



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

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# PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

## *STATE REPORT: NORTH DAKOTA*

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

## **State Report: North Dakota**

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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: North Dakota<sup>1</sup>

#### *Executive Summary*

We rate North Dakota’s prison sentencing system overall as one that operates with a *high degree of indeterminacy* within the ranking system developed for this project (see pp. iii-iv). This judgment is based on the two major classes of prison sentences in the state: one with an *extremely high degree of indeterminacy* and another with an *extremely low DOI*. We believe that the state’s prison population is made up mostly of prisoners serving sentences with the highest DOIs.

For “less serious” offenses, North Dakota places as much time-served discretion at the back end of its prison-sentencing system as any jurisdiction in the country. The agency with the most power over time served at the back end of North Dakota’s prison-sentencing system is, by far, the parole board. Likewise, North Dakota’s parole board is the most important decisionmaker whose discretionary choices determine the size of the state’s prison population—at least for the major group of prisoners convicted of “less serious” offenses.

For prisoners classified as “violent offenders,” North Dakota is in the lowest tier of all states with *extremely low DOIs*. There is little time-served discretion over prisoners classified as “violent offenders.” What discretion exists is shared between the parole board and department of corrections. Actual time served is controlled almost exclusively at the front end of the system for this group of sentences, where the most powerful decisionmakers are prosecutors and judges. The size of this subpopulation of prisoners is thus overwhelmingly controlled by front-end decisionmakers.

#### *Terminology note*

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

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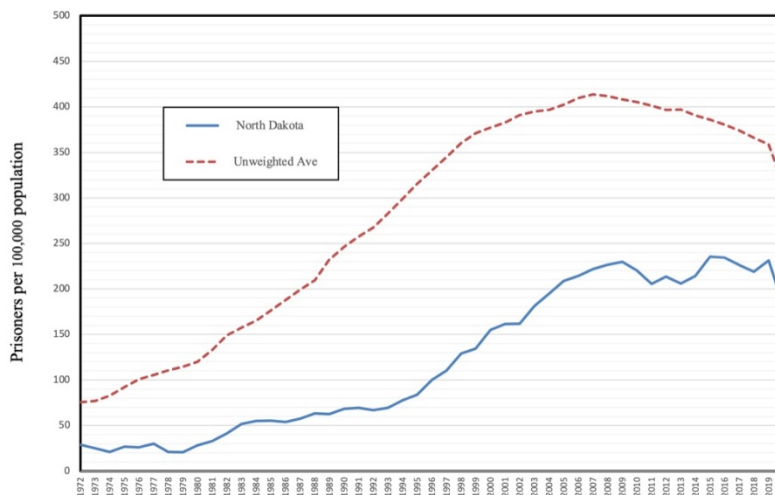
<sup>1</sup> This report was prepared with support from Arnold Ventures. The views expressed are the authors’ and do not necessarily reflect the views of Arnold Ventures. For a broad overview of the law of parole release and supervision in North Dakota, see Alexis Lee Watts, Julia Barlow, Eric Arch,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

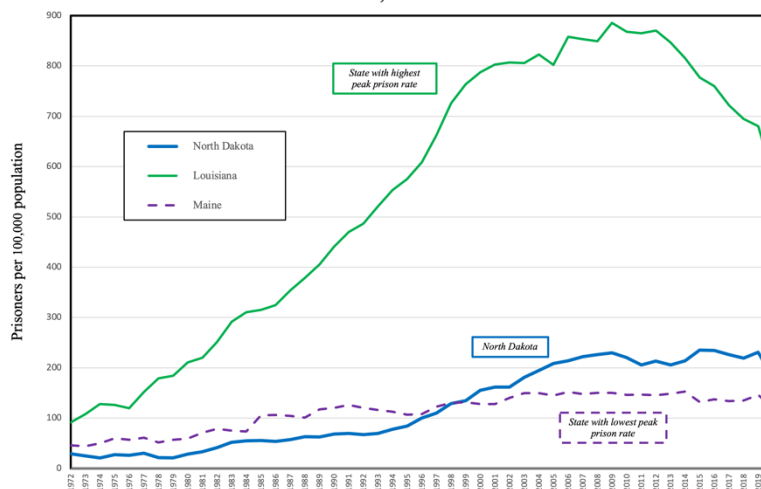
### *North Dakota's prison-rate history, 1972 to 2020*

