

ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: DELAWARE

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Prison-Release Discretion and Prison Population Size

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Definitions and Concepts

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

Scaling up to the systemwide level, the project explores the degree to which prison population size in each state is placed under the jurisdiction of decision makers who exercise time-served discretion after judicial sentences have been finalized. Higher degrees of indeterminacy across 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 greatly across U.S. jurisdictions. One goal is to inform state governments how they may deliberately adjust their laws and practices of prison-release authority to achieve desired policy goals, such as reductions of prison populations in a manner consistent with public safety

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. Our five tiers are based on the variations we observe in current American sentencing systems, not any absolute or theoretical conceptions of degrees of indeterminacy that could be imagined in hypothetical systems.

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

Prison-Release Discretion and Prison Population Size

State Report: Delaware¹

Executive Summary

On our subjective ranking scale, we rate Delaware's prison-sentencing system as one with a *low degree of indeterminacy*, alternatively expressed as a *high degree of determinacy*. Parole-release discretion has been abolished for all prisoners under current law. For general-rules prisoners, mandatory release dates are advanced through credit earnings under the jurisdiction of the department of corrections. For the highest-achieving prisoners, release may be advanced to approximately the 69-percent mark of the judicial maximum sentence.

As with other American systems that have abolished parole-release discretion for most or all prisoners, the primary location of back-end release discretion in Delaware is in the department of corrections, exercised by prison officials who administer the credit-earning and forfeiture rules. Other forms of back-end release discretion such as medical parole, executive clemency and sentence modification are rarely used and have no important impact on the system's operation as a whole.

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. We thank Johnette for her review of an earlier draft.

Introduction

Delaware's prison-rate history, 1972 to 2019

In 2019, Delaware's prison rate was 382 per 100,000 general population, with a year end prison population of 3,735.² Delaware's prison rate was 21st highest among all states.

Figure 1. Prison Rate Change in Delaware and (Unweighted) Average Among All States, 1972 to 2019

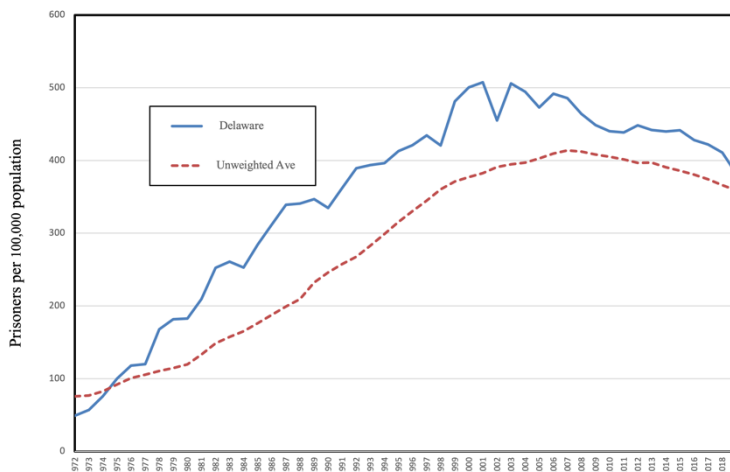
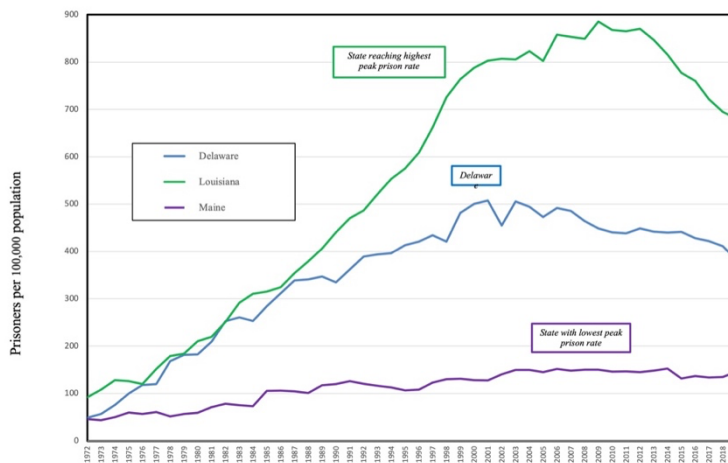


Figure 2. Prison Rate Change in Delaware, Louisiana, and Maine, 1972 to 2019



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 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

² E. Ann Carson, *Prisoners in 2018* (Bureau of Justice Statistics, 2020), at 7 table 4, 11 table 7.

Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), at <https://www.bjs.gov/index.cfm?ty=nps> (visited May 24, 2020); 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 2018-2019).

Delaware reached its peak prison rate in 2001 at 508 per 100,000, which dropped to 382 per 100,000 by yearend 2019. This is a net difference of -126 per 100,000, which was the 13th largest prison-rate drop of all states.

Figures 1 and 2 span two important periods in American criminal-justice history. From 1972-2007, the United States lived through 35 years of uninterrupted growth in the nationwide prison rate. This might be called the Great Prison Buildup. Since 2007, prison rates have been dropping in the average American state, although each state has charted its own course.

Terminology note

The Delaware Board of Parole acts as a parole board for the small number of prisoners in the state who are eligible for discretionary parole release. This report will refer to the Board of Parole as the “parole board.” Delaware’s Department of Correction will be referred to as the “department of corrections.”

1. General rules of prison release

Delaware’s Truth-in-Sentencing Act of 1989 abolished discretionary parole release for persons convicted of crimes committed on or after June 30, 1990.³ Prison sentences in Delaware are expressed as fixed terms.⁴ Prisoners reach mandatory release dates after serving their judicial

³ S. 58, 135th Gen. Assemb., 1st Sess. (Del. 1989); Del. Code tit. 11, § 4205(j) (“No sentence . . . imposed pursuant to this section [on felony sentences] is subject to parole.”). The truth-in-sentencing laws also limited the good-time credits that could be earned per year and generally reduced the maximum terms for most crime categories. See *Sentencing Information*, Del. Dep’t Just., https://attorneygeneral.delaware.gov/criminal/sentencing_info (last visited Feb. 18, 2021).

⁴ Del. Code tit. 11, § 3901(a) (2020); see also *id.* §§ 4205(a) (“A sentence of incarceration for a felony shall be a definite sentence.”), 4204(f) (“In committing an offender to the Department of Correction the court shall fix the maximum term of incarceration.”). There are seven classes of felonies in the state: class A felonies require a minimum sentence of 15 years, up to a maximum of life imprisonment; class B felonies a minimum of 2 years and a maximum of 25 years; class C felonies a maximum of 15 years; class D felonies a maximum of 8 years; class E felonies a maximum of 5 years; class F felonies a maximum of 3 years; and class G felonies a maximum of 2 years. *Id.* § 4205(b). Some crimes are outside of the classification scheme. For example, the punishment for first-degree murder is life imprisonment without the possibility of parole. See *id.* §§ 4205(b)(1) (noting exemption of first-degree murder from the class A felony sentencing scheme).

sentence minus any good time credits earned and not forfeited.⁵ Delaware is unusual among the states in providing that forfeited good-time credits cannot be restored.⁶

Three types of credits are available. Basic good time credits are earned at the rate of two days per month during an inmate's first year of incarceration and at 3 days per month after the first year.⁷ A prisoner may earn up to 36 days of good-time per 365 days served.⁸

Second, "meritorious good time" of up to 5 days per calendar month may be earned for "satisfactory participation" in "education, rehabilitation, work, or other programs as designated by the Commissioner."⁹ The actual number of days earned depends on the number of hours spent in programming per month.¹⁰

Third, "meritorious bonus good time" credits of up to 60 days "may be awarded for successful completion of an approved program designed to reduce recidivism."¹¹

Because different types of credits may be added onto each other, the three figures below postulate cases of: prisoners who earn only good time credits; those who earn good time plus program participation credits; and those who earn good time, program participation, and program completion credits. All three figures assume five-year judicial maximum terms in order to make computations possible. (The release milestones shown in the figures would vary somewhat with shorter or longer maximum terms.)

Figure 3 shows the timeline for prisoners serving five-year sentences who earn full good time credits throughout their stays (two days per month in year one and three days per month thereafter). The figure envisions well-behaved prisoners with no program participation. If none of their credits are forfeited, their mandatory release dates (MRDs) would occur at the 92-percent mark of their judicial maximum terms.

