



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

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# PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

*STATE REPORT: TEXAS*

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### 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 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 greatly across U.S. jurisdictions. One goal is to inform state governments how they may deliberately adjust their laws and practices of prison-release authority to achieve desired policy goals, such as reductions of prison populations in a manner consistent with public safety

### ***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. Our five tiers are based on the variations we observe in current American sentencing systems, not any absolute or theoretical conceptions of degrees of indeterminacy that could be imagined in hypothetical systems.

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”***

<b>Ranking</b>	<b>Alternative terminology</b>	
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

## Prison-Release Discretion and Prison Population Size

### State Report: Texas <sup>1</sup>

#### *Executive Summary*

Texas's prison-sentencing system has two major frameworks for prison-release discretion: one for prisoners convicted of lower-severity offenses and another for the higher-severity group. For lower-severity prisoners, the degree of indeterminacy is extremely high. For higher-severity offenders, it is moderate. Because the two populations are roughly equal in size, we can average out their respective release regimes to say that Texas's prison-sentencing system as a whole is highly indeterminate. For purposes other than overall evaluation, however, it is a system split in two.

Back-end releasing authority in Texas is concentrated in the parole board. The department of corrections has modest power through its allocation of good conduct credits, which affect only lower-severity prisoners. When the credit-giving power is used, its main effect is to advance prisoners' parole-eligibility dates, thus increasing the parole board's release discretion. The department of corrections has little authority to curtail the board's discretion. Most importantly, the department has no power to advance prisoners' dates of mandatory release through credit awards. The parole board always retains discretion to hold prisoners for their full maximum terms. Compared with some other states, there are few checks and balances at the back end of the system.

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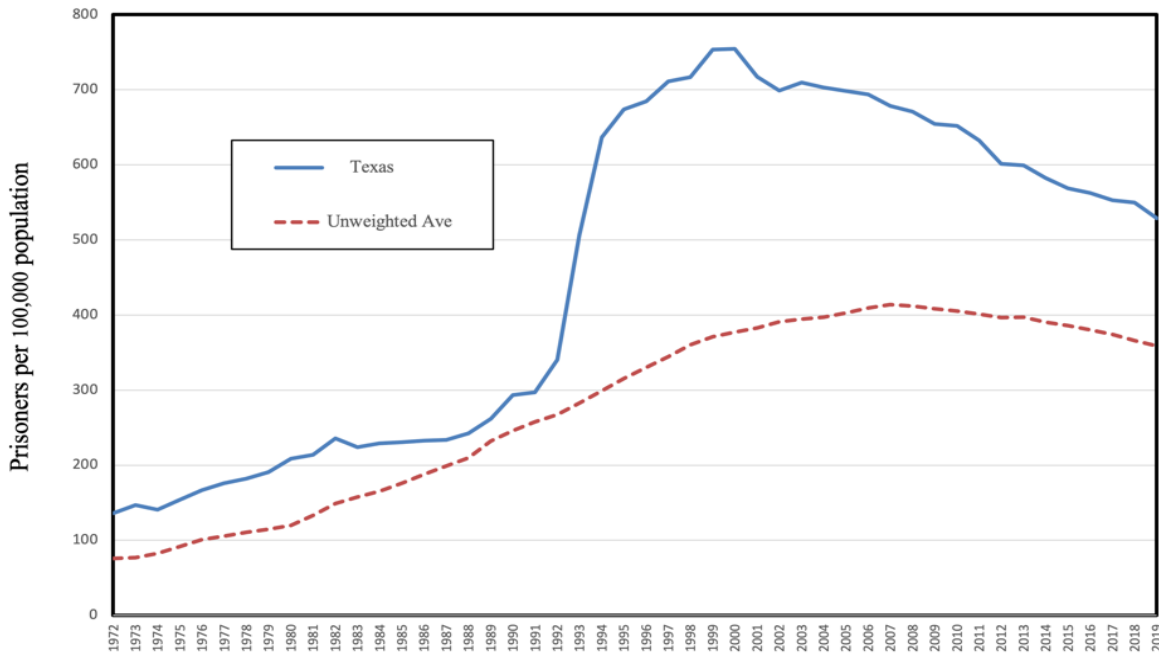
<sup>1</sup> This report was prepared with support from Arnold Ventures. The views expressed are the authors' and do not necessarily reflect the views of Arnold Ventures. We thank Carl Reynolds for detailed comments on early drafts of this report. We would have fundamentally misunderstood the Texas prison-sentencing system without his help.

**Introduction**

*Texas prison-rate history, 1972 to 2019*

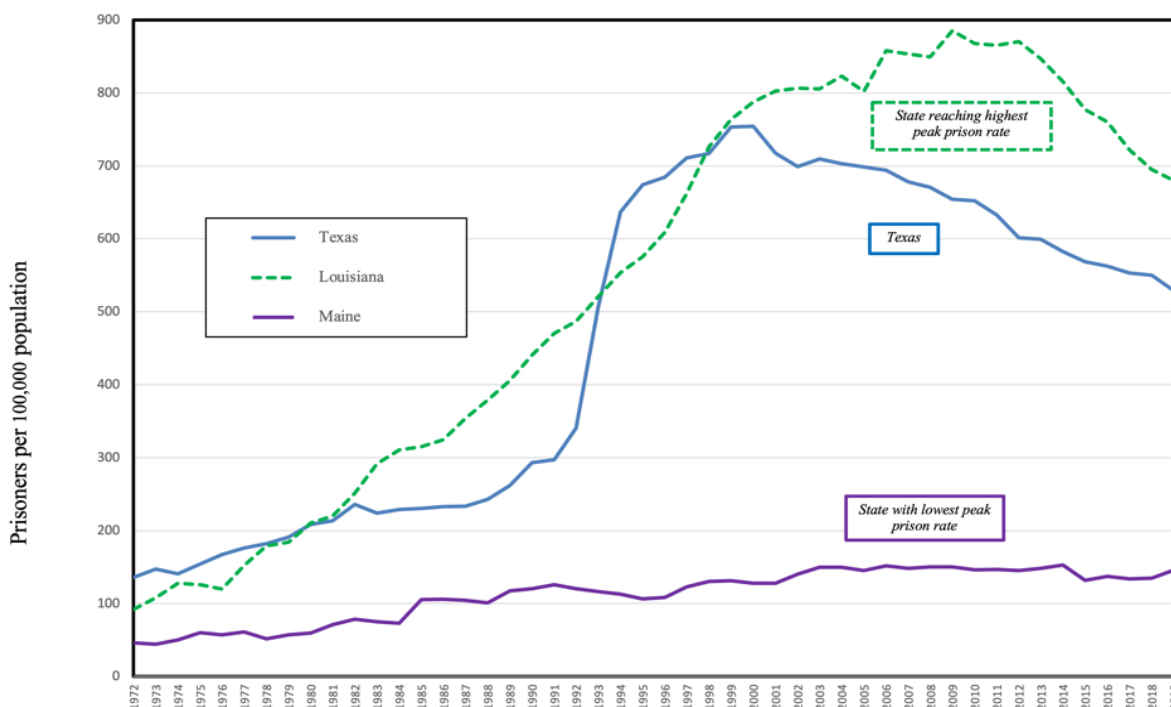
In 2019, Texas’s prison rate was 529 per 100,000 general population, with a yearend prison population of 154,479.<sup>2</sup> Texas’s prison rate was 6<sup>th</sup> highest among all states.

**Figure 1. Prison Rate Change in Texas and (Unweighted) Average Among All States, 1972 to 2019**



<sup>2</sup> E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020) at 8 (table 4), 12 (table 7).

Figure 2. Prison Rate Change in Texas, Louisiana, and Maine, 1972 to 2019



Sources: Timothy J. Flanagan, Kathleen Maguire & Michael J. Hindelang, *Sourcebook of Criminal Justice Statistics, 1990* at 605 table 6.56, Rate (per 100,000 resident population) of sentenced prisoners under jurisdiction of State and Federal correctional authorities on December 31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991) (for 1972-1977); E. Ann Carson, *Imprisonment rate of sentenced prisoners under the jurisdiction of state or federal correctional authorities per 100,000 U.S. residents, December 31, 1978-2016* (Bureau of Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), available at <https://www.bjs.gov/index.cfm?ty=nps> (visited May 24, 2020); 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 2018-2019).

