
Article

Prison-Release Reform and American Decarceration

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INTRODUCTION

This Article zeroes in on one significant engine of American prison growth that is also a promising instrument of decarceration reform: the wildly dissimilar mechanisms that exist across the states to determine when people sentenced to prison will be released.¹

The subject of “prison-release reform” addresses all official decision points occurring after the pronouncement of a judicial prison sentence that have bearing on the amount of time a particular defendant will actually serve (time served). To flesh out this inquiry for each jurisdiction, we need to ask what degree of power over time served is vested in “back-end” officials like parole boards (as opposed to the length-defining force of the judicial sentence) and the ways in which those officials have actually made use of their powers in individual cases and aggregates of cases. For a complete policy analysis, we must also ask how back-end releasing practices have changed over time and—most importantly of all—what fluctuations in those practices, for good or ill, are foreseeable in the future.

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1. For a broader slate of recommendations that address mass incarceration as well as “mass punishments” of other forms, see MODEL PENAL CODE: SENTENCING (AM. LAW INST., Forthcoming 2020) [hereinafter MPC]; Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing—Workable Limits on Mass Punishment*, 48 CRIME & JUST. 255 (2019). The MPC recommends that all states eliminate the discretionary-release powers of their parole boards. See MPC, *supra*, § 6.11(9)–(10) & cmt. a, app. B (explaining the preference for determinate sentencing systems). This Article is addressed primarily to the two-thirds of states that have not taken this step and are unlikely to do so in the near future.

This constellation of questions has received little attention in contemporary analyses of mass incarceration.² It is time to correct that error.

The main protagonist of this Article's narrative is the American parole board, although there are important supporting actors in some jurisdictions, including corrections officials who administer good-time or similar credits.³ In most places, paroling authorities are the power players. Two-thirds of all states operate with "indeterminate" prison-release systems in which parole boards hold the lion's share of legal authority over the ultimate durations of most prison sentences.⁴ Their use of that power

2. In the 1980s and 1990s, Kay Knapp and others argued that state efforts to control prison populations and avoid correctional overcrowding were unlikely to succeed alongside the arcane and unpredictable prison-release practices of parole boards and corrections officials. This belief influenced comprehensive sentencing reforms in Minnesota, Washington, Oregon, North Carolina, and Kansas, all of which included the abolition of discretionary parole release in order to achieve greater predictability in the use of prison resources. *See* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 32–33 (3d ed. 1994); Andrew von Hirsch, *The Enabling Legislation*, in *THE SENTENCING COMMISSION AND ITS GUIDELINES* 62, 75 (Andrew von Hirsch et al. eds., 1987); Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 681–84 (1993); Kay A. Knapp, *Back to Basics: Fundamental Issues in Sentence Reform Revisited*, 11 FED. SENT'G REP. 86, 86–87 (1998). In the intervening years, however, this mind-set has largely disappeared from the debate of incarceration reform.

3. Depending on the state, officials with prison-release discretion may include a variety of decision makers within departments of corrections (e.g., prison intake officers, those who administer good-time and earned-time credits, disciplinary officers and supervisors, hearing officers, and wardens), judges with paroling or other prison-release authority over some cases, boards of pardons, governors, and even (but rarely) sentencing commissions. *See, e.g.*, CAL. CONST. art. V, § 8 (granting the governor clemency authority); 61 PA. CONS. STAT. §§ 4502–4507 (2019) (describing Pennsylvania's recidivism risk reduction incentive, which allows a sentencing judge to impose both a minimum and maximum sentence and requires no further review by the parole board once the incarcerated person has met the program requirements and served the minimum sentence).

4. These include Colorado, Connecticut, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Mississippi (for nonviolent offenders), Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wyoming. *See* AM. LAW INST., MODEL PENAL CODE: SENTENCING, REPORT 18–27 (2003) (describing the indeterminate sentencing system proposed in the original Model Penal Code, approved in 1962); JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRIS-*

across many cases is a leading determinant of prison population size.⁵ Strikingly, paroling authority is tightly concentrated. In most states, parole boards are made up of fewer than a dozen people.⁶ Nationwide, prison policymaking through parole release is administered by a total of roughly 350 individuals.⁷

Time served is also governed to some extent by prison officials. Most states, including “determinate” (non-paroling) states, allow for good-time, earned-time, or other discounts against minimum terms, maximum terms, or both. These are awarded by corrections officials based on prisoners’ good conduct, program participation, work done in prison, meritorious acts, and so on. The classification and application of such credits varies markedly across states.⁸ For brevity, I will refer to them generically as “good-time” credits unless otherwise noted.

ONER REENTRY 66–67 tbl.3.1 (2003); Kevin R. Reitz, *The Traditional “Indeterminate” Sentencing System*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 270, 274–75 (Joan Petersilia & Kevin R. Reitz eds., 2012).

5. See Kevin R. Reitz & Edward E. Rhine, *Parole Release and Supervision: Critical Drivers of American Prison Policy*, 3 *ANN. REV. CRIMINOLOGY* 281, 283 (2020) (estimating that in 2016, two-thirds of prison terms were impacted by parole board decisions and policies).

6. See Mario A. Paparozzi & Joel M. Caplan, *A Profile of Paroling Authorities in America: The Strange Bedfellows of Politics and Professionalism*, 89 *PRISON J.* 401, 412–14 tbl.1 (2009) (identifying forty-three states with parole boards of fewer than twelve members).

7. See EBONY L. RUHLAND ET AL., *ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY* 10 (2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/final_national_parole_survey_2017.pdf [<https://perma.cc/AKG9-RF7P>] (reporting a 2013 count of 340 parole board members across forty-six states); Paparozzi & Caplan, *supra* note 6 (reporting a 2000–01 total of 347 individuals serving as full- or part-time members of state parole boards).

