



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: MONTANA

Kevin R. Reitz, Melanie Griffith, and Edward E. Rhine

July 2023

Prison-Release Discretion and Prison Population Size

State Report: Montana

Table of Contents

Executive Summary

Introduction

1. General rules of prison release in Montana

2. Life sentences in Montana

a. Adults

b. Juvenile life sentences

3. Infrequently used forms of prison release in Montana

a. Compassionate release

b. Clemency

c. Release during overcrowding emergencies

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

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: Montana¹

Executive Summary

On the ranking scale developed for this project (see pp. iii-iv), we rate Montana’s prison-sentencing system as one that operates with a *high degree of indeterminacy*. For general-rules prisoners, first eligibility for discretionary parole release occurs at the 25-percent mark of prisoners’ judicial maximum sentences.

Sentencing courts in Montana have the unusual power to order in individual cases that prisoners will never enjoy eligibility for discretionary release, or that their minimum terms to release eligibility will be delayed past the 25-percent mark of their maximum sentences. We would be prepared to change our assessment of the state’s prison-sentencing system if presented with data that sentencing courts regularly restrict prisoners’ parole-eligibility dates. At the theoretical extreme, sentencing courts could push the system to 100-percent determinacy if all judges ruled to eliminate parole-release eligibility in every individual case.

Montana is one of a small number of states that have abolished good time, earned time, and related credits for prisoners to reduce their judicial maximum sentences or the period of time to first parole-release eligibility, or both. Because of this, the only major back-end decisionmaker with discretion over time actually served by prisoners is the parole board. Alternative release mechanisms such as medical parole and executive clemency are not used often enough to have any important impact on the size of Montana’s prison population.

Terminology note

This report will refer to the Montana Board of Pardons and Parole as the “parole board.” The Montana Department of Corrections will be referred to as the “department of corrections” or “DOC.”

¹ This report was prepared with support from Arnold Ventures. The views expressed are the authors’ and do not necessarily reflect the views of Arnold Ventures. For a broad overview of the law of parole release and supervision in Montana, see Alexis Lee Watts, Steven Graziano, Eric Arch, & Edward E. Rhine, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Montana* (Robina Institute of Criminal Law and Criminal Justice, 2019).

Introduction

Montana’s prison-rate history, 1972 to 2019

At yearend 2020, Montana’s prison rate was 362 per 100,000 general population, with a prison population of 3,927.² Montana’s prison rate was 15th highest among all states.

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

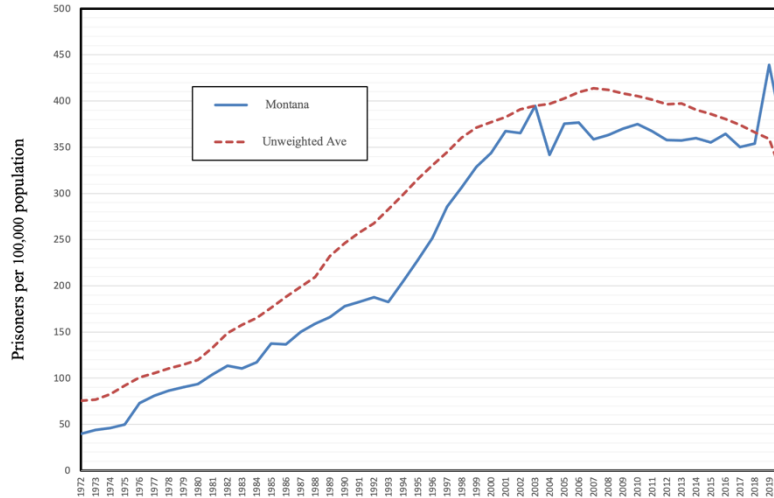
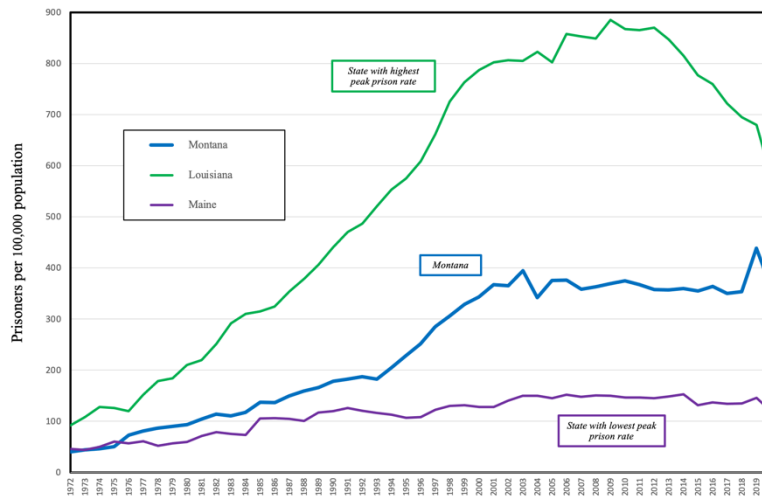


