



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: PENNSYLVANIA

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Prison-Release Discretion and Prison Population Size

State Report: Pennsylvania

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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: Pennsylvania¹

Executive Summary

Overall, we rank Pennsylvania’s prison-release system as moderately indeterminate, although we do not have firm confidence in this judgment. As in several other states, sentencing courts in Pennsylvania have considerable discretion to vary the lengths of judicial minimum terms in relation to the judicial maximum sentences they impose. There is no fixed formula between the two, as there is in most other states. In the discretion of Pennsylvania sentencing judges, minimum terms in general-rules cases may be fixed anywhere from 0 to 50 percent of the maximum.

Our subjective ranking of Pennsylvania’s system depends on our guess that most Pennsylvania judges impose minimum terms at or near the 50-percent mark. If we are wrong about this, shorter minimum terms would produce sentences with a higher degree of indeterminacy.

There is no traditional good-time or earned time system in Pennsylvania. In the vast majority of cases, the state’s department of corrections has no direct authority over sentence length. For a minority of prisoners, Pennsylvania has instituted two different versions of administrative parole release—a form of somewhat routinized release at a projected date. For prisoners who fall within these programs, the DOC has the power to block release through findings of major infractions or, in some cases, noncompliance by prisoners with their correctional plans.

Terminology note

This report will refer to the Pennsylvania Parole Board as the “parole board.” The Pennsylvania 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 Pennsylvania, see Alexis Lee Watts, Cecelia Klingele, Kevin R. Reitz, Edward E. Rhine, & Mariel Alper, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Pennsylvania* (Robina Institute of Criminal Law and Criminal Justice, 2016) (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

Pennsylvania’s prison-rate history, 1972 to 2020

At yearend 2020, Pennsylvania’s prison rate was 308 per 100,000 general population, with a yearend prison population of 39,335.² Pennsylvania’s prison rate was 25th highest among all states.

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

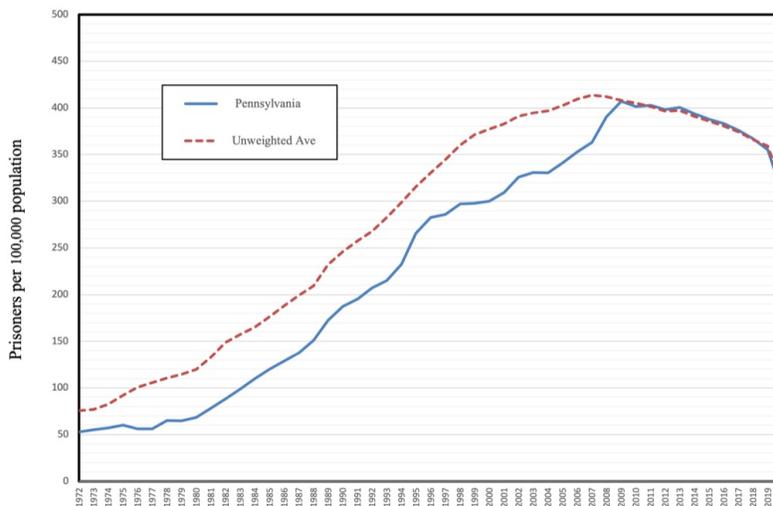
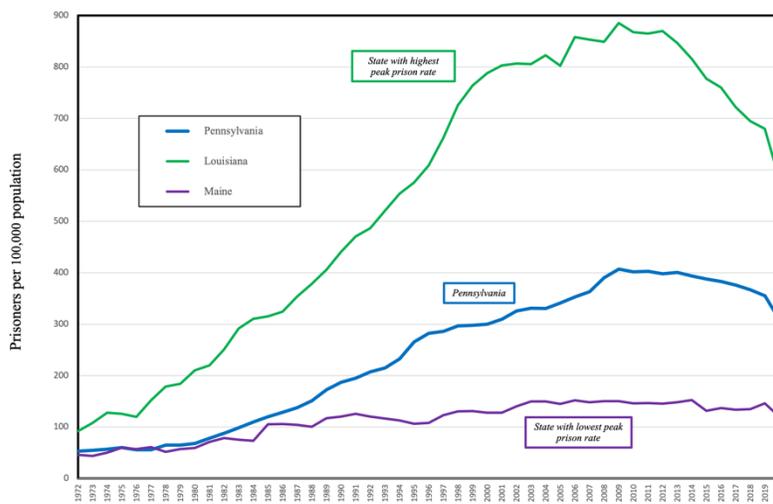


Figure 2. Prison Rate Change in Pennsylvania, Louisiana, and Maine, 1972 to 2020



Sources: Timothy J Flanagan, Kathleen Maguire & Michael J. Hindelang, *Sourcebook of Criminal Justice Statistics, 1990*, at 605 table 6.56, Rate (per 100,000 resident population) of sentenced prisoners under jurisdiction of State and Federal correctional authorities on

² E. Ann Carson, *Prisoners in 2020-Statistical Tables* (Bureau of Justice Statistics, 2021), at 12 table 4, 16 table 7.

