



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

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# PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

## *STATE REPORT: VERMONT*

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

## **State Report: Vermont**

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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: Vermont<sup>1</sup>

#### *Executive Summary*

In this project's ranking system, we classify Vermont's prison-sentencing system as operating with a *high degree of indeterminacy* overall (see pp. iii-iv). The degree of indeterminacy in Vermont's system is dependent on judicial sentencing patterns, however, because Vermont judges enjoy unusual discretion to vary the relationship between the minimum and maximum prison terms they impose in individual cases. In most general-rules cases, courts are free to impose sentences with an extremely high degree of indeterminacy, an extremely low degree of indeterminacy, or anything in between. Our judgment of the current operation of the system is based on data on actual sentencing patterns in the late 2010s gathered by the Council on State Governments. If aggregate judicial sentencing patterns were to change away from these patterns, the basic character of the prison-sentencing system would change along with them.

#### *Terminology note*

This report will refer to the Vermont Parole Board as the "parole board." The Vermont Department of Corrections will be referred to as the "department of corrections."

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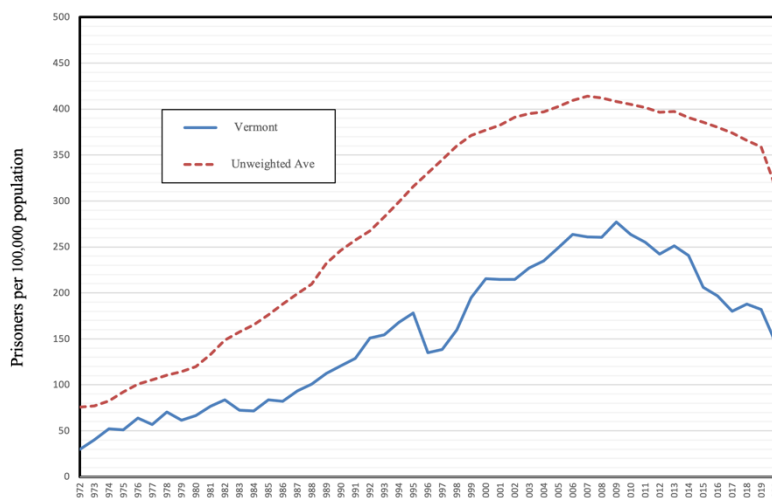
<sup>1</sup> This report was prepared with support from Arnold Ventures. The views expressed are the authors' and do not necessarily reflect the views of Arnold Ventures. For a broad overview of the law of parole release and supervision in Vermont, see Alexis Lee Watts, Mike McBride, & Edward E. Rhine, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Vermont* (Robina Institute of Criminal Law and Criminal Justice, 2018) (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

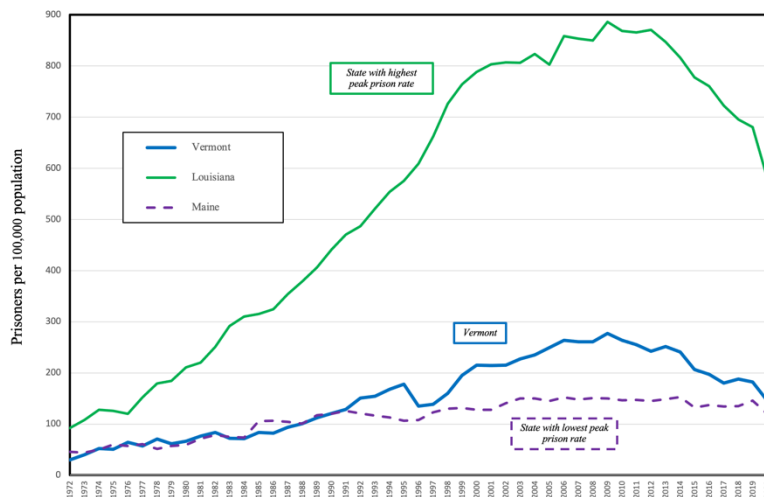
### *Vermont's prison-rate history, 1972 to 2020*

In 2020, Vermont's prison rate was 146 per 100,000 general population, with a yearend prison population of 907.<sup>2</sup> Vermont's prison rate was 45<sup>th</sup> highest among all states.

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



**Figure 2. Prison Rate Change in Vermont, 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

<sup>2</sup> E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 12 table 4, 16 table 7. Preliminary information about changes in Vermont's imprisonment rates after 2020 is presented below in the section on "The COVID period in Vermont."



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

Vermont reached its peak prison rate in 2009 at 277 per 100,000, which dropped to 146 per 100,000 in 2020. This is a net difference of -131 per 100,000, which was the 22<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 Vermont*

In a separate study, the Robina Institute found 255 releases in Vermont from March 2020 through December 2021 that were accelerated in response to the pandemic.<sup>9</sup> This number is the equivalent of about 16 percent of Vermont's pre-COVID prison population (at yearend 2019). As reported by the Robina Institute:

Due to concerns regarding the COVID-19 pandemic, Jim Baker, the commissioner for the Vermont Department of Corrections (DOC), made an effort to decrease the Vermont prison population during the early stage of the pandemic. Baker started by "looking at which inmates can be let out on furlough and who can be released on probation." This resulted in almost 100 people being released from prison between March 19, 2020, and March 26, 2020, which brought the DOC's total number of releases since late February to over 200. It was then reported on April 30, 2020, that 255 people had been released by the DOC since March 13, 2020.<sup>10</sup>

In calendar year 2020, Vermont's prison rate fell from 182 to 146 per 100,000—a one-year decline of -36 per 100,000. This was the 40<sup>th</sup> largest one-year drop reported among all 50 states

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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 79 Appendix E.

for that year.<sup>11</sup> Measured in percentage terms, it was a 19.8-percent reduction in the state's prison rate. The state's total prison population fell by 230 people, from 1,137 to 907.<sup>12</sup>

Falling admissions were probably a more important factor in Vermont's 2020 prison rate drop than annual releases. The number of prison admissions in the state dropped by 63 percent in 2020 compared with the previous year (from 2,560 to 952). Total releases in 2020 fell by 52.1 percent over 2019 (from 2,470 to 1,182).<sup>13</sup>

Vermont's prison-rate drop slowed after calendar year 2020. From yearend 2020 to December 2021, the Vera Institute reported that Vermont saw a slight decrease in its prison population, from 1,292 to 1,284—or 0.6 percent.<sup>14</sup>

### ***1. General rules of prison release in Vermont***

The general rules of prison release in Vermont focus on judicial sentences, which may be modified by credit-based deductions. Most sentences include separate judicial minimum and maximum terms. In most cases, both the judicial minimum and maximum are subject to potential reductions through credit earnings.

There is some complexity in how this all fits together in Vermont. The following sections will discuss each of the system's key legal components.