Figure 2. Prison Rate Change in Montana, Louisiana, and Maine, 1972 to 2020



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

² E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 11 table 4, 15 table 7. Preliminary information about changes in Montana’s imprisonment rates after 2020 is presented below in the section on “The COVID period in Montana.”

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

In the Bureau of Justice Statistics' annual reports, Montana reached its peak prison rate in 2019 at 440 per 100,000, which was a 24-percent increase from the prison rate reported in 2018. In a single year, Montana jumped from the state with the 21st highest prison rate to 11th position. BJS explained that Montana had implemented a new data management system and that 2019 data were not compatible with earlier years.³ Because of this, we cannot offer confident comparisons of the state's prison rate today versus earlier points in time. By 2020, Montana's reported prison rate had fallen to 362 per 100,000—for an incremental drop of -78 per 100,000, which was the 39th largest drop among all states from their peak rates (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.⁴

³ See E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020), at 32 (“In 2018, the Montana Department of Corrections transitioned to a new data-management system and worked to identify and clean up prisoner placement concerns in the data. The state rewrote its data-extract programs for NPS reporting in 2019, so these data are not comparable to previous years' data for Montana.”).

⁴ 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).

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 100,000.⁵ We believe this was the largest one-year decline in state prison rates in American history.⁶

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.⁷

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.⁸

⁵ 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.

⁶ Historical sources show no one-year decline in average state prison rates that approaches -51 per 100,000. See Margaret Werner Cahalan, *United States Historical Correctional Statistics, 1850-1984* (Bureau of Justice Statistics, 1986); Margaret Cahalan, *Trends in Incarceration in the United States since 1880: A Summary of Reported Rates and the Distribution of Offenses*, 25 *Crime & Delinq.* 9 (1979).

⁷ 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).

⁸ 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

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 2020.⁹

The COVID period in Montana

In a separate study, the Robina Institute found only four releases in Montana from March 2020 through December 2021 that were accelerated in response to the pandemic. As reported by the Robina Institute:

On April 1, 2020, Montana Governor Steve Bullock issued a directive regarding COVID-19. In relevant part, the directive tasked the Montana Department of Corrections with providing assistance to the Board of Pardons and Paroles to consider early release for certain individuals, “but only so long as they do not pose a public safety risk and can have their medical and supervision needs adequately met in the community.” The Board considered those aged 65 or older, those with medical conditions putting them at a high risk during the pandemic and those who were otherwise medically frail, those who were pregnant, and those who were nearing their release date. According to reports, as of November 2020, only three people had been

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.

⁹ See E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 17, 17 table 8 (admissions fell from 530,905 to 319,346). There was no comparable upswing in prison releases. Total releases from state prisons actually fell in 2020, dropping 9.8 percent from the previous year. *Id.* at 19 table 9 (nationwide releases fell from 557,309 to 502,723). Only five states released five percent or more of prisoners in 2020 than they had released in 2019: Arizona (6.9 percent), Maine (30.9 percent), Nebraska (5.9 percent), New Jersey (19.7 percent), and Wyoming (8.0 percent). For a focus on patterns of parole release in 2020, see Tiana Herring, *Parole boards approved fewer releases in 2020 than in 2019, despite the raging pandemic* (Prison Policy Initiative, February 3, 2021), at <https://www.prisonpolicy.org/blog/2021/02/03/parolegrants/> (surveying data from 13 states; finding that total numbers of parole releases fell in nine states; among all 13 states, the average drop in numbers of parole releases from yearend 2019 to yearend 2020 was 11.3 percent). See also Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022) (concluding that “the greatest impact on prison population overall occurred on the admissions side of the equation.”). From March 2020 through December 2021, Mitchell et al. estimate a total of 47,967 “non-routine COVID releases” from state prisons nationwide. Over a similar period (January 2020 to December 2021), Vera Institute of Justice (Vera) reported a drop in the aggregate state prison population of 217,989 people, from 1,259,977 to 1,041,988. Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2.

