



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: UTAH

Kevin R. Reitz, Allegra Lukac, and Edward E. Rhine

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Definitions and Concepts

“Indeterminacy” in a prison sentence means “unpredictability of time served.” Once a particular judicial sentence has been imposed, can we say with confidence how much time the defendant will actually serve before the sentence’s expiration? If actual time-to-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 small range of possibility, then the sentence has a low degree of indeterminacy—or, we might say—a high degree of determinacy. “Determinacy” means “predictability of time served” at the time of judicial sentencing.

Scaling up to the systemwide level, the degree of indeterminacy in prison sentences regulates which government officials have effective control over prison population size. Higher degrees of indeterminacy across individual sentences produce 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 of this project is to inform state governments how they may 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 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: Utah

Executive Summary

Overall, Utah's prison-sentencing system operates with an *extremely high degree of indeterminacy*. Indeed, it is a candidate for the ranking of the most indeterminate system in the U.S. today. At the back end of the prison-sentencing system, release discretion is concentrated almost exclusively in the parole board, with most felonies carrying sentences with wide gaps between the judicial minimum and maximum terms. There is no system of good-time credits to narrow the board's discretionary power over release dates. Indeed, the Utah parole board even holds broad statutory power to release the majority of prisoners *before* their minimum terms have expired. The supremacy of the parole board is only increased by the fact that the Utah Constitution vests the clemency power nearly exclusively in the board.

Another feature of Utah's system that makes it extraordinarily indeterminate is that sentencing courts have no control over the maximum sentences they impose and only rarely have discretion to select among alternative minimum terms. All newly-admitted prisoners arrive with sentences that include the statutory maximum prison terms for their offenses of conviction. There is no room for lenity below the statutory maximum penalty at the front end of Utah's prison-sentencing system.

Introduction

Utah's prison-rate history, 1972 to 2018

In 2018, Utah's prison rate was 208 per 100,000 general population, with a yearend prison population of 6,641.¹ Utah's prison rate was 44th largest among all states.

Figure 1. Prison Rate Change in Utah and (Unweighted) Average Among All States, 1972 to 2018

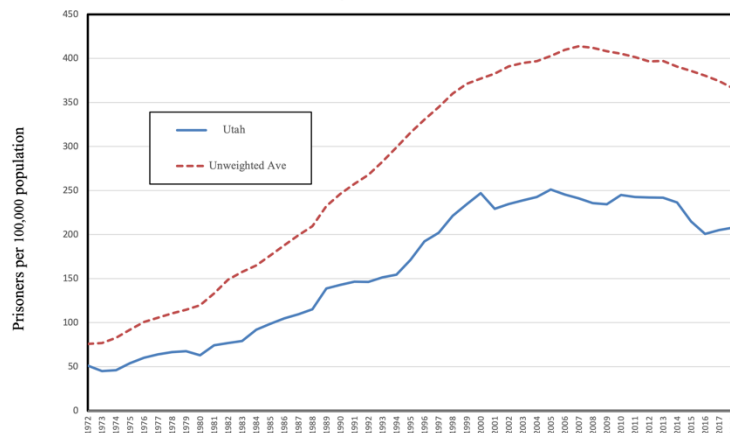
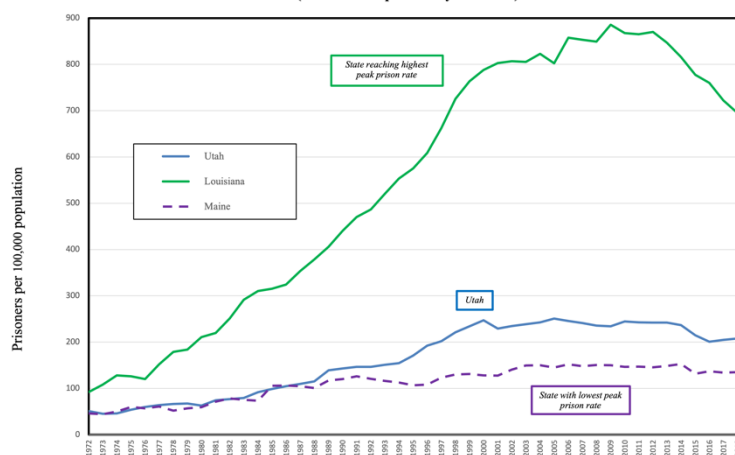


Figure 2. Prison Rate Change in Utah, Louisiana, and Maine, 1972 to 2018 (standard 900 per 100K y-axis scale)



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 Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), at

¹ E. Ann Carson, *Prisoners in 2018* (Bureau of Justice Statistics, 2020), at 7 table 4, 11 table 7.

<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 2017-2018).

Utah reached its peak prison rate during the national buildup period in 2005 at 251 per 100,000, which dropped to 208 per 100,000 in 2018. This is a net difference of -43 per 100,000, which was the 29th largest prison-rate drop of all states.

From 1972 through 2000, Utah's prison rate grew in virtually every year, but more slowly than the average prison-rate growth among all states. From yearend 2000 to 2012, Utah's prison rate was relatively flat. From 2012 through 2018, the state's prison rates returned to levels last seen in the late 1990s.

Figure 1 shows that Utah has been a low-imprisonment state by national standards throughout the full period depicted, 1972 through 2018. From 1973 forward, Utah has been 40th or lower in prison rates among all states.