#### ***Minimum and maximum prison terms***

Vermont has no general scheme for the grading of felony offenses.<sup>15</sup> Instead, authorized penalties are prescribed separately for each offense in the state's criminal code. For most offenses, there is a statutorily authorized maximum prison term, or more than one if the offense

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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 15-16 table 7.

<sup>12</sup> *Id.*, at 12 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. The percent changes for total admission and releases are calculated by this report and not by BJS. BJS did not calculate the percent changes between 2019 and 2020 because it found that the data was not comparable due to failure for Vermont to submit 2019 National Prisoner Statistics on admissions and releases.

<sup>14</sup> See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 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.

<sup>15</sup> Vermont is one of 14 states without a comprehensive grading scheme for felonies and misdemeanors. See American Law Institute, *Model Penal Code: Sentencing* (2023), Section 6.01, Reporters' Note b.

is segmented into different levels of severity. For instance, Vermont's grand larceny statute authorizes a prison term of "not more than 10 years."<sup>16</sup> People convicted of petit larceny may be sentenced to "imprisonment for not more than one year."<sup>17</sup> Those convicted of burglary face statutory maximum penalties of up to 15, 20, 25, or 30 years, depending on the circumstances of the offense.<sup>18</sup>

For some serious crimes, the governing statute includes both minimum and maximum authorized prison terms. For example, authorized prison sentences for manslaughter include terms of "not less than one year nor more than 15 years."<sup>19</sup> For most forms of sexual assault (excluding statutory rape), the statute provides that convicted people "shall be imprisoned not less than three years and for a maximum term of life."<sup>20</sup>

Within the statutorily authorized penalty ranges for most crimes, sentencing courts have broad discretion to choose both the maximum and minimum terms to be imposed on individual defendants, including the relationship between the two. The relevant statute provides that, when a sentencing court imposes "any term of imprisonment, other than for life," the court "shall establish a maximum and may establish a minimum term for which the respondent may be held in imprisonment. The maximum term shall not be more than the longest term fixed by law for the offense of which the respondent is convicted, and the minimum term shall be not less than the shortest term fixed by law for the offense."<sup>21</sup>

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<sup>16</sup> Vt. Stat. tit. 13, § 2501. For most offenses, the sentencing court has the option of suspending a prison sentence and/or imposing a fine. These alternatives are not included in the discussion above. It addresses the statutory options given to judges once they have decided to impose an executed prison term.

<sup>17</sup> Vt. Stat. tit. 13, § 2502.

<sup>18</sup> See Vt. Stat. tit. 13, § 1201(c)(1)-(3), which authorizes the following maximum prison sentences:

A person convicted of burglary shall be imprisoned not more than 15 years.

A person convicted of burglary and who carries a dangerous or deadly weapon, openly or concealed, shall be imprisoned not more than 20 years.

A person convicted of burglary into an occupied dwelling shall be imprisoned not more than 25 years.

A person convicted of burglary into an occupied dwelling shall be imprisoned not more than 30 years if the person carried a dangerous or deadly weapon, openly or concealed, during commission of the offense.

<sup>19</sup> Vt. Stat. tit. 13, § 2304.

<sup>20</sup> Vt. Stat. tit. 13, § 3252(f)(1). For this offense, a sentence of imprisonment is mandated by statute, and the maximum term of life is also mandated. There is a separate and more serious crime, aggravated sexual assault, that includes mandatory imprisonment, a mandatory life maximum term, and a required minimum term of at least 10 years unless the judge finds mitigating circumstances supporting a reduced minimum as low as five years. Vt. Stat. tit. 13, § 3253(b),(c)(2).

<sup>21</sup> Vt. Stat. tit. 13, § 7031(a).

This provision gives courts enormous discretion to fashion sentences with varying degrees of indeterminacy. For example, consider the crime of manslaughter. Authorized prison terms for this offense must be “not less than one year nor more than 15 years.”<sup>22</sup> Under Vermont law, sentencing courts may choose from a wide array of sentence configurations: A court could legally impose sentences of one-to-15 years, or 14-to-15 years, or one-to-two years, or two-to-seven years, or three-to-13 years, and on and on (with variations down to months and days also possible). Even a sentence of 15-to-15 years is allowed—which would eliminate parole release eligibility for that particular defendant.

For most felonies in Vermont, there is no limitation on the authorized lengths of minimum terms. For example, Vermont’s grand larceny statute authorizes prison terms of “not more than 10 years.”<sup>23</sup> This range has no “bottom.” Sentencing courts could impose sentences of zero-to-10-years, making the defendant eligible for discretionary parole release at the time of admission to prison. Sentencing courts could also choose to impose long minimum sentences, such as nine-to-10 years or 10-to-10 years, for the same offense.

In most states, there are statutory rules or formulas that govern the relationship between the minimum and maximum terms in judicial prison sentences.<sup>24</sup> The majority approach reflects legislative policymaking and uniform rules that apply across general categories of cases. In Vermont, the minimum-maximum configurations of judicial prison sentences are left open to varying resolutions by individual judges in individual cases.

Vermont falls within a minority of states where sentencing judges are “gatekeepers” of the degrees of indeterminacy in the individual sentences they impose. In most cases, a Vermont court has discretion to fashion a sentence that is extremely indeterminate or has very little indeterminacy or is anywhere in between. We know of no sentencing system in which the judicial “gatekeeping” power is total.<sup>25</sup> Compared with other states in which judges have gatekeeping authority, however, the power is especially expansive in Vermont: judicial gatekeeping discretion is the single most important factor in determining the DOIs in

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<sup>22</sup> Vt. Stat. tit. 13, § 2304.

<sup>23</sup> Vt. Stat. tit. 13, § 2501. For most of the provisions discussed in this section of the report, the sentencing court has the option of suspending a prison sentence and placing the defendant on probation, or imposing a fine as the sole penalty. The discussion above addresses the statutory options given to judges once they have decided to impose an executed prison term.

<sup>24</sup> 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 36-43 table 6 (comparing indeterminate sentence structure and parole release eligibility rules in the 34 American “paroling” jurisdictions).

<sup>25</sup> Certain adjustments at the back end of Vermont’s system (such as good time deductions) can introduce a measure of indeterminacy into judicial sentences—even those that appear to be 100 percent determinate on their own terms.



individual sentences. So, in the aggregate, judicial sentencing patterns are the most important driver of the degree of indeterminacy of Vermont's prison-sentencing as a whole.

This is not to overstate the powers of sentencing courts. It is likely that the configuration of many or most sentences is narrowed down or settled in plea agreements or sentence agreements entered by the parties—all prior to judicial sentencing. (Indeed, the minimum-maximum ratio of a sentence could be a matter of considerable salience in plea bargaining.) A final judicial sentence is generally the culmination of inputs by multiple parties. The legislature's delegation of gatekeeping authority to sentencing courts creates the opportunity for other courtroom actors to apply pressure on how that power is used.