8. In many paroling states, good-time credits foreshorten the maximum term a prisoner must serve (sometimes called the “mandatory release date”) but do not advance the date of first parole-release eligibility. See IOWA CODE § 903A.2(1)(a) (2019); KY. REV. STAT. ANN. § 197.045 (West 2019); LA. STAT. ANN. § 15:571.3(A)(1) (2019); MISS. CODE ANN. § 47-5-138.1(1) (2019); NEB. REV. STAT. § 83-1,108(1) (2019); N.H. REV. STAT. ANN. § 651-A:22(III) (2019) (stating credits for good conduct only affect mandatory release date; different rule applies to “earned time credits”); N.Y. CORRECT. LAW § 803 (McKinney 2019) (stating credits for good behavior are counted only against maximum term; different rule applies to “merit time allowances”); OKLA. STAT. tit. 57, § 138(A) (2019). In several indeterminate states, good-time credits accelerate parole-release eligibility but have no effect on the maximum possible prison stay. See COLO. REV. STAT. §§ 17-22.5-301, -403, -405 (2019); N.Y. CORRECT. LAW § 803 (crediting “merit time allowances” against minimum term; different rule applies to

If the good-time credits on offer in a determinate state are sufficiently generous, it can become difficult to distinguish that state from its sister indeterminate states. For example, the “determinate” state of Washington⁹ allows for “earned-release-time” credits that may subtract as much as 50% from the maximum prison stays of many nonviolent offenders.¹⁰ In Washington, the

credits for good behavior); 61 PA. CONS. STAT. § 4505(c)(2) (2019); TEX. GOV'T CODE ANN. § 498.003(a) (West 2019). In still other indeterminate systems, good-time credits do both of these things; that is, they simultaneously advance the date of first parole-release eligibility *and* reduce prisoners' maximum terms. *See* CONN. GEN. STAT. § 18-7a(a) (2019); MASS. GEN. LAWS ch. 127, § 129D(b), (d) (2019); NEV. REV. STAT. § 209.4465(7) (2019); N.H. REV. STAT. ANN. § 651-A:22(IV) (2019) (allowing earned time credits to be subtracted from both minimum and maximum terms; different rule applies to “credits for good conduct”); VT. STAT. ANN. tit. 28, § 811 (2019). Finally, some indeterminate states do not provide for good-time credits that subtract in any mathematical fashion from prisoners' minimum or maximum terms. In indeterminate states that eschew formal good-time deductions, however, one would expect prisoners' institutional behavior to be taken into account by parole boards when making discretionary release decisions. *See* ALEXIS LEE WATTS ET AL., ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, PROFILES IN PAROLE RELEASE AND REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN THE UNITED STATES: GEORGIA 8 (2016) [hereinafter GEORGIA PAROLE PROFILE], https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/603837_georgia_parole_profile3.pdf [https://perma.cc/VVZ4-9T3W]; ALEXIS LEE WATTS ET AL., ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, PROFILES IN PAROLE RELEASE AND REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN THE UNITED STATES: MICHIGAN 4 (2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/700688_new_michigan_parole_profile3.pdf [https://perma.cc/8JWU-Z9A5]; ALEXIS LEE WATTS ET AL., ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, PROFILES IN PAROLE RELEASE AND REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN THE UNITED STATES: MONTANA 4 (2019), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/montana_parole_profile.pdf [https://perma.cc/6NFL-AXVL]; ALEXIS LEE WATTS ET AL., ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, PROFILES IN PAROLE RELEASE AND REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN THE UNITED STATES: UTAH 5 (2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/701159_new_utah_parole_profile2_.pdf [https://perma.cc/5629-CK4L].

9. Washington abolished discretionary parole release for all cases in conjunction with the creation of felony sentencing guidelines, which became effective in 1984. *See* RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 124–25 tbl.3.1 (2013); David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 73–85 (2001).

10. This formula was introduced in 2003, increasing peak earned-timed allowances that were formerly capped at 33%, thus amounting to a 50% increase in the credits potentially available to eligible prisoners. ELIZABETH DRAKE ET AL., WASH. STATE INST. FOR PUB. POLICY, INCREASED EARNED RELEASE FROM PRISON: IMPACTS OF A 2003 LAW ON RECIDIVISM AND CRIME COSTS, REVISED 1

decisions of prison officials to bestow, withhold, or forfeit earned-release credits (suppose, for example, all were withheld) contribute heavily to the state's prison rate.

The American run-up to mass incarceration was achieved through uninterrupted growth in nationwide incarceration rates from 1972 through year-end 2007 (the "Great Prison Buildup").¹¹ This Article hypothesizes that prison-release discretion was one of its driving forces: During the thirty-five year buildup period, in some years more than others, parole boards across the country became increasingly hesitant to release prisoners. They became progressively more risk-averse in their decision-making and ever more fearful of external scrutiny and condemnation. Instead of using their release discretion as often as they had done in the earlier twentieth century, parole boards transformed themselves into agencies of "release-denial discretion."