In 2020, North Dakota's prison rate was 182 per 100,000 general population, with a yearend prison population of 1,396.<sup>2</sup> North Dakota's prison rate was 40<sup>th</sup> highest among all states.

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



**Figure 2. Prison Rate Change in North Dakota, 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).

North Dakota reached its peak prison rate in 2015 at 235 per 100,000, which dropped to 182 per 100,000 in 2019. This is a net difference of -53 per 100,000, which was the 42<sup>nd</sup> largest prison-rate drop of all states from their peak positions (in various years) through 2020.

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

### *The COVID period*

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

<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. For a tentative update, the Vera Institute of Justice has collected state imprisonment counts reaching into December 2021, which are not fully compatible with BJS reports. See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022).

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>

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

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<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, 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.

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>

### *The COVID period in North Dakota*

In a separate study, the Robina Institute found 240 releases in North Dakota from March 2020 through December 2021 that were accelerated in response to the pandemic.<sup>9</sup> This number was the equivalent of about 13 percent of North Dakota's pre-COVID prison population (at yearend 2019). The Robina Institute report explained as follows:

In March 2020, the North Dakota Parole Board held a special meeting to grant early parole to 120 people as part of its COVID-19 mitigation efforts. The Parole Board considered a person's medical conditions, the amount of time left on their sentence (the Board was looking for those with nine months or less left), and whether they had a reliable place of residence. In April 2020 the Parole Board heard 141 cases and granted parole for 120 of those people. As of May 8, 2020, the Parole Board director said that the Board had met facility goals concerning COVID-19 and would not be holding another special meeting for extra requests.<sup>10</sup>

In calendar year 2020, North Dakota's prison rate fell from 231 to 182 per 100,000—a one-year decline of -49 per 100,000. This was the 27<sup>th</sup> largest one-year drop reported among all 50

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<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 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> *Id.*, at 76 Appendix E.

states for that year (tied with Missouri).<sup>11</sup> Measured in percentage terms, it was a 21-percent reduction in the state's prison rate. The state's total prison population fell by 371 people, from 1,767 to 1,396.<sup>12</sup>

Accelerated COVID releases were responsible for a meaningful share of the state's reduction in prison population in 2020, but falling admissions were a more important factor. The number of prison admissions in the state dropped by 39.2 percent in 2020 compared with the previous year (from 1,419 to 863). Total releases in 2020 fell by 7.4 percent over 2019 (from 1,318 to 1,220).<sup>13</sup>

North Dakota's prison-rate drop reversed after calendar year 2020. From yearend 2020 to December 2021, the Vera Institute reported that North Dakota saw an increase in its prison population, from 1,401 to 1,689—or 20.6 percent.<sup>14</sup>

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<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.

<sup>12</sup> *Id.*, at 11 table 4.

<sup>13</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 18 table 8, 20 table 9.

<sup>14</sup> See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 4 table 2. As a general matter, Vera's *People in Prison* reports should not be treated uncritically as "updates" of BJS's annual *Prisoners* series. Vera does not always gather prisoner counts from the same dates as BJS, nor does it calculate state prison rates in the same way. For example, BJS calculates yearend prison rates using yearend population estimates for each state from the Census Bureau, while Vera uses the Census Bureau's July 1 estimates (six months earlier). Occasionally, the absolute numbers of state prisoners reported by Vera are dramatically different from those in BJS reports, suggesting basic differences in counting rules. Because of such incompatibilities, we do not attempt to integrate data from the two sources in any of our state reports for this project.

