



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

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# **PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE**

## ***STATE REPORT: NEW MEXICO***

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## **State Report: New Mexico**

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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: New Mexico<sup>1</sup>

#### *Executive Summary*

In our assessment, New Mexico’s prison-sentencing system operates with a *moderate degree of indeterminacy* overall (see pp. iii-iv). This judgment is based on the state’s two main classes of sentences for people convicted of “nonviolent” and “serious violent” offenses. Sentences for those convicted of “nonviolent” crimes, the largest subpopulation in the state’s prisons, carry a *high degree of indeterminacy* by statutory formula but, in practice, probably border on a *moderate degree of indeterminacy* for most prisoners. Full sentence-reduction credits require a great deal of program participation and completion, which may be unrealistic for many prisoners. Prisoners convicted of “serious violent” offenses serve sentences with a *low degree of indeterminacy*, and even this degree of indeterminacy is dependent on program participation and completion that may be impossible for many.

Our finding of a *moderate degree of indeterminacy* means that prison population size in New Mexico is governed in roughly equal measure by sentences pronounced in court and the discretionary actions taken at the back end of the system by prison officials. Although New Mexico abolished parole-release discretion several decades ago, it retains a substantial quotient of back-end release discretion as a matter of structural design.

#### *Terminology note*

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

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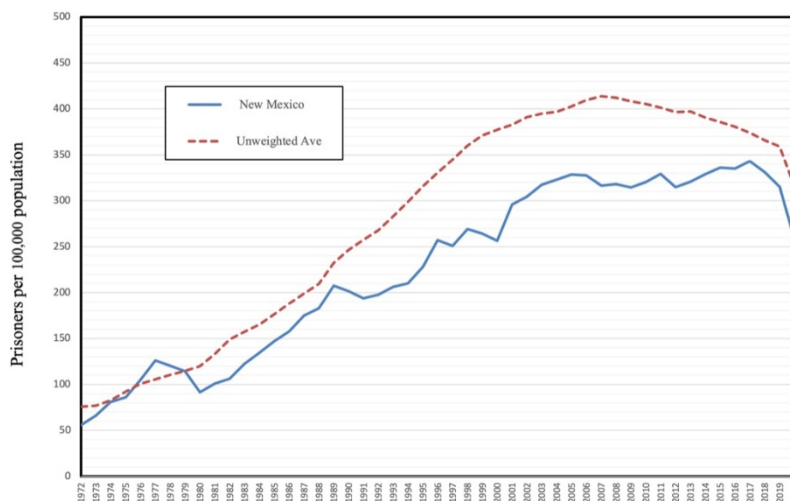
<sup>1</sup> This report was prepared with support from Arnold Ventures. The views expressed are the authors’ and do not necessarily reflect the views of Arnold Ventures.

## Introduction

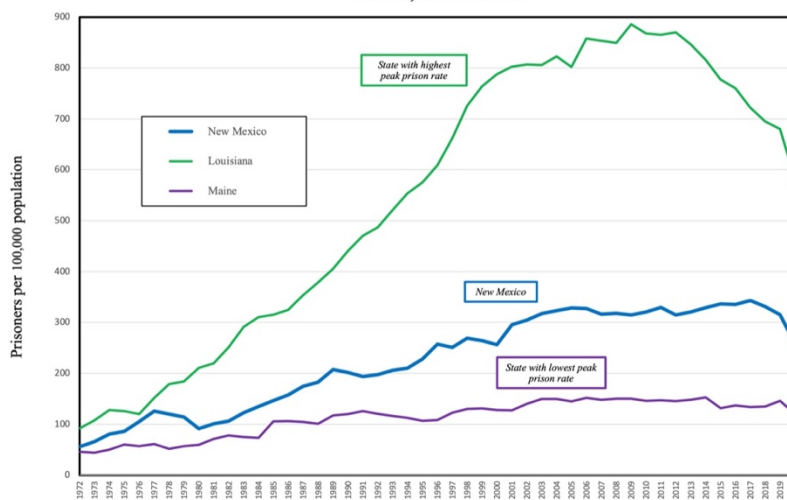
### *New Mexico's prison-rate history, 1972 to 2020*

At yearend 2020, New Mexico's prison rate was 258 per 100,000 general population, with a prison population of 5,433.<sup>2</sup> New Mexico's prison rate was 34<sup>th</sup> largest among all states.