(2009), https://www.wsipp.wa.gov/ReportFile/1039/Wsipp_Increased-Earned-Release-From-Prison-Impacts-of-a-2003-Law-on-Recidivism-and-Crime-Costs-Revised_Full-Report.pdf [<https://perma.cc/G3N5-ZHY2>]. This was done in a deliberate attempt to reduce the state's prison population and was later declared a success on cost-benefit grounds by the Washington State Institute of Public Policy. *See id.* at 4, 8 (estimating that, during 2003 and 2004, 23% of all prison releases in Washington were eligible to receive the heightened amount of earned-release credits and, within this group, average time served was sixty-three days shorter than that for a comparison group assembled from the pre-reform period). Indeed, Washington's earned-time reform falls within the general family tree of prison-release reforms envisioned by this Article. Yet the Washington experiment also serves to illustrate the importance of tracking actual release practices pre- and post-reform. For meaningful evaluation of the success of Washington's program, I would want to know how many prisoners have actually received the newly-available credits and in what quantities—data that was unavailable to the WSIPP researchers. *See id.* at 4 n.12. For example, if few prisoners post-reform were awarded any portion of the newly-available credits, and awards within the preexisting 33% ceiling remained essentially the same as before, then the formal availability of the 50% discount under the new regime would have had little measurable importance as of the date of evaluation. Under these circumstances, the reform could be described as the creation of a reservoir of *unused* prison-release discretion that might still (who knows?) be used with greater frequency in the future.

11. The nationwide state imprisonment rate in 1972 was 84 per 100,000, rising more than fivefold to 447 per 100,000 in 2007. *See* PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ-111098, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86, at 11 tbl.1 (1988), <https://www.bjs.gov/content/pub/pdf/hspsfy25-86.pdf> [<https://perma.cc/D7ES-6CX8>]; HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 224280, PRISONERS IN 2007, at 18 app. tbl.6 (2008), <https://www.bjs.gov/content/pub/pdf/p07.pdf> [<https://perma.cc/6DXZ-KZVU>].

This narrative runs contrary to the conventional wisdom of mass incarceration's causes. In the United States, there is a romanticized view of parole boards. They are reflexively classified as agents of lenity by many academics and criminal-justice professionals.¹² Parole boards are said to offer "early release," which is seen as an act of grace.¹³ Some (but not all) historians of parole claim that release discretion in past eras operated as a safety valve to prevent prison overcrowding.¹⁴ If this were reliably the case, then getting rid of parole-release discretion would be bad for prison-population control. On this reasoning, the determinate sentencing reforms in one-third of the states during the late twentieth century—abolishing parole-release discretion for most cases—are often cited among the top contributors to the Great Prison Buildup.¹⁵

12. See, e.g., Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1750, 1752 (2012) (describing parole as a holistic appraisal of a person for the purpose of accomplishing a retributive ideal, not merely focusing on past behavior to render punishment).

13. Indeed, the law in most states is that parole release is an act of grace—accordingly, there is no "right" to be released. See Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213, 243–44 (2017).

14. This is not an airtight historical claim. For a sampling of views that the indeterminate prison-release systems of the early- and mid-twentieth century were fueling prison population growth, see generally FRANCIS A. ALLEN, *Legal Values and the Rehabilitative Ideal*, in *THE BORDERLAND OF CRIMINAL JUSTICE* 25, 34–35 (1964); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 48 (1974); SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 120 (1998) ("The tendency of the indeterminate sentence to lengthen prison terms became one of the major criticisms of the practice voiced by liberals in the 1960s."); John C. Coffee, Jr., *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. 1361, 1364–65 n.8 (1975) (stating that the first modern indeterminate system, created in 1889 in Illinois, caused prisoners to serve longer sentences than those serving fixed sentences); Sheldon L. Messinger & Philip E. Johnson, *California's Determinate Sentencing Statute: History and Issues* (1977), reprinted in *THE CRIMINAL JUSTICE SYSTEM* 950, 954 (Franklin E. Zimring & Richard S. Frase eds., 1980); Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 L. & CONTEMP. PROBS. 528, 531–32, 535 (1958) (citing a study that found time served was 20% longer in indeterminate jurisdictions than in systems of "definite" sentences).

15. For assertions that determinate sentencing reform was responsible for a substantial share of American prison growth during the buildup period, see generally TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 51–53 (2007); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 60–61 (2001); MARC MAUER, *RACE TO INCARCERATE* 49, 56–58 (1999); EDWARD E. RHINE ET AL., *PAROLING AUTHORITIES: RECENT HISTORY*

As often happens, the conventional wisdom gets it wrong. On average, states that maintained discretionary prison-release schemes over the prison buildup years experienced greater amounts of prison growth than states that abolished discretionary parole release.¹⁶ Today, nine of the ten states with the highest standing prison rates are those that used indeterminate prison-release systems through the entire buildup period, and the tenth had been indeterminate for most of that time.¹⁷

Prison populations in determinate states also grew during the buildup years from 1972 to 2007, but less than in indeterminate states.¹⁸ Over the course of the buildup decades, sixteen states abolished parole-release discretion.¹⁹ After doing so, only three of these saw greater prison growth through 2007 than the average indeterminate state.²⁰ This bulk history lacks detail, but certain facts are reasonably clear. In the specific context of the Great Prison Buildup, indeterminate prison-release systems

AND CURRENT PRACTICE 26–29 (1991); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 56–57 (2003); FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 169–71 (1991); Douglas A. Berman, *Exploring the Theory, Policy, and Practice of Fixing Broken Sentencing Guidelines*, 21 *FED. SENT'G REP.* 182, 183–84 (2009); Alfred Blumstein, *Prison Populations: A System Out of Control?*, 10 *CRIME & JUST.* 231, 241 (1988); A. Keith Bottomley, *Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s*, 12 *CRIME & JUST.* 319, 342 (1990); David J. Rothman, *More of the Same: American Criminal Justice Policies in the 1990s*, in *PUNISHMENT AND SOCIAL CONTROL: ESSAYS IN HONOR OF SHELDON L. MESSINGER* 29, 34 (Thomas G. Blomberg & Stanley Cohen eds., 1995); David F. Weisman & Christopher Weiss, *The Origins of Mass Incarceration in New York State: The Rockefeller Drug Laws and the Local War on Drugs*, in *DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM* 73, 76–77 (Steven Raphael & Michael A. Stoll eds., 2009).

