



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: VIRGINIA

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Prison-Release Discretion and Prison Population Size

State Report: Virginia

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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: Virginia

Executive Summary

On the scale developed for this project (see pp. iii-iv), we assess the Virginia prison-sentencing system as one with a *low degree of indeterminacy* overall. There are two main classes of prison sentences in Virginia, which apply to “more serious offenses” (as enumerated in statute) and “less serious offenses” (those not enumerated). For the more serious class, sentences carry an *extremely low degree of indeterminacy*. As of mid-2022, however, the formula for earned sentence credits for the less serious offenses was made significantly more generous than for the more serious crimes. Sentences for less serious offenses now carry a *low degree of indeterminacy*. If we simply average out the two main classes of prison sentences in Virginia, the center of gravity appears to be a *low degree of indeterminacy*—but not greatly distant from the extremely-low borderline.

Before the changes in credit-earning formulas that became effective in 2022, the Virginia prison-sentencing system as a whole operated with an extremely low degree of indeterminacy for virtually all sentences. The state is thus an example of a highly determinate American jurisdiction that has shifted its general structure to one of greater indeterminacy. Notably, Virginia made this systemic change through increases in available credit awards rather than the introduction or expansion of discretionary parole release.

Virginia is also one of a handful of states that provide for the award of earned-time credits when the programs necessary to win those credits are not available to prisoners.

Terminology note

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

Introduction

Virginia’s prison-rate history, 1972 to 2020

At yearend 2020, Virginia’s prison rate was 370 per 100,000 general population, with a prison population of 31,838.¹ Virginia’s prison rate was 14th largest among all states.

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

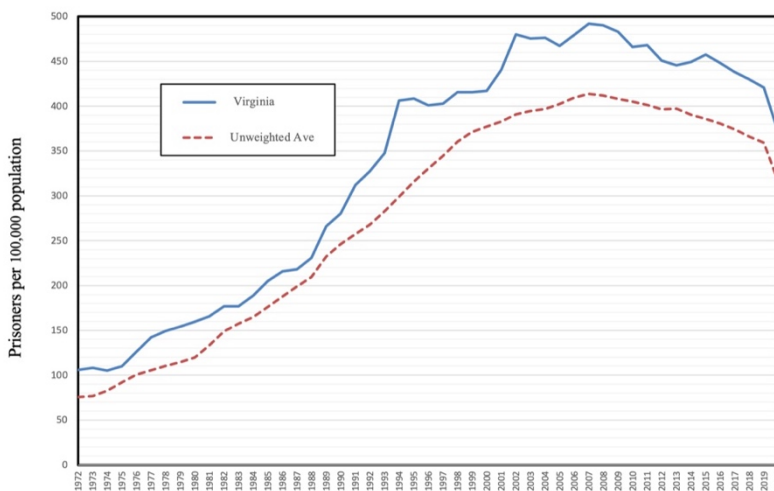
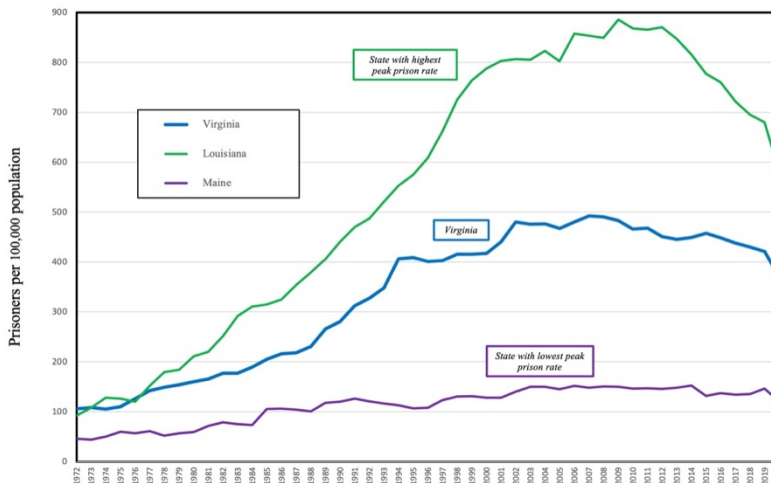


Figure 2. Prison Rate Change in Virginia, Louisiana, and Maine, 1972 to 2020



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

¹ E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 12 table 4, 16 table 7.

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).