December 31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991) (for 1972-1977); E. Ann Carson, *Imprisonment rate of sentenced prisoners under the jurisdiction of state or federal correctional authorities per 100,000 U.S. residents, December 31, 1978-2016* (Bureau of Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), at <https://www.bjs.gov/index.cfm?ty=nps>; E. Ann Carson, *Prisoners in 2018* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2017); E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2018); E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 15-16 table 7 (for 2019-2020).

Pennsylvania reached its peak prison rate in 2009 at 407 per 100,000, which dropped to 308 per 100,000 in 2019. This is a net difference of -99 per 100,000, which was the 32nd largest prison-rate drop of all 50 states (measured from each state's peak 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 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

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.

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,

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

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

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.

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

The COVID period in Pennsylvania

In a separate study, the Robina Institute found only 165 releases in Pennsylvania from March 2020 through December 2021 that were accelerated in response to the pandemic.⁹ This number was the equivalent of 0.4 percent of Pennsylvania’s pre-COVID prison population (at yearend 2019).

On April 10, 2020, Pennsylvania Governor Tom Wolf issued an executive order in response to the COVID-19 pandemic requiring the Pennsylvania Department of Corrections (DOC) to establish a Reprieve of Sentence of Incarceration Program through which the DOC would recommend qualified individuals to Governor Wolf for consideration for issuance of a conditional reprieve. To qualify, a person had to be vulnerable to COVID-19 (either because of their age, medical conditions, or pregnancy); either eligible for release within the next twelve months or within nine months of their minimum eligibility release date; and not convicted of certain enumerated crimes (largely violent and sex-related crimes). Between the issuance of the order and February 10, 2021, Governor Wolf granted 165 reprieves. On June 22, 2020, Governor Wolf announced that, in addition to the reprieve program, a number of measures had been taken to reduce the prison population. These measures included furloughing paroled individuals from centers to home plans, maximizing parole releases, reviewing parole detainers, expediting the release process for anyone with a pending approved home plan, and reviewing and releasing people who are beyond their minimum sentences. However, we could find no documentation of the number of people affected by these measures. Some news articles reported that the prison

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), Pennsylvania (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 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.

population decreased by 3,312 people; however, this was likely due primarily to a decrease in admissions rather than an increase in releases.¹⁰

In calendar year 2020, Pennsylvania’s prison rate fell from 355 to 308 per 100,000—a one-year decline of -47 per 100,000. This was the 30th largest one-year drop reported among all 50 states for that year (tied with Maryland, New York, and Washington).¹¹ Measured in percentage terms, it was a 13.2-percent reduction in the state’s prison rate. The state’s total prison population fell by 6,150 people, from 45,485 to 39,335.¹² Through yearend 2021, Pennsylvania’s prison population fell to 37,180.¹³

Falling admissions were the most important cause of Pennsylvania’s substantial prison drop from 2019-20. The number of prison admissions in the state fell by 41.7 percent in 2020 compared with the previous year (from 16,858 to 9,824—or a drop in admissions of 7,034 prisoners). Total releases in 2020 fell by 12.6 percent over 2019 (from 17,838 to 15,591).¹⁴

1. General rules of prison release in Pennsylvania

For general-rules prisoners, Pennsylvania judges have discretion to set the durations of minimum terms to parole-release eligibility, which can be any length up to 50 percent of the maximum.¹⁵ There is no statutory formula that establishes a fixed relationship between minimum and maximum terms. If a prisoner is denied parole, the parole board is required to consider a renewed parole application after one year.¹⁶

There are no good-time or earned-time credits as such in Pennsylvania. Instead, there is something called the Recidivism Risk Reduction Incentive Program (“RRRI”), discussed later. Only about 10 percent of all prisoners are RRRI-eligible.¹⁷ For the vast majority of

¹⁰ 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 78 Appendix E (footnote omitted).

¹¹ 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.

¹² *Id.*, at 12 table 4, 16 table 7.