16. See *infra* Figure 8.

17. JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 252156, *PRISONERS IN 2017*, at 11 tbl.6 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/PE6A-ZLME>]. The nine states were Louisiana, Oklahoma, Mississippi, Arkansas, Texas, Missouri, Kentucky, Georgia, and Alabama. The tenth state, Arizona, had an indeterminate prison-release system for twenty-two years of the thirty-five-year buildup. These two-plus decades were responsible for Arizona's extraordinarily high prison rate. After switching to a determinate system in 1994 and for the rest of the buildup years through 2007, Arizona experienced less prison growth than the average state still using an indeterminate system. See *infra* Figure 9.

18. See *infra* Part IV.

19. See *infra* Figure 9.

20. See *infra* Figure 9.

were not associated with low incarceration growth compared with other types of sentencing systems. On the contrary, the historical record of discretionary parole-release systems from 1972 to 2007 suggests that they had a pronounced vulnerability to the forces that drove prison expansion across the country.²¹

It may seem counterintuitive that parole boards' power to grant "early release" can work in the direction of severity, but this is a cognitive illusion.²² To clear our perceptions, we must recognize that parole boards' law-given authority to reduce prison-sentence lengths always entails a corresponding power *to increase prison stays*. For example, if a parole board has authority to release a prisoner who has served 25% of the judicial maximum sentence, the board's use of its discretion has the potential to shave 75% off the maximum term, yes—but we could just as easily say that the board's discretion *not to release* could add as much as 300% to the minimum term (a quadrupling of the minimum). Such breadth of possibility in individual cases, when scaled up to many cases, is a major lever of aggregate prison policy. For example, if we consider all the prisoners in the state who are subject to this 75/300 degree of discretion, the board's use of its release-denial authority could swing the size of that portion of the state's prison population across a range of variation of 4:1.

Aside from the sheer magnitude of their power over prison policy, parole boards operate in a low-friction environment where great changes in sentencing outcomes can take hold without new legislation, sentencing guidelines, amendment to regulations, variations in prosecutorial practices, court decisions, or announced policy changes of any kind. Even record-keeping of parole-release decisions is wanting in most states, including routine data collection. The cumulative actions of parole boards can generate large swings in a state's prison population while hardly alerting anyone to the source of the change.

Although parole boards are powerful ministries of prison policy, they are also supremely vulnerable to certain kinds of external pressure. Their members enjoy low professional status, high job insecurity, and no insulation from media and political

21. For an empirical analysis of what those forces may have been, comparing data from all fifty states and many other countries, see Tapio Lappi-Seppälä, *American Exceptionalism in Comparative Perspective: Explaining Trends and Variation in the Use of Incarceration*, in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* 195 (Kevin R. Reitz ed., 2018).

22. For many examples of such cognitive misperceptions, see DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 7–8, 27–28, 209–11 (2011).

reprisals when a single releasee commits a horrible crime. No one pays attention to most of what parole boards do, so they are never given credit for parolees who do well or the reductions in crime that come along with the successful reintegration of hundreds or thousands of ex-prisoners. Instead, board members are held personally accountable only for a tiny number of worst-case scenarios in high-profile cases.²³ The consequences of a single release decision gone wrong are part of the lore of the field, even

23. See, e.g., Larry Fish, *Officer's '95 Killing Led to a Tougher Pa. Parole System*, PHILA. INQUIRER, June 6, 2005, at A1 (“Ten years ago, Robert ‘Mudman’ Simon won parole from Pennsylvania’s Graterford Prison, where he was serving time for second-degree murder, and moved to New Jersey. Within three months, he was arrested for shooting and killing a police officer. Since then, Pennsylvania has made its parole system tougher and, most would say, better by setting clear criteria for releasing convicts before their maximum sentences are served. But it also has helped increase Pennsylvania’s record prison population. Some say that it has made it harder for offenders to get out and stay out, and that Pennsylvania convicts can expect to serve some of the longest terms in the country. ‘Mudman Simon put a big chill on the operation of our entire prison system, most noticeably in the area of parole,’ said [the] executive director of the Pennsylvania Prison Society.”). On the effects of the changes in Pennsylvania’s parole system, see *Judge: Inmates Are Unfairly Being Denied Parole*, PA. L. WKLY., Oct. 26, 1998, at 1346 (citing statistics that 77% of prisoners eligible for parole release were given parole in the early 1990s before the Mudman case, but this had dropped to 44% of eligible prisoners by 1997). On changes in other states, see also Dave Altimari & Colin Poitras, *Parole an Issue After Cheshire Slayings*, HARTFORD COURANT, July 27, 2007, at A1 (“[Governor] Rell said she is forming a special panel to review not only how [the two killers] were paroled, but also to take a look at the entire process of who gets released from state prisons.”); John Dannenberg, *Systemic Changes Follow Murder of Colorado Prison Director*, PRISON LEGAL NEWS (July 10, 2014), <https://www.prisonlegalnews.org/news/2014/jul/10/systemic-changes-follow-murder-colorado-prison-director> [<https://perma.cc/6GJV-SURM>] (“State Parole Chief Tim Hand was placed on paid administrative leave following [Prison Director] Clements’ murder [by a prison releasee] and later fired. . . . [T]he state’s prison population has been rising due to fewer paroles being granted.”); Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, WASH. POST (July 11, 2015), https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8eaa61_story.html [<https://perma.cc/58FS-E8DJ>] (“A man the [Massachusetts parole] board had voted unanimously to release went on to commit another terrible crime. . . . [W]hen board members arrived at work days later, armed troopers escorted them to a conference room where they found . . . the governor’s chief of staff, distributing resignation letters”); Christine Stuart, *Gov. Rell Bans Parole for Crimes of Violence*, N.Y. TIMES (Sept. 23, 2007), <https://www.nytimes.com/2007/09/23/nyregion/23rell.html> [<https://perma.cc/GYN4-V3G2>] (anticipating Connecticut

in states that have not recently experienced a catastrophic case. In a 2015 national survey, most parole board chairs nominated political vulnerability and pressure toward the “minimization of all risk” as one of the most important problems confronting their field.²⁴

American parole boards are sitting ducks when things go disastrously wrong. They lack the cover of enforceable decision rules or the credibility of a genuine deliberative process. Institutionally they are under-resourced beyond reason.²⁵ They must make decisions in minutes rather than hours, any one of which could cost them their jobs.²⁶ The combination of great power (in one sense) and abject weakness (in another) is a formula for the mismanagement of prison policy.

