



**ROBINA INSTITUTE**  
OF CRIMINAL LAW AND CRIMINAL JUSTICE

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# PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

## *STATE REPORT: NEBRASKA*

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July 2023

# **Prison-Release Discretion and Prison Population Size**

## **State Report: Nebraska**

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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: Nebraska<sup>1</sup>

#### *Executive Summary*

Overall, Nebraska’s prison-sentencing system operates with a *moderate degree of indeterminacy* in the ranking system developed for this project (see pp. iii-iv). This systemwide judgment “averages out” the two main classes of sentences in Nebraska: one with low indeterminacy and one with high indeterminacy.

For the least serious felonies (those with authorized maximum terms no longer than four years), prison sentences have no parole release eligibility. The indeterminacy in these sentences is entirely a matter of good-time reductions; they carry a *low degree of indeterminacy*. In contrast, sentences for more serious felonies (those with authorized maximum terms of 20 years or more) almost always include parole release eligibility, with reductions for good time credits. Depending on where judges choose to set minimum terms in relation to maximums, such sentences almost always fall in the range of *high indeterminacy* to *extremely high indeterminacy*.

Nebraska makes important use of movable mandatory release dates (MRDs) driven by good time credits. Nebraska also awards most sentence credits “up front” to newly admitted prisoners, subject to potential loss by forfeiture.

Parole boards have a great deal of power to influence time served, but only for prisoners convicted of serious felonies. The department of corrections holds very substantial time-served discretion on paper, across both general-rules sentence classes, and affecting both minimum and maximum terms—except that good time credits are awarded automatically by statute. The Nebraska DOC has no discretion to withhold such credits in the first instance; its power rests in the forfeiture process.

#### *Terminology note*

This report will refer to the Nebraska Board of Parole as the “parole board.” The Nebraska Department of Correctional Services will be referred to as the “department of corrections” or “DOC.”

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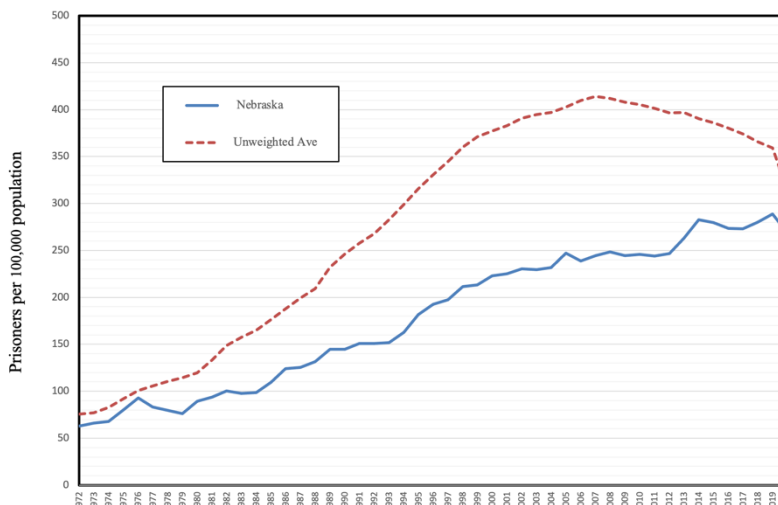
<sup>1</sup> This report was prepared with support from Arnold Ventures. The views expressed are the authors’ and do not necessarily reflect the views of Arnold Ventures. For a broad overview of the law of parole release and supervision in Nebraska, see Alexis Lee Watts, Edward R. Rhine, Steven Graziano, Mike McBride, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Nebraska* (Robina Institute of Criminal Law and Criminal Justice, 2017) (including surveys of parole-release criteria, procedures for release decisions, laws relating to parole supervision and revocation, and the institutional attributes of the parole board).

## Introduction

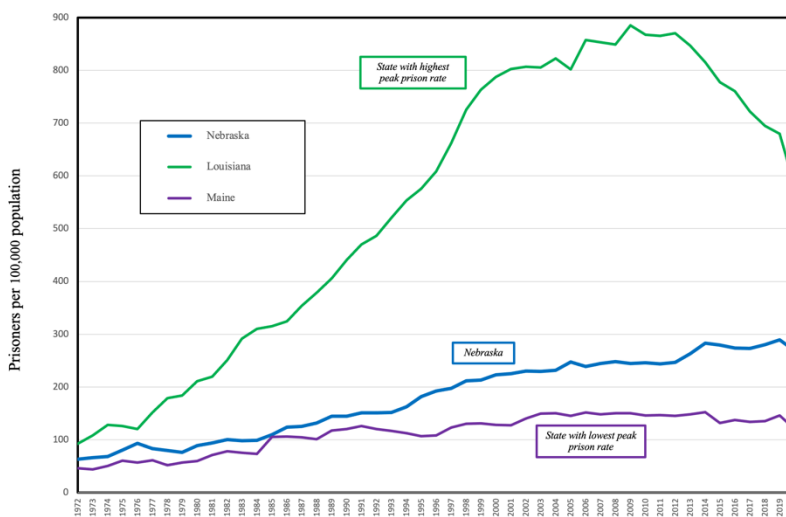
### *Nebraska's prison-rate history, 1972 to 2020*

At yearend 2020, Nebraska's prison rate was 269 per 100,000 general population, with a prison population of 5,220.<sup>2</sup> Nebraska's prison rate was 31<sup>st</sup> highest among all states.