### *Credits against sentence*

Most prisoners in Vermont are eligible to receive “earned time” reductions of seven days per month if they have not committed a “major disciplinary rule violation.”<sup>26</sup> In the terminology of this project, this is a form of *good-time credits* because the criterion for accrual is staying out of trouble.<sup>27</sup> To maintain consistency, we will use the project's terminology in this report.

This credit system is relatively new. Vermont lawmakers repealed the state's previous good-time program in 2005.<sup>28</sup> The current system became effective in June 2021.<sup>29</sup>

Good-time credits are applied to reduce judicial minimum and maximum sentences. Reductions from judicial minimum terms create earlier parole eligibility dates (PEDs). Reductions from judicial maximum sentences create earlier mandatory release dates (MRDs).<sup>30</sup> All reductions depend on credits earned and not forfeited.<sup>31</sup> Full good-time credits of seven

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<sup>26</sup> Vt. Stat. tit. 28, § 818(b)(2)(A); Vermont Department of Corrections, Earned Time Rule: APA Rule # 21-011 (Effective June 12, 2021).

<sup>27</sup> 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), Ch. 6:

We define “good-time credits” as those obtained through the avoidance of disciplinary violations. ... “Earned-time credits,” as we define them, must be won through participation in or completion of designated activities. These commonly include work in prison, rehabilitative programs, vocational training, and educational accomplishments.

<sup>28</sup> See Alan J. Keays, *Panel recommends expanding inmates' access to earned 'good time' program*, VTDigger (Dec. 29, 2019), <https://vtdigger.org/2019/12/29/panel-recommends-expanding-inmates-access-to-earned-good-time-program>.

<sup>29</sup> Vermont Department of Corrections, Earned Time Rule: APA Rule # 21-011 (Effective June 12, 2021).

<sup>30</sup> Vt. Stat. tit. 28, § 818(b)(2).

<sup>31</sup> Prisoners may be denied all or part of their good behavior reductions for any month in which they commit any offense or violate a rule or regulation. Vt. Stat. tit. 28, § 818(b)(2)(A). Additionally, a maximum of ten days of any previously earned reductions may be forfeited for each subsequent offense or violation that occurs in the same

days per month, if accrued without interruption over an entire prison term, would result in 19-percent reductions in prisoners' minimum and maximum terms.

Higher credit earnings of one day per day are available to prisoners who are enrolled in "treatment in a residential setting for a substance use disorder."<sup>32</sup> In this project's terminology, these are *earned-time credits*. Prisoners who manage to win such credits continuously throughout their terms would receive 50-percent reductions from their judicial minimum and maximum sentences—although we suspect that such uninterrupted enrollment in a drug treatment program is a practical impossibility for most prisoners.

There is a separate earned-time credit rule for prisoners in work camps. They may earn up to 30 days per month if they demonstrate "beyond the level normally expected consistent program performance or meritorious work performance."<sup>33</sup> Only prisoners with minimum custody status are eligible for work camps, and people convicted of "listed offenses" are ineligible.<sup>34</sup> Continuous earnings of 30 days per month would yield reductions of 50-percent from minimum and maximum terms.

Prisoners convicted of the following "disqualifying offenses" are not eligible for good-time or earned-time credits: murder, voluntary manslaughter, kidnapping, lewd and lascivious conduct with a child (but not for offenders under 18 years of age who have consensual contact with a victim at least 12 years old), sexual assault, aggravated sexual assault, and aggravated sexual assault of a child.<sup>35</sup> Also ineligible are prisoners sentenced to life without parole, those sentenced to an "interrupted sentence," those who have been reincarcerated for a violation of release conditions, and those already eligible for work camp reduction credits (see below).<sup>36</sup>

### *Vermont's two-track parole release process*

The parole release process in Vermont has two separate tracks: a traditional parole release process for "listed offenses," which are a selection of serious offenses enumerated in statute (see next section). Since January 1, 2021, there is a separate "presumptive parole" track for

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month. Vt. Stat. tit. 28, § 812. A prisoner's supervising officer may restore any denied or forfeited good behavior reductions—in whole or in part—upon approval from the Commissioner of Corrections. Vt. Stat. tit. 28, § 813.

<sup>32</sup> Vt. Stat. tit. 28, § 818(b)(3). The statute refers to "residential" and "inpatient" drug treatment. Does it apply to prisoners still incarcerated, or must the person be enrolled outside the prison? The DOC rule merely reprints the statutory language.

<sup>33</sup> Vt. Stat. tit. 28, § 811.

<sup>34</sup> Vermont Department of Corrections, *Interim Memo: Work Camp Eligibility and Removal* (Mar. 23, 2015), at <https://doc.vermont.gov/sites/correct/files/documents/policy/interim-mem-work-camp-eligibility-and-removal.pdf>. For the current roster of "listed offenses," see *infra notes* 39-40 and accompanying text.

<sup>35</sup> Vt. Stat. tit. 28, § 818(c)(1)(A)-(G); Vermont Department of Corrections, *Earned Time Rule: APA Rule # 21-011* (Effective June 12, 2021), Rule # 21-011(IV)(B)(2)(a)-(g).

<sup>36</sup> Vt. Stat. tit. 28, § 818(b)(1),(b)(2)(B).





“unlisted offenses,” which includes the great majority of nonviolent offenses along with lower-level violent offenses.<sup>37</sup> As explained below, we consider it more accurate to categorize “presumptive parole” in Vermont as a form of “administrative parole release” (APR).

### *Traditional parole release in Vermont*

Prisoners convicted of “listed offenses” must go through the traditional process of discretionary parole release—a process that will be familiar to most readers in its broad outlines.<sup>38</sup> “Listed offenses” include the completion or attempt to commit:

Stalking, aggravated stalking, domestic assault, first degree aggravated domestic assault, second degree aggravated domestic assault, sexual assault, aggravated sexual assault, lewd or lascivious conduct, lewd or lascivious conduct with a child, murder, aggravated murder, manslaughter, aggravated assault, assault and robbery with a dangerous weapon, arson causing death, assault and robbery causing bodily injury, maiming, kidnapping, unlawful restraint in the second degree, unlawful restraint in the first degree, recklessly endangering another person, violation of abuse prevention order, operating vehicle under the influence of alcohol or other substance with either death or serious bodily injury resulting, negligent or grossly negligent operation resulting in serious bodily injury or death, leaving the scene of an accident with serious bodily injury or death, burglary into an occupied dwelling, abuse, abuse by restraint, neglect, sexual abuse, financial exploitation, exploitation of services, aggravated sexual assault of a child, human trafficking, and aggravated human trafficking.<sup>39</sup>

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<sup>37</sup> See Vermont Parole Board, *The Vermont Parole Board Manual* (Mar. 1, 2021), at 5 (defining “presumptive parole” as “[t]he release of an offender who is convicted of unlisted offenses and meets specified criteria to community-based supervision without an interview”). The eligibility criteria for presumptive parole exclude prisoners who have been convicted of “listed offenses.” See Vt. Stat. tit. 28, § 501a(7) (“Text of subsec. (7) effective until January 1, 2023”). The list of excluded offenses is scheduled to become much shorter in 2023. See *id.* (stating that the “[t]ext of subsec. (7) [will be] effective January 1, 2023” and referring to a statute with a much shorter list of enumerated offenses).