Organization of this report

This report is divided into four parts. Parts I through III describe the contours of Utah's prison-release system in some detail, with extensive citations and statutory analysis. Part I surveys the prison-release rules that apply to most prisoners. Part II then covers a number of important subgroups of prisoners who are not subject to the general rules. Part III catalogues some additional prison-release mechanisms that exist in Utah but are infrequently used, such as medical release and the clemency power.

Part IV draws on the raw research in Parts I through III to analyze and model the degrees of indeterminacy that exist for the most important subgroups of prisoners who are serving different classes of sentences. Ultimately, if a large enough percentage of all prisoners are included, this allows for broad observations about the Utah system as a whole. The overarching goal of Part IV is to explore the relationship between the various forms of prison-release discretion in Utah and the size of the state's prison population.

I. General Rules of Prison-Release Discretion

The Utah Board of Pardons and Paroles (abbreviated as the “parole board” through most of this report) has jurisdiction over both parole-release and most clemency decisions.

Utah has a system of advisory guidelines that are addressed to both sentencing judges and the parole board.² Utah’s “Sentencing and Release Guidelines” function in part as parole-release guidelines (see section 1.1 below).³

A. Determination of release eligibility

For general-rules cases, Utah has an unusual lock-step scheme in which sentencing judges have no discretion to set or influence the actual durations of the prison sentences they impose for each crime. “Judicial” maximum prison sentences must be fixed at the same level as the statutory maximum penalty for the offense of conviction. Any applicable minimum terms to parole-release eligibility are also preset by statute.⁴

Once sentencing courts decide to sentence a defendant to prison, they must impose the full “indeterminate term” required for the felony grade of the offense of conviction, as summarized in Table 1 below.⁵ For example, a defendant sentenced to prison for a second-degree felony must receive an indeterminate sentence of one to 15 years.⁶ The judge’s limited role at

² The guidelines are promulgated and revised by the Utah Sentencing Commission, see Utah Code § 63M-7-404.

³ Utah Sentencing Commission, *2020 Adult Sentencing & Release Guidelines* (2020). For judges, the principal functions of the guidelines are to provide recommendations on the questions of whether a prison sentence should be imposed (but not the length of such sentences), whether probation should be imposed, the length of probation term the judge should select, whether a term of jail confinement should be imposed as a condition of probation, and the length of jail confinement the judge should select. See Utah Sentencing Commission, *2020 Adult Sentencing & Release Guidelines* (2020), at 24 (“Form 1—General Matrix”) (with three zones for “imprisonment,” “presumptive probation,” and “jail as initial condition of probation”).

⁴ This does not mean that sentencing courts are irrelevant to the state’s prison policy. In most cases, courts have discretion to suspend the execution of prison sentences and place defendants on probation, so they often retain an important power to make “in-out” decisions. See Utah Code § 76-3-406 (setting forth 14 offense types for which probation or suspension of sentence may not be granted). See also *State v. Lineberry*, 391 P.3d 332, 333 (Utah App. 2016), citing Utah Code § 76-3-203(2) (finding no abuse of sentencing discretion when trial court chose to impose prison term rather than probation for second degree felony”).

⁵ Utah Code § 77-18-4(1),(2) (“Whenever a person is convicted of a crime and the judgment provides for a commitment to the state prison, the court shall not fix a definite term of imprisonment unless otherwise provided by law. ... The sentence and judgment of imprisonment shall be for an indeterminate term of not less than the minimum and not to exceed the maximum term provided by law for the particular crime.”). Trial courts do have discretion over the length of jail confinement. In felony cases, jail terms of up to one year may be imposed as a condition of probation. See Utah Code § 77-18-1(8)(c); *State v. Monzon*, 365 P.3d 1234 (Utah App. 2016) (defendant requested total sentence of 60 days in jail; presentence investigation report recommended 180 days in jail followed by one year of probation).

⁶ Maximum sentences are increased for repeat sex offenders. See Utah Code § 76-3-407(2) (“the maximum penalty for a sexual offense is increased by five years for each conviction of the defendant for a prior sexual offense that

sentencing has been emphasized by the Utah courts. In 2018, for example, the Utah Court of Appeals stated as follows:

Under Utah's indeterminate sentencing scheme, which has been in place in some form since 1913, a sentencing court “has no discretion in fixing the term of imprisonment. [It] simply imposes the statutorily prescribed range of years, and the Board of Pardons determines exactly how long the prisoner is to be confined.”⁷

Table 1. Required Indeterminate Sentences by Felony Grade

Grade of felony	Required indeterminate term
Capital felony	25 years to life (unless death or life without parole) ⁸
First-degree aggravated murder	25 years to life (unless life without parole) ⁹
Felony of the first degree	Five years to life
Felony of the second degree	One to 15 years
Felony of the third degree	Up to five years

Sources: Utah Code §§ 76-3-206, 76-3-207.7, 76-3-203.

arose from a separate criminal episode”). Also, there are enhanced penalty ranges for offenses committed in concert with two or more members of a criminal street gang. Utah Code § 76-3-203.1. For example, the penalty for a third-degree felony is increased to that for a second-degree felony, and the penalty for a second-degree felony is increased to that for a first-degree felony. *Id.*, § 76-3-203.1(4)(c),(d).

⁷ *State v. Cuttler*, 436 P.3d 278 (Utah App. 2018), quoting *Labrum v. Utah State Board of Pardons*, 870 P.2d 902, 907 (Utah 1993). See also *Padilla v. Utah Board of Pardons & Parole*, 947 P.2d 664, 669 (Utah 1997) (explaining that sentencing courts “must set an indeterminate sentence as provided by statute”).