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



**Figure 2. Prison Rate Change in New Mexico, 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).

New Mexico reached its peak prison rate during the national buildup period in 2017 at 343 per 100,000, which dropped to 258 per 100,000 by yearend 2020. This is a net difference of -85 per 100,000, which was the 37<sup>th</sup> largest (14<sup>th</sup> smallest) prison-rate drop of all states (measured from each state's peak through 2019).

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>3</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 general population, for an average incremental downturn of -51 per 100,000.<sup>4</sup> We believe this was the largest one-year decline in state prison rates in American history.<sup>5</sup>

<sup>3</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.

<sup>4</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>5</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,

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>6</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>7</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 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>8</sup>

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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>6</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>7</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.

<sup>8</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

### *The COVID period in New Mexico*

In a separate study, the Robina Institute found 550 releases in New Mexico from March 2020 through December 2021 that were accelerated in response to the pandemic.<sup>9</sup> This number was the equivalent of about eight percent of New Mexico pre-COVID prison population (measured at yearend 2019). As reported by the Robina Institute:

New Mexico Governor Michelle Lujan Grisham signed an executive order on April 6, 2020, designed to release people in prison to prevent the spread of COVID-19. The executive order essentially commutes individuals' sentences, placing them on parole instead. In order to qualify for commutation, a person in prison had to meet strict criteria: be scheduled to be released in the next 30 days; have a parole plan; not be serving time for driving while under the influence, domestic abuse, or assault on a peace officer; not be a sex offender (even if they are not currently serving time for a sex offense); and not be serving an enhanced sentence for use of a firearm. The first group of releases, the day after the order was signed, consisted of 10-12 people. As of September 30, 2021, that number had risen to over 550.<sup>10</sup>

In calendar year 2020, New Mexico's prison rate fell from 315 to 258 per 100,000—a one-year decline of -57 per 100,000. This was the 19<sup>th</sup> largest one-year drop reported among all 50 states for that year.<sup>11</sup> Measured in percentage terms, it was an 18.1-percent reduction in the state's

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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>9</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 35 Appendix A.

<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 74 Appendix E (footnote omitted).

<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.

prison rate. The state's total prison population fell by 1,201 people, from 6,634 to 5,433.<sup>12</sup> Through yearend 2021, New Mexico saw a continued reduction in its prison population, from 5,433 to 5,079—or 6.5 percent.<sup>13</sup>

Falling admissions were the important cause of New Mexico's large prison drop from 2019-20, not an increase in the number of releases. The number of prison admissions in the state dropped by 23.8 percent in 2020 compared with the previous year (from 3,122 to 2,380). Total releases in 2020 fell by 11.9 percent over 2019 (from 3,508 to 3,090).<sup>14</sup>

### ***1. General rules of prison release in New Mexico***

New Mexico abolished parole release discretion for the vast majority of prison sentences effective July 1, 1979.<sup>15</sup> Time actually served by an individual prisoner is determined by the judicial maximum sentence minus any conduct-based credits the prisoner has earned and not forfeited.<sup>16</sup> Subtraction of such credits from the judicial maximum term results in a mandatory release date (or “MRD”) in the terminology of this project.

New Mexico makes no provision for good-time credits that accrue continuously over time merely because prisoners have avoided serious disciplinary violations. Instead, all conduct-based credits in New Mexico follow an earned-time blueprint in which prisoners may accumulate credits only through active participation in programs or other affirmative “meritorious” conduct (such as “heroic” or “extraordinary” acts).<sup>17</sup>

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

<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.

<sup>15</sup> Allison Grace Karslake & Kathleen Kennedy Townsend, *Definite Sentencing in New Mexico: The 1977 Criminal Sentencing Act*, 9 N.M. L. Rev. 131, 131-32 (1978).

<sup>16</sup> See N.M. Stat. Ann. § 33-2-38.