granted parole based on those conditions; one additional person was granted medical parole with COVID-19 listed as a factor in the Board’s consideration.¹⁰

In calendar year 2020, Montana’s prison rate fell from 439 to 362 per 100,000—a one-year decline of -77 per 100,000. This was the third largest one-year drop reported among all 50 states for that year.¹¹ Measured in percentage terms, it was a 17.5 percent reduction in the state’s prison rate. The state’s total prison population fell by 796 people, from 4,723 to 3,927.¹²

Falling admissions were the main causal factor in this prison population drop. The number of prison admissions in the state dropped by 26.2 percent in 2020 compared with the previous year (from 2,428 to 1,791). Total releases in 2020 increased by 1.2 percent over 2019 (from 2,487 to 2,517).¹³

Montana’s prison-rate drop reversed after calendar year 2020. From yearend 2020 to December 2021, the Vera Institute reported that Montana saw an increase in its prison population, from 2,421 to 2,658—or 9.8 percent.¹⁴ As of September 19, 2022, the Montana Department of Corrections reported a total prison population of 2,766.¹⁵

1. General rules of prison release

As a general rule, prisoners must serve one-fourth of their judicial maximum sentences before becoming eligible for discretionary parole release.¹⁶ Sentencing judges have open-ended power to vary this formula for individual defendants, however. When imposing sentences of more than one year, sentencing courts may add the “restriction” that prisoners will not be eligible

¹⁰ Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 34 Appendix A, 73 Appendix E (footnote omitted).

¹¹ The largest single-state drop from yearend 2019 to yearend 2020 was in Kentucky, from 515 to 414 per 100,000. E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 15 table 7.

¹² *Id.*, at 11 table 4.

¹³ *Id.*, at 17 table 8, 19 table 9.

¹⁴ See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 4 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.

¹⁵ Montana Department of Corrections, *Secure Facility Daily Population: Snapshot as of 9/19/2022*, at https://dataportal.mt.gov/t/COR/views/POPReportPublic_15931787918580/SecurePopulation?%3Aiid=2&%3AisGuestRedirectFromVizportal=y&%3Aembed=y#3.

¹⁶ Mont. Code § 46-23-201(3).

for parole release at all (that is, they must serve their full judicial maximum sentences) or must serve longer minimum terms before parole-release eligibility than would otherwise be required. In order to exercise this power, the judge must make a finding that “the restriction is necessary for the protection of society” and must supply a written statement of reasons for the restriction.¹⁷

There is no conduct-based credit system in Montana with effect on sentence length or release eligibility. The Montana legislature repealed good-time credits in 1995 as part of a “truth in sentencing” reform, which took effect January 31, 1997.¹⁸ Currently, Montana is one of only four states that operate without credit-based discounts against sentence based on a good-time model, earned time model, or both.¹⁹

Most prisoners denied release by the parole board must wait up to one year before their next release hearing, although prisoners convicted of violent or sexual offenses may be required to wait up to six years.²⁰