Virginia reached its peak prison rate in 2007 at 492 per 100,000, which dropped to 370 per 100,000 in 2020. This is a net difference of -122 per 100,000, which was the 23rd largest prison-rate drop of all states from their peak positions (in various years) through 2020.

Figures 1 and 2 span two important periods in American criminal-justice history. From 1972-2007, the United States saw 35 years of uninterrupted growth in the nationwide aggregated prison rate. This might be called the Great Prison Buildup. Since 2007, national prison rates have been falling. From 2007 through yearend 2019 (prior to the COVID pandemic), the average drop in states' prison rates was about 1.2 percent per year, with much variation across individual states.

The COVID period

We view American prison rates following the arrival of the COVID pandemic in March 2020 as discontinuous with earlier rates and trends. Whatever factors were at work to determine state prison rates in the “before times,” the pandemic introduced a major new causal force that, at least temporarily, diverted the course of prison-rate change nationwide.²

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 100,000.³ We believe this was the largest one-year decline in state prison rates in American history.⁴

² In Figures 1 and 2 above, the COVID period arrives in the very last year of data that has been reported by the Bureau of Justice Statistics (BJS) as of this writing—from yearend 2019 to yearend 2020. Figures 1 and 2 rely exclusively on BJS data covering the years 1972-2020. For a tentative update, the Vera Institute of Justice has collected state imprisonment counts reaching into December 2021, which are not fully compatible with BJS reports. See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022).

³ 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.

⁴ 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.⁵

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.⁶

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 2020.⁷

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).

⁵ 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).

⁶ 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.

⁷ 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 Virginia

In a separate study, the Robina Institute found 1,376 releases in Virginia from March 2020 through December 2021 that were accelerated in response to the pandemic.⁸ This number was the equivalent of about four percent of Virginia pre-COVID prison population (at yearend 2019). As reported by the Robina Institute:

On April 22, 2020, the Virginia General Assembly approved a proposed budget amendment from Governor Ralph Northam which gave the director of the Virginia Department of Corrections (DOC) authority to release people from prison early during the COVID-19 pandemic. The early release plan developed by the DOC had several requirements. People had to have a viable housing plan, be at a low to medium risk of recidivism, have less than one year left to serve, have their good time earning at a certain level, and have no active detainer. If they were convicted of a class 1 felony or a sexually violent offense, they were not considered. All final decisions about early releases were made by the Director of Corrections, who also considered the individuals' medical conditions. People were released periodically throughout the DOC's period of authority: 62 were released during the week after the amendment was approved, and 606 had been released as of October 15, 2020. When the DOC's authority to release individuals early terminated at midnight on July 1, 2021, a total of 1,376 people had been released early.⁹

releases fell from 557,309 to 502,723). Only five states released five percent or more of prisoners in 2020 than they had released in 2019: Arizona (6.9 percent), Maine (30.9 percent), Nebraska (5.9 percent), New Jersey (19.7 percent), and Wyoming (8.0 percent). For a focus on patterns of parole release in 2020, see Tiana Herring, *Parole boards approved fewer releases in 2020 than in 2019, despite the raging pandemic* (Prison Policy Initiative, February 3, 2021), at <https://www.prisonpolicy.org/blog/2021/02/03/parolegrants/> (surveying data from 13 states; finding that total numbers of parole releases fell in nine states; among all 13 states, the average drop in numbers of parole releases from yearend 2019 to yearend 2020 was 11.3 percent). See also Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022) (concluding that “the greatest impact on prison population overall occurred on the admissions side of the equation.”). From March 2020 through December 2021, Mitchell et al. estimate a total of 47,967 “non-routine COVID releases” from state prisons nationwide. Over a similar period (January 2020 to December 2021), Vera Institute of Justice (Vera) reported a drop in the aggregate state prison population of 217,989 people, from 1,259,977 to 1,041,988. Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2.

⁸ 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.

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 79 Appendix E (footnote omitted).

In calendar year 2020, Virginia’s prison rate fell from 421 to 370 per 100,000—a one-year decline of -51 per 100,000. This was the 25th largest one-year drop reported among all 50 states for that year.¹⁰ Measured in percentage terms, it was a 12.1-percent reduction in the state’s prison rate. The state’s total prison population fell by 4,253 people, from 36,091 to 31,838.¹¹ From yearend 2020 to December 2021, the Vera Institute reported that Virginia saw a continued reduction in its prison population, from 31,838 to 30,371—or 4.6 percent.¹²

I. General Rules of Prison Release in Virginia

Virginia abolished discretionary parole release effective January 1, 1995 and, at the same time, instituted judicial sentencing guidelines.¹³ Virginia allows jury sentencing in noncapital cases, but jury sentences are imposed in a tiny fraction of all criminal cases.¹⁴

¹⁰ The largest single-state drop from yearend 2019 to yearend 2020 was in Kentucky, from 515 to 414 per 100,000. E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 15 table 7.