¹³ See E. Ann Carson, *Prisoners in 2021-Statistical Tables* (Bureau of Justice Statistics, 2022), at 11 table 4.

¹⁴ E. Ann Carson, *Prisoners in 2020-Statistical Tables* (Bureau of Justice Statistics, 2021), at 18 table 8, 20 table 9.

¹⁵ As in most states, sentencing courts may choose any judicial maximum sentence at or below the statutory maximum penalty for the offense(s) of conviction.

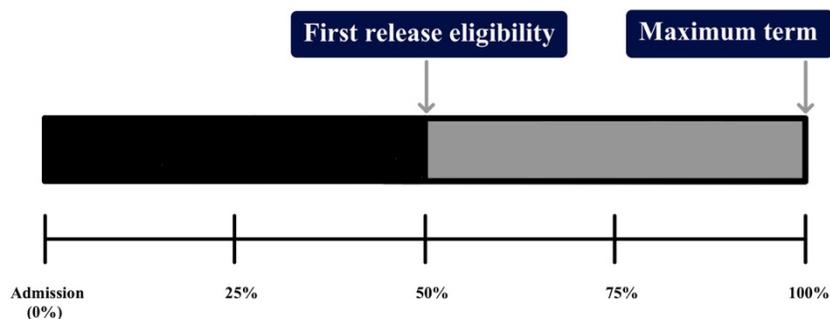
¹⁶ 61 Pa. C.S.A. § 6139(a)(3).

¹⁷ In 2017, there were 4,610 RRRI-eligible prisoners out of a total prison population of 48,438. Pennsylvania Department of Corrections, *Recidivism Risk Reduction Incentive: 2018 Report* (2018), at 4; Pennsylvania Department of Corrections, *Annual Statistical Report* (2018), at 12.

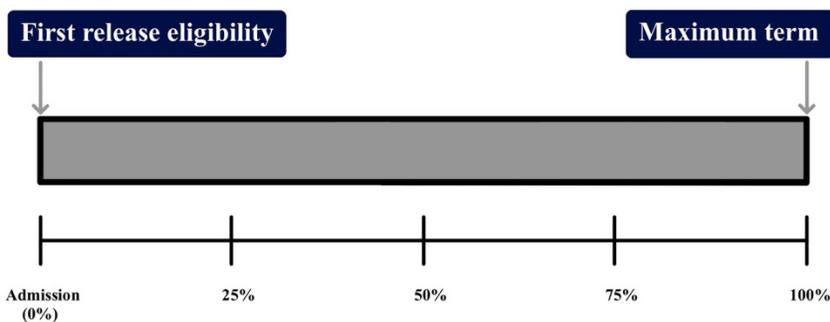
prisoners, credit-based discounts against sentence length are not factors that need to be considered in the prison-release timeline.

Pennsylvania Figure 3 shows the timeline for cases in which the judge imposes the longest allowable minimum term. This sentence is 50-percent indeterminate. Since there is no statutory floor on the duration of the judicial minimum term, a minimum of zero is also permissible.¹⁸ This extreme case is illustrated in Pennsylvania Figure 4; here the sentence is 100-percent indeterminate.

Pennsylvania Figure 3. Prison-Release Timeline for General-Rules Cases with Longest Possible Minimum Term Selected by Court



Pennsylvania Figure 4. Prison-Release Timeline for General-Rules Cases with Shortest Possible Minimum Term Selected by Court



All percentage-length minimum terms in between the examples shown in Figures 3 and 4 are possible in general-rules cases, within the discretion of sentencing courts. It is not possible to define the degrees of indeterminacy (DOIs) of general-rules sentences simply by collating relevant legislation, sentencing guidelines, or other sources of positive law.

¹⁸ 42 Pa. C.S.A. § 9756(a)-(b).

This observation has heightened importance because there is only one class of general-rules sentences in Pennsylvania. Presumably a very large percentage of all prisoners are serving such sentences. Thus, this is a state in which the degree of indeterminacy at the back end of the prison-sentencing system is to a large extent determined by judicial sentencing patterns.

On the scale developed for this project (see pp. iii-iv), we rank a sentence class with 50-percent minimum terms as having a *moderate degree of indeterminacy*. We rank sentences with no minimum terms as *extremely high in indeterminacy*. In the first instance, we would calculate the population multiple potential (PMP) as 2:1 (see p. v.). In the latter case, we would express the PMP as “greater than 100:1”—a convention adopted by the project to avoid PMP calculations of ∞ :1.