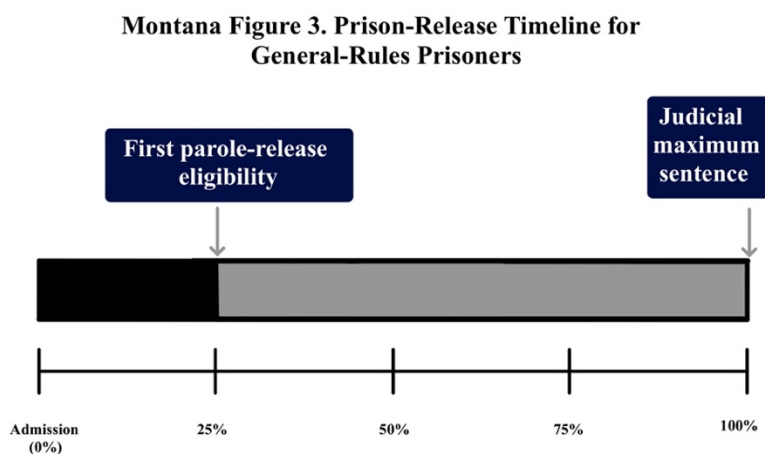
¹⁷ Mont. Code § 46-18-202(2) (“Whenever the sentencing judge imposes a sentence of imprisonment in a state prison for a term exceeding 1 year, the sentencing judge may also impose the restriction that the offender is ineligible for parole and participation in the supervised release program while serving that term. If the restriction is to be imposed, the sentencing judge shall state the reasons for it in writing. If the sentencing judge finds that the restriction is necessary for the protection of society, the judge shall impose the restriction as part of the sentence and the judgment must contain a statement of the reasons for the restriction.”). See *State v. Garrymore*, 145 P.3d 946, 952 (Mont. 2006) (upholding an effective sentence of life without the possibility of parole when the statute allowed a sentence of life with the possibility of parole but the judge invoked § 46-18-202(2)). A judge may also choose to restrict parole eligibility for a term of years, rather than for the entire sentence. See *State v. Kirkbride*, 185 P.3d 340, 345 (Mont. 2008) (upholding a sentence of life imprisonment with parole ineligibility for 55 years).

¹⁸ Susan Barth Fox, *Policies on Good Time and the Effects on Sentencing Practices* (Corr. Standards & Oversight Committee May 1998), at 3. The truth-in-sentencing reforms were not intended to reduce the prison population but rather to simplify the sentencing scheme so that judges would have a better understanding of how much time would actually be served by the defendants they were sentencing. *Id.* at 2. Time spent in jail both prior to and after conviction is credited against the sentence. Mont. Code § 46-18-403(1).

¹⁹ See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 75.

²⁰ Mont. Code § 46-23-201(5). A “violent offense” includes any violation of, attempt, solicitation, or conspiracy to commit one of the following offenses: deliberate homicide; mitigated deliberate homicide; aggravated assault; a third or subsequent partner or family member assault; assault on a peace officer or judicial officer (except causing bodily injury or reasonable apprehension of bodily injury that is neither serious nor involving a weapon); assault on a minor; assault with a weapon; strangulation of a partner or family member; kidnapping if the victim is not a minor; aggravated kidnapping if the victim is not a minor; robbery; arson; and operation of an unlawful clandestine laboratory. Mont. Code § 46-23-502(13). A “sexual offense” is defined as any violation of, attempt, solicitation, or conspiracy to commit one of the following offenses: unlawful restraint, kidnapping, or aggravated kidnapping if the victim is less than 18 years old and the offender is not the victim’s parent; sexual assault if committed by a licensed professional and “commits the offense during any treatment, consultation, interview, or evaluation of a person’s physical or mental condition, ailment, disease, or injury”; sexual assault if the victim is

Figure 3 illustrates the default prison-sentence timeline for most prisoners in Montana. First parole-release eligibility occurs at the 25-percent mark of judicial maximum sentences. This is an immovable milestone in the timeline. The minimum term to release eligibility cannot be shortened by the award of conduct-based credits. Similarly, Montana maintains no conduct-based credit system that may reduce the judicial maximum sentence to an earlier mandatory release date.