When inquiring into the origins of mass incarceration, the active parole boards in two-thirds of the states should have a place of honor. Instead, they are too often seen as casualties of the surge toward prison population growth and not one of its makers. This is an error with forward-looking policy consequences. For example, how should we evaluate claims that state decarceration reforms should include a restoration of parole boards’ releasing authority where it has been limited or removed? For some, the answer is that a return to indeterminacy

governor’s changes in parole-release procedure, a House spokesperson promised “to make sure that the Corrections Department had the resources it needed to deal with what he described as a ‘dramatic increase in population over the next few months’”).

24. RUHLAND ET AL., *supra* note 7. During the buildup years, sixteen states and the federal government passed legislation abolishing parole-release discretion for the vast majority of prisoners. In order of abolition, these were Maine, California, Indiana, Illinois, New Mexico, Minnesota, Florida, Washington, Oregon, Delaware, Kansas, Arizona, North Carolina, Virginia, Ohio, and Wisconsin. The federal system discontinued discretionary parole release in 1984. *See* PETERSILIA, *supra* note 4. Whether one favors these “determinate sentencing reforms” or not, they contributed to a sense of wariness and embattlement within surviving parole boards. *Id.* at 65–75.

25. *See* MPCs, *supra* note 1, § 6.13 cmt. g.

26. *See id.* at app. B at 900 (citing studies that found parole boards had between three and twenty minutes to decide each case).

is a good idea.²⁷ For me, there should be a caveat: “Not without dramatic improvements on the paroling systems of the past.”²⁸

Because of their concentrated power, parole boards and other releasing agencies are promising sites for decarceration reform.²⁹ Parole boards in a number of states have already shifted toward greater generosity in their release decisions—sometimes under pressure from the political branches to reduce prison costs.³⁰ This may be a fruitful pathway to reduced prison rates, as long as the political winds are blowing in the direction of decarceration. We must cast our thoughts to the longer term, however, when current sensibilities of de-escalation may give way once again to a national wave of punitivism. This is not sure to happen, of course, but it would be naïve to put it outside the realm of reasonable foreseeability.³¹ If we fail to reassess the traditional American machinery of prison-release discretion now, many states will remain just as helpless in future decades to resist pressures toward runaway prison growth as they were in the 1980s and 1990s.

The overriding goal of this Article is to convince the reader that its subject matter is important. An awareness of the vicissitudes of prison-release discretion is essential to a basic understanding of mass incarceration and to the formulation of long-term decarceration strategies. The creation of such awareness is no small task, however. The Article deals with areas of inquiry that have been grossly neglected by researchers and practitioners. It may be fair to say that prison-release discretion is the only

27. See Douglas A. Berman, *The Enduring (and Again Timely) Wisdom of the Original MPC Sentencing Provisions*, 61 U. FLA. L. REV. 709, 724 (2009); Peggy Burke & Michael Tonry, *Successful Transition and Reentry for Safer Communities: A Call to Action for Parole*, CTR. FOR EFFECTIVE PUB. POL'Y (2006), <http://newcepp.reclaimhosting.com/wp-content/uploads/2015/12/Successful-Transition-and-reentry-for-safer-communities-a-call-to-action-for-parole.pdf> [<https://perma.cc/EQU5-XEH4>].

28. See Edward E. Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 293–95 (2017) (discussing such proposed changes as limiting the scope of the boards' discretion, establishing blanket parole eligibility when prisoners have served fifteen years, and a presumption of release at first eligibility).

29. See FRANKLIN E. ZIMRING, *THE INSIDIOUS MOMENTUM OF MASS INCARCERATION* (forthcoming 2020) (manuscript ch. 7 at 24–25).

30. See *infra* Part V.

31. See Kevin R. Reitz, *American Exceptionalism in Crime and Punishment: Broadly Defined*, in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT*, *supra* note 21, at 1, 29 (arguing that “pinning reformist optimism to a new ‘low plateau’ of American crime rates is not a wholly defensible way to plan for the future”).

important engine of mass incarceration that has gone largely *unseen*.

To this purpose, the remainder of the Article assembles evidence of the centrality of prison-release discretion in the past and future of American incarceration policy.

I. TIME SERVED AS A FACTOR IN AMERICAN PRISON GROWTH

Empirical analyses of American prison growth have focused on two causal mechanisms. A jurisdiction's prison population—and its prison rate—are a function of (1) the number of people admitted to its prison system, and (2) the amount of time they each serve once they get there.³² Research shows that increased admissions and longer terms of stay were both responsible for America's prison buildup in about equal measures through the 1980s.³³ During the 1990s—the decade of most rapid expansion—the National Research Council estimated that increases in time served were responsible for more than 60% of incarceration growth across the states.³⁴

Without further research, we cannot say whether prison-release discretion was the main source of lengthening prison terms during the buildup period. While prison-release discretion is an important determinant of time served, it is not the only factor. Waves of harsh legislation probably had large effects, too. For example, many offenses now carry no parole-release eligibility, even in states with indeterminate release structures for most inmates.³⁵ Life-without-parole sentences cannot be shortened by parole boards or credits for good behavior. Some prison sentences now reach parole eligibility only after long “minimum” periods such as forty or fifty years, essentially unheard of before the 1980s.³⁶ People serving extremely long sentences tend to accumulate in prison populations, so they contribute heavily to state

32. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 50–52 (Jeremy Travis et al. eds., 2014).