¹¹ *Id.*, at 12 table 4, 16 table 7. Virginia’s 2020 prison rate drop cannot be accounted for in Bureau of Justice Statistics reporting of changes in release and admissions numbers in calendar year 2020. According to BJS, the number of prison admissions in the state dropped by 1.3 percent in 2020 compared with the previous year (from 12,018 to 11,866—or 152 persons), and releases in 2020 increased by 1.6 percent over 2019 (from 12,695 to 12,904—or 209 persons). *Id.*, at 18 table 8, 20 table 9. These figures account for a prison drop of only 361 people, far short of the drop of 4,253 reported from yearend 2019-2020. We think an error in the estimate of actual admissions in 2020 is to blame. BJS indicated that the 2020 release rates were “preliminary” and were based on data from fiscal year 2019. *Id.*, at 18 table 8 n.l. We suspect the actual drop in prison admissions from 2019 to 2020 was vastly larger than reported by BJS.

¹² See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2. As a general matter, Vera’s *People in Prison* reports should not be treated uncritically as “updates” of BJS’s annual *Prisoners* series. Vera does not always gather prisoner counts from the same dates as BJS, nor does it calculate state prison rates in the same way. For example, BJS calculates yearend prison rates using yearend population estimates for each state from the Census Bureau, while Vera uses the Census Bureau’s July 1 estimates (six months earlier). Occasionally, the absolute numbers of state prisoners reported by Vera are dramatically different from those in BJS reports, suggesting basic differences in counting rules. Because of such incompatibilities, we do not attempt to integrate data from the two sources in any of our state reports for this project.

¹³ Va. Code Ann. § 53.1-165.1 (“The provisions of [Article 3 (Procedures Governing Parole)] shall not apply to any sentence imposed or to any prisoner incarcerated upon a conviction for a felony offense committed on or after January 1, 1995. Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense.”); Va. Code Ann. § 19.2-298.01(G) (effective date of discretionary sentencing guidelines); see also Virginia Senate Finance Committee, *Parole Abolition and Sentencing Reform: A 20-Year Retrospective* (2015), at 3. Under the former system, some prisoners who earned full sentence credits could win release after serving as little as one-fifth of their judicial maximum sentences. *Id.* at 5; see Va. Code Ann. § 53.1-201 (former “good conduct allowance” system).

¹⁴ Va. Code Ann. § 19.2-295(B) (“When the accused is tried by a jury, deliberations of the jury shall be confined to a determination of the guilt or innocence of the accused, except that when the ascertainment of punishment by the jury has been requested by the accused”); see also Va. Code Ann. § 19.2-295.1.

1.1. General rules of prison release

The vast majority of prisoners in Virginia receive judicial maximum sentences that are reducible only by “earned sentence credits.” With the exceptions noted below, there is no mechanism for discretionary parole release.

Virginia’s parole board’s release jurisdiction includes cases sentenced under prior law,¹⁵ prisoners who committed their offenses while juveniles who are serving sentences of life or more than 20 years,¹⁶ and prisoners with indeterminate sentences imposed under the Youthful Offender Act.¹⁷ In recent years, parole grant rates have been low.¹⁸

¹⁵ See Va. Code Ann. §§ 53.1-151 to 53.1-165.1. The old cases reach back to prisoners who committed their offenses before January 1, 1995, most prisoners sentenced by juries prior to June 9, 2000, and prisoners serving sentences for multiple misdemeanors committed prior to July 1, 2008. Va. Code Ann. § 53.1-165.1; Va. Code Ann. § 53.1-153. For a full summary of the parole board’s release jurisdiction, see Virginia Parole Board, *About the Parole Board*, at <https://vpb.virginia.gov/about-the-parole-board/> (last visited Dec. 27, 2022).