Texas reached its peak prison rate during the national buildup period in 2000 at 754 per 100,000, which dropped to 529 per 100,000 by the end of 2019.<sup>3</sup> This is a net difference of -225 per 100,000, which was the second largest prison-rate drop of all states.

Figure 1 shows the history of prison-rate change in Texas dating back to 1972, with a comparison baseline of average prison rates across all states over the same period.<sup>4</sup> The figure spans the Great Prison Buildup period, 1972 to 2007, in which national prison rates

<sup>3</sup> The sources for the footnotes in this section are the same as for Figures 1 and 2.

<sup>4</sup> This is an unweighted average, so the prison rate from each state counts equally, regardless of the state’s population.

experienced continuous increases, and the post-buildup period from 2008 through 2019. Since 2007, average prison rates for all states have been in modest but continuous decline.<sup>5</sup>

As shown in Figure 1, Texas's history is starkly divergent from the average state experience in a number of ways. While Texas's reported prison rate was close to the state average in the late 1980s, Texas's prison populations skyrocketed through the 1990s. For the nation as a whole, the 1990s was a decade of dramatic prison growth, yet Texas made most other states look like they were standing still. Then, early in the 2000s, prison rates in Texas turned the corner from growth to decline earlier than most other states. Even after average state prison rates began to fall in 2007, the drop in Texas's prison rates has been somewhat steeper than the average state's.<sup>6</sup>

Figure 2 offers further comparative information by adding trend lines for the state with the highest peak prison rate across the full time period, 1972-2019 (Louisiana) and the state with the lowest peak (Maine). The comparison with Louisiana is particularly informative. It shows that, in the late 1990s, Texas was fully in the hunt with states like Louisiana (and Oklahoma) for the highest prison rate in America's mass incarceration era. From 1994 through 1997, Texas reached first position. After 2000, Texas began to reverse course, falling out of the top five in 2014. While Texas remains a high-imprisonment state today, its yearend 2019 rate was 22 percent lower than Louisiana's.

One question raised by this history is whether there were identifiable changes in Texas's prison-release practices that may have been responsible for some part of the large overall decline in the state's prison population after 2000.<sup>7</sup> If this were so, we might nominate Texas as an important case study for possible emulation by other states. With currently-available information, however, it is not possible to make confident assertions on this score. Even so, and as discussed more fully in this report, Texas is (indisputably) an example of a jurisdiction with a high degree of indeterminacy overall in its framework for prison-release decision making. It is also (indisputably) an example of a state that has dramatically reduced its imprisonment rate over the past 20 years in a nearly-continuous downward trend. Even without solid evidence of a causal linkage, this is a brightly-colored flag that further inquiry is warranted.

Another important question is whether the Texas system of indeterminate prison release had any special vulnerability to runaway prison growth during the buildup period. Specifically, did Texas's highly indeterminate prison-release system play any important role in the state's

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<sup>5</sup> From a peak position of 414 per 100,000 at yearend 2007, the average state prison rate fell to 359 per 100,000 by the end of 2019—an average net change of -55 per 100,000 during the post-buildup period.

<sup>6</sup> From 2007 through 2019, the net change in the Texas prison rate was -169 per 100,000, roughly three times the drop in the average state over the same period.

<sup>7</sup> See Tony Fabelo & Michael Thompson, *Reducing Incarceration Rates: When Science Meets Political Realities*, 32 *Issues in Sci. and Tech.* 35 (2015), available at <https://issues.org/reducing-incarceration-rates-when-science-meets-political-realities/>.



explosive prison growth through the 1990s?<sup>8</sup> If so, policymakers should be concerned that the same vulnerability might reemerge in future years.

It is possible that the high degree of indeterminacy in the Texas system facilitates large swings in time-served practices—in either a lengthening or shortening direction. There are no structural brakes in either direction. No formal legal change is required in Texas to drive the state’s prison rates up or down through shifts in prison-release practices. No sharp changes in the behavior of judges and prosecutors are needed either. The existing scope of prison-release discretion in Texas is a sufficient mechanism of massive change in prison policy all by itself.

### *Organization of this report*

This report is divided into four parts. Parts I through III describe the contours of Texas’s prison-release system in some detail, with extensive citations and statutory analysis. Part I surveys the prison-release rules that apply to most prisoners. Part II then covers a number of important subgroups of prisoners who are not subject to the general rules. Part III catalogues some additional prison-release mechanisms that exist in Texas but are infrequently used, such as medical release and the clemency power.

Part IV draws on the raw research in Parts I through III to analyze and model the degrees of indeterminacy that exist for the most important subgroups of prisoners who are serving different classes of sentences. Ultimately, if a large enough percentage of all prisoners are included, this allows for broad observations about the Texas system as a whole. The overarching goal of Part IV is to explore the relationship between the various forms of prison-release discretion in Texas and the size of the state’s prison population.

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<sup>8</sup> On this subject, see Carl Reynolds, *Testimony Before the American Bar Association Justice Kennedy Commission* (2004) (“The parole approval rate went from 41 percent of cases considered in 1984 to a peak of 77 percent in 1990, with 38,041 prison releases occurring in the latter year. (That rate and number of releases went down to 39 percent and 29,048, respectively, in 1993, despite large increases in the confined population and, concomitantly, the parole eligible pool of inmates; by 2001 the figures were 25 percent and 15,246.)”).

## *I. General Rules of Prison-Release Discretion in Texas*

### *A. General rules of parole release eligibility*

#### *1.1. General rules of first release eligibility*

The Texas prison population includes two sizeable groups governed by different sets of general rules for parole release eligibility. Together, the two general-rules groups make up about 93 percent of all prisoners in the state.<sup>9</sup> The two major subpopulations might be categorized as “lower-severity offenders” and “higher-severity offenders,” differentiated for the most part by their offenses of conviction. These descriptive labels are only broad approximations, however, and are used for sake of convenience.<sup>10</sup>

##### *a. Lower-severity offenders (also called “Not-3G offenders”)*

The lower-severity group, a bare majority of all Texas prisoners, become eligible for discretionary parole release when their time-served-to-date plus any good time credits they have earned equals one-quarter of the judicial maximum sentence or 15 years, whichever is less.<sup>11</sup>

The lower-severity group is made up of prisoners whose offenses of conviction are not on the extended statutory list of crimes used to define the higher-severity group (see next section).<sup>12</sup> In Texas, prisoners in this group are often called “Not-3G offenders.”

##### *b. Higher-severity offenders (also called “3G offenders”)*

Nearly half of all Texas prisoners fall into a category called “3G offenders,” which includes prisoners convicted of statutorily-enumerated crimes that are—roughly speaking—more serious than offenses not included in the 3G list.<sup>13</sup> This “higher-severity” group does not

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<sup>9</sup> See Part II for the exceptions.

<sup>10</sup> For example, some prisoners with life sentences are included in the category we are calling “lower-severity offenders.” See, e.g., section 1.4a, Illustration 3.

<sup>11</sup> Tex. Gov’t Code § 508.145(f) (General rule, subject to listed exceptions, is that “any other inmate is eligible for release on parole when the inmate’s actual calendar time served plus good conduct time equals one-fourth of the sentence imposed or 15 years, whichever is less.”).

<sup>12</sup> See Tex. Gov’t Code § 508.145(f) (defining the lower-severity group as “any other inmate” not covered by the previous subsections (a) through (e)).