⁸ See Utah Code § 76-3-206(2)(a).

⁹ See Utah Code § 76-3-207.7(2)(a).

Selected first-degree felonies are graded at an especially high level of severity, and must receive an “alternative minimum sentence” greater than shown in Table 1. These offenses include child kidnapping, aggravated kidnapping, rape of a child, object rape of a child, sodomy on a child, aggravated sexual abuse of a child, and aggravated sexual assault.¹⁰ Four of these offenses carry default sentences of 15 years to life while the sex offenses with child victims carry 25 years to life.¹¹ Depending on the existence of statutory aggravating factors, however, all of these crimes carry mandatory sentences of life without parole. This elevation of penalty depends on a finding by the trier of fact that the defendant caused serious bodily injury during the offense or had previously been convicted of a “grievous sexual offense.”¹² On the other hand, in certain circumstances, the statutes give courts discretion to impose lower minimum terms of ten, six, or three years to life. Such reductions always require the judge to find that the “lesser term ... is in the interests of justice.”¹³

Several other felonies carry elevated sentencing ranges of 15 years to life when the defendant caused serious bodily injury or has a prior conviction of a “grievous sexual offense.” These include the first-degree felonies of rape, object rape, and forcible sodomy and the second-degree felony of forcible sexual abuse.¹⁴ Here again, sentencing courts have discretion to reduce minimum terms to six or 10 years if the court finds such reductions to be “in the interests of justice.”¹⁵

The ten offense categories with “alternative minimum terms” present rare instances in which Utah sentencing courts have a degree of power over the duration of minimum terms.

In cases with multiple counts of conviction, sentencing courts also have power to influence defendants’ minimum and maximum terms through the choice of whether to impose

¹⁰ See Utah Sentencing Commission, 2020 Adult Sentencing & Release Guidelines (2020), at 19-20. The relevant statutes, in the order presented above, are Utah Code §§ 76-5-301.1, 76-5-302, 76-5-402.1, 76-5-402.3, 76-5-403.1, 76-5-404.1, and 76-5-405.

¹¹ For example, the default sentence for aggravated sexual assault is 15 years to life, Utah Code § 76-5-405(2)(a)(i), and the default sentence for rape of a child is 25 years to life, Utah Code § 76-5-402.1(2)(a).

¹² See, e.g., Utah Code § 76-5-402.1(2)(b). The offenses that meet the statutory definition of “grievous sexual offense” are listed in Utah Code § 76-1-601(8). “Serious bodily injury” is defined in *id.*, § 76-1-601(17).

¹³ See, e.g., Utah Code § 76-5-405(3)(a) (“If, when imposing a sentence under Subsection (2)(a)(i), a court finds that a lesser term than the term described in Subsection (2)(a)(i) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than: (i) 10 years and which may be for life; or (ii) six years and which may be for life.”). For sexual offenses with child victims, such reductions also require that the defendant is a first-time offender and was under age 21 at the time of the offense. See Utah Code § 76-5-402.14(a)(i),(ii) (necessary conditions for discretionary sentences of 15 years to life, 10 years to life, or 6 years to life when default sentence was 25 years to life).

¹⁴ See Utah Sentencing Commission, 2020 Adult Sentencing & Release Guidelines (2020), at 20.

¹⁵ See, e.g., Utah Code § 76-5-402(4). A similar sentencing structure exists for convictions of attempt or solicitation to commit rape of a child, object rape of a child, sodomy on a child.

concurrent or consecutive terms.¹⁶ A judge's decision to impose consecutive terms means that the statutory minimum terms for each offense will be added together or "stacked" to create an aggregate minimum term.¹⁷ Ordinarily, the statutory maximum terms are also stacked, but only up to a limit of 30 years for second- or third-degree felonies.¹⁸ Thus, for example, consecutive sentences on three counts of felonies of the second degree would result in a single aggregated sentence of three-to-30 years.

1.1. General rules of parole release

Prison release dates are determined by the parole board within the broad range of possibilities created by the statutory indeterminate sentences.

Within six months of a person's admission to prison, the parole board must conduct an "administrative review" for the purpose of scheduling the prisoner's "original hearing."¹⁹ There are few definitive rules concerning when original hearings must be scheduled except that, for prisoners who were under age 18 at the time of their crimes, original hearings must be scheduled within no later than 15 years.²⁰

Actual release dates are determined at the original hearings or later rehearings. The parole board's decisions may be informed by the state's sentencing and release guidelines, which offer

¹⁶ In making these decisions, the court must take into account "the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant." Utah Code § 76-3-401(1),(2). Also, sentencing courts must order consecutive sentences "if the later offense is committed while the defendant is imprisoned or on parole, unless the court finds and states on the record that consecutive sentencing would be inappropriate." *Id.*, § 76-3-401(3).

§ 76-3-401. Concurrent or consecutive sentences--Limitations--Definition, UT ST § 76-3-401"

¹⁷ Utah Code § 76-3-401(8)(b) ("when indeterminate sentences run consecutively, the minimum term, if any, constitutes the aggregate of the validly imposed minimum terms.").

¹⁸ Utah Code § 76-3-401(8)(a) ("if the aggregate maximum term exceeds the 30-year limitation, the maximum sentence is considered to be 30 years"). This rule does not apply if one of the counts carries a sentence of death or life imprisonment; or for consecutive sentences for a crime committed after the earlier crime had already been sentenced. *Id.*, § 76-3-401(6)(b)(i),(ii).