For purposes of our analysis of the Pennsylvania system as a whole, we are forced to make assumptions about judicial sentencing patterns. 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.¹⁹ Our assumption is supported by a recent report by the Pennsylvania Commission on Sentencing: in 2019, stating that the mean minimum sentence was 28.4 months and the mean maximum sentence was 67.9 months. This gross statistic yields an average minimum term that is approximately 42 percent of the maximum term.²⁰

If we are correct in our best guess, the PMP for general-rules sentences is 2:1, or at least in that ballpark. If we place the average minimum term at 42 percent, for example, as in the report cited above, the PMP would be 2.4:1. We see no evidence that Pennsylvania judges are acting in ways that would produce high degrees of indeterminacy across the system as a whole, even though this is a legally-authorized possibility.

As a caveat, we must stress that the degree of indeterminacy in a prison-sentencing system like Pennsylvania’s is largely up to the aggregate behavior of sentencing courts. Changing judicial sentencing patterns over time can cause the DOI of the entire system to shift without any formal changes in law. In contrast with most American systems, in which the systemwide DOI is defined in statutory law, the Pennsylvania legislature has chosen to delegate much of this policy decision to judges.²¹

¹⁹ As a working hypothesis in this project, we assume that, given a choice, sentencing judges prefer to render sentences with relatively predictable downstream outcomes. Sentences with higher degrees of indeterminacy mean lowered importance of the judicial sentence itself.

²⁰ Pennsylvania Commission on Sentencing, *Annual Report 2019* (2019), at 60 table 6. This statistic applies to defendants who received “state incarceration.” For prisoners sentenced to “county incarceration,” minimum terms on average were set at approximately 23 percent of the judicial maximum term. *Id.*

²¹ For a discussion of the 11 states that, like Pennsylvania, have some version of “judge-made degrees of indeterminacy,” 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), at 32-33, 46.

Recidivism Risk Reduction Incentive Program

There are no good-time or earned-time credits in Pennsylvania. Instead, there is something called the Recidivism Risk Reduction Incentive Program (“RRRI”), adopted in 2009. This is a multi-step variation of the earned-time model that must be ordered as part of a defendant’s sentence and then carried through by the DOC and the parole board. The RRRI program bears resemblance to the “administrative parole release” (APR) programs we have found in 11 other states.²²

The sentencing court determines RRRI eligibility as part of the sentence.²³ Many defendants convicted of nonviolent offenses are potentially eligible.²⁴ Judges do not appear to use the RRRI option automatically, however. The Pennsylvania Commission on Sentencing estimated that, while 41 percent of newly-committed prisoners had been statutorily eligible for an RRRI sentence in 2017, judges gave RRRI sentences to only 53 percent of this group.²⁵

Defendants found to be eligible receive two minimum sentences: the standard minimum and a shorter RRRI minimum. The RRRI minimum is three-fourths of the standard minimum when the standard minimum is three years or less, and five-sixths of the standard minimum for standard minimum sentences greater than three years.²⁶

For eligible prisoners, the DOC must use “validated assessment tool to determine the needs and risks of the offender.” It must then develop “a program plan ... designed to lower the risk

²² 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), at 47:

We define administrative parole release as a routinized path to release that requires fewer procedural stages and less case-by-case discretion than the traditional parole-release process. ... The exact shape of existing APR programs varies greatly from state to state. In APR’s purest form, once eligible prisoners have served a specified amount of time and have satisfied predetermined APR criteria, they are released without further consideration. Unless eligible prisoners have been “derailed” from the APR process (for example, as a result of a serious disciplinary infraction), parole officials have no discretion to debate or deny release. In APR programs that call upon the parole board to participate, their role is often pro forma or limited to narrow issues such as reviewing prisoners for eligibility.

²³ The eligibility requirements may also be waived by the prosecutor, but the court has authority to refuse to accept the government’s waiver after considering any victim input. 61 Pa. C.S.A. § 4505(a),(b).

²⁴ 61 Pa. C.S.A. § 4503. The definition of “eligible person” includes defendants with no “history of present or past violent behavior;” no prior sentence enhancement or conviction based on the use of a deadly weapon, and no prior convictions of designated offenses, including registrable sex offenses, child pornography, and drug trafficking.

²⁵ Pennsylvania Commission on Sentencing, *Pennsylvania’s Recidivism Risk Reduction Incentive Program: 2019 Report to the Legislature* (2019), at 6. The commission qualified this estimate by noting that, “[u]nder the current reporting system, it is difficult to determine the true number of eligible offenders.” *Id.* at 5.