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



**Figure 2. Prison Rate Change in Nebraska, 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

<sup>2</sup> E. Ann Carson, *Prisoners in 2020-Statistical Tables* (Bureau of Justice Statistics, 2021), at 11 table 4, 15 table 7.



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).

Nebraska reached its peak prison rate in 2019 at 289 per 100,000, which dropped to 269 per 100,000 by yearend 2020.<sup>3</sup> This is a net difference of -20 per 100,000, which was the smallest prison-rate drop of all 50 states (measured from each state's peak through 2020).

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

### *The COVID period*

We view American prison rates following the arrival of the COVID pandemic in March 2020 as discontinuous with earlier rates and trends. Whatever factors were at work to determine state prison rates in the “before times,” the pandemic introduced a major new causal force that, at least temporarily, diverted the course of prison-rate change nationwide.<sup>4</sup>

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

<sup>3</sup> Over the entire period 1972 to 2019, Nebraska was the only state other than Kansas to have reached a peak prison rate in 2019. Still, in that year, Nebraska's prison rate remained below the average rate of 359 per 100,000 among all states.

<sup>4</sup> 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.

general population, for an average incremental downturn of -51 per 100,000.<sup>5</sup> We believe this was the largest one-year decline in state prison rates in American history.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup>

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

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<sup>5</sup> 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.

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> 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.

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.<sup>9</sup>

### *The COVID period in Nebraska*

In a separate study, the Robina Institute reported that Nebraska was one of 16 states that made no special COVID-related prison releases from March 2020 through December 2021 (that is, there was no official policy to implement accelerated releases in response to the pandemic).<sup>10</sup>

In calendar year 2020, Nebraska's prison rate fell from 289 to 269 per 100,000—a one-year decline of -20 per 100,000. This was the 49<sup>th</sup> largest (second lowest) one-year drop reported among all 50 states for that year.<sup>11</sup> Measured in percentage terms, it was a 6.9-percent reduction in the state's prison rate. The state's total prison population fell by 376 people, from

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<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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.

5,596 to 5,220.<sup>12</sup> Through yearend 2021, Nebraska's prison population rebounded nearly to its pre-pandemic size, growing from 5,220 to 5,511.<sup>13</sup>

Falling admissions were the most important cause of Nebraska's prison drop from 2019-20. The number of prison admissions in the state fell by 16.6 percent in 2020 compared with the previous year (from 2,495 to 2,080). A rise in the number of releases also contributed to the one-year drop. Total releases in 2020 grew by 5.9 percent over 2019 (from 2,317 to 2,453).<sup>14</sup>

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<sup>12</sup> *Id.*, at 12 table 4, 16 table 7. Nebraska'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. 1. We suspect the actual drop in prison admissions from 2019 to 2020 was vastly larger than reported by BJS.

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

<sup>14</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 17 table 8, 19 table 9. The increased number of releases in calendar year 2020 suggests that there may have been informal changes in discretionary practices by the parole board or department of corrections to accelerate releases in response to the pandemic. Such a shift could have taken place without public announcement.

## 1. General rules of prison release in Nebraska

Felony offenses in Nebraska are graded into ten classes. Table 1 below summarizes the statutory penalty ranges for all except Class I felonies, which are punishable by death.<sup>15</sup>

**Table 1. Authorized Felony Sentences in Nebraska**

<i><b>Felony Grade</b></i>	<i><b>Statutory Maximum Prison Term</b></i>	<i><b>Shortest Allowable Minimum Term</b></i>
Class IA	Life	Life (except for juveniles)
Class IB	Life	20 years
Class IC	50 years	5 years (mandatory minimum)*
Class ID	50 years	3 years (mandatory minimum)*
Class II	50 years	1 year
Class IIA	20 years	No lower limit
Class III**	4 years	Sentences are determinate (no parole release eligibility)***
Class IIIA**	3 years	Sentences are determinate (no parole release eligibility)***
Class IV	2 years	Sentences are determinate (no parole release eligibility)***

Sources: Neb. Rev. St. §§ 28-105(1), 29-2204(1), 29-2204.02.

\* A “mandatory” minimum must be served in full and cannot be reduced by good time credits.

\*\* These felony classes also carry mandatory postrelease supervision terms of nine months if the sentencing court chooses to impose a prison sentence.

\*\*\* Sentences must be indeterminate, however, when imposed consecutively or concurrently with parolable sentences for more serious felonies.