<sup>13</sup> The reference to 3G offenders comes from an old statutory scheme that has since been re-numbered. Official state reports and practitioners continue to use the technically-outdated reference. See Texas Department of Criminal Justice, *FY 2018 Statistical Report* (2019) at iii (glossary of terms with definition of “3G” offense as one of those “formerly listed” in Tex. Code Crim. Proc. § 42.12, Section 3G (2016)); James Randall Smith, *Time Calculations for First Parole Review* (private attorney’s website), available at [http://texasparole.com/?page\\_id=132](http://texasparole.com/?page_id=132) (table distinguishing between “3G Offenses” and “All Other Offenses”). This terminology is opaque to outsiders.

become eligible for discretionary parole release until half of their judicial maximum sentences have been served or 30 years, whichever is less. Unlike lower-severity offenders, the minimum time to parole release eligibility for higher-severity offenders is not reducible by good time credits.<sup>14</sup>

There is no easy shorthand to describe the enumerated offenses that place prisoners into the higher-severity 3G category. Roughly speaking, the list includes serious violent crimes, sexual assaults, and offenses with child victims. As of June 2020, the qualifying offenses were:

Murder; criminal solicitation of a capital offense; aggravated kidnapping; sex trafficking; first- and second-degree sexual assault; indecency with a child; injury to a child; first-degree injury to an elderly or disabled person; aggravated robbery; first-degree burglaries with intent to commit sexual assault or indecency with a child; aggravated promotion of prostitution; compelling prostitution; sexual performance by a child; use of child in commission of certain felony-level drug offenses; a variety of drug offenses committed within 1,000 feet of school property, a playground, a youth center, or on a school bus (“drug-free zone” offenses); offenses involving the use or exhibition of a deadly weapon; engaging in organized criminal activity; and directing activities of criminal street gangs.<sup>15</sup>

### *1.2. Reconsideration after denial of release*

For most prisoners who have been denied release by the parole board, the board must set a date for reconsideration of release “as soon as practicable after the first anniversary of the date of the denial.”<sup>16</sup> For certain prisoners convicted of statutorily-designated offenses, the date for reconsideration may be set as far into the future as 5 or 10 years.<sup>17</sup>

In some circumstances, no date of reconsideration is ever required. The parole board may sometimes deny release and order offenders to “serve all” of their remaining judicial maximum sentence. For most prisoners, a “serve-all order” is allowed if their maximum term expires in less than one year. For some offenses, serve-all orders may extend as long as five years. And

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To avoid the problem for non-Texas readers, this report gives 3G offenders the alternative label, “higher-severity offenders.”

<sup>14</sup> Tex. Gov’t Code § 508.145(d)(2). The statute further states that, “in no event is the [3G] inmate eligible for release on parole in less than two calendar years.” Given the gravity of 3G offenses, the two-year alternative minimum period to parole release eligibility does not affect many prisoners, reaching only cases in which the judicial maximum sentence for a 3G offense is less than four years.

<sup>15</sup> This is a condensation of the list found in Tex. Gov’t Code § 508.145(d)(1), which relies primarily on the offense categories collected in Tex. Code Crim. Proc., art. 42A.054 (offenses ineligible for community supervision at the judicial sentencing stage), plus three other categories.

<sup>16</sup> Tex. Gov’t Code § 508.141(g)(2).

<sup>17</sup> Tex. Gov’t Code § 508.141(g-1).

for some, there is no time cap on serve-all orders (other than the judicial maximum sentence itself).<sup>18</sup>

## ***B. General rules on the effects of good time, earned time, and other discounts***

### ***1.3. Two tracks of rules for good time credits***

There are two sets of general rules governing the operation of good time credits in Texas, with the breakdown of prisoners largely comparable to the bifurcation of “higher-severity” and “lower-severity” groups (or “3G” versus “Not-3G” offenders) for purposes of parole eligibility (see section 1.1 above).<sup>19</sup>

For higher-severity offenders, the accrual of good time credits does not affect dates of parole eligibility and cannot shorten their maximum terms or bring about an earlier presumptive-release date.<sup>20</sup> Nearly half of all Texas prisoners, in other words, receive no mathematical or otherwise formalized credits against sentence as a result of credit earnings. The “general rule” for the higher-severity group is that no such discounts are available.

For lower-severity offenders, in contrast, good time credits have formulaic legal effects on both minimum periods to parole release eligibility and maximum terms of stay.

### ***1.4. Generally-available credits for lower-severity offenders: types and amounts***

Good time credits (called “good conduct time” in Texas) are awarded by the department of corrections to prisoners who participate in designated types of prison programming. The

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<sup>18</sup> 37 Tex. Admin. Code §145.12(3).

<sup>19</sup> The main difference is that, for purposes of the use of good time credits as a way of winning a “date of release to mandatory supervision” (DRMS), the higher-severity group who cannot claim such credits is larger than the group who cannot claim credits to advance their dates of parole eligibility. The parole-eligibility limitation applies only to prisoners with current convictions of 3G offenses; DRMS ineligibility covers prisoners with current *and prior* convictions of 3G offenses. This interesting statutory choice is not as important as it once might have been. Following legislation in 1996, the DRMS is no longer a date of mandatory release under Texas law. See section 1.4b.

<sup>20</sup> Many prisoners are ineligible for release to mandatory supervision, including those with current or prior convictions of capital murder, first- or second-degree murder, robbery, first-degree arson, first- or second-degree aggravated assault, aggravated kidnapping, first-degree burglary, indecency with a child, any felony-level sexual assault, sexual abuse of a child, sex trafficking, and a number of other designated crimes. Tex. Gov’t Code § 508.149(a) (with 21 subsections identifying prisoners who may not be released to mandatory supervision; ineligibility extends to prisoners with current or prior convictions of designated crimes; all but four of the 21 subsections overlap with the statutory definition of “3G” offenses).

requirement of program participation may be waived for prisoners if the department finds they are incapable of participating.<sup>21</sup>

The main type of “good conduct time” accrues regularly with the passage of time, in monthly installments that depend on the prisoner’s classification into one of four earning categories.<sup>22</sup> Additional credits may be awarded each month at the discretion of the department of corrections, irrespective of prisoner’s earning classification.<sup>23</sup>

As a general rule, good-conduct credits are applied to two different milestones in the prison-sentence timeline for lower-severity offenders. Such credits (1) advance a prisoner’s first eligibility date for discretionary parole release; and (2) are also deducted from the judicial maximum term to establish what Texas calls a “date of release to mandatory supervision.”<sup>24</sup>

The statutory limit on total good time credits that may be earned per month is 45 days at the most generous extreme.<sup>25</sup> For many prisoners, however, it appears that realistic monthly earnings are in the range of 10 or 20 days per month.<sup>26</sup>

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<sup>21</sup> Tex. Gov’t Code § 498.003(b) provides that credits may be granted “only if the department finds that the inmate is actively engaged in an agricultural, vocational, or educational endeavor, in an industrial program or other work program, or in a treatment program, unless the department finds that the inmate is not capable of participating in such a program or endeavor.”

<sup>22</sup> Inmates are classified as followed: Trusty, Class I, Class II, or Class III. The limits for regularly-accruing credits earned in each 30-day period are 30 days, 20 days, 10 days, or zero credits, respectively. Tex. Gov’t Code §§ 498.003(b)-(c).

<sup>23</sup> An additional 15 days of credit per 30-day period may be earned at the discretion of the department of corrections for an inmate’s participation in designated types of programs. These discretionary awards are authorized without qualifications based on a prisoner’s “classification” in the four-tier system. Tex. Gov’t Code § 498.003(d). The discretionary credits may be awarded “for diligent participation in an industrial program or other work program or for participation in an agricultural, educational, or vocational program.” The types of activities that can support the discretionary award of credits under § 498.003(d) overlap substantially with the activities required to receive the regularly-accruing credits under § 498.003(b).

<sup>24</sup> Tex. Gov’t Code § 498.003(a) (except for designated ineligible offenders, “a parole panel shall order the release of an inmate who is not on parole to mandatory supervision when the actual calendar time the inmate has served plus any accrued good conduct time equals the term to which the inmate was sentenced.”).

<sup>25</sup> Prisoners in the “trusty” classification could earn as much as 30 hours of good-conduct time per month under Tex. Gov’t Code § 498.003(b)(1) and could earn an *additional* 15 hours of credit in the same month under § 498.003(d). The State of Texas argued for this interpretation in Appellant’s (State’s Brief) at 44-45, *Texas v. Jaquez*, (Tex. Ct. App., June 24, 2019) (No. 03-19-00087-CR), 2019 WL 2905297.