## 1. General rules of prison release in North Dakota

North Dakota felonies are graded into four classes, and there are two classes of misdemeanors. Sentencing courts in individual cases have discretion to impose judicial maximum prison sentences up to the statutorily-authorized maximum penalty, or shorter than the statutory maximum.

**Table 1. Maximum Statutorily-Authorized Prison Sentences by Grade of Offense in North Dakota<sup>15</sup>**

<i>Grade of Offense</i>	<i>Maximum Authorized Prison Term</i>
Class AA Felony	Life without parole
Class A Felony	20 years
Class B Felony	10 years
Class C Felony	5 years
Class A Misdemeanor	360 days
Class B Misdemeanor	30 days

Under North Dakota’s general rules of prison release, most prisoners are eligible for discretionary parole release soon after they enter prison, unless a contrary rule is provided by statute.<sup>16</sup> Usually in the first few months after they are admitted, the parole board performs an “initial review” to determine when a prisoner will be considered for release by the board. This process is done by file review only, without personal appearances by the affected

<sup>15</sup> N.D. Cent. Code § 12.1-32-01.

<sup>16</sup> N.D. Cent. Code Ann. § 12-59-09 (“All inmates sentenced to the custody of the department of corrections and rehabilitation are subject to the jurisdiction of the parole board, except when parole for the inmate is prohibited by statute.”); *see also* N.D. Dep’t of Corr. & Rehab., Directive 1A-13(5)(C) (rev. Aug. 2, 2021), at [https://www.docr.nd.gov/sites/www/files/documents/parole\\_pardon/Parole/Parole%20Board%20Policy%20-%202021.pdf](https://www.docr.nd.gov/sites/www/files/documents/parole_pardon/Parole/Parole%20Board%20Policy%20-%202021.pdf) (stating that unless a prisoner is ineligible for parole by statute or has less than 120 days left on their time in custody, they are subject to jurisdiction of the parole board); *id.* at (5)(E)(1)(a),(c) (stating that the parole board may conduct an initial review of each eligible adult within 60 to 90 days of their arrival in custody when they have more than three years to serve and that the clerk shall set parole review dates for prisoners who have less than three years to serve); N.D. Dep’t of Corr. & Rehab., *Facility Handbook* (Aug. 2021) at 86, [https://www.docr.nd.gov/sites/www/files/documents/friends\\_family/Facility%20Handbook.pdf](https://www.docr.nd.gov/sites/www/files/documents/friends_family/Facility%20Handbook.pdf) (“If you qualify for parole review, you will be notified of a future parole review date within 90 days of arrival . . .”).

prisoners.<sup>17</sup> In essence, the parole board has broad discretion to set minimum terms to parole release consideration for each prisoner individually. There are no statutory provisions that regulate how long or short the board-selected minimum terms may be.

The most important statutory exception to the above approach is for prisoners classified as “violent offenders” under North Dakota law. These are people who have been convicted of statutorily-designated crimes or attempts to commit those crimes. The designated offenses are the commission or attempt to commit: murder, manslaughter, class B felony aggravated assaults, kidnapping, sexual act or contact by force or threat of death, serious bodily injury, or kidnapping, robbery, and especially serious burglaries.<sup>18</sup> “Violent offenders” do not become eligible for parole release until they have served 85 percent of their judicial maximum sentences.<sup>19</sup>

### *Reconsideration after denials of release*

For cases in which the parole board has considered a prisoner’s case and denied release, there is no required timeline to reconsideration. In denying release, the board may order that the prisoner must serve the remainder of his or her term. The board may also set a date for reconsideration or my order that the prisoner must satisfy specific conditions in order to obtain reconsideration.<sup>20</sup>

### *Generally-available credits: types and amounts*

Most prisoners receive sentence reduction credits for performance criteria established through department of corrections rules, including participation in court-ordered or staff-recommended treatment or education programs and good work performance. Sentence reduction credits are