⁵ See Del. Code tit. 11, § 4381 (stating that "all sentences, other than a life sentence . . . may be reduced by good time credit," except habitual offenders or when so ordered by the sentencing judge). If an offender is convicted of any crime (including physically assaulting a correctional officer) during the term of incarceration, all earned good-time credits must be forfeited. *Id.* § 4382(a), (c). All or some credits may also be forfeited for rules violations or for filing frivolous or malicious legal actions. *Id.* § 4382(b), (e).

⁶ *Id.* § 4382(d).

⁷ Del. Code tit. 11, § 4381(c)(1)–(2).

⁸ *Id.* § 4381(c)(3).

⁹ *Id.* § 4381(d); see also State of Del. Dep't of Corr., Policy No. 7.2, Application and Forfeiture of Good Time, at VI.E.1 (2019), https://doc.delaware.gov/assets/documents/policies/policy_7-2.pdf (defining "meritorious good time").

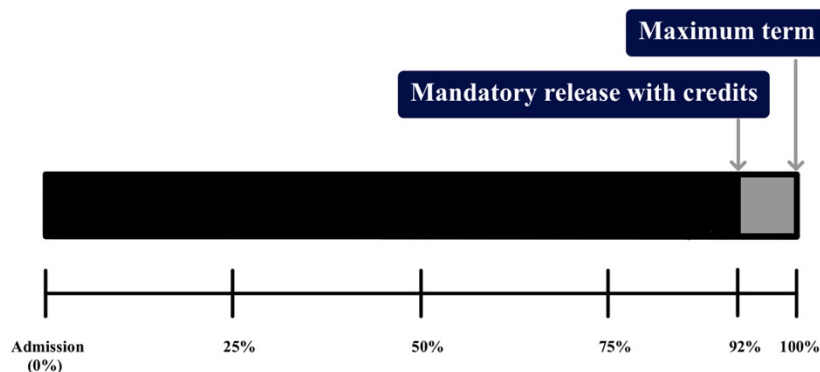
¹⁰ State of Del. Dep't of Corr., *supra* note 9, at VI.E.3.

¹¹ Del. Code tit. 11, § 4381(d); see also State of Del. Dep't of Corr., *supra* note 9, at VI.F.1 (defining "meritorious bonus good time").

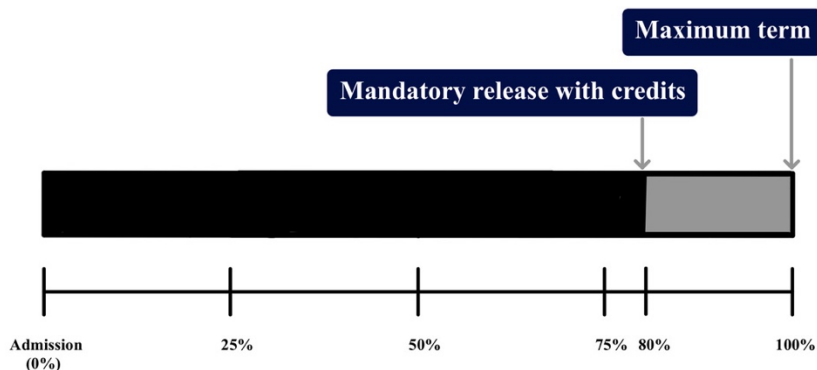
Figure 4 makes the same assumptions as Figure 3 but adds steady earnings of program participation credits (five days per month) throughout prisoners' terms. Such prisoners would be well-behaved and would have managed to remain enrolled in qualifying programs through every day of their confinement. With no credit forfeiture, Figure 4 prisoners would earn MRDs at the 80-percent mark of their judicial maximum terms.

Figure 5 incorporates all the same assumptions as Figure 4, but also supposes that prisoners have earned one program completion credit (of 60 days) in each year of confinement, including their final partial year (in Figure 5, only five months of the fourth year would be served before mandatory release). As we conceive it, Figure 5 prisoners would have to be well behaved and would have to be very fortunate and industrious in program availability, participation, and completion. We view the Figure 5 timeline as within the realm of possibility, but at the outer boundary of what could be realistically achieved.