<sup>15</sup> Neb. Rev. Stat. § 28-105(1).

*“More serious” versus “less serious” felonies*

There are two sets of general rules of prison release in Nebraska: One set applies to the “more serious” felony grades as defined below; the second set applies to “less serious” felonies (our terminology, as defined below).

*Parolable sentences for more serious felonies*

Sentences for “more serious” felonies—those with statutorily authorized maximum terms of 20 years or longer—carry eligibility for discretionary parole release.<sup>16</sup> When imposing sentences for felonies graded as Classes IB through IIA, sentencing courts must set both a minimum and a maximum term. The judicial maximum may not be longer than the “maximum limit” allowed by statute. The minimum term may be “any term of years less than the maximum term imposed by the court,” although the court must also abide by any “minimum limit” imposed by law for a specific crime.<sup>17</sup>

As a general rule under Nebraska law, this group of prisoners becomes eligible for discretionary parole release after serving one-half of their judicial *minimum* terms.<sup>18</sup> This formula for first release eligibility differs from those in the majority of paroling states, which calculate eligibility dates as a fraction of prisoners’ judicial maximum terms.

The above rule does not apply to “mandatory minimum” terms, however, which must be served in full (that is, no 50-percent reductions). Likewise, good time credits do not begin to accrue until the mandatory minimum has expired.<sup>19</sup>

The math gets a little tortured when there is an applicable mandatory minimum term and the sentencing court has imposed a minimum term that exceeds the mandatory minimum (that is, part of the judicial minimum term is mandatory and part is not). Instead of simply halving the judicial minimum term in such cases, the initial parole eligibility date is calculated by subtracting the mandatory minimum segment from the full judicial minimum sentence, halving the difference, and adding that difference to the mandatory minimum.<sup>20</sup>

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<sup>16</sup> This group includes parolable life sentences, but not life without parole.

<sup>17</sup> Neb. Rev. Stat. § 29-2204(1) (sentence for felonies other than Class III, IIIA, or IV felonies).

<sup>18</sup> Neb. Rev. Stat. § 83-1,110(1) (“Every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence”).

<sup>19</sup> Neb. Rev. Stat. § 83-1,110(1); *State v. Russell*, 863 N.W.2d 813, 818 (2015) (stating that a prisoner “will not receive any good time for the entire duration of the mandatory minimum”).

<sup>20</sup> See *State v. Castillas*, 826 N.W.2d 255, 268 (Neb. 2013). For example, if a court imposes a 15-year minimum sentence, five years of which are mandatory, initial parole eligibility would occur at the ten-year mark)

*Non-parolable sentences for less serious felonies*

There is a second important class of general-rules sentences in Nebraska, for “less serious” felonies: those with statutory maximum terms no longer than four years.<sup>21</sup> For felonies graded as Class III or lower, courts must impose “determinate sentences” that carry no parole release eligibility. These sentences have no minimum terms.<sup>22</sup>

Prisoners with both classes of general-rules sentences are eligible for mandatory release, calculated by subtracting an inmate’s total good time deductions from the judicial maximum sentence. This is the date “when discharge from the custody of the state becomes mandatory.”<sup>23</sup> For sentences that include a mandatory minimum prison term, good time credits do not begin to accrue until the mandatory has been served.<sup>24</sup>

*Reconsideration after denial of parole release*

If the board “defers” a parole release decision, prisoners must be afforded subsequent parole reviews at least once a year until a release date is fixed.<sup>25</sup> However, according to the Nebraska Supreme Court’s interpretation of the applicable statute, the board also has the power to

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<sup>21</sup> There is a big drop in maximum penalties between Class IIA felonies, with a statutory maximum penalty of 20 years, and Class III felonies with a statutory maximum of four years—and nothing in between. Across this divide, much different rules of prison release apply. But the steep drop-off in maximum penalties is equally noteworthy, and somewhat puzzling from a policy perspective. It is almost as though the sentencing codes of two different states have been cut-and-pasted together, with the mismatch reflecting distinct philosophies of criminal punishment.

<sup>22</sup> Neb. Rev. Stat. § 29-2204.02 (sentences for Class III, IIIA, and IV felonies). However, sentences for this felony grade must be indeterminate when imposed consecutively or concurrently with sentences for a felonies graded as Class IIA or higher. Neb. Rev. Stat. § 29-2204.02(4). For a discussion of the rules applicable to “indeterminate” and “determinate” sentences in Nebraska, see *State v. Starks*, 955 N.W.2d 313 (Neb. 2021).

<sup>23</sup> See Neb. Rev. St. § 83-1,107(2)(c) (“The total reductions under this subsection shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted from the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.”); see also Neb. Rev. Stat. § 83-1,118(3) (“The department shall discharge a committed offender from the custody of the department when the time served in the facility equals the maximum term less good time.”). For releasees, the parole supervision term ends when “when the time served in the custody of the department and the time served on parole equal the maximum term less good time.” Neb. Rev. Stat. § 83-1,118(2).