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<sup>17</sup> See N.D. Dep’t of Corr. & Rehab., Directive 1A-13(E)(1)(b) (rev. Aug. 2, 2021), [https://www.docr.nd.gov/sites/www/files/documents/parole\\_pardon/Parole/Parole%20Board%20Policy%20-%202021.pdf](https://www.docr.nd.gov/sites/www/files/documents/parole_pardon/Parole/Parole%20Board%20Policy%20-%202021.pdf) (“The purpose of an initial docket is for the Parole Board to examine information gathered and various assessments conducted by the Department as well as the nature of the offense(s) and length of sentence(s). Based upon that information, the Parole Board may defer the case to a later month and year for parole consideration.”); see also N.D. Dep’t of Corr. & Rehab., *Facility Handbook* (Aug. 2021) at 86, [https://www.docr.nd.gov/sites/www/files/documents/friends\\_family/Facility%20Handbook.pdf](https://www.docr.nd.gov/sites/www/files/documents/friends_family/Facility%20Handbook.pdf) (.

<sup>18</sup> N.D. Cent. Code Ann. § 12.1-32-09.1(1).

<sup>19</sup> *Id.* (providing that when a prison sentence has been imposed for such offenses, prisoners are “not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served or the sentence is commuted”). North Dakota also imposes mandatory minimum prison terms on a number of offenses involving the possession or use of firearms. See N.D. Cent. Code Ann. § 12.1-32-02.1. We do not analyze the operation of this class of sentences in this report.

<sup>20</sup> N.D. Dep’t of Corr. & Rehab., *Facility Handbook* (Aug. 2021) at 88, [https://www.docr.nd.gov/sites/www/files/documents/friends\\_family/Facility%20Handbook.pdf](https://www.docr.nd.gov/sites/www/files/documents/friends_family/Facility%20Handbook.pdf).

earned at a rate of five days per month.<sup>21</sup> Days of credits are subtracted from prisoners' judicial maximum sentences to establish earlier mandatory release dates (MRDs). Over the full life of a prison term, this would result in roughly a nine percent deduction from prisoners' maximum terms.<sup>22</sup>

### *Timeline Diagrams*

The two main classes of sentence in North Dakota are those for people classified as “violent offenders” and the larger numbers of prisoners who are not so classified. The latter group have been convicted of “less serious” crimes, including nonviolent offenses and some violent or sex offenses graded at lower levels of severity. For example, lower degrees of aggravated assaults, sexual offenses, and burglaries fall outside the “violent offense” category in North Dakota law.

For the main group of “less serious” offenses, the parole board has a staggering amount of release and release denial discretion, as shown in North Dakota Figure 3 below. Under North Dakota law, prisoners are eligible for discretionary parole release upon admission. Standard processing of a new prisoner's case, with an initial review generally occurring 30-90 days after admission, make an immediate release extremely unlikely, but it is not legally barred.

North Dakota Figure 4 adds in the effect of full sentence reduction credits, which may advance mandatory release dates (MRDs) at the most by about nine percent. The earning rate is only five days per month. Compared with most other state systems with movable MRD mechanisms, the credit-earning rate in North Dakota is “minimal.”<sup>23</sup>

The sentence class shown in North Dakota Figures 3 and 4 has an extremely high degree of indeterminacy. As a matter of law, such sentences are 100 percent indeterminate because the judge's sentence imposes no amount of time a prisoner must serve. In other words, the sentencing court has no time-served discretion, which is entirely located at the back end of

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<sup>21</sup> N.D. Cent. Code Ann. § 12-54.1-01. Offenders may also receive either a lump sum or a monthly rate of meritorious conduct sentence reduction for outstanding performance or heroic acts or as a special control and security measure. These reductions may only be awarded after a written recommendation is made by the warden and approved by the director of the department. Sentence reductions for special control or security measures may not exceed two days per month. N.D. Cent. Code Ann. § 12-54.1-03. Uniformly in this project, we assume that credits of this kind are rarely awarded.