²⁶ 61 Pa. C.S.A. § 4505(c)(2).

of recidivism.”²⁷ The prisoner must successfully complete all “programs designated in the program plan.”²⁸

At the expiration of a prisoner’s RRRI minimum sentence, “[t]he [parole] board or its designee shall issue a decision to parole, without further review by the board” if the prisoner has successfully completed all required RRRI programming and maintained a good conduct record. Release is far from automatic under these conditions, however. The board retains authority to deny release if there is a “reasonable indication that the inmate poses a risk to public safety.”²⁹ At least one Pennsylvania court has ruled that release by the parole board is not mandatory and remains discretionary for DOC-certified RRRI prisoners.³⁰ In a recent statistical report, only 12.5 percent of certified RRRI-eligible prisoners were released at their RRRI minimums, although 63.6 percent were released prior to their standard minimum sentences. The Pennsylvania Commission on Sentencing concluded that further study was needed to better understand the lower-than-expected numbers of releases at or near prisoners’ RRRI minimum terms.³¹

²⁷ Pennsylvania Commission on Sentencing, *Pennsylvania’s Recidivism Risk Reduction Incentive Program: 2019 Report to the Legislature* (2019), at 4. The level of difficulty built into RRRI program plans is indicated in part by average requirements:

On average, an inmate who enters PA DOC custody with a RRRI minimum sentence date is recommended for between 1 and 2 treatment programs during incarceration. This treatment programming is in addition to education requirements for some offenders. Specifically, an estimated 30.8% of RRRI-sentenced inmates are recommended for a Therapeutic Community, 19.9% for Violence Prevention, 9.7% for Outpatient Treatment, 8.9% for Thinking for a Change, and 5.7% for Batterers Intervention.

Pennsylvania Department of Corrections, *Recidivism Risk Reduction Incentive: 2018 Report* (2018), at 4. The Pennsylvania Commission on Sentencing reported that, from 2008 to 2018, 57 percent of all RRRI-eligible prisoners who were released had been certified by DOC as in compliance with their program plans and not barred from release for disciplinary reasons. Pennsylvania Commission on Sentencing, *Pennsylvania’s Recidivism Risk Reduction Incentive Program: 2019 Report to the Legislature* (2019), at 9.

²⁸ 61 Pa. C.S.A. § 4506(a).

²⁹ 61 Pa. C.S.A. § 4506(a). It is not clear how information to this effect might reach the board. However, before release under the RRRI program, the DOC must certify “that it has not received additional information demonstrating a history of past or present violent behavior which was not available at the time of sentencing.” Id. § 4506(a)(9).

³⁰ *Homa v. Pennsylvania Bd. of Prob. & Parole*, 192 A.3d 329 (Pa. Commw. Ct. 2018).

³¹ Pennsylvania Commission on Sentencing, *Pennsylvania’s Recidivism Risk Reduction Incentive Program: 2019 Report to the Legislature* (2019), at 12-13, 19. At least some of the explanation is that, when RRRI-eligible prisoners are admitted with very short minimum terms, they may lack adequate time to complete their program plans before the RRRI release date arrives. Another possibility identified by the Commission was that the parole board was making its own findings about program compliance and/or institutional misconduct, despite favorable DOC certification. Id. at 10-11, 19.

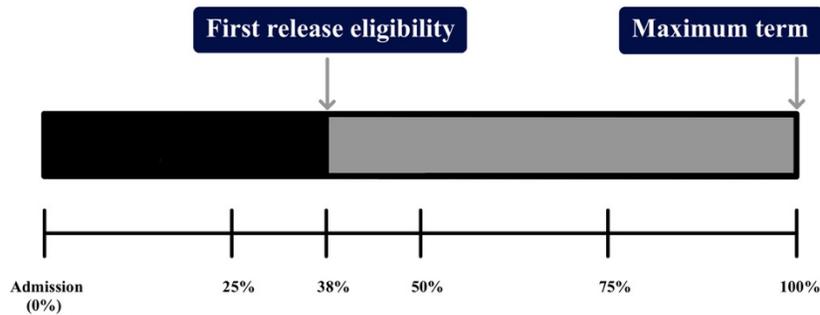
Although the RRRI program offers only modest decreases in prisoners' minimum terms,³² its main import is to hold out the prospect of release at or near the expiration of the RRRI minimum, before their standard minimum term, or at least earlier than non-RRRI prisoners would be released. For non-RRRI prisoners who reach their "standard" minimum terms, release turns on the traditional decisionmaking process of the parole board, which normally includes a review of a prisoner's file, a hearing, and a discretionary decision by the board to release or deny release. For such prisoners, first parole eligibility is no guarantee of release. The Pennsylvania DOC reported that, on average, prisoners who are not sentenced to the RRRI program serve approximately 130 percent of their standard minimum term.³³

Pennsylvania Figure 5 depicts the RRRI minimum term for eligible prisoners with standard minimum terms of three years or less. Pennsylvania Figure 6 does the same for prisoners with standard minimum terms of more than three years.