<sup>24</sup> An inmate must serve the mandatory minimum portion of a sentence before earning good time credit toward the maximum portion of the sentence. *State v. Castillas*, 826 N.W.2d 255, 268 (Neb. 2013).

<sup>25</sup> Neb. Rev. Stat. § 83-1,111(4).

“deny” release without reconsideration for the remainder of a prisoner’s sentence.<sup>26</sup> Thus, the options expressly made available to the board are “annual review” or “no further review.”

### *Good time reductions from minimum and maximum terms*

The Department of Corrections must automatically reduce the judicial maximum term of each inmate by six months for each year of incarceration.<sup>27</sup> This sets mandatory release dates (MRDs) at the two-thirds (67-percent) mark of prisoners’ maximum terms.<sup>28</sup> We categorize these as “automatic” good time credits. While they may be lost through forfeiture, they need not be earned in the first place.

Additional good time credits are available in relatively small amounts. After prisoners have completed a twelve-month period of incarceration during which they have not been found guilty of a Class I or Class II offense or more than three Class III offenses under the department’s disciplinary code, the department is required to reduce their judicial maximum terms by three additional days per month.<sup>29</sup> We refer to these as “additional” good time credits.

Automatic good time credits can be forfeited for misconduct, erasing any sentence reductions that were based on them.<sup>30</sup> Unusually, “additional” credits cannot be lost through forfeiture after they have accrued.<sup>31</sup>

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<sup>26</sup> The power to deny parole release without future reconsideration is a product of judicial interpretation, based on the court’s unusual view that a “denial” and “deferral” of parole release are critically different decisions. *See Van Ackeren v. Neb. Bd. of Parole*, 558 N.W.2d 48, 50-52 (Neb. 1997) (“We conclude that the phrases ‘deny parole’ and ‘defers the case for later reconsideration’ are not used synonymously in the parole statutes. Thus, an offender is not entitled to an annual public parole hearing ... after parole has been denied.”).

<sup>27</sup> Neb. Rev. Stat. § 83-1,107(2)(a) (“The department shall reduce the term of a committed offender by six months for each year of the offender’s term and pro rata for any part thereof which is less than a year.”). *See also* Neb. Rev. Stat. § 83-1,107(2)(c); *Heist v. Neb. Dep’t of Corr. Servs.*, 979 N.W.2d 772, 787 (Neb. 2022) (“[T]he plain, direct, and unambiguous language of § 83-1,107 makes it clear that good time reductions earned under this section apply to an inmate’s maximum sentence, not to an inmate’s minimum sentence, and thus, not to an inmate’s PED [parole eligibility date].”)

<sup>28</sup> Credits are not applied against mandatory minimum prison sentences. *See* Neb. Rev. Stat. § 83-1,110(a) (“No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term.”); *Caton v. State*, 869 N.W.2d 911, 916 (Neb. 2015) (stating that “a defendant is unable to earn good time credit against either the minimum or maximum sentence until the defendant has served the mandatory minimum sentence”).

<sup>29</sup> Neb. Rev. Stat. § 83-1,107(2)(a)-(b).

<sup>30</sup> The automatic good time reductions in the amount of six months per year may be forfeited, withheld, or restored by the chief executive officer of the facility with the approval of the director for inmate misconduct. Neb. Rev. Stat. § 83-1,107(3).

<sup>31</sup> Neb. Rev. Stat. § 83-1,107(2)(b) (“Reductions earned under this subdivision shall not be subject to forfeit or withholding by the department.”). It is rare in U.S. law to encounter credit-based sentence reductions that are not forfeitable.



### *Timeline Diagrams*

For “more serious” felonies (those with maximum authorized terms of 20 years or more), sentencing judges have meaningful discretion to vary the degrees of indeterminacy in the individual sentences they impose by setting minimum terms lower or higher within a range of statutory permissibility. In most cases, sentencing courts are free to set minimum terms as high as the statutory maximum term, and are restricted to lowest-allowable minimum terms that are generally much shorter than allowable maximums. For example, for Class II felonies, courts may impose prison sentences of one-to-50 years (at the most indeterminate) or 50-to-50 years (at the least indeterminate).<sup>32</sup>

There are important limits on the judicial power to vary the degrees of indeterminacy in their sentences. First, under Nebraska’s general rules of prison release, prisoners become eligible for parole at the halfway mark of their *minimum* terms.<sup>33</sup> This means that, no matter how long a minimum term the judge may have selected, and because the minimum may not exceed the maximum, first parole eligibility will always come at the 50-percent mark of the judicial *maximum* sentence or earlier. For example, with the 50-to-50 year sentence posited above, first parole eligibility would be set at 25 years. Figure 3 illustrates the placement of parole eligibility dates in cases in which sentencing courts have imposed judicial minimum terms equal to the judicial maximum. (The figures below do not cover cases in which a mandatory minimum prison term is operative.)