<sup>17</sup> See N.M. Stat. Ann. § 33-2-34 (detailing the good-time credits system). Offenders who engage in a heroic act of saving life or property or who behave in extraordinary conduct may be awarded an undetermined amount of meritorious deduction as determined by the director of the corrections department. N.M. Stat. Ann. § 33-2-34(D)(6). Because we assume such credits are rarely dispensed, we do not focus on this type of conduct-based earning in our discussion below.

New Mexico statutes provide for two different classes of earned-time credits. The first we will call “time-based” meritorious conduct credits because they accrue at a fixed rate over time so long as prisoners are enrolled in qualifying programs. General-rules prisoners are separated into two earning-rate categories depending on the seriousness of their offenses. Prisoners serving sentences for crimes that are statutorily designated as “serious violent offenses” can earn a maximum of four days per month.<sup>18</sup> Prisoners serving sentences for “nonviolent offenses” (defined as crimes other than “serious violent offenses”<sup>19</sup>) can earn as much as thirty days per month.<sup>20</sup> One peculiarity of New Mexico law is that the statutory classification of “nonviolent offenses” includes many violent crimes that do not meet the statutory prerequisites to be “*serious violent offenses*.”

In addition to time-based credits, prisoners may also win “lump-sum meritorious deductions” for the successful completion of approved vocational, substance abuse, or mental health programs.<sup>21</sup> Offenders who earn a high school equivalency credential can earn three months.<sup>22</sup> Offenders who earn an associate’s degree may earn four months.<sup>23</sup> Offenders who earn a bachelor’s degree or graduate qualification may earn five months.<sup>24</sup>

Lump-sum meritorious deductions cannot exceed one year per award and cannot exceed a total of one-year for all lump-sum meritorious deductions awarded in a consecutive 12 month

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<sup>18</sup> N.M. Stat. Ann. § 33-2-34(A)(1); The following crimes are “serious violent offenses” under New Mexico statute: second degree murder, voluntary manslaughter, third degree aggravated battery, third degree aggravated battery against a household member, first degree kidnapping, first and second degree criminal sexual penetration, second and third degree criminal sexual contact of a minor, first and second degree robbery, second degree aggravated arson, shooting at a dwelling or occupied building, shooting at or from a motor vehicle, aggravated battery upon a peace officer, assault with intent to commit a violent felony upon a peace officer, and aggravated assault upon a peace officer. The following offenses may also be considered “serious violent offenses” when the nature of the offense and resulting harm are such that the court determines the crime to be a serious violent offense: involuntary manslaughter, fourth degree aggravated assault, third degree assault with intent to commit a violent felony, fourth degree aggravated assault against a household member, third degree assault against a household member with intent to commit a violent felony, third and fourth degree aggravated stalking, second degree kidnapping, second degree abandonment of a child, first, second, and third degree abuse of a child, third degree dangerous use of explosives, third and fourth degree criminal sexual penetration, fourth degree criminal sexual contact of a minor, third degree robbery, third degree homicide by vehicle or great bodily harm by vehicle, or battery upon a peace officer. N.M. Stat. Ann. § 33-2-34 (L)(4).

<sup>19</sup> N.M. Stat. Ann. § 33-2-24(L)(3).

<sup>20</sup> N.M. Stat. Ann. § 33-2-34(A)(2).

<sup>21</sup> N.M. Stat. Ann. § 33-2-34(D)(1).

<sup>22</sup> N.M. Stat. Ann. § 33-2-34(D)(2).

<sup>23</sup> N.M. Stat. Ann. § 33-2-34(D)(3).

<sup>24</sup> N.M. Stat. Ann. § 33-2-34(D)(4),(5). Prisoners who have a demonstrable physical, mental health, or developmental disability that prevents them from successfully earning a high school equivalency credential can nonetheless be awarded three months of credits. N.M. Stat. Ann. § 33-2-34(D)(1).

period.<sup>25</sup> Notably, “lump-sum” meritorious conduct credits in New Mexico are available on the same terms to prisoners convicted of “nonviolent” and “serious violent” crimes.