Delaware Figure 3. Prison-Release Timeline for General-Rules Prisoners with 5-Year Maximum Sentences and Full Good Time Credits



Delaware Figure 4. Prison-Release Timeline for General-Rules Prisoners with 5-Year Maximum Sentences and Full Good Time and Program Participation Credits



Delaware Figure 5. Prison-Release Timeline for General-Rules Prisoners with 5-Year Maximum Sentences and Full Good Time and Program Participation Credits and One Program Completion per Year

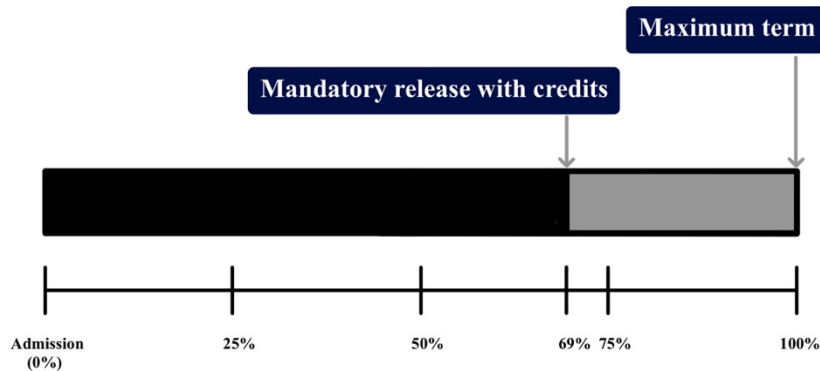


Figure 5 is probably a fair estimation of the entire range of realistic possibility for general-rules prisoners in Delaware, so we will use it as the benchmark for the degree of indeterminacy for all such prisoners. We would expect to see actual release dates for general-rules prisoners scattered within the grey portion of the timeline in Figure 5 (in between the 69-percent and 100-percent marks). On our subjective ranking scale, we have consistently ranked similar sentences as *low in indeterminacy* or, alternatively, as *high in determinacy*. For example, our classic exemplars of high determinacy are the prison-sentencing systems in Minnesota and Washington, which place earliest release dates at the 67-percent milestone for most prisoners.

We note, however, that it is much more difficult for a Delaware prisoner to obtain release at the 69-percent mark (as in Figure 5) than it is for prisoners to win release at the 67-percent juncture in Minnesota and Washington. While the mathematical appearance of the timelines looks similar, in Minnesota and Washington release at the two-thirds mark is the ordinary outcome. In Delaware, release at approximately the same percentage-of-maximum milestone requires a truly outstanding record rather than ordinary performance. This observation highlights an important limitation of our timeline diagrams. The diagrams indicate the total quantum of back-end release discretion for particular classes of sentences in mathematical form, but they provide no information about the ease or difficulty of obtaining favorable discretionary release decisions during the discretionary portion of the timeline.

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 is 4:1. That is, if the parole board were to deny release to all prisoners for as long as legally possible (a *never-release 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 (an *always-release scenario*).

If we use Figure 5 as a benchmark for general-rules sentences in Delaware, such sentences are 69 percent determinate and 31 percent indeterminate. Individual time served is mostly determined by front-end actors in Delaware’s prison sentencing system such as judges, prosecutors, and the Delaware Sentencing Accountability Commission. Figure 5 sentences have a PMP of 1.45:1. That is, if all general-rules prisoners were kept for their full judicial

maximum terms (that is, given no credit deductions), the general-rules population would eventually stabilize at a population size 45 percent larger than if all such prisoners were released at their earliest realistically possible dates (that is, if they were awarded all credits it is realistically possible to bestow).

2. Life sentences

a. Adults

Offenses that are subject to life imprisonment “without benefit of probation, parole or any other reduction” include first-degree murder,¹² sexual abuse of a child by a person in a position of trust, authority or supervision if there is an aggravating factor,¹³ and first-degree rape if there is an aggravating factor.¹⁴ For purposes of determining parole-release eligibility, a life sentence that includes the possibility of parole is deemed to be a fixed term of forty-five years.¹⁵

Based on a 2020 survey of state departments of corrections, the Sentencing Project reported that a little over 13 percent of all prisoners in Delaware were serving life sentences. Out of a total of 3,642 prisoners in that year, 101 or 2.7 percent were serving parolable life sentences and 377 or 10 percent were serving LWOP sentences.¹⁶

b. Juvenile life sentences

Juveniles who commit first-degree may be sentenced to LWOP, but may petition the court for sentence modification after having served 30 years.¹⁷ The Delaware Supreme Court upheld this sentencing scheme even after the U.S. Supreme Court’s decision in *Miller v. Alabama*.¹⁸

3. Infrequently used forms of prison release

¹² Del. Code tit. 11, § 4209(a).