¹⁹ Utah Admin. Code R671-201-1(1)(a),(2)(a) ("Administrative Review" means the process by which the Board, by majority vote, reviews, deliberates, and schedules the month and year for an offender's original hearing.").

²⁰ Utah Admin. Code R671-201-1(5) ("When scheduling an original hearing by administrative review, if the offender was less than 18 years of age at the time of the commitment offense and the offense is eligible for parole, the original hearing shall be scheduled no later than 15 years after the date of sentencing."). If the board fails to perform an administrative review and does not schedule an original hearing, the Administrative Code sets out a series of default rules for when original hearings must be scheduled. In most instances, the default timeline is one year or less. *Id.*, R671-201-1(6).

recommended time-to-be-served before release.²¹ These release recommendations are advisory and unenforceable, however, and may be disregarded by the board. They have no statutory authority and are not classified as administrative regulations or rules.²² There are no publicly-available statistics to document the degree to which the guidelines have had influence on actual patterns of release decisions.

If anything, the discussion above may seriously understate the parole board's power. By statute, the board has authority to grant release even before a prisoners' minimum has been served if the board finds "mitigating circumstances which justify the release" after a full hearing.²³ As explained by the Court of Appeals:

The Utah Board of Pardons generally retains discretion to determine the actual number of years of imprisonment a defendant serves, which may be less than the minimum term of the sentence. ... The Board is given this broad authority, "[w]ith the exception of certain minimum mandatory sentences where the Board is specifically prohibited from paroling an offender before service of the minimum term of years."²⁴

The open-ended standard of "mitigating circumstances which justify the release" would seem to place little constraint on the board's power to release prisoners *before* their minimum terms have been served. If this authority is exercised with any frequency, then the minimum terms stated in judicial sentences are not hard limits on the degree of indeterminacy carried by those sentences. Instead, minimum terms are permeable and, in the terminology developed in this project, such sentences are 100 percent indeterminate.

²¹ See Utah Sentencing Commission, 2020 Adult Sentencing & Release Guidelines (2020), at 24-26 (guidelines matrices for general-rules cases, homicide, and kidnapping). All three matrices state that they do not create any rights or expectations.

²² See *Alvillar v. Bd. of Pardons & Parole*, 322 P.3d 1204, 1205 (Utah Ct. App. 2014), *cert. denied*, 333 P.3d 365 (Utah 2014) ("While the district court imposes an indeterminate term prescribed for an offense, the Board [of Pardons and Parole] has the authority to determine the actual number of years to be served. ... The Board's decisions on parole 'are final and are not subject to judicial review.'"); citing *Preece v. House*, 886 P.2d 508, 512 (Utah 1994). The sentencing and release guidelines are referenced in the state's court rules only as an "appendix," and are not mentioned in the rules themselves. See Utah Code of Judicial Administration, Appendix D.

²³ Utah Code § 77-27-9(1)(b) ("The board may not release any offender before the minimum term has been served unless the board finds mitigating circumstances which justify the release and unless the board has granted a full hearing, in open session, after previous notice of the time and location of the hearing, and recorded the proceedings and decisions of the board.").

²⁴ *State v. Cuttler*, 436 P.3d 278, 284 (Utah App. 2018), citing Utah Code § 77-27-9(1)(b). See also *State v. Lopes*, 980 P.2d 191, 198 (Utah 1999) (Russon, J., dissenting) ("Under section 77-27-9(1)(b) ..., the Board of Pardons and Parole may release an offender before the minimum term has been served if mitigating circumstances justify the release.").

1.2. Limitations on the right to counsel at release proceedings

In other state reports, we have noted instances in which state law has provided the right to appointed counsel to prisoners during parole-release proceedings (that is, the right to a lawyer's assistance at state expense if the prisoner is unable to afford retained counsel).²⁵ In Utah, there is no statutory right to appointed counsel and even the right to assistance by retained counsel is severely curtailed by administrative rule:

(a) Except in parole revocation hearings as set forth in this rule, an offender or petitioner has no right, requirement, or entitlement to legal representation or appointed counsel before the Board or during or in connection with any Board hearing, review, or decision.

(b) No attorney or other person appointed or employed by an offender to assist in any matter or hearing before the Board may testify, speak, or otherwise address the Board during a hearing except as provided in this rule. Only the offender, a person appointed by the Board to assist an offender pursuant to this rule, or a victim as provided for by Utah law may present testimony or comment during a hearing.²⁶

A separate rule states that “[a]ttorneys may submit information for the Board to consider. The information shall be submitted in writing and directed to the Administrative Coordinator or designee.”²⁷

1.3. Reconsideration after denials of parole release

There is no routine right to a second or subsequent hearing following denial of release. If parole is not granted at the initial hearing, the Board will inform the offender of the next possible rehearing date, if there is one.²⁸

²⁵ States that extend this right to at least some prisoners include California, Connecticut, Hawaii, and Oregon.

²⁶ Utah Admin. Code R671-308-3(a),(b).

²⁷ Utah Admin. Code R671-309-1(5).

