayed release. Delayed release means that the prisoner would not be eligible for parole until serving at least 80 percent of their sentence. To be subject to delayed release, the prisoner must be convicted of a serious felony involving violence under an aggravating circumstance.³⁴ After a person has been found guilty of a serious felony involving violence, the jury must separately determine, after hearing evidence from both sides, that one or more aggravating circumstances existed that would result in

³⁰ Ark. Code § 16-93-615(b)(1)(A)-(G).

³¹ Ark. Code § 16-93-618(a)(1).

³² Ark. Code § 16-93-618(a)(1)(A)-(I).

³³ The list of relevant serious felonies involving violence are: murder in the first degree; murder in the second degree; battery in the first degree; aggravated assault; felony terroristic threatening; terroristic act; arson, unlawful discharge of a firearm from a vehicle; or an attempt, solicitation, or conspiracy of one of the aforementioned offenses. Ark. Code § 5-4-405(a)(4).

³⁴ An “aggravating circumstance” is one in which the offender purposely selected the victim because of the victim’s membership or association with a recognizable and identifiable group or class based on mental, physical, biological, cultural, political, or religious beliefs or characteristics. Ark. Code § 5-4-405(a)(1).

delayed release. If the court is the finder of fact, evidence of an aggravating circumstance is presented at the same time as the substantive case.³⁵

1.2. Reconsideration after denials of release

When the parole board exercises its discretion to deny release, it may delay reconsideration for a maximum of two years.³⁶

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

1.3. Generally-available credit: types and amounts

Good-time credits are called “meritorious good time” in Arkansas, which is awarded “for good discipline, behavior, work practices, job responsibilities, and involvement in rehabilitative activities.”³⁷ Prisoners may earn up to 30 days of meritorious good time per month while incarcerated.³⁸

The department of corrections may also award meritorious good time of up to 90 days for “each successful completion” of a state-sponsored general education development certificate program, vocational program for which certification is awarded, drug or alcohol treatment program, or approved pre-release and other rehabilitative programs or assignments. In total, such awards may not exceed 360 days.³⁹

The department of corrections is required to classify prisoners into no more than four classes “according to good behavior, good discipline, medical condition, job responsibilities, and involvement in rehabilitative activities.”⁴⁰ Prisoners reduced to the lowest class as a result of disciplinary action, and prisoners serving disciplinary sanctions in punitive segregation, are not eligible to earn meritorious good time.⁴¹

³⁵ Ark. Code § 5-4-405(a)(2), (b)

³⁶ Ark. Code Ann. § 16-93-615(b)(5).

³⁷ Ark. Code § 12-29-201(c) (such credits “shall be allocated under rules promulgated by the Board of Corrections and administered by the respective Division of Correction ... staff”). This is an unusual use of the term “meritorious good time,” which usually applies to prisoners’ acts of heroism or other extraordinary service. This may be a strategic word choice, to avoid the connotation that monthly credits are awarded by rote.

³⁸ Ark. Code § 12-29-201(a) (“An inmate may be entitled to meritorious good time reducing his or her transfer eligibility date up to thirty (30) days for each month incarcerated after imposition of sentence.”); Ark. Code § 12-29-202(b)(1) (“An inmate who maintains class through good behavior, good discipline, work practices, job responsibilities, and involvement in rehabilitative activities may earn up to one (1) day for every day served as a reduction toward his or her transfer eligibility date for each day incarcerated after the imposition of sentence.”).

³⁹ Ark. Code § 12-29-202(d)(1).

⁴⁰ Ark. Code § 12-29-202(a)(3).

⁴¹ Ark. Code § 12-29-202(b)(2), (3).

Prisoners convicted of murder in the first degree, kidnapping as a Class Y felony, aggravated robbery, rape, and trafficking of persons as a Class Y felony are never eligible to receive meritorious good time under any circumstances.⁴²

Prisoners sentenced to death or life imprisonment without parole are not eligible for meritorious good time, unless their sentences have been commuted to a term of years (see section 3.2).⁴³

a. Effect of meritorious good time on parole-release eligibility

Meritorious good time is applied to advance prisoners' dates of first eligibility for parole release (the "transfer eligibility date" in Arkansas) but may not reduce that minimum term by more than 50 percent.⁴⁴

b. Effect of meritorious good time on the judicial maximum term

Meritorious good time is not applied to reduce the length of the judicial maximum sentence.⁴⁵ Arkansas is one of ten states that do not advance prisoners' mandatory release dates through the accrual of credits.⁴⁶

1.5. Loss of meritorious good time credits

All or part of accrued meritorious good time may be forfeited "for infraction of rules," but all credits must be forfeited in the event of escape.⁴⁷ The department of corrections may restore lost meritorious good time according to rules it has promulgated.⁴⁸ Interestingly, all credits may be restored to a prisoner who has escaped "if the escapee returns to the institution voluntarily, without expense to the state, and without any act of violence while a fugitive from the institution."⁴⁹

⁴² Ark. Code § 16-93-618(d). This ban applies "[n]otwithstanding any law allowing the award of meritorious good time or any other law to the contrary." Ark. Code § 16-93-618(a)(1).