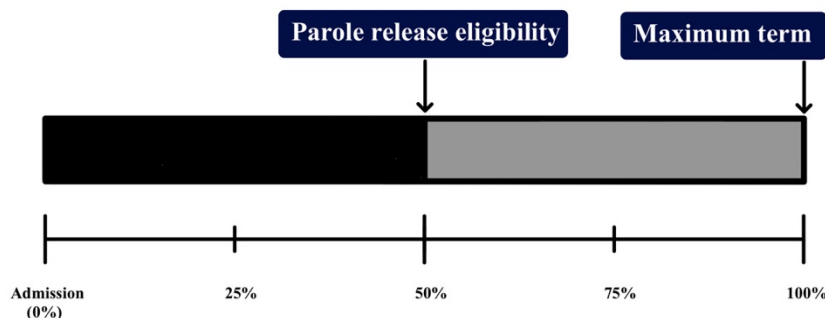
Figure 4 then adds the assumption that prisoners have earned and retained all available credits, including good time credits (automatically bestowed) of six months per year (15 days per month) and “additional credits” at the peak earning rate of three days per month. In this scenario, first parole eligibility comes at the 50-percent mark of the judicial maximum sentence and the mandatory release date (for the full credit earner) occurs at the 61-percent mark. In this configuration, the parole board holds unilateral release discretion from the 50-percent mark through sentence expiration. On the other hand, the parole board has unilateral release-*denial* discretion only from between the 50- and 61-percent marks. Following the 61-percent juncture, the department of corrections gains unilateral release discretion alongside that of the parole board. In other words, credits administered by the department of corrections can result in mandatory release no matter what the parole board thinks—and the parole board has authority to release no matter what the department of corrections thinks.

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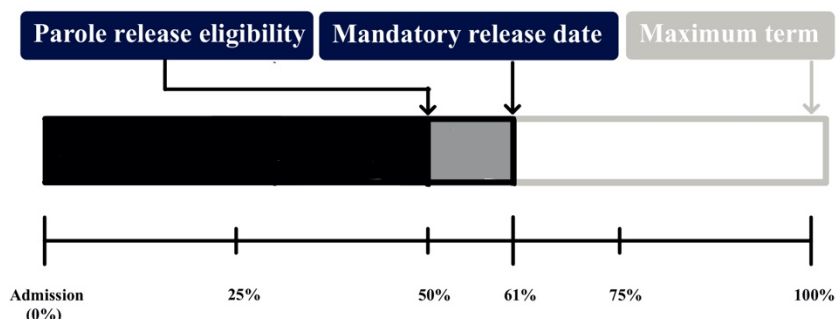
<sup>32</sup> See Neb. Rev. Stat. § 28-105(1) (listing the allowable penalty for conviction of a Class II felony as a minimum of 1-year and maximum of 50-years imprisonment).

<sup>33</sup> Neb. Rev. Stat. § 83-1,110(1). This rule does not apply to sentences that include mandatory minimum prison terms or sentences of life without parole.

**Nebraska Figure 3. Prison-Release Timeline for General-Rules Sentences with Longest Possible Minimum and No Good Time Credits**



**Nebraska Figure 4. Prison-Release Timeline for General-Rules Sentences with Longest Possible Minimum and Full Good Time Credits\***



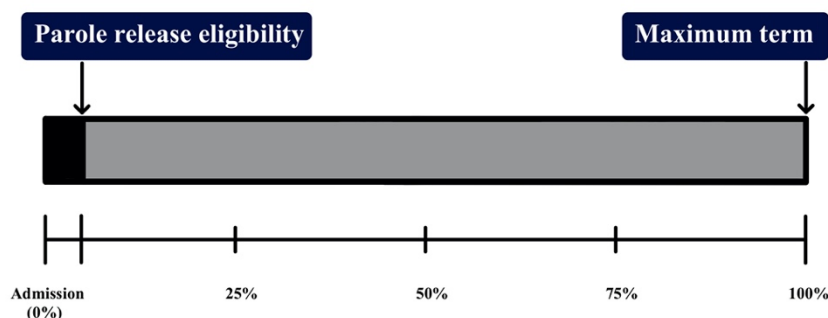
\* Includes "automatic" credits of 180 days per year plus additional credits of three days per month after first year (estimated for five year maximum term).

The sentences shown in Figures 3 and 4 are 50 percent determinate and 50 percent indeterminate. On the scale developed for this project, they carry a *moderate degree of indeterminacy* (see pp. iii-iv). The population multiplier potential (PMP) for such sentences is 2:1 (see p. v). That is, if all prisoners with this class of sentence were held as long as possible under the *longest-time-served scenario* their numbers would eventually stabilize at twice the number that would be reached if they were consistently released in accord with the *shortest-time-served scenario* allowable by law.