<sup>26</sup> Some prisoners—those classified as “Class III”—are ineligible for any routine monthly award of good time credits. *See* Tex. Gov’t Code § 498.003(c). However, they may receive credits at the discretion of the corrections department of up to 15 days per month under Tex. Gov’t Code § 498.003(d).

*a. Effects of good time credits on parole release eligibility*

The effects of good time credits on parole release eligibility are straightforward for lower-severity prisoners. Credits are subtracted from the amount of time that must elapse before a prisoner's date of first eligibility for discretionary parole release. Without good time credits, the first eligibility date would occur for the lower-severity group at the one-quarter mark of the judicial maximum sentence or after 15 years, whichever is less (see section 1.1a above). With good time credits, however, a prisoner's date of first parole release eligibility can occur much earlier.

*Illustration 1.* If a prisoner's judicial maximum term is four years, then, in the absence of any good time credits, first parole release eligibility would normally occur one year after admission. However, if the prisoner were to earn 20 days of good conduct time per month, he would accumulate 140 days of credits in the first seven months of his term. This would move his date of first parole release eligibility back to 7 months and 10 days.

*Illustration 2.* If a prisoner's judicial maximum term is 25 years, then, in the absence of any good time credits, first parole release eligibility would normally occur six years and three months after admission. Let us suppose, however, that the inmate is able to earn 20 days each month in regularly-accruing credits plus an additional 15 days of credits per month—awarded in the discretion of prison officials for “diligent participation” in a work program. The prisoner would become eligible for parole release after 2 years and 11 months.<sup>27</sup>

*Illustration 3.* A prisoner has received a life sentence with possibility of parole under Texas's habitual offender law. In the absence of any good time credits, first parole release eligibility would normally occur 15 years after admission. Let us suppose, as in *Illustration 2*, that the inmate is able to earn 20 days each month in regularly-accruing credits plus an additional 15 days of credits per month awarded in the discretion of prison officials. This prisoner would become eligible for parole release after 7 years.<sup>28</sup>

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<sup>27</sup> This illustration is taken from the State of Texas's brief in Appellant's (State's Brief) at 44-45, *Texas v. Jaquez*, (Tex. Ct. App., June 24, 2019) (No. 03-19-00087-CR), 2019 WL 2905297 (government's brief opposing prisoner's constitutional challenge of his sentence on grounds of gross disproportionality).

<sup>28</sup> This illustration is also taken from the State of Texas's brief Appellant's (State's Brief) at 44-45, *Texas v. Jaquez*, (Tex. Ct. App., June 24, 2019) (No. 03-19-00087-CR), 2019 WL 2905297. In the actual case, the defendant's current offense was the third-degree felony of tampering with physical evidence, but his prior record exposed him to a life sentence with possibility of parole under Tex. Penal Code § 12.42(d).

*b. Effects of good time credits on the judicial maximum term*

The effects of good time credits on a prisoner's maximum term are less certain in Texas than in many other states. Credits are subtracted from the judicial maximum term to yield an earlier "date of release to mandatory supervision" (abbreviated here as "DRMS"). Despite this terminology, the DRMS under Texas law should not be mistaken for a mandatory release date. Release at this milestone may be blocked "if a parole panel determines that: (1) the inmate's accrued good conduct time is not an accurate reflection of the inmate's potential for rehabilitation; and (2) the inmate's release would endanger the public."<sup>29</sup> Thus, the judicial maximum term continues to define prisoners' mandatory release dates regardless of how many good time credits are earned.

*Illustration.* Assume that the parole board has consistently denied discretionary parole release to a lower-severity prisoner throughout his or her six-year prison term. If the prisoner were able to earn 20 days of credits for every 30 days in confinement, his or her "date of release to mandatory supervision" would occur after slightly more than three years and seven months.<sup>30</sup> By statute, the prisoner must be released at this milestone unless the parole board acts to block his or her release. If the board continually blocks the prisoner's release for the remainder of his or her term, however, the prisoner will serve the entire six-year maximum sentence before release is statutorily required.

Data from Fiscal Year 2018 show that the parole board blocked release for roughly half of all prisoners who had reached their dates of release to mandatory supervision.<sup>31</sup> In light of this practice, it is fair to say that the DRMS functions as a *presumptive release date*—albeit one with modest presumptive force that may be overridden at the parole boards' discretion.

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<sup>29</sup> Tex. Gov't Code § 508.149(b). The "date of release to mandatory supervision" in Texas used to be equivalent to mandatory release dates in other states. In 1996, however, the legislature created a new discretionary power in the parole board to block the previously mandatory releases. In other words, releases that used to be mandatory are now discretionary, although the word "mandatory" is still retained in Texas terminology as a relic of the former law. Official state reports now refer to "Discretionary Mandatory Supervision" or "DMS" rather than mandatory supervision. See Texas Board of Pardons and Parole, *Annual Statistical Report FY 2018* at 9. See also Texas Department of Criminal Justice, *FY 2017 Statistical Report* (undated) at iv ("Under the law in effect until August 31, 1996, release to mandatory supervision was automatic for most offenders, with no requirement of release approval from the Board of Pardons and Paroles. Offenders who committed their offense after August 31, 1996 must receive approval from the Board of Pardons and Parole.").

<sup>30</sup> Twenty days of credit earned every month for three years seven months (43 months) adds up to 860 days (or 28 months 20 days), which would bring the "date of release to mandatory supervision" back to 3 years 7 months 10 days.

<sup>31</sup> Texas Board of Pardons and Parole, *Annual Statistical Report FY 2018* at 9. Overall, the parole board allowed release in only 48 percent of the 19,077 cases in which prisoners had reached their date of release to mandatory supervision. 14,257 of the DRMS cases involved prisoners convicted of nonviolent offenses, for whom the board blocked release in 49 percent of all cases.

*c. Loss of good time credits*

After it has been awarded, good conduct time may be “forfeited” or “placed in suspension” by the department of corrections if “the inmate commits an offense or violates a rule of the department.” When the department elects to forfeit good time credits, they can never be restored. If the department merely suspends the credits, however, the department reserves discretion to reinstate those credits at a later time.<sup>32</sup>

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<sup>32</sup> Tex. Gov’t Code § 498.004(a) . The department’s actions to remove and restore good time credits must adhere to a number of statutory requirements in § 498.004(c). This provision also requires the department to adopt policies for such decisions, and to act in accordance with those policies. *See also* § 498.0045 (Forfeiture of Good Conduct Time: Frivolous Lawsuits).



## II. Prisoners Outside the General Rules

Most prisoners who fall under exceptions to Texas’s general rules of prison-release discretion are already considered high-severity (or “3G”) offenders, but the special rules applicable to them, as detailed below, are even more restrictive of their release opportunities than the general rules for the high-severity group.

### 2.1. Life without parole

Prisoners sentenced to life without parole (LWOP) or death are completely ineligible for parole release.<sup>33</sup> Many of the LWOP group (and all on death row) have been convicted of *capital felonies* under Texas law. For adults convicted of capital crimes, a sentence of LWOP is mandatory for anyone not sentenced to death.<sup>34</sup>

Two classes of sub-capital offenses graded as *felonies of the first degree* also carry an authorized penalty of LWOP. These are the most serious sex crimes in the Texas Penal Code: *aggravated sexual assaults* and the *continuous sexual abuse of a young child or children*.<sup>35</sup> For these offenses, the judge has discretion to impose LWOP but it is not mandatory.<sup>36</sup>

Under Texas’s habitual offender law, defendants convicted of designated sexually violent offenses or continuous sex trafficking must be sentenced to LWOP if they have a prior conviction of either of those offense types.<sup>37</sup>

In FY 2018, there were 1,139 persons serving LWOP sentences in the Texas prisons, or less than one percent of the total prison population.<sup>38</sup>

### 2.2. Other sentences without parole

If the sentencing court chooses not to impose LWOP for an *aggravated sexual assault* or the *continuous sexual abuse of a young child or children*, the court may order a fixed prison term of

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<sup>33</sup> Tex. Gov’t Code § 508.145(a).