<sup>38</sup> In this project’s Final Report, we have defined “discretionary parole release” as: “the traditional process that in most states includes a release hearing; individualized consideration by the board of prisoners’ fitness for release; broad discretion on the board’s part to weigh prisoners’ self-presentation, life circumstances, institutional behavior, offenses of conviction, prior records, and victim input; and the requirement of affirmative votes by board members in favor of release.” 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 47. For an overview of Vermont’s traditional parole-release process, see Vermont Parole Board, *The Vermont Parole Board Manual* (Mar. 1, 2021), at 18-23.

<sup>39</sup> The current version of Vt. Stat. tit. 28, § 501a(7) cross-references the offenses listed in Vt Stat. tit. 13, § 5301(7)(A)-(EE) (list includes statutory citations for included offenses), which are named in text above. This version of § 501a(7) will expire at the end of 2022. See Vt. Stat. tit. 28, § 501a(7) (appended by note: “Text of subsec. (7) effective until January 1, 2023”).

Effective January 1, 2023, the list of offenses that are ineligible for APR is scheduled to be shortened to a much smaller number:

Arson causing death, assault and robbery with a dangerous weapon, assault and robbery causing bodily injury, aggravated assault, murder, manslaughter, kidnapping, unlawful restraint, maiming, sexual assault, aggravated sexual assault, and burglary into an occupied dwelling.<sup>40</sup>

Parole eligibility dates (PEDs) for prisoners convicted of listed offenses are ordinarily determined by the minimum term imposed by the sentencing court.<sup>41</sup> However, “[i]f the inmate’s sentence has no minimum term or a zero minimum term, the inmate shall be eligible for parole consideration within 12 months after commitment to a correctional facility.”<sup>42</sup>

### *Administrative parole release in Vermont*

Vermont’s “presumptive-parole” track for unlisted offenses is a streamlined alternative to the traditional approach, designed to make release relatively automatic for many prisoners convicted of lower-level offenses. In the terminology of this project, we classify Vermont’s “presumptive parole” as a form of “administrative parole release” (APR), defined as follows:

We define administrative parole release as a routinized path to release that requires fewer procedural stages and less case-by-case discretion than the traditional parole-release process. APR is fundamentally built on a contract model: Prisoners are assigned a correctional plan early in their terms; if they follow the plan, the state extends them a credible promise that they will be released on an established date. To give such contracts credibility, denials of release or “derailment” from the APR track should be permitted only under defined circumstances.<sup>43</sup>

For consistency within this project and to avoid confusion for readers of multiple project publications, this report will use the project’s terminology rather than Vermont’s terminology.

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<sup>40</sup> A superseding version of § 501a(7) will take effect in 2023. See Vt. Stat. tit. 28, § 501a(7) (appended by note: “Text of subsec. (7) effective January 1, 2023”). This newer version cross-references the offenses listed in Vt. Stat. tit. 33, § 5204(a)(1)-(12) (list includes statutory citations for included offenses), which are named in text above.

<sup>41</sup> Vt. Stat. tit. 28, § 501(2).

<sup>42</sup> Vt. Stat. tit. 28, § 501(1).

<sup>43</sup> 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 47. We have identified programs in at least a dozen states that substantially satisfy this definition. See *id.* at 49-51 table 7 (collecting the major features of APR programs nationwide).

(Such within-project standardization of terminology is a common feature of all our state reports.)<sup>44</sup>

Most Vermont prisoners are eligible for APR except those serving sentences for “listed offenses” (see previous section). People reincarcerated on the current sentence because of a parole revocation are also ineligible.<sup>45</sup>

The APR statute generally requires release “at the expiration of the inmate's minimum or aggregate minimum term of imprisonment” if the prisoner meets several statutory conditions. The prisoner must:

- have no new criminal conviction while serving the current sentence;
- have no outstanding warrants, detainers, commitments, or pending charges;
- be “compliant with the required services and programming portion of the inmate's case plan” for at least 90 days before expiration of the minimum term; and
- be “compliant with the conditions of supervision if the offender is supervised in the community on furlough” for the 90 days preceding parole eligibility or, if less than 90 days, the entire period
- have “no major disciplinary rule violation or pending infraction” in the preceding 12 months.<sup>46</sup>

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<sup>44</sup> We set aside Vermont’s nomenclature for an additional reason. In this project’s comparative analysis, we take care to distinguish “presumptive parole release” from APR. 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, forthcoming 2022), at 48, which includes the following:

“Presumptive parole release,” as we use the term, starts with the premise that certain prisoners should be released at their next eligibility date; in principle, the board should order release unless there is a sufficient showing to overcome the “presumption.” ... [O]ur study permits us to draw structural comparisons between presumptive and administrative parole release. Presumptive parole attempts to put a substantive thumb on the scale that will affect parole boards’ decision patterns one case at a time. In contrast, APR encourages the routinized release of designated groups of prisoners by charting a shortened procedural path to release that bypasses the discretionary framework of case-by-case analysis. To us, these are strikingly different strategies: APR places a procedural thumb on the scale rather than a substantive one.

<sup>45</sup> Vt. Stat. tit. 28, § 501a(6),(7).

<sup>46</sup> Vt. Stat. tit. 28, § 501a(1)-(5).

Prisoners' compliance with their case plans is the only affirmative requirement on this list.<sup>47</sup> For most prisoners (those without legal difficulties from other cases), the other criteria for APR are satisfied if the prisoner has stayed out of serious trouble.

Release is not entirely automatic. The department of corrections must "screen" prisoners eligible for APR under subjective "risk criteria" set out in statute. Prisoners who fail the risk screening are referred to the parole board for "administrative review" (file review) and a parole hearing.<sup>48</sup> The key statutory language is as follows:

If the Department [of Corrections] determines that, based on clear and convincing evidence, there is a reasonable probability that the inmate's release would result in a detriment to the community, or that the inmate is not willing and capable of fulfilling the obligations of parole, the Department shall, at least 60 days prior to the inmate's eligibility date, refer the inmate to the Parole Board for a parole hearing.<sup>49</sup>

The parole board may deny APR on the above grounds. Alternatively (even if the standard above is not met), the board may deny APR and set a full hearing if "it determines, through its administrative review, that a victim or victims should have the opportunity to participate in a parole hearing."<sup>50</sup>

Denial of APR is not a definitive denial of release; rather it is a "derailment" from the APR track that shifts prisoners into the more traditional parole hearing process.<sup>51</sup>

In summary, release under the APR system is meant to be a routine matter if prisoners satisfy the behavioral requirements mentioned earlier and are not flagged as having failed the department of correction's risk screening. For prisoners who clear these hurdles, the parole board does not engage in the traditional individualized decisionmaking process for release.<sup>52</sup>

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<sup>47</sup> We do not know how rigorous the requirements of individual case plans might be in Vermont, or how readily the department of corrections will certify compliance. These are critical implementation variables in APR programs.