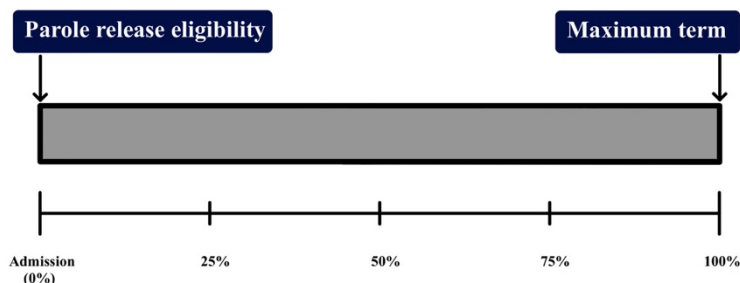
<sup>22</sup> Prison officials may withhold good time credits or cause a prisoner to forfeit already-earned good time credit. N.D. Cent. Code Ann. § 12-47-23 (“All necessary means shall be used, under the direction of the warden, to maintain order in the penitentiary, enforce obedience, suppress insurrections, and prevent escapes.”).

<sup>23</sup> We use the following benchmarks for our classifications of credit earning levels as “generous,” “moderate,” or “minimal.” Our cutoffs are: “generous” deductions (40 percent off or more); “average” (20 to 39 percent); and “minimal” (19 percent or less). See Kevin R. Reitz, Edward E. Rhine, Allegra Lukac, & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 65.

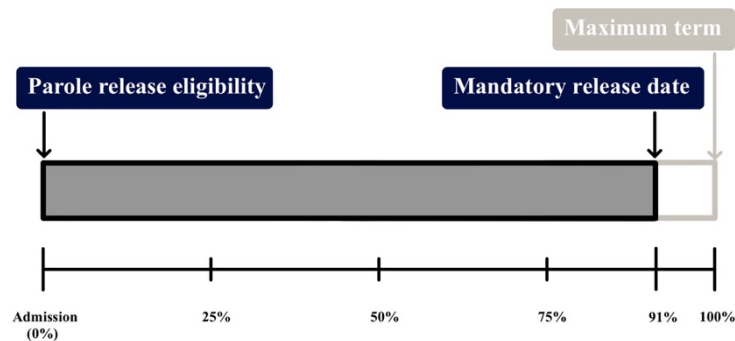


North Dakota’s prison-sentencing system (for this class of sentence). In such cases, we assign a population multiplier potential (PMP) of “greater than 100:1” (see p. v).<sup>24</sup>

**North Dakota Figure 3. Prison-Release Timeline for General-Rules Sentences for “Less Serious” Offenses with No Sentence Reduction Credits**



**North Dakota Figure 4. Prison-Release Timeline for General-Rules Sentences for “Less Serious” Offenses with Full Sentence Reduction Credits**



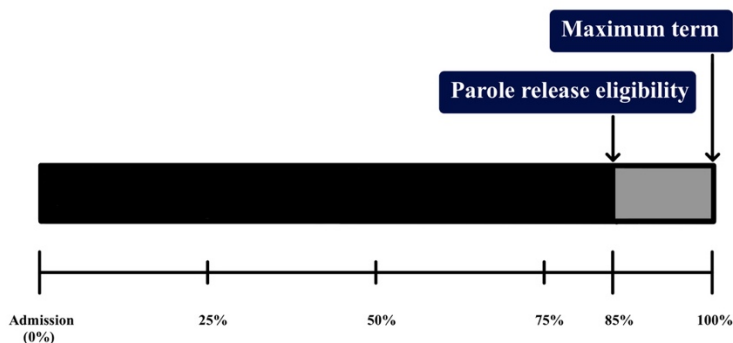
For prisoners whose offenses classify them as “violent offenders,” the applicable prison-release rules are sharply in contrast with the general rules for “less serious” crimes. As depicted in North Dakota Figure 5, parole release eligibility for this group does not occur until the 85 percent mark of the judicial maximum term.