¹⁶ Va. Code Ann. § 53.1-165.1(E) (“Notwithstanding the provisions of subsection A [making all the parole rules inapplicable to cases after 1994] or any other provision of this article to the contrary, any person sentenced to a term of life imprisonment for a single felony or multiple felonies committed while the person was a juvenile and who has served at least 20 years of such sentence shall be eligible for parole and any person who has active sentences that total more than 20 years for a single felony or multiple felonies committed while the person was a juvenile and who has served at least 20 years of such sentences shall be eligible for parole. The Board shall review and decide the case of each prisoner who is eligible for parole in accordance with § 53.1-154 and rules adopted pursuant to subdivision 2 of § 53.1-136.”).

¹⁷ Va. Code Ann. § 19.2-311 (giving judges discretion to impose indeterminate sentences on defendants who were under age 21 at the time of their offenses and have no prior convictions). Indeterminate sentences imposed under Va. Code Ann. § 19.2-311 must be four years in length but must include an additional suspended prison term of at least 18 months. Defendants convicted of murder and serious sex offenses are excluded. In order to impose such a sentence, the judge must conclude that an individual defendant is “capable of returning to society as a productive citizen following a reasonable amount of rehabilitation.” Va. Code Ann. § 19.2-311(A),(B). For prisoners who receive such sentences, the rules of parole eligibility are found in Va. Code Ann. § 19.2-313 (providing no minimum term to parole eligibility, but prisoners become eligible for parole consideration only “upon certification by the Director of the Department of Corrections that the person has successfully completed the [youthful offender] program ... and a determination that he has demonstrated that such release is compatible with the interests of society and of such person and his successful rehabilitation to that extent”).

¹⁸ See Nora Demleitner, *Virginia can be at the forefront of criminal justice reform*, Washington Post (Aug. 27, 2020) (“For those still eligible, parole grants came ever later and often never. Between 2012 and 2018, on average, Virginia’s Parole Commission granted parole to about 6 percent of applicants. Geriatric parole, which is available at the earliest to offenders who are at least 60 years old and have served 10 years, has been equally unavailing. Yet lower is the percentage released early of those who were sentenced under the Youthful Offender Act.”); Emma Gauthier & Anna Madigan, *Virginia denies vast majority of parole requests, data shows*, Virginia Capital News Service (Dec. 17, 2019) (“Between January and October of this year, the Parole Board granted parole 5% of the time.”).

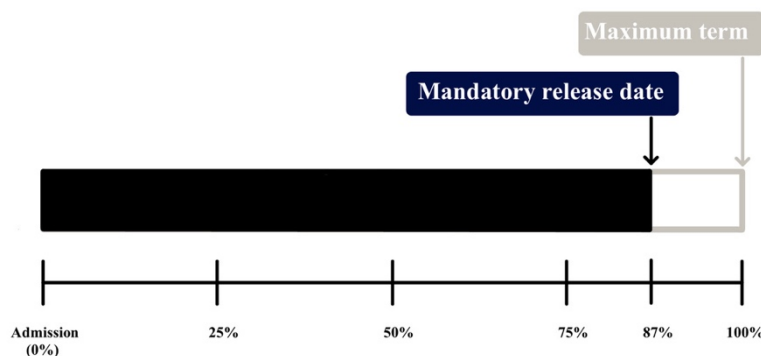
1.2. Generally-available credits: types and amounts

Virginia’s “earned sentence credits” are awarded at varying rates depending on prisoners’ offenses of conviction and their compliance with their program assignments as determined by the department of corrections.¹⁹

Earned sentence credits are deducted from prisoners’ judicial maximum sentences to establish earlier mandatory release dates.²⁰ The credits do not advance the earliest date of discretionary parole release eligibility for Virginia prisoners with parolable sentences.²¹

For prisoners with convictions of the “most serious” offenses, as enumerated in Va. Code Ann. § 53.1-202.3(A), earning rates are 4.5 days per month based on “full participation in and cooperation with programs to which a person is assigned” and “by meeting such other requirements as may be established by law or regulation.”²² Full accrual of credits produces a

Virginia Figure 3. Prison-Release Timeline for Prisoners with Sentences for “More Serious Crimes” with Full Earned Sentence Credits



¹⁹ See Va. Code Ann. § 53.1-32.1(A) (“The Director shall maintain a system of classification which (i) evaluates all prisoners according to background, aptitude, education, and risk and (ii) based on an assessment of needs, determines appropriate program assignments including career and technical education, work activities and employment, academic activities which at a minimum meet the requirements of § 66-13.1, counseling, alcohol and substance abuse treatment, and such related activities as may be necessary to assist prisoners in the successful transition to free society and gainful employment.”).