<sup>48</sup> Administrative review is required under Vt. Stat. tit. 28, § 502a(e)(1). A parole hearing is required under Vt. Stat. tit. 28 § 502a(e)(2).

<sup>49</sup> Vt. Stat. tit. 28, § 502a(e)(2).

<sup>50</sup> Vt. Stat. tit. 28, § 502a(e)(3)(A).

<sup>51</sup> We coined this term in 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 52.

<sup>52</sup> The Justice Reinvestment Summary of the legislation creating "presumptive parole" in Vermont described the program as follows:

In one important respect, Vermont's APR program is unusual compared with those in other states. Across states, the operative effects of APR depend on the position of minimum terms in individual sentences. However, in Vermont the positioning of minimum terms in individual sentences is highly unpredictable, depending in large part on the discretion of the sentencing judge. If minimum terms are not set by formula, the APR program can be expected to have scattershot applications from prisoner to prisoner, and unpredictable overall effects on prison population size.

### *Time to reconsideration following denial of release*

For prisoners denied parole release, the parole board must "review the inmate's record" once a year (a file review). If the prisoner makes a written request, the board must also conduct an interview annually. The board must also conduct an interview if requested by the department of corrections.<sup>53</sup>

## **2. Life sentences in Vermont**

### **a. Adults**

Murder in the first degree carries a maximum life sentence with a minimum term of 35 years unless a jury finds that there were aggravating factors that would allow the court to set a longer minimum term up to and including life without parole (LWOP).<sup>54</sup> Similarly, murder in the second degree carries a maximum life sentence with a minimum term of 20 years unless a jury finds that there were aggravating factors that would allow the court to set a longer minimum term up to and including life without parole (LWOP).<sup>55</sup> In essence, Vermont erects a factfinding stage at sentencing before an LWOP sentence may be imposed that resembles the sentencing phase in states that retain capital punishment.

Sex offenders sentenced to life sentences are ineligible for parole consideration until they have successfully completed all treatment and programming unless the Department determines that

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Presumptive parole provides for the automatic parole of offenders at their minimum aggregate sentence if they meet specific criteria. The DOC can dispute an offender's release by presenting clear and convincing evidence to the Parole Board that the release is a detriment to public safety. The Parole Board can determine if hearings are needed for victim safety.

Vermont Department of Corrections, *Justice Reinvestment II (Act 148 of 2020) (Changes in law impacting offenders) Effective January 1, 2021* (2020), available at <https://doc.vermont.gov/sites/correct/files/Justice%20Reinvestment%20Overview%20and%20Impacts.9-20-20.pdf>.

<sup>53</sup> Vt. Stat. tit. 28, § 502(c)(1)-(3).

<sup>54</sup> Vt. Stat. tit. 13, § 2303(a)(1),(b).

<sup>55</sup> Vt. Stat. tit. 13, § 2303(b)(1),(c).

the prisoner poses a sufficiently low risk to reoffend or that a program can be implemented to provide adequate supervision and that addresses any risk they may pose to the community.<sup>56</sup>

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

Individuals under the age of eighteen at the time of their offense cannot be sentenced to LWOP in Vermont.<sup>57</sup>

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

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

The parole board may release to medical parole any prisoner diagnosed as terminally ill or with a debilitating medical condition that renders them physically unlikely to present a danger to society. Serious medical conditions resulting from noncompliance with a medical treatment plan are ineligible for medical parole. The department of corrections must promptly notify the parole board upon receipt of an inmate's diagnosis for consideration of medical parole as expeditiously as possible.<sup>58</sup>

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

The Governor may grant pardons and remit fines in all instances except in cases of treason, for which the Governor may only grant reprieves, or impeachment.<sup>59</sup> The Governor may also attach conditions to a pardon as they deem proper, and they serve as the sole and exclusive judge regarding whether the conditions of the pardon have been violated.<sup>60</sup> The parole board may act as an advisor upon the Governor's request.<sup>61</sup>

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

Vermont does not have a statutory mechanism for the emergency release of prisoners in circumstances of prison overcrowding.

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<sup>56</sup> Vt. Stat. tit. 13 § 3271(d).

<sup>57</sup> Vt. Stat. tit. 13, § 7045.

<sup>58</sup> Vt. Stat. tit. 28, § 502a(d).

<sup>59</sup> Vt. Const. CH II, § 20.

<sup>60</sup> Vt. Stat. tit. 28, § 810(a).

<sup>61</sup> Vermont Parole Board, *The Vermont Parole Board Manual* (Mar. 1, 2021), at 11.

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

For reasons explained below, we rank Vermont's prison-sentencing system as one that operates with a *high degree of indeterminacy* overall (see pp. iii-iv).

In making a global assessment of the degrees of indeterminacy found in a state's prison-sentencing system, we normally focus on the general rules of prison release for the one, two, or three major classes of prison sentences in a particular state. We use *prison-release timeline diagrams* as a visual aid in modeling the rules for different sentence classes. That is hard to do in Vermont. There are so many allowable sentence configurations under Vermont law—for different classes of ordinary sentences—that we cannot capture them all in a reasonable number of diagrams. Instead, the timeline diagrams below are illustrations of the range of possibilities, influenced by available information on actual sentencing patterns in Vermont.

We have found no published data on judicial sentencing patterns that would allow us to draw firm conclusions about the degrees of indeterminacy judges are currently building into their prison sentences.<sup>62</sup> However, in 2019, the Council on State Governments (CSG) presented an analysis of disposition data obtained from the Vermont Judiciary.<sup>63</sup> Figures 3, 4, and 5 below are inspired by the CSG's report that, over a five-year period in the late 2010s, the median length of judicial minimum sentences for "person" and "property crimes" in Vermont was 20 percent of the median length of judicial maximum sentences for the same offense categories.

Vermont Figure 3 illustrates a sentence with a judicial minimum term that expires at the 20-percent mark of the judicial maximum term. The figure assumes that no good-time or earned-time credits have been earned.

Vermont Figure 4 depicts the same sentence while adding the effects of ordinary good-time credits of seven days per month. We would expect most prisoners to earn credits at this level. If this earning rate were sustained for a full prison term, the lengths of both the judicial minimum and maximum terms would be reduced by 19 percent.