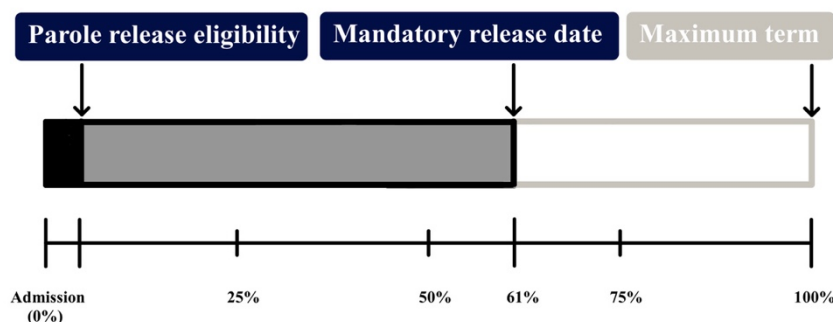
In contrast, if sentencing courts choose to impose very short minimum terms, near the smallest allowable percentage of the maximum, such sentences would be *extremely high in indeterminacy*. At the extreme, for Class IIA felonies, courts are free to impose a minimum of zero, rendering

prisoners release-eligible at the moment of admission.<sup>34</sup> Nebraska Figures 5 and 6 do not go to this full extreme, but posit judicial minimum terms that are initially positioned at 10 percent of the judicial maximum. (The figures do not include cases in which a mandatory minimum prison term is operative.) Such a judicial minimum would be halved to the five-percent mark to establish the date of first parole release eligibility, as shown in Figure 5. Figure 6 adds the effects of full credit earnings (of both automatic and additional credits), which create a mandatory release date at the 61-percent mark of the judicial maximum term.

**Nebraska Figure 5. Prison-Release Timeline for General-Rules Sentences with Short Minimum\* and No Good Time Credits**



**Nebraska Figure 6. Prison-Release Timeline for General-Rules Sentences with Short Minimum and Full Credits**



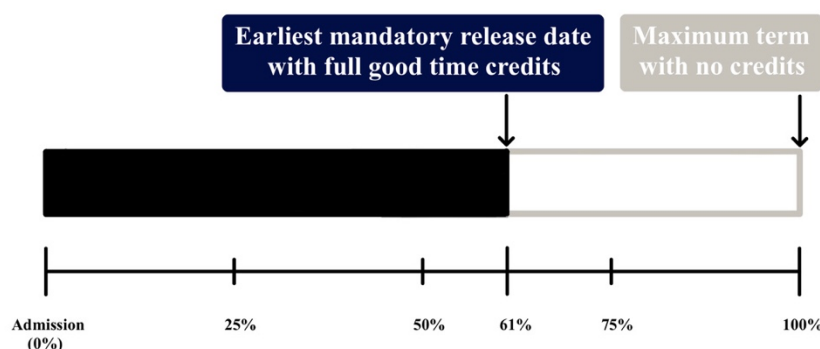
The sentence example in Figures 5 and 6 is five percent determinate and 95 percent indeterminate. In our ranking system, such sentences carry an *extremely high degree of indeterminacy*, with a PMP of 20:1. That is, if all prisoners with this class of sentence were held as long as possible under the *longest-time-served scenario* their numbers would eventually stabilize at 20 times the number that would be reached if they were consistently released in accord with the *shortest-time-served* scenario allowable by law.

<sup>34</sup> Neb. Rev. Stat. § 28-105(1) (listing the allowable penalty for conviction of a Class IIA felony as a minimum of none and maximum of 20-years imprisonment). We have seen other examples of zero minimums in this project, including states in which many or all prison sentences carry parole release eligibility at the moment of admission.

In sum, for “more serious” felonies (excluding offenses with mandatory minimums), sentencing courts have the power to vary the degrees of indeterminacy of their sentences within a bandwidth that ranges from moderate to extremely high indeterminacy.

For “less serious” felonies (those with maximum terms of four years or less), things are simpler. In most cases, sentencing courts are required to impose determinate sentences with no parole release eligibility. Such sentences are reducible by good time credits, following the standardized formulas discussed above. Under the assumptions in the previous example, prisoners with this class of sentence could earn mandatory release as early as the 61-percent of their maximum terms, as shown in Figure 7. These sentences that carry a *low degree of indeterminacy*. Their PMP is 1.6:1.

Nebraska Figure 7. Prison-Release Timeline for General-Rules  
“Determinate” Sentences for Lower-Level Felonies



### *Mandatory minimum sentences in Nebraska*

Class IC felonies carry a mandatory minimum sentence of five years while Class ID felonies carry a mandatory minimum of three years.<sup>35</sup> Offenders convicted of sexual assault of a child in the first degree, a Class IB felony, must serve a mandatory minimum of fifteen years.<sup>36</sup> Offenders convicted of sexual assault of a child in the first degree with prior convictions of first degree sexual assault, sexual assault of a child, or sexual assault of a child in the second or third degree, will be subject to a mandatory minimum penalty of 25 years.<sup>37</sup> Offenders

<sup>35</sup> Neb. Rev. Stat. § 28-105(1).