33. *Id.* at 53.

34. *Id.* at 54–55. The Council noted that, because of methodological limitations, its estimates “should be viewed as a lower bound on the increase in time served.” *Id.* at 53.

35. MARC MAUER & ASHLEY NELLIS, *THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES* 9–10 (2018).

36. *See id.*

prison rates. For developments like these, we cannot blame parole boards or other back-end decision makers.

As a driver of prison rates, prison-release discretion operates most powerfully in run-of-the-mill cases that are governed by a state's standard release formulas. These are the rules of the road for the majority of people who enter American prison systems. For the mass of offenders, judicial sentences usually establish minimum and maximum possible terms that draw fixed borders on the scope of downstream release discretion.³⁷ As discussed below, these broadly-spaced bookends are generally less determinative of actual time served than the discretionary decisions of parole boards and other prison-release authorities. For the mine run of prison sentences in indeterminate states, it is fair to say that parole boards have more to say about time served than sentencing judges.

The exact contribution of discretionary-release denials to state prison populations cannot be estimated without granular research that no one has yet performed. Napkin estimates can be drawn from the big-picture statistics we have in hand, but that is all. If the National Research Council is correct that increases in time served were a leading factor in the buildup to mass incarceration—responsible for 60% or more of the buildup in the 1990s—we can speculate how much of that 60% was the product of back-end decisions.³⁸ The results could be eye-catching. For example, even if only one-third of the growth in time served across the 1990s was attributable to shifting practices of prison-release authorities (fewer releases, more denials), then 20% of all prison growth during that critical decade was driven by officials invested with prison-release discretion. That is a big chunk of the mass incarceration problem.

Also, agencies with prison-release discretion often have a degree of control over the number of prison *admissions*. In most states, parole boards make decisions concerning revocations back to prison of parolees who have violated their terms of supervision. In recent years, parole revocations have added up to about 28% of all prison admissions nationwide.³⁹ During the

37. See Reitz, *supra* note 4, at 274.

38. See *supra* note 34 and accompanying text.

39. TIMOTHY A. HUGHES ET AL., U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 184735, TRENDS IN STATE PAROLE, 1990–2000, at 13 tbl.19 (2001), <https://www.bjs.gov/content/pub/pdf/tsp00.pdf> [<https://perma.cc/ZQ73-BFKU>].

prison boom years, that figure reached 35%.⁴⁰ For now, however, this aspect of parole board power can be set to one side. The focus of this Article is prison-*release* discretion, not *reincarceration* discretion.⁴¹ However, it is relevant to note that every person reincarcerated via revocation creates the need for a later release—or “re-release”—determination. In most states, re-release discretion reverts back to the jurisdiction of parole boards and other agencies with influence over first-release decisions.⁴² This introduces layers of complexity into the question of “how long” a given prison sentence really is. The full calculation of time served in an individual case must include the period between admission and first release, plus any additional incarcerations on subsequent revocations.

II. THE SCOPE OF PRISON-RELEASE DISCRETION

As a matter of formal legal authority, the amount of control over prison population size that is ceded to American parole boards is breathtaking. Because every state is different and parole release is nowhere a subject of great visibility, it requires some digging to appreciate the stakes involved. To illustrate, this section will describe the general rules of release discretion in Georgia, Iowa, and Colorado.⁴³

40. See BRONSON & CARSON, *supra* note 17, at 13 tbl.7; HUGHES ET AL., *supra* note 39.

41. Others have emphasized the great influence that parole officers and parole boards have over prison populations and their associated costs through their use of the revocation process. See MICHAEL JACOBSON, *DOWNIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* 132 (2005) (“Virtually no one in government can spend money like a parole officer [through decisions to trigger the revocations process]. . . . [T]he decisions of a single parole officer can mean that a given state has to spend over a million dollars per year on prisons.”); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015 (2013) (discussing both parole and probation supervision as feeders of incarceration populations through revocations).

42. See EDWARD E. RHINE ET AL., *ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, LEVERS OF CHANGE IN PAROLE RELEASE AND REVOCATION* 4, 6 (2019), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/parole_landscape_report.pdf [<https://perma.cc/6PDT-QBL4>].

43. The schematics presented in this section and the next address only the period between prison admission and first release. An attempt to create timeline diagrams that incorporate parole revocations, reincarcerations, and re-releases—all of which could occur multiple times in a single case—would require greater thought and creativity than I have so far been able to devote to the subject.