North Dakota Figure 6 adds in the effect of full sentence reduction credits. As before, such credits advance prisoners’ MRDs by nine percent at most.

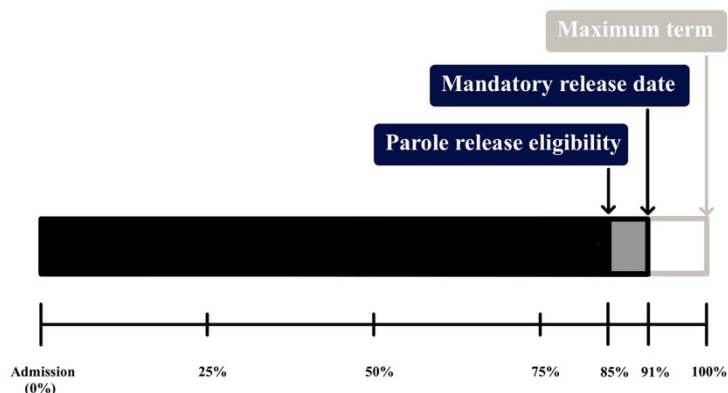
<sup>24</sup> The PMP for such sentences, if calculated in the same way as in other states, is a nonsensical ratio of  $\infty:1$ . We prefer to use the “greater than 100:1” formulation to express the extreme indeterminacy and extremely large PMP associated with such sentence. Other states with prison sentences (for large percentages of their prisoners) that are 100 percent indeterminate include Hawaii, Iowa, and Utah.



North Dakota Figure 5. Prison-Release Timeline for General-Rules Sentences for Serious Violent Offenses with No Sentence Reduction Credits



North Dakota Figure 6. Prison-Release Timeline for General-Rules Sentences for Serious Violent Offenses with Full Sentence Reduction Credits



The sentence class shown in North Dakota Figures 5 and 6 carries an *extremely low degree of indeterminacy*. Sentences of this kind are only 15 percent indeterminate. They have a PMP of 1.18:1. This sentence class is among the least indeterminate (or most determinate) in our 50-state survey.

## 2. Life sentences in North Dakota

### a. Adults

Class AA felonies carry a maximum penalty of life imprisonment without parole.<sup>25</sup> Examples of class AA felonies include murder, certain sexual offenses, as well as certain offenses involving a minor victim.<sup>26</sup>

A prisoner convicted of a class AA felony who receives a sentence of life with the possibility of parole is eligible for parole consideration after serving 30 years, less credits for good conduct.<sup>27</sup> The Supreme Court of North Dakota held that parole consideration after 30 years is controlling over the requirement that a prisoner convicted of violent crime serve 85 percent of their sentence prior to being considered for parole.<sup>28</sup>

### b. Juvenile life sentences

North Dakota eliminated life without parole sentences for juveniles in 2017 by amending the statute requiring the life without parole penalty for convictions of certain convictions of gross sexual imposition. The statute now contains a caveat that the penalty will not apply if “the defendant was a juvenile at the time of the offense.”<sup>29</sup>

Offenders sentenced for crimes committed before the age of 18 are eligible to file a motion for reduction in sentence after serving at least 20 years imprisonment. The court may decide to reduce the term of imprisonment imposed if it determines the defendant is not a danger to the safety of any individual and the interest of justice warrant a sentence modification. The court

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<sup>25</sup> N.D. Cent. Code Ann. § 12.1-32-01.

<sup>26</sup> See, e.g., N.D. Cent. Code Ann. § 12.1-16-01 (murder); N.D. Cent. Code Ann. § 14-02.6-02 (partial-birth abortion); N.D. Cent. Code Ann. § 12.1-20-03(3)(a),(4) (certain categories of gross sexual imposition); N.D. Cent. Code Ann. § 12.1-41-03(3) (forced labor of a minor).

<sup>27</sup> N.D. Cent. Code Ann. § 12.1-32-01 (“[A] person found guilty of a class AA felony and who receives a sentence of life imprisonment with parole, shall not be eligible to have that person’s sentence considered by the parole board for thirty years, less sentence reduction earned for good conduct . . .”).