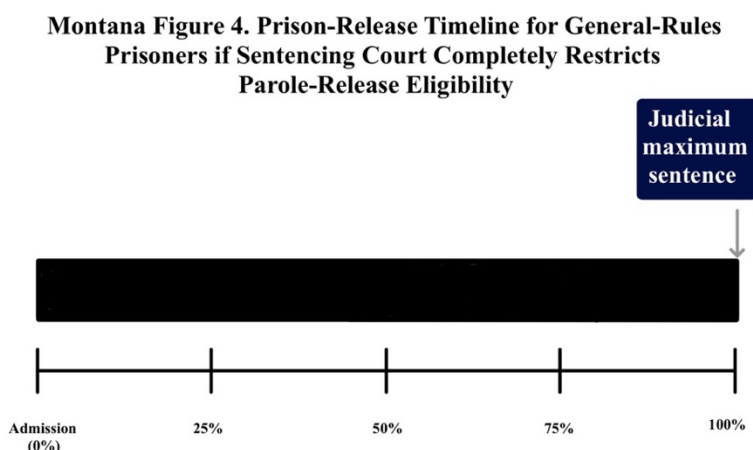
Such sentences are 25 percent determinate and 75 percent indeterminate. In the normal course, a full 75 percent of potential time-to-be-served by prisoners falls under the jurisdiction of the parole board’s release and release-denial discretion. Only 25 percent of potential time served within the judicial maximum is “determined” by the sentencing court. In the ranking scale we use in this project, such sentences have a *high degree of indeterminacy* (see pp. iii-iv).

The class of sentences shown in Figure 3 produce a population multiplier potential (PMP) of 4:1 (see p. v). That is, if all prisoners serving this type of sentence were held for their full maximum terms, their numbers would eventually settle at four times the size of the same group if all were released at the moment of earliest eligibility. If general-rules sentences such as those depicted in Figure 3 are the norm in Montana’s prison system, then the state’s parole board has a great deal of power to influence prison population size. Actual-time-served outcomes,

less than 16 years old and the offender is three or more years older than the victim; sexual intercourse without consent; a third or subsequent offense of indecent exposure; indecent exposure to a minor where the victim is less than 16 years old and the offender is more than 4 years older than the victim; incest if (1) the victim is less than 18 years old and the offender is three or more years older than the victim, or (2) the victim is 12 years old or younger and the offender is at least 18 years old; aggravated sexual intercourse without consent; prostitution, promoting prostitution, or aggravated promotion of prostitution involving a child where the patron was at least 18 years old; aggravated promotion of prostitution involving a victim of human trafficking or a person subjected to force, fraud, or coercion and the offender is at least 18 years old and knew or should have known about the victim’s situation; sexual abuse of children; sexual servitude; or patronizing a victim of sexual servitude. See Mont. Code § 46-23-502(9).

within judicial maximum terms, are largely outside the control of front-end actors such as judges and prosecutors.

We take note, however, that sentencing courts in Montana have the unusual power to withhold or delay parole release eligibility for defendants who are sentenced to judicial maximum terms greater than one year. This gives judges authority to increase the degree of determinacy in individual cases even to the point of extinguishing all indeterminacy. Figure 4 shows the extreme case of a sentence in which the judge has ordered that the prisoner will never become eligible for discretionary release. The timeline in Figure 4 is entirely blacked out to denote that there no release discretion from the day of admission until expiration of the judicial maximum term. One way to look at this is that sentencing courts have expansive release-denial discretion in individual cases. In Figure 4, the judge's total restriction on parole-release eligibility yields a prison sentence that is 100-percent determinate.



Montana judges have the power to delay parole release eligibility as well as to rule it out entirely, so they have freedom to craft sentences with a wide range of degrees of indeterminacy. Any possibility between the 25-percent level of determinacy in Figure 3 and the 100-percent determinacy in Figure 4 is available to sentencing courts in ordinary cases.

If such powers were used with regularity, it would be impossible to describe the degree of indeterminacy in Montana's prison-sentencing system as a whole. The character of the system would shift with changeable judicial sentencing patterns. Montana is thus an example of a state in which sentencing courts are powerful gatekeepers of the degree of indeterminacy that flows to the back end of the prison-sentencing system.²¹

²¹ Eleven states grant sentencing courts at least some discretion to set the ratio between minimum and maximum terms or their sentences. See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 32-33.