⁴³ Ark. Code § 12-29-201(g)(1), (2).

⁴⁴ Ark. Code § 12-29-201(e)(2).

⁴⁵ Ark. Code § 12-29-201(d) ("Meritorious good time will not be applied to reduce the length of a sentence.").

⁴⁶ 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").

⁴⁷ Ark. Code § 12-29-203(a).

⁴⁸ Ark. Code § 12-29-203(c).

⁴⁹ Ark. Code § 12-29-203(b). This suggests that episodes of escape that turn out to be nonserious are encountered with some regularity.

II. Life Sentences in Arkansas

2.1. Life sentences without parole

Prisoners sentenced to life without parole (LWOP) are not eligible for release unless granted a commutation, pardon, or reprieve by the governor.⁵⁰

2.2. Life sentences with possibility of parole

Generally, the Arkansas legislature has not provided for a sentence of life with the possibility of parole in over fifty years. Therefore, for adult offenders, a life sentence in Arkansas virtually always means LWOP.⁵¹

2.3. Juvenile life sentences and sentences longer than 20 years

Arkansas has abolished the sentence of LWOP for juvenile offenders. Prisoners convicted of capital murder committed before age 18 become eligible for discretionary parole release after 30 years. If convicted of murder in the first degree, they become eligible after 25 years.⁵² In either case, meritorious good time is not credited against their minimum terms.⁵³

There is also a special parole eligibility rule for prisoners who committed crimes before age 18 “in which the death of another person did not occur.” Such prisoners are “eligible for release on parole no later than after twenty (20) years of incarceration, including any applicable sentencing enhancements, and including an instance in which multiple sentences are to be served consecutively or concurrently, unless by law the minor is eligible for earlier parole eligibility.”⁵⁴ For prisoners in this category, credits for meritorious good time are applied to reduce their minimum terms.⁵⁵

⁵⁰ Ark. Code § 5-4-606.

⁵¹ *Hobbs v. Turner*, 431 S.W.3d 283, 287 (Ark. 2014).

⁵² Ark. Code § 16-93-621(a)(2)(A). This provision, enacted in 2017, was expressly made retroactive in Ark. Code § 16-93-621(a)(2)(B) (“Subdivision (a)(2)(A) of this section applies retroactively to a minor whose offense was committed before he or she was eighteen (18) years of age, including minors serving sentences of life, regardless of the original sentences that were imposed.”).

⁵³ Ark. Code § 16-93-621(a)(3).

⁵⁴ Ark. Code § 16-93-621(a)(1).

⁵⁵ The ban on meritorious good time credits in Ark. Code § 16-93-621(a)(3) is limited to cases of juveniles convicted of capital or first-degree murder.

III. Infrequently used forms of prison release in Arkansas

3.1. Medical or “compassionate” release

The Director of the Division of Correction or the Director of the Division of Community Correction must notify the parole board when an inmate is either terminally ill or permanently incapacitated and should be considered for medical parole. The inmate’s diagnosis must be confirmed by the independent opinions of a Division of Correction or Division of Community Correction physician and a consultant physician in Arkansas. The parole board may approve the inmate for medical parole if it is satisfied that the inmate’s physical condition makes the inmate no longer a threat to public safety. The board may revoke a person’s medical parole supervision if the person’s medical condition improves to the point that he or she would not have initially been eligible for medical parole. Inmates required to register as a sex offender who are assessed as a Level 3 offender or higher⁵⁶ or have been convicted of sex offenses where the victim was fourteen years of age or younger are ineligible for medical parole.⁵⁷

According to research conducted by Families Against Mandatory Minimums, the parole board in Arkansas does not provide any data in the annual reports regarding how many inmates are released via medical parole.⁵⁸