<sup>28</sup> *State v. Comes*, 936 N.W.2d 114, 116 (N.D. 2019). *Comes* held that a prisoner sentenced to life imprisonment with the possibility of parole must always satisfy the requirements of N.D. Cent. Code Ann. § 12.1-32-01(1), i.e. serve at least 30 years in custody, prior to becoming eligible for parole. *Comes* challenged his amended judgment, citing § 12-32-09.1 which prohibits violent offenders to be released on parole until serving at least 85 percent of their sentence and finding that a term of life imprisonment with parole relates to life expectancy on the day of sentencing. Since *Comes* had a life expectancy of 23.8 years, he argued that he should be eligible for parole upon serving 85 percent of his 23.8 year “sentence.” However, the *Comes* court found that § 12.1-32-01(1) controlled and § 12-32-09.1 is only relevant to prisoners serving sentences of life with the possibility of parole when 85 percent of their life expectancy on the date of sentencing is at least 30 years.

<sup>29</sup> N.D. H.B. 1195, 65<sup>th</sup> Leg. Assemb. (N. D. 2017) (amending N.D. Cent. Code § 12.1-20-03 and enacting N.D. Cent. Code Ann. § 12.1-32-13.1 regarding juvenile sentencing reduction).

must also consider certain factors including the nature of the offense, age of the defendant at the time of the offense, and whether the defendant has demonstrated maturity, rehabilitation, and a fitness to re-enter society.<sup>30</sup>

### ***3. Infrequently used forms of prison release in North Dakota***

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

Any prisoner may be eligible for “medical parole” who has a serious or terminal medical condition, including those sentenced to life without parole or convicted for a violent or armed offense.<sup>31</sup>

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

The governor may remit fines and grant commutations, reprieves, and pardons.<sup>32</sup> The pardon advisory board—consisting of five members including the attorney general and two members of the parole board—conducts the initial review of applications for executive clemency.<sup>33</sup> Although the pardon advisory board provides the governor recommendations, the governor is not bound by them and may dissolve the pardon advisory board at any time.<sup>34</sup>

In November 2019, the pardon advisory board approved a new policy easing the process for pardons for convictions of marijuana possession or ingestion or paraphernalia possession.<sup>35</sup> The new streamlined process allows eligible individuals to submit a short application specific to pardons for marijuana charges available on the Board’s website.<sup>36</sup> An applicant is eligible under the new policy so long as they have not violated any criminal laws within five years of their application.<sup>37</sup>

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<sup>30</sup> N.D. Cent. Code Ann. § 12.1-32-13.1(1),(3).

<sup>31</sup> N.D. Cent. Code Ann. § 12-59-08.

<sup>32</sup> N.D. Cent. Code Ann. § 12-55.1-04.

<sup>33</sup> N.D. Cent. Code Ann. § 12-55.1-02.

<sup>34</sup> *Id.*

<sup>35</sup> Jack Dura, *North Dakota pardon board recommends applicants under new policy* (Nov. 29, 2019), Bismarck Tribune, [https://bismarcktribune.com/news/local/crime-and-courts/north-dakota-pardon-board-recommends-1st-batch-of-applicants-under-new-policy-for-marijuana-offenses/article\\_64ce377c-a7ca-589f-b121-e0c393409b86.html](https://bismarcktribune.com/news/local/crime-and-courts/north-dakota-pardon-board-recommends-1st-batch-of-applicants-under-new-policy-for-marijuana-offenses/article_64ce377c-a7ca-589f-b121-e0c393409b86.html). Note that the new policy does not extend to convictions for manufacturing, intent to distribute, or actual distribution of marijuana.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

### *c. Release during overcrowding emergencies*

North Dakota has no emergency release statute regarding prison overcrowding. However, as the state struggled with overcrowding of the North Dakota Women’s Prison in mid-2019, the Department rolled out a new Inmate Admission Prioritization Plan.<sup>38</sup> The plan included a new deferred roster for low-risk prisoners, who may be held in county jails until a prison bed opens up.<sup>39</sup>