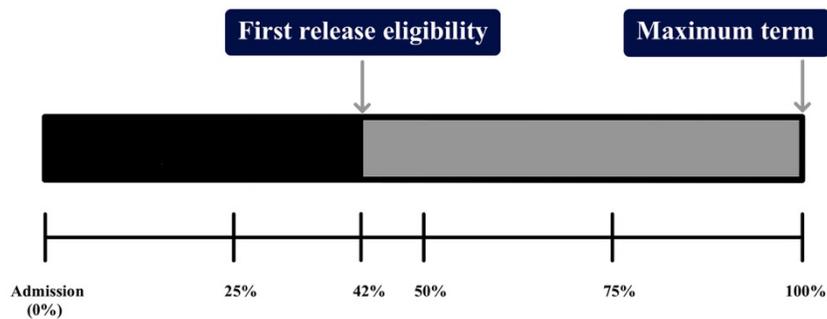
³² For prisoners with minimum terms of three years or less, the potential shortening of time-actually-served is 12 percent; the potential reduction is only eight percent for prisoners with longer minimum terms. *Compare* Pennsylvania Figures 5 and 6 with Pennsylvania Figure 3.

³³ Pennsylvania Department of Corrections, *Recidivism Risk Reduction Incentive: 2018 Report* (2018), at 8.

Pennsylvania Figure 5. Prison-Release Timeline for General-Rules Cases with Longest Possible Minimum Term Selected by Court, Minimum is 3 Years or Less, and Judge Orders that Prisoner is Eligible for Recidivism Risk Reduction Incentive Program



Pennsylvania Figure 6. Prison-Release Timeline for General-Rules Cases with Longest Possible Minimum Term Selected by Court, Minimum is More Than 3 Years, and Judge Orders that Prisoner is Eligible for Recidivism Risk Reduction Incentive Program



The overall impact of the RRRI program on the Pennsylvania prison-sentencing system has probably not been great. In 2019, the Pennsylvania Commission on Sentencing reported that 23 percent of all admissions since November 2008 were prisoners with sentences that established their RRRI eligibility.³⁴ That is an appreciable number of people, but not a major determinant of the state’s prison rate. Because RRRI prisoners tend to have shorter than average sentences, they represent a much smaller share of the standing population than their

³⁴ Pennsylvania Commission on Sentencing, *Pennsylvania’s Recidivism Risk Reduction Incentive Program: 2019 Report to the Legislature* (2019), at 5.

admission cohorts. As of September 30, 2017, nearly 10 percent of all prisoners were RRRI-eligible.³⁵

Short sentence parole

Prisoners serving a standard or RRRI minimum sentence of two years or less may be eligible for “short sentence parole” (SSP), in which they are automatically released on parole at the minimum sentence date without an interview with the Parole Board.³⁶ Prisoners ineligible for SSP include those convicted of crimes involving personal injury, crimes of violence, firearm and other weapons offenses, some sex offenses, and drug trafficking.³⁷ SSP can be lost for serious misconduct.³⁸ Also, the parole board has relatively broad discretion to eject prisoners from the SSP program: “Regardless of sentence imposed, this section does not apply to: ... any person who the board, in its discretion, determines should be excluded from this section because: (i) there exists an identifiable threat to public safety; or (ii) inclusion substantially jeopardizes the rehabilitative needs of the person.”³⁹

The SSP program first went into effect in December 2019. It is therefore too early to tell how it is working. Like the RRRI program, it has elements of the administrative parole release programs we have seen in other states. Also like the RRRI program, eligibility for SSP will be concentrated in the subpopulation of prisoners convicted of nonviolent offenses. There could be significant overlap in the coverage of the two initiatives. A first report on the SSP program was due from the Pennsylvania Commission on Sentencing in early 2022.⁴⁰

³⁵ In 2017, there were 4,610 RRRI-eligible prisoners out of a total prison population of 48,438. Pennsylvania Department of Corrections, *Recidivism Risk Reduction Incentive: 2018 Report* (2018), at 4; Pennsylvania Department of Corrections, *Annual Statistical Report* (2018), at 12.