3.2. Executive clemency

The Governor of Arkansas has the power to grant reprieves, commutations of sentence, and pardons in all criminal and penal cases excepting treason and impeachment.⁵⁹ All applications for pardon, commutation of sentence, or reprieve must be referred to the parole board for investigation. Before the board considers an application, it must solicit the recommendation of the committing court, prosecuting attorney, and county sheriff of the county where the person was committed. As part of the board’s investigation, the Chair of the parole board has the power to issue oaths and subpoena witnesses to appear and testify and bring before the board any relevant books, papers, records, or documents. The board must issue public notice of each recommendation it submits to the governor.⁶⁰

The Governor of Arkansas receives around 400-500 applications for pardon a year, of which around 100 are granted. The current governor, Governor Asa Hutchinson, has granted more

⁵⁶ Level 3 Offenders are sex offenders deemed to be “High Risk.” See Arkansas Crime Information Center, *Community Information: Sex Offender Information*, <https://www.dps.arkansas.gov/crime-info-support/arkansas-crime-information-center/community-information/sex-offender-information/> (last visited Aug. 18, 2022).

⁵⁷ Ark. Code § 12-29-404(b)-(e).

⁵⁸ Families Against Mandatory Minimums, *Arkansas Compassionate Release* (December 2021), at 3, https://fammm.org/wp-content/uploads/Arkansas_Final.pdf.

⁵⁹ Ark. Const. art. VI, § 18.

⁶⁰ Ark. Code § 16-93-204.

than 500 pardons since January 2015.⁶¹ Press releases are published each month announcing the governor's intent to grant executive clemency, found at the government website.⁶²

3.3. Emergency release for prison overcrowding

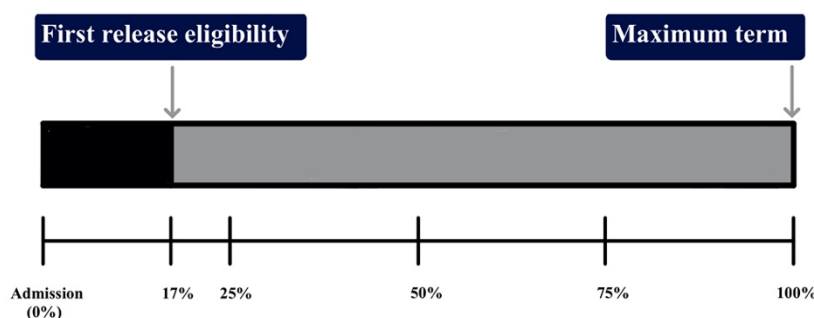
The Board of Corrections may declare a prison overcrowding state of emergency when the population of the prison system exceeds 98 percent of capacity for thirty consecutive days.⁶³ The director of the Department of Corrections must provide the board with a list of eligible inmates and recommend certain inmates from that list for parole, transfer, or discharge. The Board of Corrections may move up the projected parole eligibility, transfer eligibility, or minimum release date of any inmate on the list by up to ninety days.⁶⁴ A state of emergency can only be declared once every ninety days.⁶⁵

IV. Overall assessment of indeterminacy in Arkansas's prison-sentencing system

4.1. General-rules cases

Arkansas has two release formulas that together cover the majority of all prisoners. Figures 3 and 4 depict the applicable rules for prisoners whose offenses are ranked at the lower level of seriousness in the state's sentencing guidelines. Figures 5 and 6 show the rules for prisoners convicted of crimes ranked at the higher level of seriousness. (For general-rules prisoners, there are only two levels.)

Arkansas Figure 4. Prison-Release Timeline for Prisoners with Release Eligibility at One-Third of Maximum with 30 Days of Meritorious Good Time per Month



⁶¹ Restoration of Rights Project, *Arkansas Restoration of Rights & Record Relief* (Updated Dec. 2, 2021), <https://ccresourcecenter.org/state-restoration-profiles/arkansas-restoration-of-rights-pardon-expungement-sealing/>.

⁶² <https://governor.arkansas.gov/our-office/clemency-and-extraditions/>.

⁶³ Ark. Code § 12-28-603(a)(1).

⁶⁴ Ark. Code § 12-28-604(a)(1)-(3).

⁶⁵ Ark. Code § 12-28-605(a).

Prisoners in the lower-seriousness group enter prison with a date of first parole-release eligibility set at one-third of their judicial maximum terms, as shown in Figure 3. This minimum term to release eligibility may be shortened by as much as 50 percent through the accrual of meritorious good time credits, as illustrated in Figure 4. The full 50-percent discount is very much achievable in the Arkansas system because the default earning rate of credits is 30 days per month. This by itself would result in a foreshortening of the minimum term by 50 percent. Additional credits are available for educational attainment, program completion, and the like. Among the lower-seriousness prisoners, we expect many to fall within the scenario shown in Figure 4, which allows for parole release as early as 16.67 percent of their judicial maximum term.