Prisoners are ineligible to earn meritorious deductions if they: (1) disobey an order to perform labor; (2) are in disciplinary segregation; (3) are confined for committing a serious violent offense within first 60 days of admission to prison; or (4) are not an active participant in programs recommended and approved for the prisoner by the classification supervisor.<sup>26</sup> People serving sentences for life imprisonment or life imprisonment without the possibility of release or parole are ineligible to earn meritorious deductions.<sup>27</sup>

Interestingly, New Mexico places fixed statutory limits on forfeiture penalties. Meritorious deductions may be forfeited in an amount up to 90 days for two or more misconduct violations. Forfeitures in an amount in excess of 90 days may only occur upon the recommendation of the classification supervisor, the warden, and final approval of the director of the adult institutions division of the corrections department.<sup>28</sup> The great majority of states place no similar limitations on the scope of forfeiture penalties.

Meritorious deductions may be restored in whole or in part to an offender who is exemplary in conduct and work performance for a period of at least six months following the date of forfeiture. Reductions may be restored upon recommendation of the classification supervisor, the warden, and final approval of the director of the adult institutions division of the corrections department.<sup>29</sup>

### Prison-Release Timeline Diagrams

Figures 3 through 6 illustrate the prison-release timelines for:

- (Figure 3) nonviolent general-rules prisoners who earn time-based meritorious deductions throughout their full terms;
- (Figure 4) nonviolent general-rules prisoners who earn full time-based meritorious deductions and who also win 9 months of lump-sum meritorious credits before release;
- (Figure 5) serious violent general-rules prisoners who earn full time-based meritorious deductions; and

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<sup>25</sup> N.M. Stat. Ann. § 33-2-34(E).

<sup>26</sup> N.M. Stat. Ann. § 33-2-34(F).

<sup>27</sup> N.M. Stat. Ann. § 33-2-34(G).

<sup>28</sup> N.M. Stat. Ann. § 33-2-36(A).

<sup>29</sup> N.M. Stat. Ann. § 33-2-37(A).

- (Figure 6) serious violent general-rules prisoners who also earn full time-based meritorious deductions and who win 15 months of lump-sum meritorious credits before release.

Figures 4 and 6 show the possible course of high-performing prisoners, not average prisoners. To estimate the earliest possible release dates that are realistic for outstanding prisoners, both figures assume exemplary records of program participation and completion throughout the prison term.<sup>30</sup> For example, a prisoner could earn release as shown in Figure 4 by finishing two work or treatment programs and obtaining a GED, for a total of nine months of credits, all earned within 21 months before mandatory release. Figure 6 prisoners are posited to have earned more lump-sum credits than Figure 4 prisoners because the Figure 6 group must spend 80 percent more time in confinement before reaching their earliest possible MRDs—therefore, they have more time inside to accumulate lump-sum awards at the hypothesized “exemplary” rate.

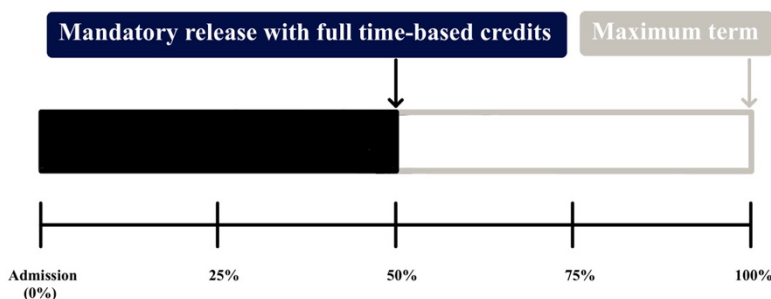
Figures 3 and 4 focus on the degree of indeterminacy in general-rules sentences for “nonviolent” offenses. With combined credit earnings as posited in Figure 4, such sentences are 35 percent determinate and 65 percent indeterminate. That is, about 35 percent of time served is “determined” by the judicial prison sentence, while the remainder of potential time served within the judicial maximum term falls under the jurisdiction of back-end decisionmakers. In New Mexico, the important back-end actors are the prison officials who administer the conduct-based credit system, including the award and forfeiture of credits.