A. GEORGIA

In Georgia, the law for most cases grants parole boards authority to release after a prisoner has served 33% of the maximum judicial sentence.⁴⁴ This could be quantified as a 67/200 release-denial system (that is, the parole board has the power to release with 67% of the maximum still to be served or to delay release until time served is triple the minimum sentence (+200%)).⁴⁵ For cases within its jurisdiction and subject to these rules, the Georgia parole board's actions can vary the size of the prison population by as much as 3:1. For example, suppose that the statewide prison rate for those subject to the 67/200 prison-release rules would be 100 per 100,000 if every prisoner were released at first eligibility. If, at the other extreme, the board were to hold all 67/200 prisoners for their entire maximum terms, the state's prison rates for the same group of offenders would be 300 per 100,000.⁴⁶

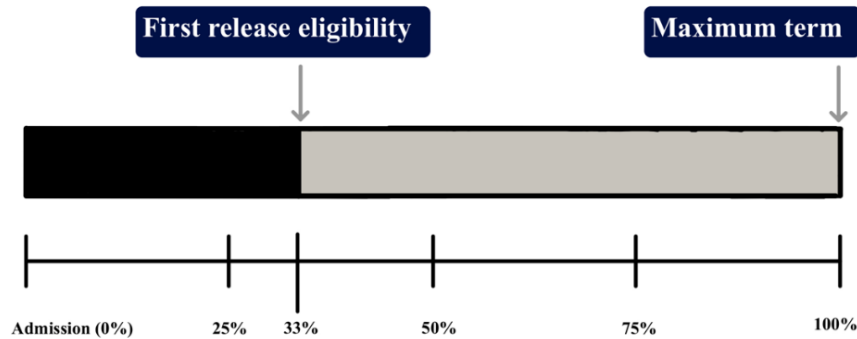
A diagram of the Georgia system is shown in Figure 1. The black portion of the timeline represents the percentage of the judicial maximum sentence that must be served—or the “minimum sentence,” while the gray stretch of the timeline shows the amount of potential time served that is subject to the parole board's discretion to release or deny release.

44. See GA. CODE ANN. § 42-9-45(b)(1)–(2) (2019); GEORGIA PAROLE PROFILE, *supra* note 8.

45. In Georgia, as opposed to many other states, the Department of Corrections has no authority to change the 67/200 formula in individual cases. Good-time awards are instead used to recommend that the parole board grant earlier releases within their discretionary window. See GA. CODE ANN. § 42-5-101(d); GA. COMP. R. & REGS. 125-3-7-.01(2) (2020); GEORGIA PAROLE PROFILE, *supra* note 8 (“Though [performance incentive] credits [awarded by the Department of Corrections] may hasten parole release, they do not reduce either the minimum parole eligibility date or the maximum length of a sentence.”).

46. Actual prison rates under the 67/200 system, or any other mathematical release formula, will depend on how many people have been sentenced to prison who are subject to those rules, the maximum terms those prisoners have received, and the population of the state. In the hypothetical case above, if we assume a state with a general population of 5,000,000 people, there must be 15,000 people in prison on any given day to produce a prison rate of 300 per 100,000 under the scenario above in which the parole board releases no one. In the same state, if the parole board released everyone at first eligibility, the prison population would be 5,000.

**Figure 1. Prison-Release Discretion
Diagram: Georgia**



In Georgia, as in most other indeterminate states, the parole board’s release-denial decisions are “discretionary” in an almost unencumbered sense of the term. Their rulings are not subject to enforceable rules, and the board’s decisions are effectively immune from appeal in most instances.⁴⁷ Thus, in Georgia, the board’s power within the 67/200 framework is, for practical purposes, unassailable.⁴⁸

Georgia prisoners cannot advance their release eligibility dates or shorten their maximum terms through the accumulation of good-time credits. In Georgia, the accrual of good-time

47. See Reitz, *supra* note 4, at 283–85 (surveying state laws).

48. Many states delegate greater prison-release discretion to back-end officials than Georgia. For example, in Arkansas, many prisoners who earn the maximum available good end time credits become eligible for release after serving one-sixth of the traditional maximum term. See ARK. CODE ANN. § 16-93-614(c)(3)(B) (2019). In such cases, the mathematical measurement of the parole board’s release-denial discretion is 83/500. In New Jersey, the parole handbook explains that, for ordinary prisoners who are serving a ten-year sentence, first release eligibility occurs after twenty-three months and five days. See N.J. STATE PAROLE BD., *THE PAROLE BOOK: A HANDBOOK ON PAROLE PROCEDURES FOR ADULT AND YOUNG ADULT INMATES* 35 (5th ed. 2012), <https://www.state.nj.us/parole/docs/AdultParoleHandbook.pdf> [<https://perma.cc/45A6-AZAU>]. This is roughly an 80/422 release-denial formula. Even these examples, however, fall short of the outer extremes of American prison-release indeterminacy. In several states, inmates are admitted to prison with no minimum terms. In theory—although probably not routinely in practice—they may be released by the parole board on the day of their arrival. See HAW. REV. STAT. § 706-669(1) (2019); IOWA CODE § 902.3 (2019).

credits is treated as a non-binding factor to be taken into account by the parole board when making release decisions.⁴⁹ Prison officials' awards of credits are not meaningless if they sway the boards' decisions, but they do not alter the formal mathematical scope of the board's 67/200 release-denial discretion.

B. IOWA

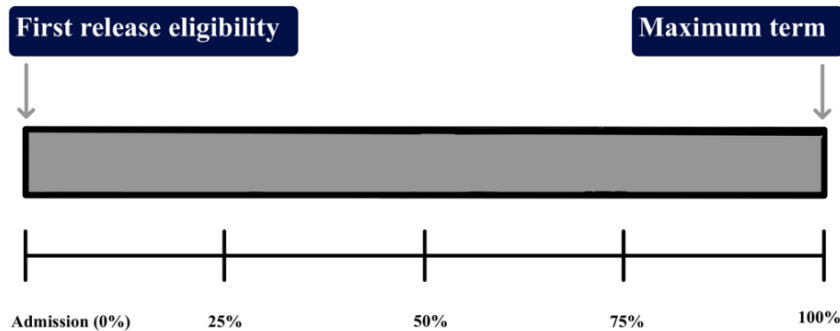
In Iowa, the law of prison release for most prisoners is an entirely different model. An ordinary prisoner is admitted with a maximum prison term but no minimum.⁵⁰ Subject to the parole board's choices, the inmate could serve anywhere from 0 to 100% of the judicial maximum sentence.⁵¹ Figure 2 depicts this arrangement. There is no black segment in the figure's timeline, which indicates that there is no minimum amount of time served that is dictated by the judicial sentence. In theory, if the parole board were to release every prisoner at the moment they were admitted, the prison rate for cases within the board's jurisdiction would be 0 per 100,000. Or, at the opposite extreme, the board could hold everyone for their full maximum terms. The prison rate for board-governed cases would then be as high as the judicial maximum sentences could possibly produce.