²⁸ Utah Code § 77-27-7(1) (West) (2020), Rehearings are often given for the following reasons: 1) the Board requires more information of evaluation on the offender's situation; 2) the offender needs to demonstrate commitment to or involvement in specific programming; 3) the offender needs to demonstrate more responsible behavior in the institution or; 4) the nature of the offense and length of sentence make it impractical to set a date at the first hearing. See *Inmate Orientation Handbook*, 5. Under a rule promulgated by the board, prisoners may request “redetermination” after a minimum of 5 years, except for prisoners with life sentences, who must wait ten years. Utah R. Admin. P. R671-316(3).

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

1.4. Generally-available credits: types and amounts

Utah law offers no good-time credits that accrue by formula over the passage of time.

The parole board has statutory responsibility to establish an earned-time system to reward prisoners' completion of programs designed to reduce their risk of recidivism.²⁹ The board's current system allows prisoners to earn up to eight months of credit for the completion of two approved programs.³⁰ The system also gives the board discretion to award credits with no ceiling on their amount "to recognize additional or extraordinary programming performance or achievement."³¹

a. Effects of good-time credits on release eligibility

Earned-time credits have no effect on the timing of prisoners' release eligibility.

b. Effects of good-time credits on the judicial maximum term

Earned-time credits have no effect on the judicial maximum sentence and do not establish earlier dates of mandatory release.

c. Effects of good-time credits on release date

Earned time credits have effect only after the parole board has ordered a release date for a prisoner.³² If such a date has been ordered, earned time credits are subtracted from that date to establish an earlier release date.³³

²⁹ Utah Code § 77-27-5.

³⁰ Utah Admin. Code R671-311-3(3)(a),(b) ("An offender shall earn an adjustment of four months for the successful completion of a program identified by the Department as pertaining to, satisfying, or applying within an offender's case action plan. ... An offender shall earn an adjustment of four months for successful completion of one additional program").

³¹ Utah Admin. Code R671-311-3(3)(d) ("The Board, in its discretion, may grant earned time adjustments in excess of four months to recognize additional or extraordinary programming performance or achievement.").

³² Utah Admin. Code R671-311-3(2)(a)(i) (earned-time "adjustment" is defined to mean "a reduction of an offender's period of incarceration when a release date has been ordered by the Board").

³³ Utah Code § 76-3-403 (West) (2020).

1.5. Loss of good-time credits

The parole board's regulations state that "a release date granted by the Board following an earned time adjustment [may be] rescinded due to a major disciplinary violation, new criminal conviction, new criminal activity, or other similar action committed by the offender."³⁴

Many states have provisions allowing for the forfeiture of credits when prisoners file lawsuits found to be nonmeritorious. Under Utah law, the filing of such a lawsuit is expressly made a factor the parole board may consider when making release decisions.³⁵

II. Prisoners Outside the General Rules

2.1. Life sentences without parole

Sentences of "life in prison without parole" are in fact subject to the release discretion of the parole board in Utah, but under a more restrictive legal standard than normally applied. The relevant statute provides that "[t]he board may parole a person sentenced to life in prison without parole if the board finds by clear and convincing evidence that the person is permanently incapable of being a threat to the safety of society."³⁶

The parole board also has the authority to commute a sentence of death to a sentence of life in prison without parole for crimes committed on or after April 27, 1992.³⁷

2.2. Life sentences with possibility of parole

Sentences of life with the possibility of parole carry minimum terms of five or 25 years, depending on the grade of offense (see Part I, Table 1). Minimum terms may be stacked in cases of multiple counts of conviction carrying maximum life terms, if the court elects to impose consecutive sentences.³⁸ For example, if the sentencing court orders consecutive sentences on two counts of first-degree felonies (each of which carries an indeterminate sentence of five years to life), the resulting sentence would be ten years to life.

³⁴ Utah Admin. Code R671-311-3(2)(e).

³⁵ Utah Code § 77-27-5.3(2) ("In any case filed in state or federal court in which a prisoner submits a claim that the court finds to be without merit and brought or asserted in bad faith, the Board of Pardons and Parole and any county jail administrator may consider that finding in any early release decisions concerning the prisoner.").

³⁶ Utah Code § 77-27-9(7).

³⁷ Utah Code § 77-27-9(2)(e).

³⁸ Utah Code § 76-3-401(8)(b) ("when indeterminate sentences run consecutively, the minimum term, if any, constitutes the aggregate of the validly imposed minimum terms.").

2.3. Juvenile life sentences

Utah has banned sentences of life without parole for defendants who committed their crimes while under age 18. The maximum penalty for any offense that may be imposed on a juvenile offender is an indeterminate sentence of 25 years to life.³⁹

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

3.1. Medical or “compassionate” release

Upon receipt of a written “request” from the department of corrections, the parole board is required to consider the compassionate release of prisoners in several “exceptional circumstances.” These include:

- The prisoner’s “public safety and recidivism risk is significantly reduced due to the effects or symptoms of advancing age, medical infirmity, disease, or disability, or mental health disease or disability.”
- The prisoner “suffers from a serious and persistent medical condition which requires extensive medical attention, nursing home care, or palliative care.”
- The prisoner’s “immediate family member dies within 120 days of a previously scheduled release.”⁴⁰

3.2. Executive clemency

The Utah Constitution provides that the Board of Pardons and Paroles (the “parole board” in this report) may “commute punishments, and grant pardons after convictions, in all cases except treason and impeachments.”⁴¹ In contrast with most other states, the Utah Constitution limits the governor’s powers to the granting of “respite or reprieves” following a conviction, but the effect of such actions “may not extend beyond the next session of the

³⁹ Utah Code § 76-3-209 (“Notwithstanding any provision of law, a person may not be sentenced to life without parole if convicted of a crime punishable by life without parole if, at the time of the commission of the crime, the person was younger than 18 years of age. The maximum punishment that may be imposed on a person described in this section is an indeterminate prison term of not less than 25 years and that may be for life. This section shall only apply prospectively to individuals sentenced on or after May 10, 2016.”). See also Utah Code § 76-3-206(2)(b).