²⁰ Va. Code Ann. § 53.1-202.2(A) (“One earned sentence credit shall equal a deduction of one day from a person’s term of incarceration.”).

²¹ Va. Code Ann. § 53.1-202.3(G) (“Notwithstanding any other provision of law, no portion of any sentence credits earned shall be applied to reduce the period of time a person must serve before becoming eligible for parole upon any sentence.”).

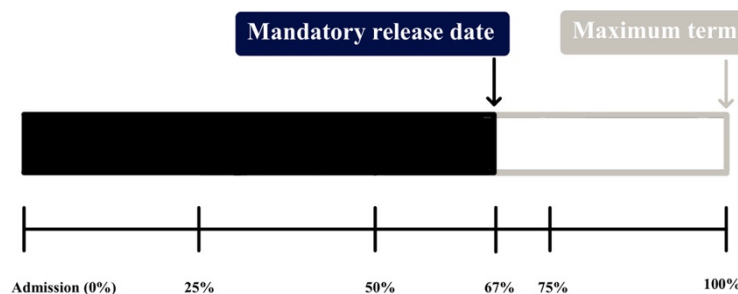
²² Va. Code Ann. § 53.1-202.2(A); Va. Code Ann. § 53.1-202.3(A). The crimes subject to the 4.5 day per month earning rate are: any Class 1 felony; murder; solicitation to commit murder; terrorism; providing material support for terrorism if the death of any person results; felony kidnapping or abduction; malicious felony assault or bodily wounding; strangulation; female genital mutilation; felony assault and battery against a family or household member; felony stalking; felony violation of a protective order; robbery; carjacking; felony criminal sexual assault; entering a dwelling with intent to commit murder, rape, robbery or arson; use of machine gun for crime

mandatory release date (MRD) at the 87 percent mark of the judicial maximum sentence. See Virginia Figure 3 below.

On the scale developed for this project, such sentences carry an *extremely low degree of indeterminacy*—which could also be described as an extremely high degree of determinacy (see pp. iii-iv). The population multiplier potential (PMP) for such sentences is 1.15:1 (see p. v). That is, if all prisoners serving such sentences were consistently denied all available credits (the *longest-time-served scenario*), the size of the prisoner subpopulation serving such sentences would eventually reach a level 15 percent higher than the same group if everyone were consistently awarded all available credits (the *shortest-time-served scenario*). Actual time served and prison population size are overwhelmingly determined by front-end sentencing decisionmakers, including discretionary choices of judges and prosecutors.

For prisoners convicted of “less serious” offenses (other than those enumerated in Va. Code Ann. § 53.1-202.3(A)), the general rule is that credit earnings of up to 15 days per month are authorized, depending on how a prisoner is classified by the department of corrections within a “four-level classification system.”²³ Full credit earnings at the full rate produce an MRD at the two-thirds (or 67-percent) mark of the judicial maximum sentence. See Virginia Figure 4 below.

Virginia Figure 4. Prison-Release Timeline for Prisoners with Sentences for “Less Serious Crimes” with Full Earned Sentence Credits



of violence; possession or use of a “sawed-off” shotgun or rifle in the perpetration or attempt of a crime of violence; felony prostitution; most family offenses and crimes against children; felony obscenity and related offenses, except knowingly possessing child pornography; torture to a companion animal resulting in death or euthanasia; felony trespass upon school or church property; treason; escape of persons committed; leaving the Commonwealth on conditional release; employment of a minor involving sexually explicit visual material; cruelty and injuries to children; and a second or subsequent violation of certain offenses when the person was at liberty between convictions.

²³ Va. Code Ann. § 53.1-202.3(B). For persons receiving Level I sentence credits, 15 days shall be deducted for every 30 served. For persons receiving Level II sentence credits, 7.5 days shall be deducted for every 30 served. For persons receiving Level III sentence credits, 3.5 days shall be deducted for every 30 served. No sentence credits shall be awarded to persons classified in Level IV or for any person causing substantial security or operational problems at the correctional facility. All credits are awarded “to persons who participate in and cooperate with all programs, job assignments, and educational curriculums to which the person is assigned.”