Vermont Figure 5 then illustrates the effects of credit earnings at the much higher earning rate of one day per day available under the earned-time allowances for prisoners in work camps (for performance above expectations) or those enrolled in inpatient drug treatment programs. We believe it would be unusual if not impossible for someone to earn credits at this higher rate for the entirety of a prison term. Therefore, Figure 5 is not representative of what most prisoners

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<sup>62</sup> The scope of the current project does not allow us to pursue data requests from individual states.

<sup>63</sup> Jacqueline Salvi, Cassondra Warney, Ed Weckerly, & Ellen Whelan-Wuest, *Vermont Justice Reinvestment II Working Group Meeting, November 15, 2019* (Justice Center, Council of State Governments, 2019), at 39-40, <https://csgjusticecenter.org/wp-content/uploads/2020/10/JR-in-Vermont-third-presentation.pdf>. Greater detail from the CSG presentation is reproduced in the Appendix at the end of this report.

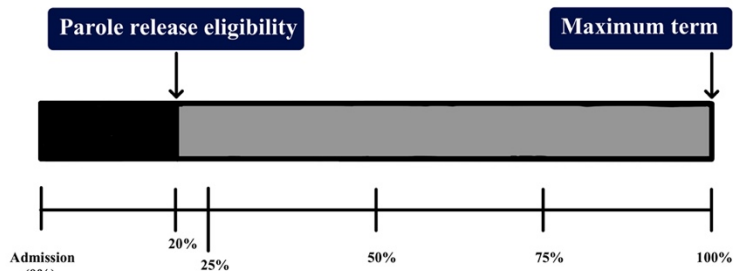
could expect. Nonetheless, it indicates that—at least in theory—credit-based reductions greater than those shown in Figure 4 are available to some prisoners.

We treat Figure 4 as the operative model for the narrow class of sentences with parole release eligibility at the 20-percent mark of the judicial maximum term. With ordinary good-time credit reductions, such sentences would be 16 percent determinate and 84 percent indeterminate. In this project’s ranking system, they would carry an *extremely high degree of indeterminacy*. Their population-multiplier potential (PMP) (see p. v) would be 6.3:1.

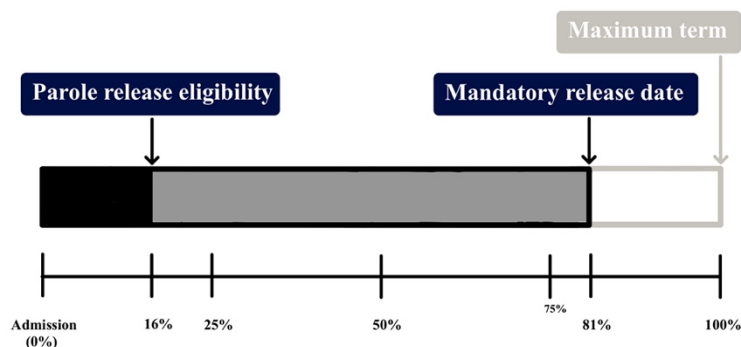
Figures 3 to 5 present a scenario in which the sentencing court has pronounced a relatively short minimum term in relation to the judicial maximum sentence. But sentencing courts are free to select much smaller minimum-maximum ratios.



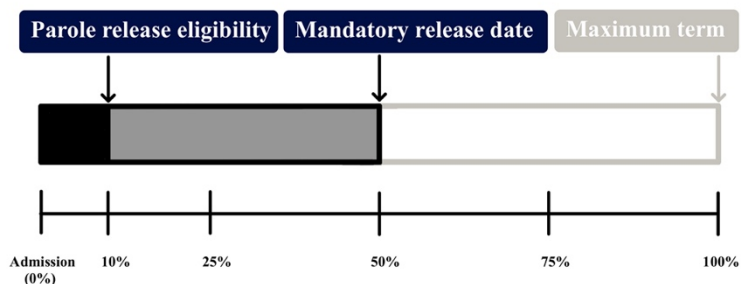
**Vermont Figure 3. Prison-Release Timeline for General-Rules Sentence When Judge Sets Minimum Term at 20 Percent of Maximum Term and with no Credits**



**Vermont Figure 4. Prison-Release Timeline for General-Rules Sentence When Judge Sets Minimum Term at 20 Percent of Maximum Term and with Full Good Time Credits**



**Vermont Figure 5. Prison-Release Timeline for General-Rules Sentence When Judge Sets Minimum Term at 20 Percent of Maximum Term and with Most Possible Credits for Residential Drug Treatment or Good Work Performance at Work Camp**



Vermont Figures 6, 7, and 8 analyze one scenario in which the sentencing court has elected to impose a relatively long minimum term—one that expires at the 75-percent mark of the judicial maximum sentence. Figure 6 shows the timing of parole release eligibility under such a sentence if the prisoner has earned no good-time or earned-time credits.

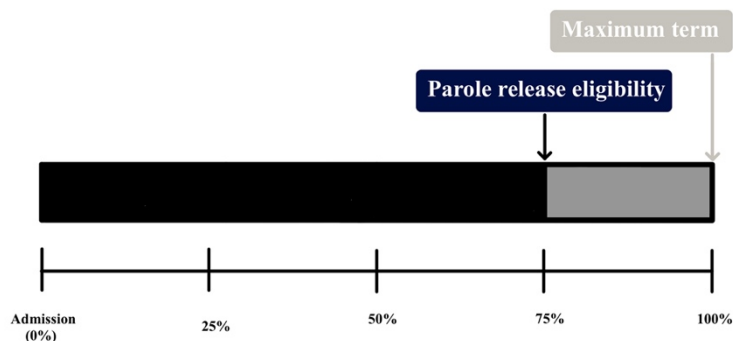
Figure 7 depicts the same sentence while adding the effects of ordinary good-time credits of seven days per month. We would expect most prisoners to earn credits at this level. If this earning rate were sustained for a full prison term, the lengths of both the judicial minimum and maximum terms would be reduced by 19 percent.

Figure 8 shows the greater credit-based deductions that are available in theory to prisoners in work camps or enrolled in drug treatment programs. While the figure illustrates a theoretically possible result, we do not believe it is realistically achievable by most prisoners. Nonetheless, under law, some prisoners may earn sentence reductions greater than those shown in Figure 7.

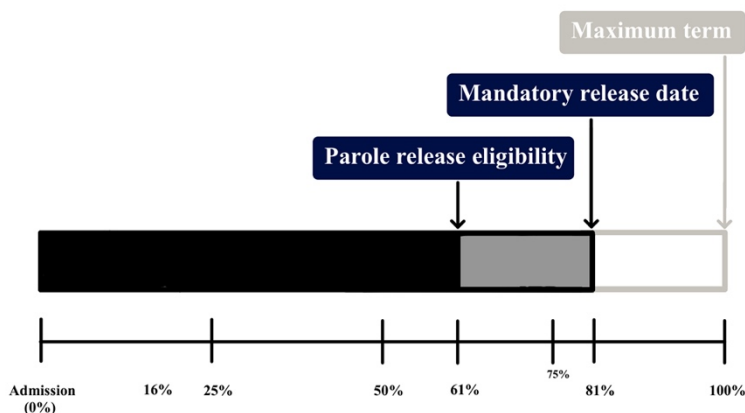
We treat Figure 7 as the operative model for the narrow class of sentences with parole release eligibility at the 75-percent mark of the judicial maximum term. With ordinary good-time credit reductions, such sentences would be 75 percent determinate and 25 percent indeterminate. In this project's ranking system, they would carry a *low degree of indeterminacy*. Their PMP would be 1.33:1.