For purposes of this report, we will assume that Montana sentencing courts rarely restrict the parole-release eligibility of defendants. That is, we treat the 25-percent minimum term as the default sentence configuration in the state. We have no data to support this assumption, but it allows us to make direct comparisons between the Montana system and those of other states—with the important caveat that Montana’s system has a “wild card” not found in most other jurisdictions.

2. Life sentences

a. Adults

Judges have discretion to sentence those convicted of deliberate homicide,²² sexual assault if the victim was less than 16 years old and the offender was 3 or more years older than the victim,²³ infliction of bodily injury upon anyone while in the course of committing sexual assault,²⁴ or sexual intercourse without consent²⁵ to life imprisonment without the possibility of parole (LWOP).

Defendants must be sentenced to LWOP if the death penalty is not imposed if they have been convicted of a second offense of any of the following: deliberate homicide, aggravated kidnapping, sexual abuse of children, ritual abuse of a minor,²⁶ or aggravated sexual intercourse without consent;²⁷ or a third offense of any of the following: mitigated deliberate homicide, aggravated assault, strangulation of a partner or family member, kidnapping, robbery, or aggravated promotion of prostitution of a child.²⁸ However, if any of the prior offenses were considered exempt from the mandatory minimum sentence, they are not counted for purposes of determining whether life without the possibility of parole is mandatory.²⁹

²² Mont. Code § 45-5-102(2).

²³ Mont. Code § 45-5-502(3).

²⁴ *Id.*

²⁵ Mont. Code § 45-5-503(2).

²⁶ Except performance of an act of torture, mutilation, or sacrifice of an animal or person in the presence of a minor. Mont. Code § 45-5-627; Mont. Code § 45-5-627(1)(b).

²⁷ Mont. Code § 46-18-219(1)(a).

²⁸ Mont. Code § 46-18-219(1)(b).

²⁹ Mont. Code § 46-18-219(3); see Mont. Code § 46-18-222 (listing the exceptions, including that the offender was under 18 at the time of the crime, the offender suffered from significant mental impairment at the time of the crime, the offender was “acting under unusual and substantial duress”; and the offender was an accomplice with only minor participation in the offense).

b. Juvenile life sentences

Montana is not among the states that have abolished LWOP sentences for defendants who were under age 18 at the time of their offenses.³⁰ Since the U.S. Supreme Court declared mandatory life sentences for juveniles unconstitutional,³¹ there have been only two Montana cases that have touched on the issue.³²

3. Infrequently used forms of prison release

a. Compassionate release

Medical release, called “medical parole” in Montana, may be granted to an offender who “is unlikely to pose a detriment to the person, victim, or community,” and either “has a medical condition requiring extensive medical attention” or “has been determined by a physician to have a medical condition that will likely cause death within 6 months or less.”³³ If an offender’s sentencing judge restricted the possibility of parole, the offender may be allowed release on

³⁰ See Josh Rovner, *Juvenile Life Without Parole: An Overview* (The Sentencing Project, 2021).

³¹ *Miller v. Alabama*, 567 U.S. 460, 470 (2012) (holding mandatory sentences of life without parole unconstitutional when applied to defendants who were under age 18 at the time of their crimes; stating further that, “[a]lthough we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison”) see also *Graham v. Florida*, 560 US 48 (2010) (robbery case; holding life without parole an unconstitutional penalty when applied to a juvenile offender for a non-homicide offense); *Montgomery v. Louisiana*, 136 S.Ct. 718, 735 (2016) (stating that *Miller* required “a sentencer to consider a juvenile offender’s youth and attendant characteristics before determining that life without parole is a proportionate sentence”); *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (holding that sentencing courts are not required to make a factual finding of “permanent incorrigibility” before sentencing a juvenile offender to life without parole so long as court has considered the defendant’s youth before imposing the LWOP sentence).