<sup>34</sup> Tex. Penal Code § 12.31(a)-(b).

<sup>35</sup> Tex. Gov’t Code § 508.145(a).

<sup>36</sup> Tex. Penal Code §§ 21.02(h); 22.021(e)-(f).

<sup>37</sup> Tex. Penal Code § 12.42(c)(4). The term “sexually violent offense” is defined in Texas Code Crim. Proc., art. 62.001(6). Under § 12.42(h), with the exception of aggravated sexual assaults, the habitual offender provision is triggered only for prior convictions involving underage victims. The prior convictions that trigger this rule include substantially similar offenses in other states. § 12.42(c)(4)(B).

<sup>38</sup> Texas Department of Criminal Justice, *FY 2018 Statistical Report* (2019) at 17 (table).

up to 99 years.<sup>39</sup> Whatever sentence the judge selects carries no possibility of parole over its full length.<sup>40</sup>

### *2.3. Life sentences with possibility of parole*

Parolable life sentences for lower-severity offenders carry a minimum term of 15 years to first parole release eligibility, which may be shortened through the award of good time credits. The same minimum term of 15 years also applies to judicial maximum sentences of 60 years or more, which are sometimes placed in the category of “virtual life sentences.”<sup>41</sup>

For higher-severity (or “3G”) offenders, parolable life sentences carry a minimum term of 30 years to first parole release eligibility, which may not be reduced by good time discounts. The immovable 30-year minimum term also applies to judicial maximum sentences of 60 years or more for the higher-severity group.<sup>42</sup>

Under Texas’s habitual offender statute, some offenders must be sentenced to a life term with first parole eligibility after 35 years—a minimum term not reducible by good time credits. Application of this rule is triggered by defendants with current convictions of statutorily-designated offenses who have prior convictions of a somewhat longer list of designated offenses. The predicate current offenses are all serious sex offenses, especially with child victims, or crimes involving the intent to commit such offenses.<sup>43</sup> The required prior convictions include all of the same crimes, plus child pornography and obscenity offenses involving visual depictions of children.<sup>44</sup>

In FY 2018, there were 8,176 persons serving life sentences other than LWOP in the Texas prisons, roughly six percent of the total prison population.<sup>45</sup>

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<sup>39</sup> A defendant convicted of aggravated sexual assault may be sentenced to life or any term between 5 and 99 years. If the victim was underage, the judge must impose at least a 25-year sentence. Tex. Penal Code §§ 12.32(a); 22.021(e)-(f). For continuous sexual abuse of a young child or children, an offender may be sentenced to life or any term between 25 and 99 years. § 21.02(h).

<sup>40</sup> Other felonies of the first degree in Texas carry a maximum sentence of life with the possibility of parole.

<sup>41</sup> Tex. Gov’t Code § 508.145(f) *see Virtual Life Sentences*, The Sentencing Project (2019) at 1, available at <https://www.sentencingproject.org/publications/virtual-life-sentences/> (defining a virtual life sentence as “a sentence of 50 years or longer ... for most individuals”).

<sup>42</sup> Tex. Gov’t Code § 508.145(d)(2).

<sup>43</sup> These include sex trafficking with a child victim, indecency with a child, aggravated sexual assault, first- and second-degree sexual assault, aggravated kidnapping with intent to abuse the victim sexually, and burglary with intent to commit indecency with a child. Tex. Penal Code § 12.42(c)(2)(A).

<sup>44</sup> Tex. Penal Code § 12.42(c)(2)(B).

<sup>45</sup> Texas Department of Criminal Justice, *FY 2018 Statistical Report* (2019) at 17 (table).

#### *2.4. Juvenile life sentences*

Prisoners convicted of “capital” offenses, but who were under 18 at the time of their crimes, must be sentenced to life with the possibility of parole.<sup>46</sup> Parole eligibility for this group occurs after 40 years, with no reduction for good time credits.<sup>47</sup>

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<sup>46</sup> Tex. Penal Code § 12.31(a)(1),(b)(1).

<sup>47</sup> Tex. Gov’t Code § 508.145(b).

### *III. Other Forms of Prison-Release Discretion (not routinely used)*

#### *3.1. Medical or “compassionate” release*

The Texas parole board has authority to release prisoners to “medically recommended intensive supervision” (MRIS) in certain enumerated circumstances.<sup>48</sup> The criteria for release are different for lower-severity and higher-severity (or “3G”) prisoners (see sections 1.1a and 1.1b). Prisoners with sentences of death or life without parole are entirely ineligible. Release to MRIS is always contingent on a parole-board finding that the inmate does not constitute a threat to public safety.<sup>49</sup>

In recent years, the total numbers of prisoners granted medical release in Texas have been quite small. In the existing operation of the system, compassionate release is a tiny factor in the determination of prison population size. In FY 2018, only 62 prisoners were released, or less than one-half of one percent of all prisoners.<sup>50</sup>

#### *3.2. Executive clemency*

The Governor has the power in all criminal cases, except treason and impeachment, to grant reprieves, commutations of sentences, and pardons upon the written signed recommendation and advice of a majority of the Board of Pardons and Paroles. With the advice and consent of the Legislature, the Governor may grant commutations of sentences, reprieves, and pardons in cases of treason.<sup>51</sup>

In recent decades, very few prison sentences in Texas have been shortened through acts of executive clemency. This reflects nationwide norms. In FY 2018, the board sent a total of 22 clemency recommendations to the governor, all except one for prisoners not serving capital sentences. This represents less than one-fifth of one percent of all Texas prisoners.<sup>52</sup>

#### *3.3. Emergency release for prison overcrowding*

Texas is among a minority of states with a permanent statutory mechanism in place to address overcrowding in state prisons.<sup>53</sup> If the state’s attorney general certifies that a prison overcrowding crisis exists, certain classes of prisoners become eligible for release to “intensive

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<sup>48</sup> Tex. Gov’t Code § 508.146.

<sup>49</sup> Tex. Gov’t Code § 508.146(a)(2).

<sup>50</sup> Texas Board of Pardons and Parole, *Annual Statistical Report FY 2018* at 11 (table).

<sup>51</sup> Tex. Const. art. IV, § 11.

<sup>52</sup> Texas Board of Pardons and Parole, *Annual Statistical Report FY 2018* at 24 (chart).

<sup>53</sup> Tex. Gov’t Code § 499.025; Model Penal Code: Sentencing § 11.04, cmt. e (Am. L. Inst., forthcoming 2020) (reporting that, at one time, as many as 20 states had enacted such provisions, but finding only 11 that were still in force in 2017).

supervision parole” who would not otherwise be eligible for parole release at the time. The parole board is required to “immediately begin to review and consider” such prisoners for emergency release. Such releases are prohibited, however, if the board “determines that the release of the inmate will increase the likelihood of harm to the public, according to objective parole criteria.”<sup>54</sup> The emergency release provisions under this statute were last used in 1987.<sup>55</sup>

### 3.4. COVID response

In contrast with many other states, Texas has not responded to the COVID pandemic with increased releases of prisoners.<sup>56</sup> It has reportedly had a higher death rate from COVID than other states with large prison systems.<sup>57</sup>

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<sup>54</sup> Tex. Gov’t Code §§ 499.025(e); 499.027.

<sup>55</sup> Peter Applebome, *Texas, In Emergency, to Free 185 From Crowded Prisons*, N.Y. Times, Feb. 28, 1987.

<sup>56</sup> Crime and Justice News, *Texas Rejects Early Prison Releases During Pandemic*, The Crime Rep., July 8, 2020, available at <https://thecrimereport.org/2020/07/08/texas-rejects-early-prison-releases-during-pandemic/>.

<sup>57</sup> Terry Wallace, *Texas prisons, jails worst COVID-19 hotspots of any in US*, Associated Press, Nov. 9, 2020 (“when adjusted for size, Texas still has the second-highest rate of COVID infections and is tied for the third-highest proportion of its prison population that has died from COVID, among the ten largest prison systems.”)