Furthermore, most low-seriousness prisoners are eligible for the streamlined process of “transfer release,” which allows for release at first eligibility with no hearing. This is not fully automatic release, however, because a prisoner can be removed from the transfer release pool at the parole board’s discretion or when an objection is lodged by a crime victim (see section 1.1a).

Notably, Arkansas allows no credits or discounts to be subtracted from prisoners’ judicial maximum terms to produce earlier dates of mandatory release. This is true across all categories of prisoners, not just the lower-seriousness group. Therefore, the parole board’s release-denial authority always extends to the full length of the judicial maximum term. In the terminology of this project, the date of mandatory release as fixed by the judicial maximum sentence is an *immovable milestone*. The Arkansas system may be contrasted with many other states, in which credits or discounts are applied to advance prisoners’ dates of mandatory release. In a few states with movable dates of mandatory release and generous credit-earning rates, some prisoners can earn mandatory release at or before the halfway point of their judicial maximum terms.⁶⁶

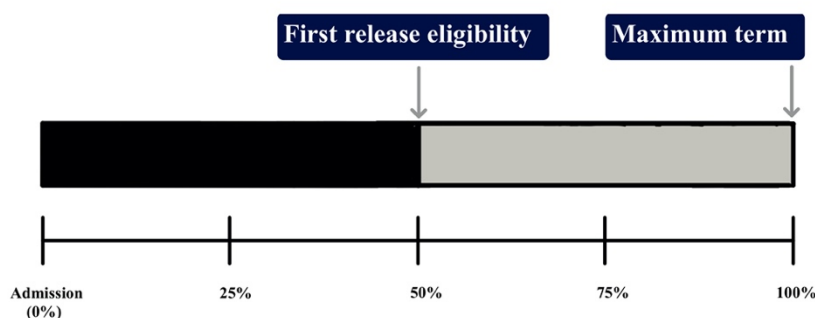
If we accept Figure 4 as a common scenario for many Arkansas prisoners, it is a useful baseline for measurement of the degree of indeterminacy that exists for this subgroup of the state’s prison population. The prison sentence shown in Figure 4 is 17 percent determinate and 83 percent indeterminate. The population-multiplier capacity that attends such sentences is 5.9:1. That is, this segment of the prison population would be 5.9 times larger in a *never-release regime* (in which no one is ever released before expiration of their maximum terms) than in an *always-*

⁶⁶ See Kevin R. Reitz, Melanie Griffith, and Edward E. Rhine, *Prison-Release Discretion and Prison Population Size, State Report: Iowa* (Robina Institute of Criminal Law and Criminal Justice, 2020), at 15 figure 4 (illustrating cases of mandatory release at 45 percent of maximum term); Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine, *Prison-Release Discretion and Prison Population Size, State Report: Maryland* (Robina Institute of Criminal Law and Criminal Justice, 2020), at 14-15 figure 4 (50 percent discount against maximum term possible); Kevin R. Reitz, Bree Crye, and Edward E. Rhine, *Prison-Release Discretion and Prison Population Size, State Report: Oklahoma* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 19-20 figure 4 (illustrating case of mandatory release at 42 percent of maximum term).

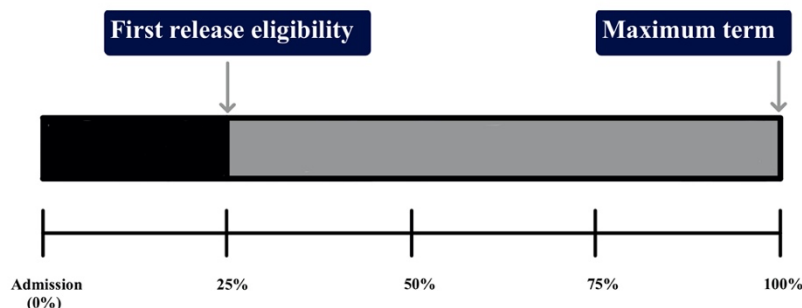
release regime (in which every prisoner is released at earliest eligibility). In comparison with other states, this is a *high degree of indeterminacy*.

Figures 5 and 6 show the circumstances of general-rules prisoners whose offenses have been ranked in the higher level of seriousness by the sentencing guidelines. Figure 5 illustrates the situation that exists for such prisoners at admission, before any meritorious good time has been earned. For such prisoners, the first date of parole release eligibility is set at 50 percent of their maximum terms. Figure 6 then takes account of the accrual of credits at the full statutory rate of 30 days per month. Arkansas law allows prisoners' minimum terms to be shortened by as much as 50 percent—which is precisely the reduction that would occur under the standard earning rate.