¹³ *Id.* § 778(6)(a)(2) (listing such factors as the infliction of serious physical injury on the victim, abusing three or more separate victims, or previous sexual offenses).

¹⁴ *Id.* § 773(c) (listing such factors as the infliction of serious physical injury on a victim younger than 16 years old, convictions for rape against three or more separate victims, or previous sexual offenses).

¹⁵ *Id.* § 4346(c).

¹⁶ Ashley Nellis, No End in Sight: America’s Enduring Reliance on Life Imprisonment (The Sentencing Project, 2021), at 10 table 1.

¹⁷ *Id.* §§ 4204A(d)(2), 4209A. A sentence modification may “modify, reduce or suspend [the] petitioner’s sentence, including any minimum or mandatory sentence, or a portion thereof, in the discretion of the Court.” *Id.* § 4204A(d)(4). Sentence modifications may be made every five years thereafter unless the court proscribes a longer period because it “finds there to be no reasonable likelihood that the interests of justice will require another hearing within 5 years.” *Id.* § 4204A(d)(3). Juvenile offenders with sentences longer than 20 years (except for first-degree murder) may petition the court for a sentence modification after serving 20 years. *Id.* § 4204A(d)(1).

¹⁸ *Burrell v. State*, 207 A.3d 137, 147 (Del. 2019).

a. Compassionate release

The parole board has broad authority to release prisoners for physical or mental conditions “which demand treatment which the Department cannot furnish” when “necessary for the well-being of [the prisoner].”¹⁹

b. Clemency

Delaware’s governor has the authority to issue commutations and pardons, except in cases of impeachment, but can only do so if recommended by a majority of the board of pardons.²⁰ When the board of pardons receives a pardon or commutation application from a prisoner, the parole board is to provide a report of “the complete record of such person, which shall include an opinion as to the state of rehabilitation of such person.”²¹

c. Sentence modification

The normal timeline for prison release in Delaware can be altered through a process called “sentence modification.” The department of corrections may request a sentence modification if there is “good cause . . . that the release of the defendant shall not constitute a substantial risk to the community or the defendant’s own self.”²² The parole board will hold a hearing to provide a recommendation to the sentencing judge, who makes the ultimate decision whether to grant or deny the modification request.²³ Without data, our guess is that few prison sentences are shortened through this process, which requires the cumulative decisions of three separate decisionmakers.

d. Release during overcrowding emergencies

Though there is no specific plan for emergency release of prisoners due to prison overcrowding, the parole board can recommend individual sentence modifications to the sentencing judge if it receives an application from the department of corrections supported by “good cause,” which specifically including prison overcrowding.²⁴

¹⁹ *Id.* § 4346(e).

²⁰ Del. Const. art. VII, § 1.

²¹ Del. Code tit. 11, § 4363.

²² *Id.* § 4217(b). “Good cause” includes “rehabilitation of the offender, serious medical illness or infirmity of the offender and prison overcrowding.” *Id.* § 4217(c).

²³ *Id.* § 4217(d)(2). Those convicted of a “Title 11 violent felony” must serve at least one-half of the sentence before it can be modified; those serving a statutory mandatory term are not eligible for modification during the mandatory portion of the sentence. *Id.* § 4217(f); *see also id.* § 4201(c) (listing Title 11 violent felonies).

²⁴ *Id.* § 4217(c).

4. Overall assessment

On our subjective ranking scale (see p. iii), we rate Delaware's prison-sentencing system as one with a *low degree of indeterminacy*, alternatively expressed as a *high degree of determinacy*. Parole-release discretion has been abolished for all prisoners other than legacy cases dating back more than 30 years. For general-rules prisoners, mandatory release dates are advanced through credit earnings under the jurisdiction of the department of corrections. For the highest-achieving prisoners, release may be advanced to approximately the 69-percent mark of the judicial maximum sentence (see Figure 5). This release milestone is similar to that for general-rules prisoners in Minnesota and Washington, which we treat as exemplars of systems with a high degree of determinacy.

As with most American systems that have abolished parole-release discretion for the majority of prisoners, the primary location of back-end release discretion in Delaware is in the department of corrections, exercised by prison officials who administer the credit-earning and forfeiture rules. Other forms of back-end release discretion such as medical parole, executive clemency and sentence modification are rarely used and have no important impact on the system's operation as a whole.