#### *IV. Modeling the Relationship Between Prison-Release Discretion and Prison Population Size in Texas*

Texas's total prison population as of August 31, 2017 numbered 133,600.<sup>58</sup> Out of this total, 79,539 prisoners were reported to be release eligible—or about 60 percent of all prisoners.<sup>59</sup> We are fortunate to have this statistic, which is not available in most states. If it is reasonably accurate, it gives us an important window into the interaction between prison-release discretion and prison population size in Texas. If all release-eligible prisoners had been released the day after the August 31, 2017 count, the prison population would have dropped from 133,660 to 54,061.<sup>60</sup> This suggests that the degree of indeterminacy for the system as a whole was *at least* 2.47:1. That is, the reported 2017 population is 2.47 times larger than its estimated size if the parole board had used the full measure of its release discretion in every case (a hypothetical *always-release* set of practices).<sup>61</sup>

Current statistics also allow a crude approximation of how much larger the Texas prison population might have been if all back-end officials had consistently denied release whenever it was in their discretion to do so (a *never-release* environment). The FY 2017 report states that prisoners released throughout that year had served an average of 61 percent of their judicial maximum sentences.<sup>62</sup> Very roughly, this suggests a much higher current prison population—219,016 rather than 133,600—if we were to imagine a hypothetical never-release world and the prison-population equilibrium it would produce. If we accept 219,016 as a credible estimate of the population that would have existed in a never-release regime, and if we accept 54,061 as an acceptable-for-now estimate of the population under an always-release regime, then the degree of indeterminacy reflected in the combined discretionary powers of all back-end

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<sup>58</sup> Texas Department of Criminal Justice, *FY 2017 Statistical Report* (undated) at 1.

<sup>59</sup> *Id.* at 17 (counting parole eligible and those eligible for “Discretionary Mandatory Supervision”).

<sup>60</sup> It is conceivable that the prison population in an always-release environment would be significantly lower than this. In the FY 2017 statistics, we do not know at what rate good time credits had been awarded to prisoners across the entire system. Presumably there was room for more generous bestowal of good time credits in the past, if we posit a uniform always-release slant in good time awards. If so, the number of inmates ineligible for release in 2017 would have been smaller than the actual number calculated above.

<sup>61</sup> In this example, we can also say that the degree of indeterminacy reflects a population-multiplier potential (PMP) of at least 2.47:1 (the ratio of the never-release population relative to the always-release population). We must distinguish the PMP of a single decision maker such as the parole board versus the PMP of all officials combined who have some degree of prison-release discretion. In Texas general-rules cases, we can say that the parole board's discretionary release authority always has a minimum PMP of 4:1. Depending on what the corrections department actually does within the range of its release discretion (to give, withhold, forfeit credits), the parole board may be gifted with increments of extra authority—and every enlargement of the board's discretionary powers will carry a correspondingly enlarged PMP.

<sup>62</sup> Texas Department of Criminal Justice, *FY 2017 Statistical Report* (undated) at 17 (table).

releasing authorities, spread across all prisoners in the system, would be in the ballpark of 4:1.<sup>63</sup> Such a system is 25 percent determinate, 75 percent indeterminate.

For aggregate prisoner populations, the degree of indeterminacy indicates the scope of back-end officials' control over the scale of imprisonment in the state. In this case, the 4:1 ratio reflects the capacity of back-end officials to enlarge or shrink the state's total prison population size—an ability that might be called the *population-multiplier potential* (PMP).

The general estimates presented above are eye-catching, but are of limited policy utility. Texas's total prison population is divided into numerous subpopulations that are governed by differing rules of release. As in all states, the Texas prison system is multi-tiered. An averaged-out PMP of 4:1 might well represent large groups of prisoners for whom the PMP is higher than 4:1, together with other sizeable groups for whom it is lower. As we will see below, this appears to be the case in the Texas prison system.

#### *4.1. Prison release timeline for lower-severity offenders (also called "Not-3G" offenders)*

Figure 3 illustrates the scope of parole release discretion for the portion of the Texas prison population this report denotes as "lower-severity offenders," called "Not-3G" offenders by Texas insiders. This is the largest single subgroup in the Texas system, accounting for 51 percent of all prisoners in FY 2018.<sup>64</sup>

Figure 3 depicts the scope of parole release discretion for this group without taking into account the potential award of good time credits. For all sentences that fit this model, the parole board's aggregate use of its release or release-denial discretion reflects a degree of indeterminacy—and a population-multiplier potential—of 4:1.<sup>65</sup>

Figure 4 expands on Figure 3 by incorporating the effects of good time credits on prison-release milestones in the sentence timeline. Figure 4 illustrates the timeline for a lower-severity prisoner who earns 30 days of credits across each month of his or her confinement. The accumulation of such credits would advance the first date of parole eligibility to one-eighth of the judicial maximum term.

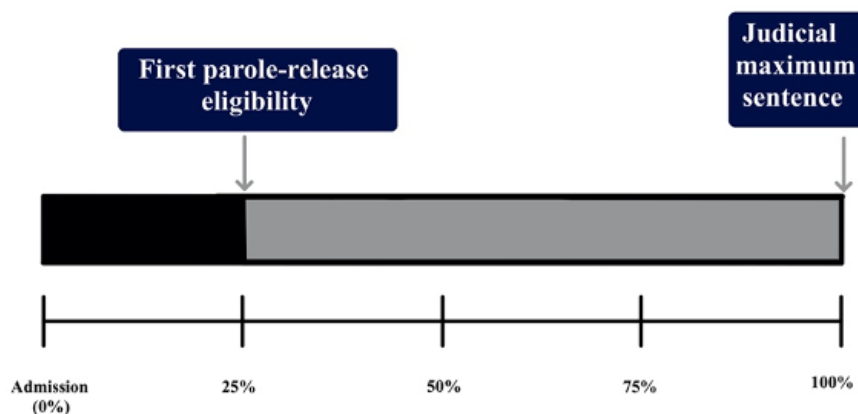
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<sup>63</sup> Disclaimer: Release cohorts are not perfect indicators of the true time-served outcomes for an entire prison system. For one thing, they include no representatives of prisoners serving sentences of life without parole. In addition, new laws in previous decades that created extremely long minimum sentences—measured in decades—may not have generated meaningful numbers of releasees yet.

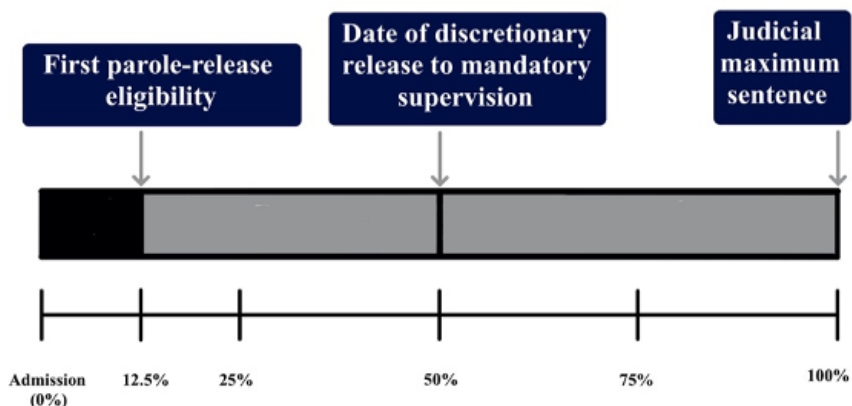
<sup>64</sup> See Texas Department of Criminal Justice, *FY 2018 Statistical Report* (2019) at 16 (table) (reporting 68,211 "Not 3G" prisoners out of the total prison population of 134,52, or 50.8 percent).

<sup>65</sup> That is, over time, the total number of prisoners serving sentences of this kind would be  $X$  if the parole board consistently released every such prisoner at the earliest possible date—and the total number would be  $4X$  if the parole board consistently denied release for all such prisoners until their date of mandatory release.