⁴⁰ Utah Admin. Code R671-314-1(4). In the case of the death of an immediate family member, the request that the board consider compassionate release may come from an “other interested person,” in addition to a request from the department of corrections.

⁴¹ Utah Const. Art 7, § 12(2)(a). See also Utah Code § 77-27-5(1)(a) (providing that “the Board of Pardons and Parole shall determine by majority decision when and under what conditions any convictions, except for treason or impeachment, may be pardoned or commuted.”)

board.” At that time, “the board shall continue or determine the respite or reprieve, commute the punishment, or pardon the offense as provided in this section.”⁴²

3.3. Emergency release for prison overcrowding

When the inmate population of the Utah State Prison exceeds “operational capacity” (defined as “96.5% of every physical and funded bed”) for at least 45 days, the director of the department of corrections must “notify the governor, the legislative leadership, and the Board of Pardons and Parole that the department is approaching an overcrowding emergency.” If the prison population then rises to exceed “emergency release capacity” (defined as “98% of every physical and funded bed”) for 45 days, the department of corrections must again give notice to the officials mentioned above. At this point, the parole board is empowered to “commence the emergency release process,” under which the parole board “may order the release of a sufficient number of inmates ... to return the prison inmate population to operational capacity.”⁴³

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

4.1. General-rules cases

General-rules cases in Utah fall within three grades of felonies (see Part I, Table 1). The degrees of indeterminacy for each felony class are different, but are extremely high across-the-board. In each class, if sentencing courts decide to impose a prison term, they have no choice but to impose the full indeterminate sentence as mandated by statute, including preset minimum and maximum terms. For first-degree felonies, the fixed indeterminate sentence must always be five-years-to-life. For second-degree felonies, the sentence is always one-to-15 years. For third degree felonies, there is no statutory minimum term, but the fixed maximum is always five years.

For first-degree felonies, we calculate the degree of indeterminacy based on the assumption that a life sentence can be equated with an average prisoner’s life expectancy of 45 years. A minimum sentence of five years represents about 11 percent of that life expectancy. Thus, although only an approximation, we can say that about 11 percent of potential time served is “determined” by the judicial sentence. The remaining 89 percent is “indeterminate,” that is, decisions about time served within this greater portion of the timeline will be made by back-

⁴² Utah Const. Art 7, § 12(3)(a).

⁴³ Utah Code § 64-13-38. The parole board must identify the particular prisoners to be released “in cooperation and consultation” with the department of corrections. *Id.*, § 64-13-38(4)(b).

end officials with release discretion long after the judicial sentence has become final. The force of these later-in-time decisions cannot be known when the judicial sentence is handed down.

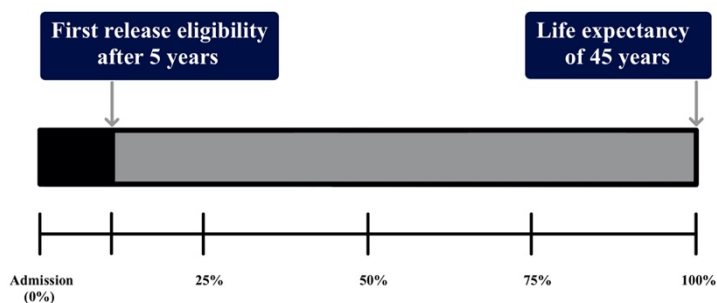
For second-degree felonies, the minimum term of one year is 6.7 percent of the maximum 15 year sentence. Such sentences are 93.3 percent indeterminate.

For third-degree felonies, there is no minimum term, meaning that prisoners are technically eligible for release the moment they are admitted to prison. Measured against the judicial maximum term, such sentences are 100 percent indeterminate.

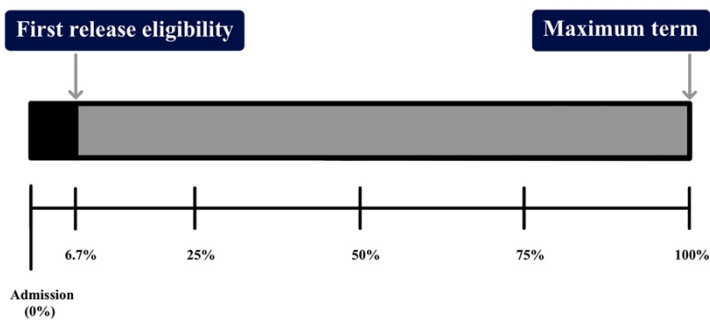
The degrees of indeterminacy in the three classes of felony sentences may also be described in absolute terms according to the number of months or years that are determinate versus those that are indeterminate. For first-degree felonies, 40 years of indeterminacy follow the initial five years, which are determinate. For second-degree felonies, 14 out of 15 years are indeterminate. For third-degree felonies, five out of five years are indeterminate. Measured in such absolute terms, the degree of indeterminacy in Utah's general-rules cases increases dramatically with the severity level of the offense of conviction.

The different degrees of indeterminacy in these three classes of sentences are depicted in Figures 3, 4, and 5 below.