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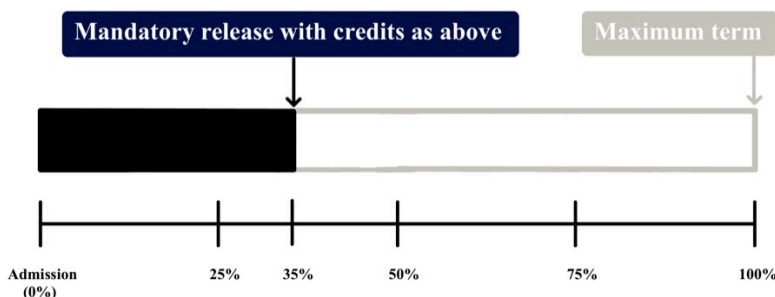
<sup>30</sup> Technically, greater reductions from judicial maximum sentences are possible under New Mexico’s statutes than shown in Figures 4 and 6. At a certain point, however, we think it unrealistic to assume that individual prisoners can earn all available credits, particularly since larger and larger credit totals reduce the timespan in which prisoners can earn.



**New Mexico Figure 3. Prison-Release Timeline for General-Rules Nonviolent Offenders with Full Meritorious Time-Based Credits**



**New Mexico Figure 4. Prison-Release Timeline for General-Rules Nonviolent Offenders with 5-Year Maximum, Full Meritorious Time-Based Credits, and 9 Months of Lump-Sum Credits**

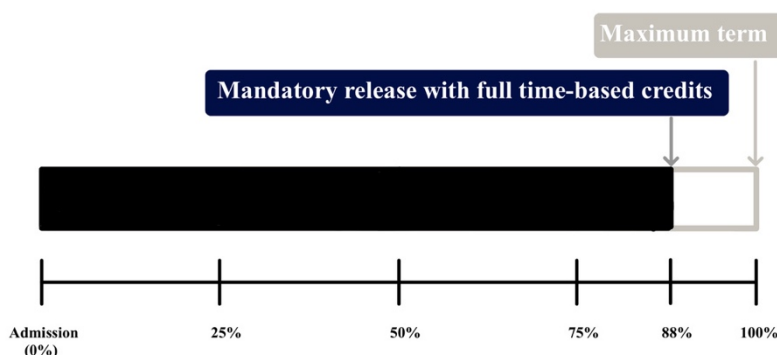


In the ranking system developed for this project (see p. iv), the sentence class shown in Figures 3 and 4 carries a *high degree of indeterminacy*. This ranking is based on full credit earnings as displayed in Figure 4, but our best guess is that the *probability* of release at this early juncture is low. A high-achieving prisoner envisioned in Figure 4 must be personally exemplary, as noted above, but must also be very lucky. They cannot bank the large credit earnings contemplated in Figure 4 unless the necessary program slots are available continuously and seamlessly throughout their prison stays. This background condition is not met in most American prisons and is seldom within the control of prison officials.

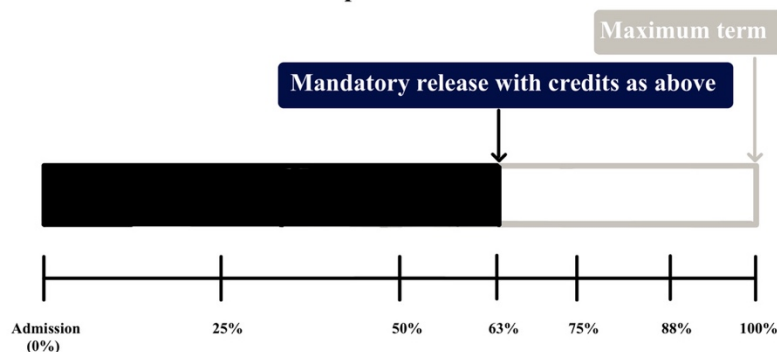


For the affected subpopulation of prisoners, this class of sentences has a population multiplier potential (PMP) of 2.9:1 (see p. v). That is, if all prisoners with this class of sentence were held as long as possible under the *longest-time-served scenario* their numbers would eventually stabilize at nearly three times the number that would be reached if they were consistently released in accord with the *shortest-time-served scenario* allowable by law.