**Texas Figure 3. Prison-Release Timeline for Lower-Severity Offenders Without Good-Time Credits**



**Texas Figure 4. Prison-Release Timeline for Lower-Severity Offenders Who Earn 30 Days of Good-Time Credits Per Month**



The same rate of credit earning would create a “date of release to mandatory supervision” (DRMS) at the 50 percent mark of the judicial maximum term. Because a DRMS is not a date of mandatory release (see section 1.4b), the parole board retains *release-denial discretion* over the full judicial-maximum term. In the scenario shown in Figure 4, the board’s discretion controls 87.5 percent of potential time served under a sentence of this kind. The PMP across sentences described in the figure is 8:1.

Figure 4 displays only one of the many possible rates of accrual of good time credits in the Texas system. For lower-severity prisoners, the minimum term to eligibility for discretionary parole release is a *movable* milestone, depending on a prisoner’s rate of good time earning.<sup>66</sup>

<sup>66</sup> Similarly, the DRMS is a movable milestone, but a less important one than the date of first parole release eligibility. The parole board has broad release-denial discretion both before and after the DRMS.



We can calculate the full range of movability as follows: If a prisoner earns no good time credits at all, then the scope of the parole board's release discretion is as shown in Figure 3. If a prisoner manages to earn the maximum possible 45 days of good time credits over his or her entire prison term, he or she would become eligible for parole release after serving slightly more than 10 percent of the judicial maximum term.<sup>67</sup>

The population-multiplier potential that we can assign to the parole board's release powers for the entire lower-severity subgroup exists somewhere along this continuum of possibilities. In individual cases, the PMP could be as low as 4:1 or as high as nearly 10:1.<sup>68</sup> The exact ratio depends on earnings of good time credits. Applied across cases, the aggregate PMP must always lie between these two extremes.

Even with the minimum PMP of 4:1—assuming that no good time credits are ever earned by anyone—there is a high degree of indeterminacy in the Texas system for lower-severity offenders. The lion's share of time-served discretion in general-rule cases is held by the parole board, which always controls at least 75 percent of time served in relation to the judicial maximum term. The board's authority over sentence length in individual cases eclipses that of front-end actors in the sentencing system. In this breakdown, the judicially-imposed sentence controls only 25 percent of potential time served in each case.<sup>69</sup>

When the model expands to include good time credits, we note that prison officials in Texas are vested with far less time-served discretion than the parole board. Indeed, the main effect of time-served discretion when exercised by the department of corrections is to enlarge the scope of the parole board's authority. The department has the power—at its most extreme reach—to expand the parole board's release discretion so that it governs nearly 90 percent of judicial maximum terms instead of 75 percent. Notably, in this configuration, the judicially-imposed sentence controls only about 10 percent of time served in each case. This is an extremely high degree of indeterminacy. The structure for lower-severity prison sentences of this kind is 10 percent determinate, 90 percent indeterminate.

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<sup>67</sup> For example, a 12-year judicial maximum sentence (144 months) carries a first parole release eligibility date of 3 years (36 months). After 14 months served, a prisoner who has earned 45 days of good time credits per month will have earned a total of 630 days of credits (or 21 months). At that point, his or her date of first parole release eligibility will have moved back to the 15-month mark (10.4 percent of the judicial maximum sentence).

<sup>68</sup> That is to say, the PMP for the *combined* discretionary powers of the parole board and the department of corrections is 10:1 (on paper). The time-served discretion of the corrections department has no PMP of its own, however. The sole possible effects of the exercise of time-served discretion by prison officials (through administration of good time credits) are to increase or leave unchanged the scope of release discretion held by the parole board.

<sup>69</sup> This is a useful description of the discretionary power of *all front-end actors*, not just sentencing judges. The judicially-imposed sentence represents the sum of all official actions that were taken beforehand to produce the judicial sentence. Thus, for example, any quantification of the importance of prosecutorial discretion in the determination of time actually served cannot be greater than the quantified importance of the judicial sentence itself.

The Texas department of corrections is a relatively minor player in a second sense. It exerts only modest authority over prisoners' maximum possible stays. While the accrual of good time credits can set a "date of release to mandatory supervision" that is far earlier than expiration of the judicial maximum term, a DRMS merely sets up a decision point that is controlled by parole-board discretion. Despite the DRMS, the parole board retains release-denial discretion over the full remainder of the judicial maximum term. We might stretch to characterize the DRMS as a *presumptive* release date. The presumption is a weak one at best, however, and is not shored up by any measure of legal enforceability.

#### 4.2. Prison release timeline for higher-severity offenders (also called "3G" offenders)

The second largest subgroup of Texas prisoners are those we have termed "higher-severity offenders," called "3G" offenders by Texas corrections officials.<sup>70</sup> Most prisoners in this category are subject to the general rules of prison release described in Part I of this report, while some higher-severity offenders are subject to more restricted opportunities for release discussed in Parts II. The higher-severity offenders subject to the general rules added up to about 42 percent of the total Texas prison population in FY 2018.<sup>71</sup>

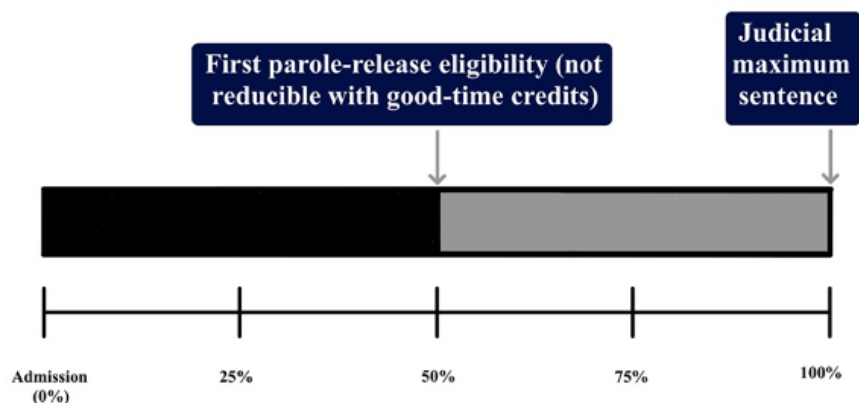
As reflected in Figure 5 below, higher-severity offenders reach first eligibility for discretionary parole release at the halfway mark of their sentences (or 30 years, whichever is shorter). In contrast with lower-severity offenders, the minimum term to parole release eligibility for the higher-severity group cannot be reduced through the accrual of good time credits. In other words, it is an *immovable minimum term*.

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<sup>70</sup> In FY 2018, this group added up to 49 percent of the state's prison population as a whole. See Texas Department of Criminal Justice, *FY 2018 Statistical Report* (2019) at 16 (table) (reporting 65,941 "3G" prisoners out of the total prison population of 134,52, or 49.2 percent).

<sup>71</sup> This estimate comes from the fact that an estimated 7 percent of all Texas prisoners are subject to the especially restrictive prison-release rules collected in Parts II and V(B) of the report. These special restrictions apply almost entirely to higher-severity (or "3G") prisoners, who make up 49 percent of the total prison population. In *FY 2017*, the 7 percent subject to exceptional restrictions included 2,480 who were not eligible for release at all and (at most) 6,200 who were serving extremely long minimum terms of 35-40 years. Texas Department of Criminal Justice, *FY 2017 Statistical Report* (undated) at 17 (table).

**Texas Figure 5. Prison-Release Timeline for Higher-Severity Offenders (or “3g” Offenders)**



In addition, higher-severity offenders are not eligible to gain a date of release to mandatory supervision (DRMS) through the accrual of good time credits. The judicial maximum sentence is therefore also an immovable milestone—although, even for prisoners who earn a DRMS, there is no guarantee of release prior to the maximum term. At most, the DRMS creates a modest presumption of release.

For the higher-severity group who fall under the general rules discussed in this section, the PMP is 2:1. That is, the size of this population in a consistent never-release regime would over time grow to twice the size of the population under consistent always-release practices. At any given time, the parole board’s actual release practices for this group yield a population in between these two extremes of possibility.

Compared with the lower-severity group, this is a far more modest degree of indeterminacy vested in back-end prison-release authorities. The sentencing court, when it pronounces a judicial maximum sentence in a higher-severity case, controls the same amount of time-to-be-served as the parole board. The total amount of time-served discretion pooled at the back end of the prison-sentence chronology is the same as the total at the front end.