³⁶ 61 Pa. C.S.A. § 6137.1(a)-(b) (“The board shall, without requiring an interview, approve for parole a person eligible for short sentence parole under this section at the expiration of the person’s minimum date or recidivism risk reduction incentive minimum date, whichever is shorter. If the person was committed to the department after expiration of the person’s minimum date, the board shall approve the person for parole within 30 days after commitment to the department.”).

³⁷ 61 Pa. C.S.A. § 6137.1(a).

³⁸ 61 Pa. C.S.A. § 6137.1(b.1) (“Notwithstanding subsection (b), a person shall not be eligible for short sentence parole under this section if the person has: (1) been found guilty of a major disciplinary infraction while confined in a county correctional institution or State correctional institution; or (2) a pending felony charge or outstanding felony arrest warrant or detainer, except that this section may be applied to allow a person to be paroled to a detainer related to an underlying felony charge.”).

³⁹ 61 Pa. C.S.A. § 6137.1(a)(9).

⁴⁰ 61 Pa. C.S.A. § 6137.1(f). As of this writing, the Commission had not published a report on the SSP program.

Sentences of less than two years

There is an unusual wrinkle in Pennsylvania: Prisoners with judicial maximum terms of less than two years must be housed in county jails, not state prisons.⁴¹ For prisoners held by the counties, parole-release discretion is vested in the trial courts of that judicial district.⁴²

While mechanisms of judicial parole are of general interest to this project, our focus is on people held in prisons, not county facilities. In Pennsylvania, judicial parole is an intriguing footnote, but not part of our analysis.

2. Life sentences in Pennsylvania

a. Adults

The Parole Board does not have the authority to release on parole any inmate sentenced to death or life imprisonment.⁴³ In Pennsylvania, any life sentence is inherently without the possibility of parole.⁴⁴ The only mechanism by which an offender sentenced to life imprisonment may obtain release is by seeking the Governor's pardon and unanimous written recommendation of the parole board.⁴⁵

b. Juvenile life sentences

Offenders under age 18 convicted after June 24, 2012 for the crimes of murder of the first degree, murder of an unborn child or murder of a law enforcement officer may be sentenced to life without parole.⁴⁶ In determining whether to impose a sentence of life without parole, the court shall consider and make findings on the record regarding a number of factors, including

⁴¹ 42 Pa. C.S.A. § 9762(b)(3) (“Maximum terms of less than two years shall be committed to a county prison within the jurisdiction of the court.”). Prisoners with maximum terms of two years or more but less than five years may also be housed at the county level under certain circumstances. *See* 42 Pa. C.S.A. § 9762(b)(2). Note that Pennsylvania is unusual in that some misdemeanors carry authorized prison sentences as long as five years. *See* 18 Pa.C.S.A. § 106(b)(6).

⁴² 42 Pa. C.S.A. § 9776(a) (“Except as otherwise provided under this chapter or if the Pennsylvania Parole Board has exclusive parole jurisdiction, a court of this Commonwealth or other court of record having jurisdiction may, after due hearing, release on parole an inmate in the county correctional institution of that judicial district.”).

⁴³ 61 Pa. C.S.A. § 6137(a)(1).

⁴⁴ The Sentencing Project, *Life Goes On: The Historic Rise in Life Sentences in America* (2013), at 4, <https://www.sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

⁴⁵ *See* Pa. Const. Art. 4 § 9(a). Legislation introduced in 2021 would have provided “a path to parole eligibility for certain [prisoners with life sentences] over 55 years old and those with chronic or terminal health conditions.” *See* Ryan Deto, *Bipartisan bill aims to allow Pa. lifers a chance at parole*, Pennsylvania Capital-Star, Nov. 15, 2021. As of this writing, the proposal appears to have stalled.

⁴⁶ 18 Pa. C.S.A. § 1102.1(a).