**New Mexico Figure 5. Prison-Release Timeline for General-Rules Serious Violent Offenders with Full Meritorious Time-Based Credits**



**New Mexico Figure 6. Prison-Release Timeline for General-Rules Serious Violent Offender with 5-Year Maximum, Full Meritorious Time-Based Credits, and 15 Months of Lump-Sum Credits**



Figures 5 and 6 focus on general-rules prisoners convicted of “serious violent offenses” as defined in New Mexico law. Only a small number of violent offenses are automatically placed in this category. Defendants convicted of the most common violent crimes are not deemed “serious” violent offenders unless the court exercises its discretion to place them in that category as part of their judicial sentences. While we have not found data that show what percentage of all New Mexico prisoners are “serious violent offenders,” it is a smaller subpopulation than would be the case if it included offenders convicted of *all* violent offenses. We are confident that far more nonviolent general-rules prisoners are admitted to New Mexico’s prisons than those who enter as “serious violent offenders.”

In the ranking system developed for this project (see p. iv), the sentence class shown in Figures 5 and 6 carries a *low degree of indeterminacy*, bordering on a *modest degree of indeterminacy*. (Eligibility for release at the 60-percent mark of the judicial maximum sentence is our borderline between “low” and “modest” indeterminacy). As discussed in connection with Figure 4, however, we believe prisoners’ prospects of release at the 63-percent mark in Figure 6 are quite small in practice.

For the affected subpopulation of prisoners, this class of sentences has a population multiplier potential (PMP) of 1.6:1. 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 60 percent more than the number that would be reached if they were consistently released in accord with the *shortest-time-served* scenario allowable by law.

## 2. Life sentences in New Mexico

Based on a 2020 survey of state departments of corrections, the Sentencing Project reported that 13 percent of all prisoners in New Mexico were serving life sentences. Out of a total of 6,062 prisoners in that year, 782 (or 13 percent) were serving life sentences with the possibility of release and two (or .03 percent) were serving life without parole (“LWOP”) sentences.<sup>31</sup>

### a. Adults

Offenders convicted of a capital felony “shall be sentenced” to either life imprisonment or LWOP.<sup>32</sup> Offenders sentenced to parolable life imprisonment become eligible for a parole-release hearing after serving 30 years of their sentence. If release is denied, the prisoner is entitled to reconsideration at two year intervals thereafter.<sup>33</sup>

Upon conviction of a third violent felony, an offender must be sentenced to life imprisonment with the possibility of parole.<sup>34</sup> A violent felony conviction incurred by an offender before reaching the age of eighteen will not count as a violent felony for purposes of this provision.<sup>35</sup>

Upon conviction of a second violent sexual felony offense, the offender must be sentenced to life imprisonment with the possibility of parole. If each violent sexual offense involved a victim under the age of thirteen at the time of the offense, the offender must be sentenced to life

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<sup>31</sup> Ashley Nellis, No End in Sight: America’s Enduring Reliance on Life Imprisonment (The Sentencing Project, 2021), at 10 table 1.

<sup>32</sup> N.M. Stat. Ann. § 31-18-14; N.M. Stat. Ann. § 31-21-10(C).

<sup>33</sup> N.M. Stat. Ann. § 31-21-10(A).

<sup>34</sup> N.M. Stat. Ann. § 31-18-23(A).

<sup>35</sup> N.M. Stat. Ann. § 31-18-23(C).

imprisonment without the possibility of parole.<sup>36</sup> A violent sexual felony conviction incurred by an offender before reaching the age of eighteen will not count as a violent sexual felony for purposes of this provision.<sup>37</sup>

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

New Mexico is not among the states that have abolished LWOP sentences for defendants who were under age 18 at the time of their offenses, although the state had no JLWOP prisoners as of 2020.<sup>38</sup> The New Mexico Supreme Court held in 2018 that a juvenile defendant's 91 and one-half year term did not deprive the defendant of a meaningful opportunity to obtain release because the defendant could become eligible for release through meritorious deductions as early as age 62, noting that the "analysis would be different" had the juvenile not had the opportunity to earn meritorious conduct credits<sup>39</sup>

## ***3. Infrequently used forms of prison release in New Mexico***

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

Offenders determined to be geriatric, permanently incapacitated, or terminally ill may be eligible for parole under the medical and geriatric parole program. The parole board must determine that parole is not incompatible with the welfare of society and may request that certain medical evidence be produced in making a parole decision. The parole term of an offender released on medical or geriatric parole shall be for the remainder of the inmate's sentence, without diminution of sentence for good behavior.<sup>40</sup>

The parole board is required to report to the New Mexico legislature the number of applications and ultimate releases to medical and geriatric parole it receives. Between FY 2019 and 2020, there were 21 applications for medical and geriatric parole, with the parole board only granting two.<sup>41</sup>

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<sup>36</sup> N.M. Stat. Ann. § 31-18-25(A),(B).