<sup>36</sup> Neb. Rev. Stat. § 28-319.01(2).

<sup>37</sup> Neb. Rev. Stat. § 28-319.01(3).

convicted for a second time of sexual assault in the first degree are subject to a mandatory minimum penalty of 25 years.<sup>38</sup>

Nebraska statute also provides an extensive mandatory minimum penalty scheme for habitual criminals; wherein offenders with two prior criminal convictions, upon conviction of a third or subsequent felony, must be sentenced to a mandatory minimum of ten years and a maximum of 60 years.<sup>39</sup> If the felony conviction is for first or second degree murder, first degree assault, kidnapping, first degree sexual assault, first degree sexual assault of a child, first degree arson, assault on an officer, emergency responder, or health care professional in the first degree, or use of explosives to commit a felony, and the offender has at least one prior conviction of one of these offenses, the mandatory minimum term must be 25 years.<sup>40</sup> If the felony conviction is for motor vehicle homicide, and the offender has a prior conviction of the same offense and a prior conviction of one of the enumerated felony offenses listed above, the mandatory minimum must be 25 years.<sup>41</sup>

## ***2. Life sentences in Nebraska***

### ***a. Adults***

Offenders convicted of felony offenses where both the minimum and maximum term are set at life imprisonment, also called “life to life” sentences, are not eligible for parole unless the Board of Pardons commutes the life sentence to a term of years.<sup>42</sup> The mandatory penalty for Class IA felonies is a life to life sentence.<sup>43</sup>

Offenders convicted of felony offenses where the maximum term is life imprisonment but the minimum term is a term of years are parole eligible.<sup>44</sup> However, sentencing judges can also

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<sup>38</sup> Neb. Rev. Stat. § 28-319(3).

<sup>39</sup> Neb. Rev. Stat. § 29-2221(1).

<sup>40</sup> Neb. Rev. Stat. § 29-2221(1)(a).

<sup>41</sup> Neb. Rev. Stat. § 29-2221(1)(b).

<sup>42</sup> *Poindexter v. Houston*, 750 N.W. 2d 693, 693 (Neb. 2008) (“Poindexter’s life sentence is indefinite. . . . His sentence has no term of years from which reductions can be taken. We conclude that under § 83-1,110, Poindexter is not eligible for parole until the Board of Pardons commutes his life sentence to a term of years.”).

<sup>43</sup> Neb. Rev. Stat. § 28-105(1) (listing the allowable penalty for conviction of a Class IB felony as a minimum of 20-years and maximum of life imprisonment).

<sup>44</sup> “Every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence as provided in sections 83-1,107 and 83-1,108.” Neb. Rev. St. § 83-1,110(1).

choose to set the minimum term as a life sentence, even if the statutory mandatory minimum is a term of years.<sup>45</sup>

### ***b. Juvenile life sentences***

Offenders convicted of a Class IA felony for an offense committed when they were under the age of eighteen years must be sentenced to a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years.<sup>46</sup> For all other offenders (not juveniles), the mandatory penalty for a Class IA felony is life imprisonment.<sup>47</sup>

In determining the juvenile offender's sentence for a Class IA felony conviction, the court must consider mitigating factors which led to the commission of the offense. The offender may submit mitigating factors to the court, including: 1) the offender's age; 2) the impetuosity of the offender; 3) the offender's family and community environment; 4) the offender's ability to appreciate risks and consequences of their conduct; 5) the offender's intellectual capacity; and 6) the result of a comprehensive mental health evaluation of the offender conducted by an adolescent mental health professional.<sup>48</sup>

## ***3. Infrequently used forms of prison release in Nebraska***

### ***a. Compassionate release***

Inmates determined by the department of corrections to be terminally ill or permanently incapacitated as a result of an existing medical or physical condition may be considered for medical parole by the parole board.<sup>49</sup> The board must review an inmate's medical, institutional, and criminal records before deciding to grant medical parole.<sup>50</sup> Medical parole may be revoked if an offender's medical condition improves or if they violate a condition of medical parole established by the board.<sup>51</sup>

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<sup>45</sup> State v. Marrs, 723 N.W.2d 504, 504 (Neb. 2006) (“[W]e find no statutory requirement that the affirmatively stated minimum term for a Class IB felony sentence be less than the maximum term. Although § 29-2204(1)(a)(ii) permits a sentencing judge imposing a maximum term of life imprisonment for a Class IB felony to impose a minimum term of years not less than the statutory mandatory minimum, it does not require the judge to do so.”).

<sup>46</sup> Neb. Rev. Stat. § 28-105.02(1).

<sup>47</sup> Neb. Rev. Stat. § 28-105(1).

<sup>48</sup> Neb. Rev. Stat. § 28-105.02(2).

<sup>49</sup> Offenders serving sentences of death or life imprisonment are not eligible for medical parole. Neb. Rev. Stat. § 83-1,110.02(1).