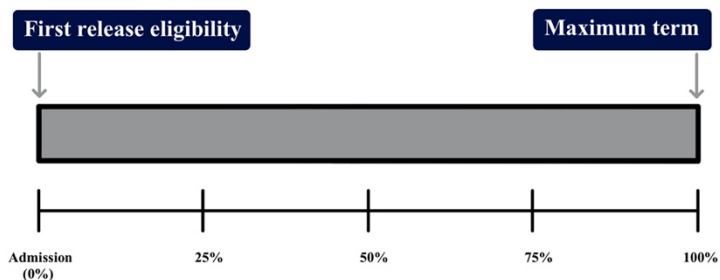
Utah Figure 3. Prison-Release Timeline for First-Degree Felony (5 years to life)



Utah Figure 4. Prison-Release Timeline for Second-Degree Felony (1 to 15 years)



Utah Figure 5. Prison-Release Timeline for Third-Degree Felony (0 to 5 years)



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*).

Table 2 below calculates the PMP for each of the three classes of general-rules sentences in Utah. The figure also displays the degrees of indeterminacy associated with each felony class measure in percentage and absolute terms.

Table 2. Degrees of Indeterminacy by Felony Grade

Sentence Class	Percent Indeterminate	Years of Indeterminacy	Population Multiplier Potential
Felony of the first degree	89 percent	40 years	9:1
Felony of the second degree	93.3 percent	14 years	15:1
Felony of the third degree	100 percent	5 years	Not calculable

Table 2 describes a system with an extraordinary degree of indeterminacy in general rules cases for the major classes of felonies. Yet the analysis above ignores the parole board’s further power to release prisoners even before their minimum terms have elapsed, if the board finds there are

“mitigating circumstances which justify the release” (see section 1.1).⁴⁴ Despite the open-ended wording of this statutory power, we assume for purposes of this report that pre-minimum releases in Utah are rare. In the absence of data, this is a matter of speculation. If the pre-minimum release power were frequently used then we would question whether Utah prison sentences in fact include “minimum sentences” in the normal sense of the term.

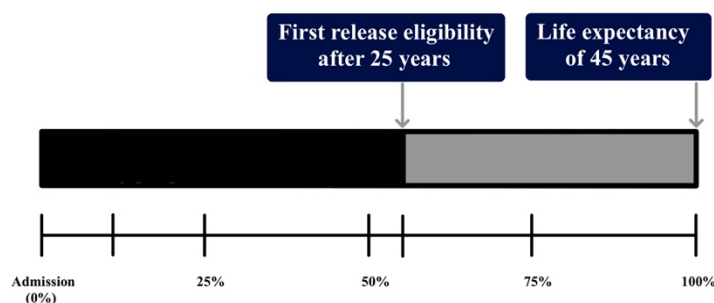
4.2. Parolable life sentences for murder

Aside from the extremely indeterminate life sentences attached to ordinary first-degree felonies in Utah, there are different species of life sentences prescribed for crimes of aggravated murder. These include sentences of life without parole (LWOP) and parolable life sentences with minimum terms of 25 years (see Part I, Table 1).

As conceptualized in this project, LWOP sentences are 100 percent determinate because there is no prison-release discretion at the back end of the sentencing system except for infrequently-used mechanisms such as pardons, commutations, and compassionate release. Placing those low-probability options aside, the PMP for such sentences is 1:1. That is, time-served discretion at the back end of the prison-sentencing system can have no effect on the size of the cohort of LWOP prisoners in the state. Their representation in the prison population is entirely determined at the front end of the system.

For parolable life sentences with 25-year minimum terms, we estimate the degree of indeterminacy against the assumption that average prisoners have a life expectancy of 45 years upon admission to prison. The resulting timeline for such sentences is shown in Figure 6.

Utah Figure 6. Prison-Release Timeline for Life Sentence for Murder (25 years to life)



By this approximation, parolable life sentences for murder are 55 percent determinate and 45 percent indeterminate, with 20 years of indeterminacy built into the full timeline. The PMP for this cohort of prisoners is 1.8:1. Compared with release formulas for parolable life sentences

⁴⁴ Utah Code § 77-27-9(1)(b).

in other states, if we limit our focus to murder cases, this is a moderate degree of indeterminacy. Indeed, most states have enacted somewhat longer minimum terms for their most serious iterations of parolable life sentences.⁴⁵

4.3. *The parole board's clemency powers*

The Utah parole board has far-reaching powers to issue pardons and commutations—a power that is withheld from the governor by the state constitution. One consequence of this is that the parole release of prisoners sentenced to life without parole is expressly contemplated in Utah law (see section 2.1).

Such an institutional arrangement is unusual in American law but is not unprecedented. Without data, we cannot tell if it has made much of a difference in Utah's prison-sentencing system. We have no evidence that these powers are frequently used by the parole board, and they are rare events in other states that repose equivalent authority in the governor. Accordingly, this report does not treat the board's clemency powers as an important element in the operation of Utah's prison system as a whole—at least in the current historical context of minimal use of the clemency power.

4.4. *Distribution of time-served discretion*

For general-rules cases, all prison-release discretion at the back end of Utah's prison sentencing system is consolidated in the parole board. This is true to a degree not seen in any other American jurisdiction. There is no routine allotment of good-time credits within the jurisdiction of the department of corrections. Utah's system of earned-time credits is administered by the parole board. Furthermore, the only effect of earned-time credits is to advance the discretionary release dates granted to prisoners, and such release dates are fully controlled by the parole board without resort to earned-time awards.⁴⁶ In other words, the board would have the same effective degree of control over prisoners' lengths of stay with or without the tool of earned-time credits.