### *4. Overall assessment of indeterminacy in North Dakota’s prison-sentencing system*

We rate North Dakota’s prison sentencing system overall as one that operates with a *high degree of indeterminacy* within the ranking system developed for this project (see p. iv). This is a judgment call based on the two major classes of prison sentences in the state: one with an extremely high degree of indeterminacy and another with an extremely low DOI. If we were simply to split the difference, we might settle on an overall rating of “moderate” indeterminacy. However, we believe that the North Dakota prison population is made up mostly of prisoners serving sentences for “less serious” offenses.<sup>40</sup> In contrast with some other states, the list of offenses designated for inclusion in the “most serious” category is relatively short.

For “less serious” offenses, North Dakota places as much time-served discretion at the back end of its prison-sentencing system as any jurisdiction in the country. We consider sentences that are more than 80 percent indeterminate to be extremely high in indeterminacy. North Dakota’s general rules for most prisoners in its system overshoots that mark to reach (theoretical) 100-percent indeterminacy.

The back-end agency with the most power over time served in North Dakota’s prison-sentencing system is, by far, the parole board. Even if the department of corrections exerts its full credit-granting powers, the parole board still controls 91 percent of the prison release timeline. The board has unilateral release and release *denial* discretion over the full segment of the timeline before the MRD kicks in. In this study, we have seen many instances of states that create a more equal division of authority over actual time served between the parole board and the department of corrections. In some states, the powers of the two agencies overlap to a

<sup>38</sup> Jacob Notermann, *ND Women’s Prison looks for overpopulation solution* (Sept. 27, 2019), KFYR, <https://www.kfyrtv.com/content/news/ND-Womens-Prison-looks-for-overpopulation-solution-561576281.html>.

<sup>39</sup> *Id.*

<sup>40</sup> As of December 31, 2021, 290 of 1,689 prisoners in North Dakota were serving time under North Dakota’s truth-in-sentencing scheme requiring prisoners to serve at least 85% of their sentence before becoming eligible for parole. N.D. Dep’t of Corr. & Rehab., *DOC Adult Services Prison Population Information: Prison Population on December 31, 2021*, at 1, [https://www.docr.nd.gov/sites/www/files/documents/statistics/factsheets/Fact%20Sheet\\_2021.pdf](https://www.docr.nd.gov/sites/www/files/documents/statistics/factsheets/Fact%20Sheet_2021.pdf).

sufficient extent that we have called it a “checks and balances” framework. For the largest category of less serious crimes, North Dakota has instituted virtually no checks and balances.

One consequence of this approach is that North Dakota’s parole board is by far the most important decisionmaker whose discretionary choices determine the size of the state’s prison population—at least for the major group of prisoners convicted of “less serious” offenses. The parole board’s powers far exceed those of officials at the front end of the system, including judges and prosecutors. If we are correct that this group of prisoners makes up a large majority of all prisoners in the state, then the parole board is the most important site of authority to regulate prison population size.

Whatever North Dakota’s philosophy of indeterminacy in sentencing for less serious offenses, the state has adopted a near-opposite approach for its most serious crimes. For prisoners classified as “violent offenders,” North Dakota is in the “lowest tier” of all states for its extremely low levels of indeterminacy.

Overall, there is little time-served discretion over prisoners classified as “violent offenders.” What little discretion exists is shared between the parole board and department of corrections, with credit-based reductions a slightly more important force in the timeline than parole release discretion.

The configuration of sentences for “violent offenders” places little time-served discretion at the back end of North Dakota’s prison-sentencing system. Actual time served is controlled almost exclusively at the front end of the system for this group of sentences, where the most powerful decision makers are prosecutors and judges. The size of this subpopulation of prisoners is thus overwhelmingly controlled by front-end decisionmakers.