On the scale developed for this project, Figure 4 sentences carry a *low degree of indeterminacy*—which could also be described as a *high degree of determinacy* (see pp. iii-iv). The population multiplier potential (PMP) for such sentences is 1.5:1 (see p. v). That is, if all prisoners serving such sentences were consistently denied all available credits (the *longest-time-served scenario*), the size of the prisoner subpopulation serving such sentences would eventually reach a level 50 percent higher than the same group if everyone were consistently awarded all available credits (the *shortest-time-served scenario*). Actual time served and prison population size are largely determined by front-end sentencing decisionmakers, including discretionary choices of judges and prosecutors. On any given sentence, front-end decisions dictate twice as many days or months actually served than are controlled by the department of corrections' decisions in the administration of earned sentence credits.

Prisoners may be granted additional credits against their sentences for bodily injuries they sustain or extraordinary services they perform but such awards may only be made by the director the department of corrections with the consent of the governor. The director has open-ended discretion to determine the amount of credit awarded.²⁴

After they have accrued, earned sentence credits may be forfeited “for violation of any written prison rules or regulations.”²⁵ The Director of the Department of Corrections has authority to restore credits once they have been forfeited—a power that may not be delegated.²⁶

One interesting feature of Virginia's earned sentence credit system is that it takes account of the predictable problems that arise when credit earnings are dependent on participation in programming that is not available to prisoners (for example, because no such programs exist in their institution or have long waiting lists). The Virginia statutes provide that, “[t]he Department shall ensure that educational, vocational, counseling, and substance abuse programs for earning sentence credits are available at all state correctional facilities.”²⁷

²⁴ See Va. Code Ann. § 53.1-191:

The Director, with the consent of the Governor, may allow to any prisoner confined in a state correctional facility a credit toward his term of confinement if he (i) renders assistance in preventing the escape of another prisoner or in the apprehension of an escaped prisoner; (ii) gives a blood donation to another prisoner; (iii) voluntarily or at the instance of a prison official renders other extraordinary services; or (iv) suffers bodily injury while in the prison system. The Director shall determine the amount of any such credit for each such service or injury. In unusual circumstances a prisoner may receive credit for donating blood, under regulations prescribed by the Director, to blood banks licensed by or subject to regulations of the State Board of Health.

It's unusual that prisoners can receive credits for injuries they sustain. It's not clear how often these types of credits are handed out, if at all.

²⁵ Va. Code Ann. § 53.1-189(A). Credits awarded for prisoner's injuries and extraordinary services are not subject to forfeiture. See Va. Code Ann. § 53.1-189(A); Va. Code Ann. § 53.1-191.

²⁶ Va. Code Ann. § 53.1-189(C).

²⁷ Va. Code Ann. § 53.1-202.5.

Furthermore, “[a] person's classification and calculation of earned sentence credits shall not be lowered or withheld due to a lack of programming, educational, or employment opportunities at the correctional facility at which the person is confined.”²⁸ We have taken note of similar provisions in New Jersey and North Carolina.²⁹

II. Life Sentences in Virginia

2.1. Life sentences without parole

There are no parolable life sentences in Virginia other than for prisoners whose crimes were committed while they were under age 18 (next section).³⁰ There is a mandatory minimum term of “confinement for life” for defendants convicted of aggravated murder but not sentenced to death.³¹ Habitual offenders, upon a third conviction for an “act of violence,” must also be sentenced to a life term without eligibility for parole or earned sentence credits.³² For habitual offenders not convicted of sex offenses, there is a chance of discretionary geriatric release by the parole board after age 60 (see discussion of geriatric release below).

2.3. Juvenile life sentences

In 2020, Virginia abolished life sentences without parole for defendants who were under the age of 18 at the time of their crimes.³³ The new legislation makes juveniles serving life sentences

²⁸ Va. Code Ann. § 53.1-202.3(C).

²⁹ Kevin R. Reitz, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, State Report: North Carolina* (Robina Institute of Criminal Law and Criminal Justice, 2023), at 9 (“If the Department determines that the defendant is unable to complete the incentives by the [advanced supervised release] date, through no fault of the defendant, then the defendant shall be released at the ASR date.” (quoting N.C. Gen. Stat. § 15A-1340.18(e)); Kevin R. Reitz, Melanie Griffith, & Edward E. Rhine, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, State Report: New Jersey* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 12 (“Notably, the APR statute waives the program completion requirement for a prisoner who ‘applied for but was unable to complete or was denied access to these programs due to circumstances beyond the inmate’s control including, but not limited to, capacity limitations or exclusionary policies of these programs.’” (quoting N.J. Stat. § 30:4-123.55d(a)(3)).)