Functionally, the parole board's release discretion might be channeled by Utah's sentencing-and-release guidelines, which set out recommended release dates for individual prisoners based on their offenses of conviction and criminal histories. These guidelines are advisory, however, and there is no meaningful process to review release decisions or otherwise enforce the guidelines' provisions. If the Utah parole board chooses to give weight to the current

⁴⁵ 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, forthcoming 2022), Chapter 9.

⁴⁶ This analysis does not take account of infrequently-used release mechanisms such as the executive clemency power, compassionate release, emergency release for conditions of overcrowding, or other forms of emergency or ad hoc release. Based on available data, we assume that such release mechanisms ordinarily have minimal impact on a state's overall prison population size.

guidelines, adhering to them some or even most of the time, we regard this as a matter of practice or convention. There is no legal or institutional requirement that the board do so, and no structural guarantee that compliance rates will not drift over time. Indeed, so far as we know, there is no regular reporting to show whether the board's release decisions are consistent with the release guidelines.

Another notable aspect of Utah's prison-sentencing system is the minimal role given to sentencing judges in the determination of time-to-be-served in prison sentences. For the major grades of felonies, "judicial" prison sentences are predetermined by statute. That is, once the sentencing judge decides to impose a prison term, the judge has no discretion over the minimum or maximum length of that term. The major influence judges exert on the state's prison populations is through their "in-out" decisions.

Comparing judicial sentencing discretion in Utah and other states, two points are most salient. First, unlike in the vast majority of states, sentencing judges in Utah have no power to influence state prison policy through their choices of maximum sentences in individual cases. In most other jurisdictions, judges have freedom to select maximum sentences at or below the statutory maximum ceilings for each offense of conviction. Indeed, in most states, judicial sentences at the statutory maximum are rare. If the habits of the judiciary in a particular state are to set judicial maximum terms below the authorized statutory maximum penalties, the aggregate of such decisions places a cap on the potential size of the state's prison population. In Utah, however, statutory maximum penalties cannot be softened by the courts; they may only be mitigated by the parole board.

Second, like many other states, Utah sentencing courts have no discretion to alter the degrees of indeterminacy in the individual sentences they impose. Such authority exists, for example, in states that allows judges to select minimum terms with varied relationships to their accompanying maximum sentences. In Utah, sentencing courts are given discretion over the duration of minimum terms only for 10 classes of very serious offenses, and through their discretion in multi-count case to impose either concurrent or consecutive sentences(see section 1.1).

In sum, across the country, time-served discretion is normally shared across the front end and back end of states' prison-sentencing systems, with different balances in each state. In Utah, the scale tilts heavily toward the back end of the system, perhaps more so than in any other American jurisdiction.

4.5. Overall assessment

We rank the degree of indeterminacy across Utah's entire prison-sentencing system as extremely high. By formula, prison sentences in Utah are among the most indeterminate in the nation. Moreover, at the back end of the system, release discretion is consolidated in the parole board without the checks and balances that exist in many other indeterminate states. To varying degrees, many systems employ overlapping or offsetting discretion across two or

more release agencies. This is emphatically not the case in Utah. Indeed, even the clemency power is held by the parole board, removing the executive's authority to override the board's refusal to release individual prisoners.

One way to conceptualize indeterminacy is to gauge the ease with which a state's prison population size can lurch toward the extremes of always-release or never-release scenarios. To the extent that dramatic changes in direction are entirely within the control of a single agency with no need of cooperation from any other decisionmaker, and are free of veto by other officials, such changes can occur more freely.

On the question of prison population size, it is equally notable that sentencing courts in Utah have extremely limited power to determine the maximum severity of their prison sentences or their degrees of indeterminacy. In contrast with most other states, time-served discretion in Utah is funneled overwhelmingly to the back end of the prison-sentencing system. Absent structural changes in Utah's prison-sentencing system, this analysis suggests that the parole board will remain the most powerful agency (or official actor) in charting the state's future course of prison growth or contraction. Not only does the parole board's power exceed that of the department of corrections, it also eclipses the impact of judicial sentencing decisions, prosecutorial charging discretion, and the plea bargaining process.

In its 2020 guidelines for sentencing and release decisions, the Utah Sentencing Commission offered its own calculation of the degree to which Utah prison populations and corrections costs were dependent upon the parole board's exercise of release discretion:

The Sentencing Commission recognizes that statutory lengths of stay available to the sentencing authorities far exceed guideline ranges and recommendations. The Commission also recognizes that if every offender served the full statutory term of his or her sentence, the fiscal impact alone would be more than 23 times the current budget. Corrections budget alone of roughly \$300,000,000 (\$300M) annually would skyrocket to \$7,000,000,000 (\$7B) annually.⁴⁷

While the basis for this calculation was not disclosed in the 2020 guidelines (and we are unable to reproduce it), we concur with the general sentiment that, in an extremely indeterminate prison-sentencing system, actual prison populations are largely within the control of prison-release authorities. In Utah, this authority is held nearly exclusively by the parole board.

⁴⁷ Utah Sentencing Commission, *2020 Adult Sentencing & Release Guidelines* (2020), at 12. These fiscal observations were included as a plea to encourage the parole board to give weight to the non-binding release guidelines.