It is important to note that, even when judges set a minimum term at 100 percent of the length of the maximum term, there is still indeterminacy in the sentence by virtue of good-time credits. Full good-time reductions produce MRDs at the 81-percent of maximum terms no matter where the minimum has been set. (Compare Vermont Figures 4 and 7.) Such sentences would have an *extremely low degree of indeterminacy*. Their PMP would be 1.23:1.

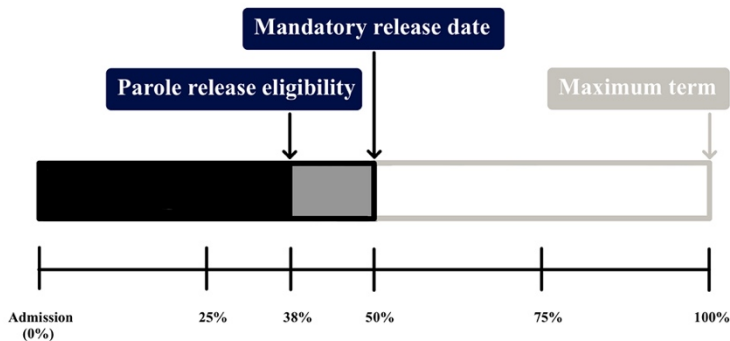
**Vermont Figure 6. Prison-Release Timeline for General-Rules Sentence When Judge Sets Minimum Term at 75 Percent of Maximum Term and with no Credits**



**Vermont Figure 7. Prison-Release Timeline for General-Rules Sentence When Judge Sets Minimum Term at 75 Percent of Maximum Term and with Full Good Time Credits**

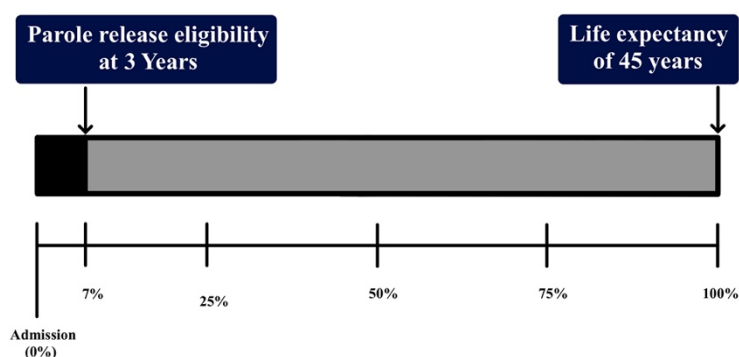


**Vermont Figure 8. Prison-Release Timeline for General-Rules Sentence When Judge Sets Minimum Term at 75 Percent of Maximum Term and with Most Possible Credits for Residential Drug Treatment or Good Work Performance at Work Camp**



Finally, Vermont Figure 9 draws on the special rules for sexual assault sentences. Such sentences must carry judicial maximum terms of life. That is, the sexual assault statute requires a fixed maximum term, with no judicial discretion to impose a shorter maximum. (This might be called a “mandatory maximum” term.) Within the mandatory maximum, sentencing courts are free to choose any minimum term of three or more years. Vermont Figure 9 models such a sentence with a three-year minimum, using a life expectancy of 45 years as a proxy for the life maximum term.

**Vermont Figure 9. Prison-Release Timeline for Life Sentence  
for Sexual Assault When Judge Sets  
Minimum Term at 3 Years**



Vermont Figure 9 represents an extreme case, on one end of a long continuum. For a conviction of the same offense, a judge could just as easily impose minimum terms of 10, 20, 30, or 40 years. Sexual assault is no more than an especially vivid example of the extreme gatekeeping power over degrees of indeterminacy that is delegated to sentencing courts in Vermont.

### *Our assessment of the system as a whole*

Based on the above illustrations, we are reasonably sure that Vermont’s prison-sentencing system is currently operating with a *high degree of indeterminacy* overall (see pp. iii-iv). Both the law and the data support the inference that meaningful numbers of judicial sentences enter the back end of the system with an extremely high degree of indeterminacy (that is, with minimum terms shorter than the 20-percent mark of the maximum). However, court statistics also indicate that many judicial sentences include minimum terms longer than that, including minimums of 33 percent and more. (See Appendix to this report.) Admittedly, these data are suggestive and not definitive. Based on the information at our disposal, however, we think most sentences would fall into our category of “high determinacy.”<sup>64</sup>

<sup>64</sup> Given the enormous discretion given to sentencing courts to decide the minimum-maximum ratio in their individual sentences, we would also expect nontrivial numbers of sentences that would qualify as having moderate, low, and extremely low degrees of indeterminacy.

The overall operation of the Vermont prison-sentencing system could change appreciably without any formal amendments to its legal structure. As judges drift toward new aggregate sentencing patterns, the overall degree of indeterminacy in the system would change accordingly.

The effective power of back-end sentencing authorities to affect time served in individual cases and prison population size is a function of the mix of judicial sentences that come through. When judicial minimum terms are short in length compared to judicial maximum terms, the parole-release process gains in importance. Under Vermont's new system effective in 2021, parole release is divided into two tracks: traditional discretionary parole and administrative parole release (APR). On the traditional track, the parole board is the most powerful decisionmaker. In APR cases, the department of corrections holds greatest power. The department must decide whether to certify APR-eligible prisoners as in compliance with their case plans. The department is also in charge of a risk-screening process that can derail prisoners from the APR track to the traditional track. In contrast, for APR-eligible prisoners, the parole board has no unilateral power over release and release denial decisions.

When judicial minimum sentences are extremely long in relation to maximum terms, good-time credits become a more important feature of time-served determination. Such credits are available at modest levels, however. For most prisoners, the highest earning rate yields only 19-percent deductions, to establish mandatory release dates (MRDs) at the 81-percent mark of their judicial maximum sentences. For small and fortunate categories of prisoners, higher earning rates are possible through earned-time credits—up to 50-percent reductions. We are skeptical that meaningful numbers of prisoners are able to claim these full benefits.