For higher-severity offenders, all back-end release discretion is concentrated in the parole board. Corrections officials have no authority to influence release eligibility dates, dates of mandatory release, or even dates of modestly-presumptive release. On paper, therefore, the degree of time-served discretion held by the Texas parole board for this subpopulation (42 percent of all prisoners) is equal to the combined time-served discretions of prosecutors, courts, and all other front-end actors who influence the lengths of prison terms.

### *4.3. Prisoners never eligible for parole*

In FY 2017, 2,480 out of the total 133,600 prisoners in the Texas prison system on August 31, 2017 were serving sentences with no parole eligibility at any time during their terms.<sup>72</sup> That was slightly less than 2 percent of the total prison population. For this small group, there is zero release discretion apportioned among back-end decision makers. Because back-end decisions can make no difference in time served by the 2 percent group, the degree of indeterminacy is zero. The PMP is 1:1.

### *4.4. Prisoners with extremely long minimum sentences*

Some Texas prisoners with parolable life sentences serve minimum terms of 35 or 40 years in Texas, with no available reductions for good time credits. Because the upper boundary on life sentences is not precisely quantified, the PMP group must be estimated with reference to prisoners' ages at admission and life expectancies at admission.

For FY 2017, the average age of persons admitted to a Texas prison was 35 years.<sup>73</sup> If we posit a life expectancy of 80 years for inmates who spend their adult lives in prison, then the average functional maximum sentence for this group is 45 years.

For life sentences with parole eligibility after 35 years and an effective maximum of 45 years, the first parole-release eligibility arrives when 78 percent of the maximum has been served. Only 22 percent of time actually served is in the parole board's control through the use of release-denial discretion. The PMP vested in the parole board's release-denial authority in such cases is 1.3:1. Using the same calculation for life sentences with parole eligibility after 40 years and an effective maximum of 45 years, the approximate PMP would be 1.1:1.

These PMPs are so small that the parole board's power to influence sentence lengths for these groups is a relatively unimportant determinant of prison population size. This conclusion is reinforced by the fact that only about six percent of all Texas prisoners were serving sentences of this kind in FY 2017.

### *4.5. Prisoners with extremely long maximum sentences*

Most prisoners serving life sentences with the possibility of parole are subject to the general rule of first parole release eligibility after 15 years. The same is true of all prisoners with sentences for terms of years longer than 60 years. Such prisoners can generally earn good time credits that shorten the 15-year minimum term to as little as seven years.

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<sup>72</sup> Texas Department of Criminal Justice, *FY 2017 Statistical Report* (undated) (presenting prison data for the year ending August 31, 2017) at 17 (table).

<sup>73</sup> *Id.* at 2 (table).

For this group, PMPs could theoretically be higher than for the general-rules cases discussed above. However, if we assume that most prisoners' life expectancies do not extend more than 60 years in the future, such a theoretical calculation would be irrelevant. Measured against an effective maximum of 45 years (see previous section), parole eligibility occurs at the one-third mark without good time credits. With maximum good time allowances, release eligibility could occur as early as 16 percent of the judicial maximum sentence. On these estimates, the PMP for this group of lifers would fall between 3:1 (parole release discretion only) and 6.3:1 (for the highest earners of good time credits).

Counting all prisoners with parolable life sentences and sentences of 60 years or more, the FY 2017 report gives us a ceiling of 11,597, or about eight percent of the total population.<sup>74</sup>

#### *4.6. Overall assessment*

Based on reported corrections statistics in Texas, it is plausible to think that the degree of indeterminacy in the prison system as a whole is at least 4:1. That is, the scope of discretions held in combination by the parole board and department of corrections is sufficient to vary the size of the total prison population by a factor of 4:1.

In absolute numbers, we can estimate that the degree of indeterminacy over the entire system would allow the parole board and corrections department, at the extremes of their discretionary powers, to produce a state prison population as small as 54,000 or as large as 219,000. In other words, the degree of determinacy in front-end judicial sentences is sufficient to dictate a prison population of 54,000. The degree of indeterminacy in the system extends to an additional 165,000 prisoners who could be in the prison population or not, on any given day, depending on how the parole board and corrections officials have been using their releasing powers. Right now, back-end releasing authorities in Texas are exerting enough of their release-denial authority to add nearly 80,000 prisoners.

This is a high degree of indeterminacy for the system as a whole, but it is concentrated in the 50 percent of the prison population designated as “Not-3G” offenders, whom we have called “lower-severity offenders” in this report. For this subpopulation, the PMP is 10:1 if we combine the discretionary powers of the parole board and prison officials; it is 4:1 in the parole board alone. In contrast, the “3G” or “higher-severity” group of prisoners makes up most of the remaining half of the state’s prison population, yet the degree of indeterminacy across these prisoners is a mere 2:1.

In contrast with the two general-rules groups, the remaining degrees of indeterminacy in the Texas prison-release system are extremely low. For the small group of prisoners outside the general rules—about seven percent of the total population—there is almost no release discretion reposed in back-end decision makers. For these subsets of prisoners, any important changes in time served, and the resulting impacts on prison population size, must originate at

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<sup>74</sup> *Id.* at 17 (table).

the front end of the prison-sentencing system, through such levers as legislation, prosecutorial charging and bargaining discretion, and judicial sentencing decisions.

In summary, Texas's prison-sentencing system has two major frameworks for prison-release discretion: one for prisoners convicted of lower-severity offenses and another for the higher-severity group. For lower-severity prisoners, the degree of indeterminacy is extremely high. Only a tiny handful of other states have prison-release systems with PMPs as high as 10:1.<sup>75</sup> For higher-severity offenders, it is moderate. There are many other paroling states with PMPs between 2:1 and 3:1 for large groups of prisoners.<sup>76</sup> Because the two populations are roughly equal in size, we can average out their respective release regimes to say that Texas's prison-sentencing system as a whole is highly indeterminate. For purposes other than overall evaluation, however, it is a system split in two.

For lawmakers interested in the potential for back-end prison-release reforms to have impact on the size of Texas's prison populations in the future, there is no question that close attention to the general rules of prison release for lower-severity (Not-3G) offenders is warranted. Reform initiatives aimed at this target have considerable room to push the Texas population down from its current size. Also, it is worth worrying about the fact that, in the absence of reform, there is latent potential for the Not-3G subpopulation to grow many times over. Right now, there are no meaningful controls that reach into the back-end stages of the prison-sentence chronology where the 10:1 degree of indeterminacy is present. Time-served discretion is unregulated and free to shift dramatically from time to time, slowly or suddenly, without the intervention of anyone (other than the parole board and prison officials). There is no friction imposed on the PMP from outside the prison-release system, and little monitoring of the system's operations.<sup>77</sup>

Across the state's correctional history of the past several decades, discretionary back-end release decisions by the parole board and department of corrections, in combination, have been more critical determinants of time served than the actions of *all other officials combined* in Texas's criminal justice system.<sup>78</sup> This is strong circumstantial evidence that back-end decision makers have been important agents in the dramatic rise of Texas's prison population in the 1990s, and the steady (but less-dramatic) fall after the turn of the century. It would be inaccurate (or premature) to say that prison-release authorities have dictated the state's entire prison policy, however, because prison population size is determined both by the number of admissions and time served following admission. Back-end officials play a smaller role in prison

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<sup>75</sup> See Hawaii and Utah reports.

<sup>76</sup> See, e.g., state reports for Colorado, Connecticut, Maryland, New York, Rhode Island, South Dakota.

<sup>77</sup> This is true even though Texas's regular reporting of corrections statistics is superior to most other states.

<sup>78</sup> For example, the power of prosecutors to control time served in Texas prisons is of minor importance when compared with back-end authorities.

admissions than in their superintendence of time served.<sup>79</sup> But this report shows that they dominate one of the two axes of the admissions/time-served interaction that sets the scale of imprisonment in Texas.

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<sup>79</sup> The parole board also controls about 15 percent of prison admissions in Texas through its revocation discretion. See Texas Department of Criminal Justice, *FY 2018 Statistical Report* (2019) at 18 (table).