³⁰ See *McLean v. Clarke*, No. 2:13CV409, 2014 WL 5286515, at *12 (E.D. Va. June 12, 2014) (holding that, because Virginia abolished parole for all felony convictions, all life sentences were necessarily life without parole).

³¹ Va. Code Ann. § 18.2-31 (aggravated murder defined; punishment); Va. Code Ann. § 18.2-10.

³² Va. Code Ann. § 19.2-297.1(A). “Act of violence” under this provision is defined to include: first and second degree murder and voluntary manslaughter; mob-related felonies; any kidnapping or abduction felony; any malicious felonious assault or malicious bodily wounding; robbery; carjacking; most criminal sexual assaults; arson of an occupied structure; conspiracy to commit any of the listed offenses; or conviction “as a principal in the second degree or accessory before the fact.”

³³ Sanjana Karanth, *Virginia Grants Parole Eligibility For People Sentenced As Children*, Huffington Post (Feb. 24, 2020) (“The Virginia law takes effect on July 1, affecting more than 700 incarcerated people sentenced as children in adult court and giving them a chance to have their case reviewed for potential release.”). For discussion of the most famous juvenile LWOP sentence in Virginia, see *id.* (“Lee Boyd Malvo ... received four life sentences

eligible for discretionary parole release after serving 20 years. The new law goes even further to make all sentences of longer than 20 years parole eligible at the 20-year mark for prisoners whose crimes were committed while they were still juveniles.³⁴

III. Infrequently used forms of prison release in Virginia

3.1. Medical or “compassionate” release

Virginia is one of five states with no medical parole law.³⁵ Prisoners with a life expectancy of three months or less may be eligible for a conditional medical pardon from the governor.³⁶

Virginia is one of 17 states that have enacted geriatric release provisions.³⁷ Any person serving a sentence for a felony offense, other than a Class 1 felony, who is sixty-five or older and has served at least five years of the sentence imposed or who is sixty or older and has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.³⁸ Limited geriatric release provisions are also available for prisoners convicted as habitual

without parole as a juvenile for killing three people in Virginia alongside John Allen Muhammad during the sniper rampage in October 2002 that terrorized parts of the state, as well as Washington and its Maryland suburbs. He received six more life sentences without parole for six killings in Maryland.”); *see also* Richard Wolf, *Virginia law makes ‘D.C. sniper’ Lee Boyd Malvo eligible for parole, ends Supreme Court case*, USA Today (Feb. 24, 2020); Samantha Michaels, *The Beltway Sniper Is Now the Center of a Debate About Juvenile Lifers*, Mother Jones (Sept. 30, 2019). In August of 2022, Malvo was denied parole in Virginia. Tom Jackman, *D.C. sniper Lee Boyd Malvo denied parole in Va. After nearly 20 years*, Washington Post (Sept. 15, 2022).

³⁴ Va. Code Ann. § 53.1-165.1(E) (“Notwithstanding the provisions of subsection A [making all the parole rules inapplicable to cases after 1994] or any other provision of this article to the contrary, any person sentenced to a term of life imprisonment for a single felony or multiple felonies committed while the person was a juvenile and who has served at least 20 years of such sentence shall be eligible for parole and any person who has active sentences that total more than 20 years for a single felony or multiple felonies committed while the person was a juvenile and who has served at least 20 years of such sentences shall be eligible for parole.”).

³⁵ *See* National Conference of State Legislatures, *State Medical and Geriatric Parole Laws*, at <https://www.ncsl.org/research/civil-and-criminal-justice/state-medical-and-geriatric-parole-laws.aspx> (last visited Dec. 29, 2022) (states without legislatively-established medical parole laws were reported as Arizona, Illinois, Iowa, Virginia, and West Virginia).

³⁶ Office of the Secretary of the Commonwealth, *Pardon Fact Sheet*, <https://www.commonwealth.virginia.gov/media/governorviriniagov/secretary-of-the-commonwealth/pdf/VIRGINIA-EXECUTIVE-CLEMENCY-FACT-SHEET.pdf> (last visited Dec. 29, 2020);

³⁷ *See* National Conference of State Legislatures, *State Medical and Geriatric Parole Laws*, at <https://www.ncsl.org/research/civil-and-criminal-justice/state-medical-and-geriatric-parole-laws.aspx> (last visited Dec. 29, 2022) (“[A]t least 17 states have feriatric parole laws in statute” including Alabama, Alaska, California, Georgia, Louisiana, Maryland, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, Oregon, South Dakota, Utah, Virginia, Washington, and Wisconsin.).