Arkansas Figure 5. Prison-Release Timeline for Prisoners with Release Eligibility at One-Half of Maximum with No Meritorious Good Time



Arkansas Figure 6. Prison-Release Timeline for Prisoners with Release Eligibility at One-Half of Maximum with 30 Days of Meritorious Good Time per Month

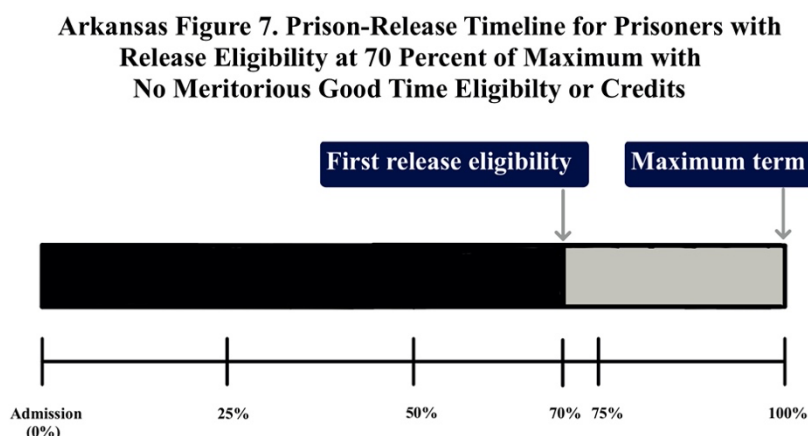


The prison-release rules for the higher-seriousness group are similar to those for the lower-seriousness group, although there is a lower degree of indeterminacy in their sentences. It is reasonable to take Figure 6 to be representative of a large number of cases in the higher-seriousness class. In Figure 6, the prison sentence is 25 percent determinate and 75 percent indeterminate. The PMP for the cohort with such sentences is 4:1. In our comparative

assessment, this sentence composition carries a high degree of indeterminacy, albeit not dramatically different from sentences we place in the category of moderate indeterminacy.

4.2. Heightened determinacy: the 70-percent group

A distinct set of rules exist for certain crimes deemed particularly serious by the Arkansas legislature. Prisoners in these classes are not eligible for discretionary parole release until they have served 70 percent of their judicial maximum terms, as shown in Figure 7. Only some of the 70-percent group may receive reductions of their minimum terms through the earning of meritorious good time credits. Full earnings would allow them to advance their dates of first release eligibility to the 35-percent mark of their judicial sentences (not pictured, but similar to Figure 7).



Publicly available statistics do not allow us to estimate the percentage of Arkansas prisoners who are serving sentences that fall under the 70-percent formula, but it is likely to be a much smaller cohort than the general-rules groups discussed in section 4.1.

We classify the sentences depicted in Figure 7 as having a low degree of indeterminacy.⁶⁷ Such sentences are 70 percent determinate and 30 percent indeterminate, with a PMP of only 1.4:1.

4.3. Distribution of time-served discretion

Arkansas is a state with a powerful parole board and a weak department of corrections, if the yardstick is how back-end release discretion is distributed between the two agencies. In every figure shown above, the parole board's release discretion and release-denial discretion span the entire indeterminate segment of the timeline. The department of corrections has no power to reduce the parole board's release-denial discretion, which always reaches to the full length of

⁶⁷ The Figure 7 configuration falls short of sentences of extremely-low indeterminacy, such as those found in Virginia and the federal system, where most prisoners must serve at least 87 percent of their judicial maximum terms before reaching the possibility of release.

the judicial maximum term. The only meaningful authority held by the department is to *increase* the board's release discretion through the award of meritorious good time credits that give prisoners advanced dates of release eligibility. This is a relatively weak power because it merely opens the possibility of parole release through movement of the eligibility milestone. An actual release decision still requires separate discretionary action by the parole board.

4.4. Overall assessment

Our overall judgment is that the prison-sentencing system in Arkansas operates with a *high degree of indeterminacy*. This is true by mathematical computation (see section 4.1), but we consider the degree of indeterminacy to be elevated by the fact that the parole board by itself is the dominant decisionmaker. There are few checks and balances in Arkansas's back-end release process, and none at all with respect to the parole board's power to deny release. This gives the parole board a great deal of unilateral power to increase time served by individual prisoners and, in the aggregate, to increase the state's prison population.