“age-related characteristics of the defendant.”⁴⁷ Age-related characteristics include the defendant’s age, mental capacity, maturity, degree of criminal sophistication exhibited, nature and extent of any prior delinquent or criminal history, and probation or institutional reports.⁴⁸

In 2017, the Supreme Court of Pennsylvania ruled in *Commonwealth v. Batts* that there is a presumption against the imposition of a sentence of life without parole for a juvenile defendant convicted of first-degree murder.⁴⁹

Pennsylvania at one point had the largest number of juveniles sentenced to life without parole in the nation.⁵⁰ Juvenile offenders previously sentenced to life without parole can seek resentencing by the trial court following the Supreme Court’s 2016 ruling in *Montgomery v. Louisiana*.⁵¹

3. Infrequently used forms of prison release in Pennsylvania

a. Compassionate release

Compassionate release determinations are initiated through the Department of Corrections and do not involve the Parole Board. The transfer of inmates seeking medical care in hospitals, long-term care facilities or hospice locations are filed with the sentencing court and initiated by the Department of Corrections, the prisoner, or a person authorized to act on the prisoner’s behalf.⁵² Only non-ambulatory, terminally ill inmates “likely to die in the near future” are

⁴⁷ 18 Pa. C.S.A. § 1102.1(d)(7). For relevant federal constitutional law, 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).

⁴⁸ 18 Pa. C.S.A. § 1102.1(d)(7).

⁴⁹ *Commonwealth v. Batts*, 163 A.3d 410, 483-84 (Penn. 2017).

⁵⁰ Pennsylvania Department of Corrections, *Juvenile Lifer FAQ*, <https://www.cor.pa.gov/Initiatives/Documents/Juvenile%20Lifers/Juvenile%20Lifer%20FAQ.pdf>.

⁵¹ Id.

⁵² 42 Pa. C.S.A. § 9777(a).

eligible to have their sentences of confinement deferred in order to obtain release and receive care from a licensed hospice care provider.⁵³

b. Clemency

Upon the written recommendation of a majority of the Board of Pardons, the Governor has authority to commute sentences and grant pardons in all criminal cases except impeachment.⁵⁴ In cases involving sentences of death or life imprisonment, the Board must give unanimous written recommendation.⁵⁵

c. Release during overcrowding emergencies

Pennsylvania has no statutory emergency release mechanism to reduce prison overcrowding.

4. Overall assessment of indeterminacy in Pennsylvania's prison-sentencing system

Overall, we rank Pennsylvania's prison-release system as having a *moderate degree of indeterminacy*, although we do not have full confidence in this judgment. Sentencing courts in Pennsylvania have considerable discretion to vary the lengths of judicial minimum terms in relation to the judicial maximum sentences they impose. There is no fixed formula between the two, as there is in most states. In the discretion of Pennsylvania sentencing judges, minimum terms in general-rules cases may be fixed anywhere from 0 to 50 percent of the maximum.

Our subjective ranking of Pennsylvania's system depends on our guess that most Pennsylvania judges impose minimum terms at or near the 50-percent mark. If we are wrong about this, shorter minimum terms would produce sentences with a higher degree of indeterminacy. At the extreme, if it is routine for sentencing courts to impose very short minimum terms, say, at the 15-percent mark or below, then those sentences would carry forward to the back end of the system with an extremely high degree of indeterminacy.

Pennsylvania is one of 11 states in which, to an important extent, judges are gatekeepers of the degrees of indeterminacy that are built into their sentences. Pennsylvania judges do not

⁵³ 42 Pa. C.S.A. § 9777(a)(2)(i). Other requirements for hospice care eligibility under this scheme include ensuring placement of the inmate in the proposed hospice location does not pose an undue risk of escape or danger to the community as well as providing crime victims, the inmate's correctional facility, and the state agency where the inmate was first committed or detained notice and an opportunity to be heard on petition. 42 Pa. C.S.A. § 9777(a)(2)(iv)-(vi).

⁵⁴ Pa. Const. Art. 4 § 9(a).

⁵⁵ Pa. Const. Art. 4 § 9(a). From 2009 onward, inmates sentenced to life imprisonment before 1997 may petition for clemency under a scheme requiring only a simple majority vote by the state Pardons Board with a review by the Governor. See The Sentencing Project, *Life Goes On: The Historic Rise in Life Sentences in America* (2013), at 19, <https://www.sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

have the power to impose *highly* determinate sentences in general-rules cases, but they can vary the DOIs of their individual sentences from extremely-high to moderate indeterminacy.

There is no traditional good-time or earned time system in Pennsylvania. In the vast majority of cases, the state's department of corrections has no direct authority over sentence length. For a small minority of prisoners, Pennsylvania has instituted two different versions of administrative parole release—a form of somewhat routinized release at a projected date. For prisoners who fall within these programs, the DOC has the power to block release through findings of major infractions or, in some cases, noncompliance by prisoners with their correctional plans.