<sup>37</sup> N.M. Stat. Ann. § 31-18-25(D).

<sup>38</sup> See Josh Rovner, *Juvenile Life Without Parole: An Overview*, at 2 (The Sentencing Project, 2021).

<sup>39</sup> *Ira v. Janecka*, 419 P.3d 161, 162 n. 1, 169 (N.M. 2018). In the absence of a legally-imposed LWOP sentence on a juvenile offender, the federal constitution requires that a state must provide a meaningful opportunity for release during the prisoner's lifetime. See *Graham v. Florida*, 560 U.S. 48, 75 (2010) ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"); *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

<sup>40</sup> N.M. Stat. Ann. § 31-21-25.1(A)-(D).

<sup>41</sup> Families Against Mandatory Minimums, "Compassionate Release: New Mexico," (Dec. 2021) at pg. 5, [https://famm.org/wp-content/uploads/New-Mexico\\_Final.pdf](https://famm.org/wp-content/uploads/New-Mexico_Final.pdf).

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

The governor of New Mexico has the power to grant reprieves and pardons after conviction for all offenses except treason and impeachment, subject to such regulations as may be prescribed by law.<sup>42</sup> Upon request of the governor, the parole board may investigate and report on any case of pardon, commutation of sentence or reprieve.<sup>43</sup>

Current Governor Michelle Lujan Grisham, in office since 2019, has reportedly pardoned 56 individuals throughout her tenure.<sup>44</sup>

### ***e. Release during overcrowding emergencies***

There is no statutory emergency release mechanism for prisoners in instances of prison overcrowding.

## ***4. Overall assessment of indeterminacy in New Mexico’s prison-sentencing system***

Our assessment of the overall degree of indeterminacy in New Mexico’s prison-sentencing system is based first on the general rules for release for “nonviolent” offenders, which we believe to be the largest subpopulation in the state’s prisons. For such sentences (see Figures 3 and 4), we assign a *high degree of indeterminacy*—although we doubt that the vast majority of prisoners are able to take advantage of all the indeterminacy that is available on paper. This is because full credit-based reductions depend on continuous access to the necessary programming—a matter that is often outside the control of prisoners and prison officials. In actual operation, the bulk of these sentences more realistically carry a *moderate degree of indeterminacy*.

Counterbalancing the subpopulation of prisoners convicted of “nonviolent” offenses, prisoners convicted of “serious violent” offenses (see Figures 5 and 6) serve sentences with a *low degree of indeterminacy*. Indeed, we think Figure 6 overstates the degree of indeterminacy realistically available to most prisoners due to the uncertainties of program availability mentioned above.

Putting these two main sentencing classes together, our best subjective judgment is that Mexico’s prison-sentencing system operates with a *moderate degree of indeterminacy* overall. The system is very close to this line when looking at sentences for “nonviolent” offenses alone, and we think the more determinate sentences for “serious violent” offenders pulls the overall system down into the territory of moderate indeterminacy. In back-of-the-envelope terms, this means that prison population size in New Mexico is governed in roughly equal degrees by the

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<sup>42</sup> N.M. Const. art. V § 6.

<sup>43</sup> N.M. Stat. Ann. § 31-21-17.

<sup>44</sup> *New Mexico Governor Issues Pardons to 6 People*, KUMN News (Aug. 29, 2022), <https://www.kunm.org/kunm-news-update/2022-08-29/mon-settlement-deadline-looms-in-rio-grande-supreme-court-case-more>.

sentences pronounced in court and the discretionary actions taken at the back end of the system by prison officials. Although New Mexico abolished parole-release discretion several decades ago, it retains a substantial quotient of back-end release discretion as a matter of structural design.