³² See *Beach v. State*, 348 P.3d 629, 642 (Mont. 2015) (holding that *Miller* did not apply retroactively); *Steilman v. Michael*, 407 P.3d 313, 317–18 (Mont. 2017) (overruling *Beach v. State* and holding that *Miller* requires sentencing judges to adequately consider the mitigating characteristics of youth when sentencing juveniles to LWOP even if the judge considered standard discretionary sentencing factors under Montana law). *Steilman* also held that a sentence equivalent to 31.33 years for deliberate homicide committed by a seventeen-year-old did not trigger *Miller* protections because it was not a de facto life sentence nor was it disproportionate to the crime committed. Though the sentence imposed was 110 years, the court found it was “equivalent” to 31.33 years because day-for-day good time credit was available (reducing the possible sentence to 55 years) and it was ordered to run concurrently to another sentence of 23 years and 8 months for a crime committed in Washington state. 407 P.3d at 320. Good time credit was available to Steilman because he committed the offense prior to January 31, 1997 when good time credits were eliminated in Montana. Susan Barth Fox, *Policies on Good Time and the Effects on Sentencing Practices* (Corr. Standards & Oversight Committee May 1998), at 5.

³³ Mont. Code § 46-23-210(1).

medical parole if the sentencing judge approves.³⁴ Those sentenced to death or LWOP are ineligible for medical parole.³⁵

If it is determined that the released offender “no longer requires extensive medical attention or is likely to pose a detriment to the person, victim, or community,” the medical parole release may be revoked and the offender returned to custody.³⁶

b. Clemency

The governor has exclusive authority to grant or deny clemency applications.³⁷ If the hearing board votes to hold a hearing on an application, it will conduct an investigation and make a nonbinding recommendation to the governor.³⁸

Those not eligible for clemency consideration include offenders sentenced to death while their automatic review with the state supreme court is pending,³⁹ those “related or connected to the governor by consanguinity within the fourth degree or by affinity within the second degree,”⁴⁰ or those who “work[] or has worked in the office of the governor since the governor took office.”⁴¹

c. Release during overcrowding emergencies

There is no release mechanism triggered when the prison population “exceeds the emergency capacity,” though an institution may temporarily suspend admissions and require new offenders to be placed in a different facility if it is over capacity for 30 consecutive days.⁴²

4. Overall assessment

On the ranking scale developed for this project (see pp. iii-iv), we rate Montana’s prison-sentencing system as operating with a *high degree of indeterminacy*. We would be prepared to change our assessment if presented with data that sentencing courts regularly restrict prisoners’ parole-eligibility dates. In theory, sentencing courts could push the system to 100-

³⁴ Mont. Code § 46-23-210(2).

³⁵ Mont. Code § 46-23-210(1)(a).

³⁶ Mont. Code § 46-23-210(6).

³⁷ Mont. Code § 46-23-301(4); Mont. Const. art. VI, § 12 (“The governor may grant reprieves, commutations and pardons, restore citizenship, and suspend and remit fines and forfeitures subject to procedures provided by law.”).

³⁸ Mont. Code § 46-23-301(3).

³⁹ Mont. Code § 46-23-301(2).

⁴⁰ Mont. Code § 46-23-301(5)(a)(i).

⁴¹ Mont. Code § 46-23-301(5)(a)(ii).

⁴² Mont. Code § 53-30-106(1).

percent determinacy if all judges eliminated parole-release eligibility in every individual case. In most other states, the degree of indeterminacy in the prison-sentencing system is the product of legislation (which may provide for varying degrees of indeterminacy for different classes of offenders). In Montana, sentencing courts act as gatekeepers of indeterminacy, with case-specific power to render their sentences more than 25-percent determinate (but never less). In the lexicon of this project, sentencing courts have broad *release-denial discretion* within the limits of the judicial maximum terms they are permitted by law to impose.

In spite of courts' gatekeeping power, we make an educated guess that judges impose 25 percent minimum terms in the vast majority of general-rules cases. Higher minimum terms require an explicit finding that extended time to parole release eligibility is necessary for the protection of society, which must be accompanied by a written statement of reasons. Based on the structure of statute, we think 25 percent was intended to be a true default.

Montana is one of only four states that have abolished good time, earned time, and related credits for prisoners to reduce their judicial maximum sentences or the period of time to first parole-release eligibility, or both. Because of this, the only major back-end decisionmaker with discretion over time-actually-served by prisoners is the parole board. Alternative release mechanisms such as medical parole and executive clemency are not used often enough to have any important impact on the size of Montana's prison population.