³⁸ Va. Code Ann. § 53.1-40.01.

offenders if they were not convicted of sex offenses.³⁹ The rate of releases on geriatric parole have been very low.⁴⁰

3.2. Executive clemency

The power to grant pardons and commute capital punishment rests with the governor.⁴¹ The Virginia Parole Board has the ability to independently investigate sentences and present recommendations for pardons or clemency to the governor if it believes such action is in the best interest of the Commonwealth of Virginia.⁴²

3.3. Emergency release for prison overcrowding

Virginia has no standing statutory mechanism for circumstances of prison overcrowding.

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

On the scale developed for this project (see pp. iii-iv), we assess the Virginia prison-sentencing system as one with a *low degree of indeterminacy* overall. There are two main classes of prison sentences in Virginia, which include the “more serious offenses” (as enumerated in statute) and “less serious offenses” (those not enumerated). For the more serious class, sentences carry an *extremely low degree of indeterminacy*. As of mid-2022, however, the formula for earned sentence credits for the less serious offenses was made significantly more generous than for the more serious crimes. Sentences for less serious offenses now carry a *low degree of indeterminacy*. If we simply average out the two main classes of prison sentences in Virginia, the center of gravity appears to be a *low degree of indeterminacy*—albeit not greatly distant from the extremely-low borderline.⁴³

³⁹ Va. Code Ann. § 19.2-297.1(C):

However, any person subject to the provisions of this section, other than a person who was sentenced ... for criminal sexual assault convictions specified in subdivision f, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the provisions of this subsection.

⁴⁰ Emma Gauthier & Anna Madigan, *Virginia denies vast majority of parole requests, data shows*, Virginia Capital News Service (Dec. 17, 2019) (“Since 2014, of the approximately 2,900 applications for geriatric parole, 147—about 5%—have been granted Of the 151 inmates older than 80 who have applied for parole, six have been granted.”).

⁴¹ Va. Const. art. 5, § 12; Va. Code Ann. § 53.1-229.

⁴² Va. Code Ann. § 53.1-231.

⁴³ A rote average of the two sentence classes (see Figures 3 and 4) yields sentences with an earliest possible release date at the 77-percent mark of the judicial maximum term. Our cutoff for sentences of extremely low indeterminacy occurs at the 80-percent mark. In addition, it is plausible to think that people convicted of less

Before the changes in credit-earning formulas that became effective in 2022, the Virginia prison-sentencing system as a whole operated with an extremely low degree of indeterminacy for virtually all sentences. In the original draft of this report in 2020, we stated that, “Virginia has the most determinate sentencing system of all American jurisdictions.”⁴⁴ This is no longer the case. Virginia is thus an example of a highly determinate American jurisdiction that has shifted its general structure to one of greater indeterminacy. Notably, Virginia made this systemic change through increases in available credit awards rather than the introduction or expansion of discretionary parole release.

Virginia is also one of a handful of states that provide for the award of earned-time credits when the programs necessary to win those credits are not available to prisoners.

For the subpopulation of prisoners convicted of the “more serious” crimes, Virginia’s prison rate is heavily determined by judicial sentencing patterns. This means that the state’s time-served policy is controlled by judges and other front-end actors who contribute to the shape of their sentencing decisions, including the legislature, sentencing commission, prosecutors, and the parties through the negotiation of guilty pleas and sentence bargains. In days and months, front-end decisions have nearly seven times the influence over actual time served as the department of corrections’ decisions in the administration of earned sentence credits.

For the subpopulation of prisoners convicted of the “less serious” crimes, Virginia’s prison rate is still largely determined by front-end sentencing decisionmakers—but not nearly to the same extent as for prisoners convicted of the “more serious” crimes. On any given sentence, for a “less serious” offense, front-end decisions dictate only twice as many days or months actually served than are controlled by the department of corrections’ decisions in the administration of earned sentence credits.

serious crimes outnumber those convicted of more serious offenses in the Virginia prisons, but we have no hard data in support of this assumption.

⁴⁴ In a 20-year retrospective of Virginia’s determinate sentencing system, the Virginia Senate Finance Committee reported that, “offenders in Virginia are serving about 90% of their nominal sentence.” See Virginia Senate Finance Committee, *Parole Abolition and Sentencing Reform: A 20-Year Retrospective* (2015), at 12. table 7.11.