## Appendix.

### *Judicial sentencing patterns in setting minimum and maximum terms*

In 2019, the Council of State Governments (CSG) presented an analysis of disposition data obtained from the Vermont Judiciary, which included information about the lengths of judicial minimum and maximum terms actually imposed in the state.<sup>65</sup> Table 1 below reproduces relevant bar charts from the CSG presentation. The chart on the left reports information concerning median minimum and maximum sentences for about 3,500 cases sentenced “over the last 5 years” (presumably 2014 to 2018). Overall, the median minimum term was 12 months and the median maximum term was 36 months.<sup>66</sup>

The chart includes similar information broken down by offense type. For people sentenced to prison for “person” and “property” felonies, the median minimum term was 12 months and the median maximum term was 60 months.<sup>67</sup> This suggests a common MIN-MAX ratio of 1:5, or a tendency of parole release eligibility to occur at about the 20-percent mark of judicial maximum terms (with an unknown distribution of minimum-maximum ratios above and below the median values).

For drug felonies, motor vehicle theft, and “other” offenses, the CSG found that median minimum sentences were at the one-third mark of median maximum sentences or later.<sup>68</sup> This suggests a tendency of parole release eligibility to occur at around the 33-percent mark of the total sentence.

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<sup>65</sup> Jacqueline Salvi, Cassandra Warney, Ed Weckerly, & Ellen Whelan-Wuest, *Vermont Justice Reinvestment II Working Group Meeting, November 15, 2019* (Justice Center, Council of State Governments, 2019), at 39-40, <https://csgjusticecenter.org/wp-content/uploads/2020/10/JR-in-Vermont-third-presentation.pdf>.

<sup>66</sup> *Id.*, at 39. CSG also reported that the mean minimum term was 16 months and the mean maximum term was about 54 months. *Id.*

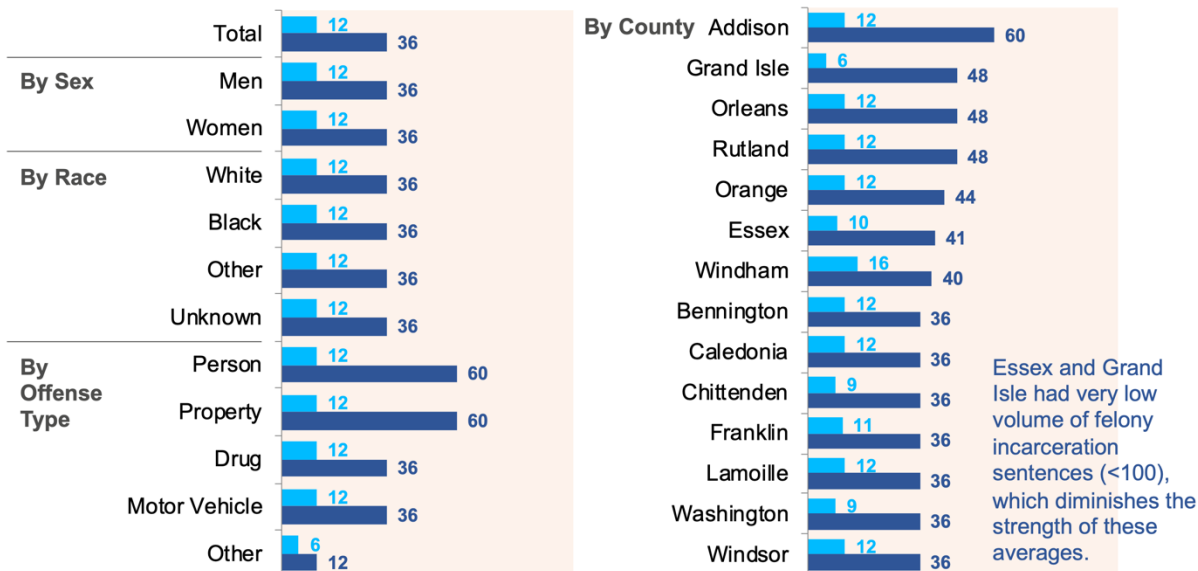
<sup>67</sup> *Id.*, at 40.

<sup>68</sup> *Id.*

**Table 1. Data Presented by Council on State Governments on Minimum-Maximum Term Ratios in Vermont in the Late 2010s**

Median **minimum** and **maximum** sentence lengths (in days) among ~3,500 felony cases with an incarceration sentence over the last 5 years:

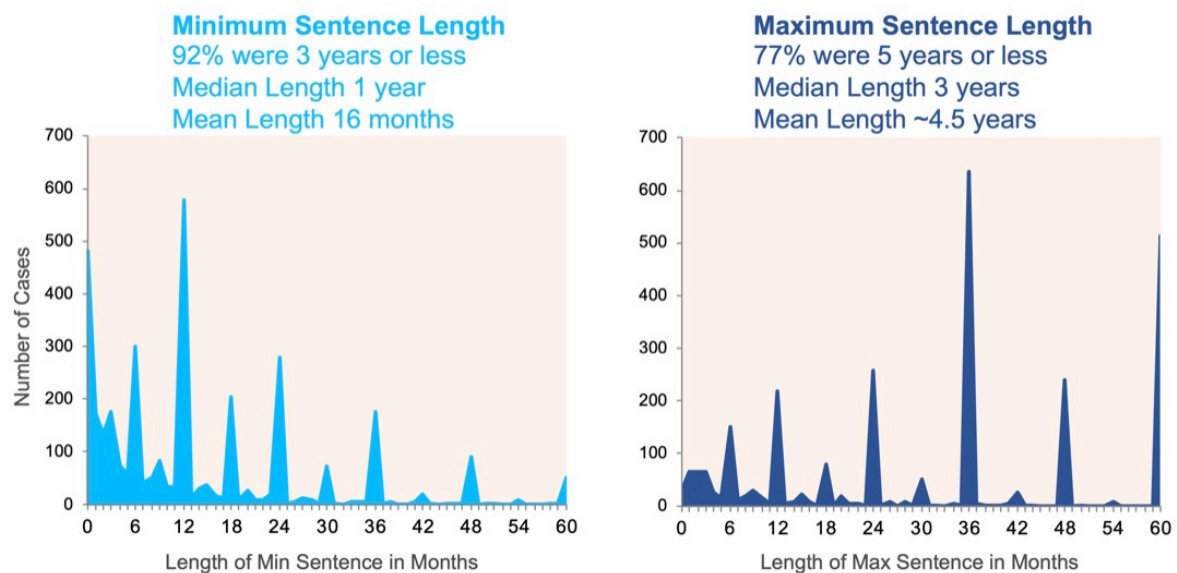
Note that this analysis does not control for factors that might explain the sentencing pattern, such as the severity of the crimes or the criminal history of the people being sentenced.



Sources: The Council of State Governments Justice Center analysis of disposition data from the Vermont Judiciary.

**Table 2. Data Presented by Council on State Governments on Numbers and Lengths of Minimum and Maximum Terms in Vermont in the Late 2010s**

Among ~3,500 felony cases with an incarceration sentence over the last 5 years:



Sources: The Council of State Governments Justice Center analysis of disposition data from the Vermont Judiciary.