<sup>50</sup> Neb. Rev. Stat. § 83-1,110.02(2).

<sup>51</sup> Neb. Rev. Stat. § 83-1,110.03.

### ***b. Clemency***

Nebraska has a Board of Pardons consisting of the Governor, Attorney General, and Secretary of State that has the power to remit fines and forfeitures, grant respites, reprieves, pardons or commutations in all cases of conviction except treason and impeachment. The parole board may advise the Board of Pardons but such advice is not binding on their ultimate decision. The Governor has the authority to suspend the execution of the sentence imposed for treason until the case can be reported to the Legislature, at which time the Legislature may decide to grant a pardon, commute the sentence, or grant a further reprieve.<sup>52</sup>

### ***c. Release during overcrowding emergencies***

Nebraska has a statutory scheme for addressing prison overcrowding. Beginning July 1, 2020, the law provides that an overcrowding emergency shall exist whenever the director of a correctional system certifies that the department's inmate population exceeds 140 percent of design capacity.<sup>53</sup> During a correctional system overcrowding emergency, the parole board must immediately consider or reconsider eligible inmates for release to parole. The parole board "shall order the release" of each eligible committed offender unless the board determines that 1) it is more likely than not that the committed offender will not conform to the conditions of parole; 2) the release of the committed offender would have a very significant and quantifiable effect on institutional discipline; or 3) there is a very substantial risk that the committed offender will commit a violent act against a person.<sup>54</sup> The parole board must continue granting parole to eligible offenders until the director of the correctional system certifies that the population is at operational capacity.<sup>55</sup>

## ***4. Overall assessment of indeterminacy in Nebraska's prison-sentencing system***

Overall, Nebraska's prison-sentencing system operates with a *moderate degree of indeterminacy* in the ranking system developed for this project (see pp. iii-iv). This is a judgment call that "averages out" the two main classes of general-rules sentences in Nebraska: one with a low degree of indeterminacy and one with moderate-to-extremely-high indeterminacy. With a bifurcated system like this, the overall ranking may not be applicable to most individual sentences, but represents a composite characterization. Lumping all individual sentences together, the ranking indicates that front-end sentencing decisionmakers share a roughly equal

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<sup>52</sup> Neb. Const. Art. IV, § 13; Neb. Rev. Stat. § 83-1,127.

<sup>53</sup> Prior to July 1, 2020, the Governor had the authority to declare a correctional system overcrowding emergency whenever the director certified that the inmate population exceeded 140% of design capacity. A recent change to the statute makes the declaration of an overcrowding emergency automatic, without a declaration by the Governor. See Neb. Rev. Stat. § 83-962(1).

<sup>54</sup> Neb. Rev. Stat. § 83-962(2)-(3).

<sup>55</sup> Neb. Rev. Stat. § 83-962(5).

amount of power over prison population size as that possessed by back-end release decisionmakers.

For the least serious felonies (those with authorized maximum terms no longer than four years), prison sentences have no parole release eligibility. The indeterminacy in these sentences is entirely a matter of good-time reductions; they carry a *low degree of indeterminacy*. In contrast, sentences for more serious felonies (those with authorized maximum terms of 20 years or more) almost always include parole release eligibility. Judges have substantial discretion to vary the ratio between the lengths of minimum and maximum sentences but—except for offenses with mandatory minimum penalties—parole release eligibility cannot come later than 50 percent of the maximum. Most judicial maximum sentences in this class are also reducible by good time credits.

Nebraska judges have meaningful discretion, through their collective decision patterns, to alter the degree of indeterminacy of the prison-sentencing system as a whole. This “gatekeeping” power applies only to “more serious” felonies and has a defined bandwidth. Depending on where judges choose to set minimum terms in relation to maximums, such sentences almost always fall in the range of *moderate indeterminacy* to *extremely high indeterminacy*. Sentences for “less serious” felonies are uniformly low in indeterminacy.

Nebraska makes important use of movable mandatory release dates (MRDs) driven by good time credits. Nebraska is also among the minority of states that award most credits “up front,” subject to potential loss by forfeiture.

The parole board has a great deal of potential power to influence time served, but only with respect to “more serious felonies” with statutory maximum terms of 20 years or more. The department of corrections’ time-served discretion arises mostly from its power to delay prisoners’ mandatory release dates (MRDs) through credit forfeitures. This is a limited power. For the most part in Nebraska, good time credits are awarded automatically by force of statute after a person has been admitted to prison. Unlike in most other states, the Nebraska department of corrections has no discretion to withhold credits in the first instance; its power is wielded exclusively through the forfeiture process.

We are confident that aggregate patterns of parole release decisions make a difference in the size of Nebraska’s prison subpopulation who are convicted of serious felonies. The department of corrections’ control over prison population size extends to most prisoners in theory, but would appear to be restricted in practice by the fact that the statutory “default” is to award credits up front.