49. GEORGIA PAROLE PROFILE, *supra* note 8.

50. See IOWA CODE § 902.3; ALEXIS LEE WATTS ET AL., ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, PROFILES IN PAROLE RELEASE AND REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN THE UNITED STATES: IOWA 8 (2016) [hereinafter IOWA PAROLE PROFILE], https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/605447_iowa_parole_profile.pdf [<https://perma.cc/59DU-5WJ5>] (“[A]side from mandatory sentences/mandatory minimum sentences imposed for certain specific crimes, there are no minimum sentences. Thus, most Iowa inmates are technically eligible for parole upon incarceration.” (footnote omitted)).

51. See IOWA PAROLE PROFILE, *supra* note 50 (discussing parole board discretion).

**Figure 2. Prison-Release Discretion Diagram:
Iowa — No Good Time Awarded**



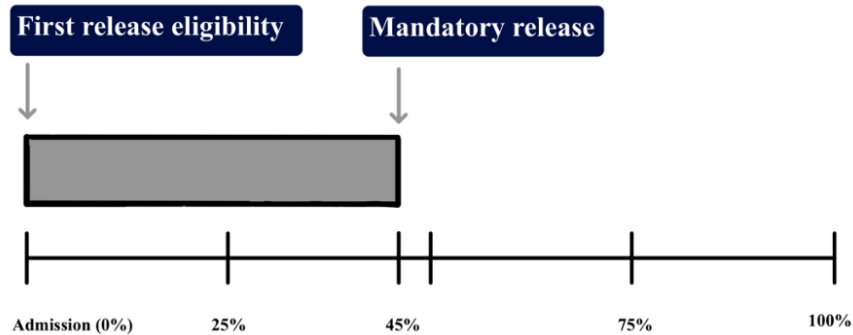
This is not a full description of the basic Iowa setup, however. The ordinary prisoner in the state can earn as much as 1.2 days of good-time credit for every day served with good behavior.⁵² These credits are subtracted from the judicial maximum sentence.⁵³ If the Department of Corrections chooses to award all possible good-time credits to a particular prisoner, then that person must be released after serving no more than 45% of the judicial maximum term. The parole board still has unaltered discretion to release the prisoner earlier than the 45% mark.⁵⁴ But on these facts, the board has lost 55% of its parole-*denial* discretion to hold the offender for the original maximum term set by the judicial sentence. A diagram of the Iowa prison-release timeline in such a case of truncated discretion is shown in Figure 3.

52. IOWA CODE § 903A.2(1)(a); *see also* IOWA PAROLE PROFILE, *supra* note 50.

53. *See* IOWA CODE § 903A.2(1)(a); IOWA PAROLE PROFILE, *supra* note 50.

54. *See generally* IOWA PAROLE PROFILE, *supra* note 50, at 8–9 (discussing criteria for parole release decisions and the absence of parole release guidelines).

**Figure 3. Prison-Release Discretion Diagram:
Iowa — Maximum Good Time Awarded**



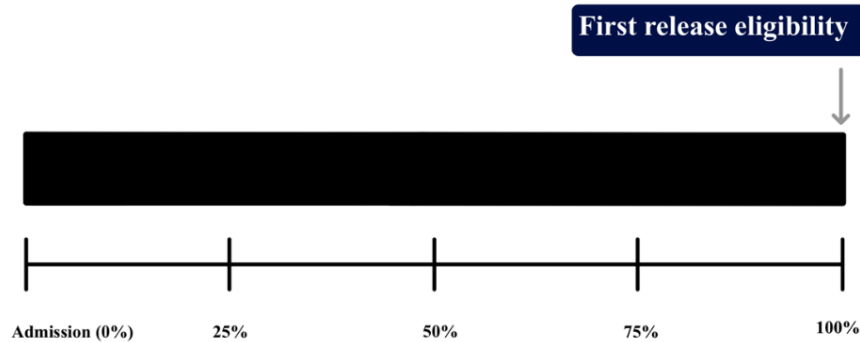
Iowa is an instance of a powerful department of corrections that wields a degree of authority over time served rivaling the parole board's. In configuring all the different ways a system like this could operate in practice, the department's and the board's prison-release discretions interact with each other in complex ways. For instance, if the Department of Corrections nearly always dispensed full good-time credits to inmates, the cutback of the parole board's authority would be very substantial. On the other hand, if the department virtually never awarded any good time credits to anyone, the parole board's release-denial discretion would remain as depicted in Figure 2. Who knows how this actually works out? Year-by-year, the effective division of authority in Iowa probably varies a great deal.

C. COLORADO

Colorado is another state with a powerful corrections department with the ability to expand or contract the parole board's authority, but in an entirely different way than in Iowa. In the ordinary felony case, an offender enters prison with no

possibility but to serve the full judicial maximum sentence—unless something changes.⁵⁵ Upon admission, the parole board has 0% discretion over time served.⁵⁶ Figure 4 depicts the situation.

**Figure 4. Prison-Release Discretion Diagram:
Colorado — No Good Time or Earned Time Awarded**



This formula is not meant to last, however. Colorado prisoners can earn fifteen days of good time for every month they serve in good standing.⁵⁷ As they accumulate credits, their maximum sentences do not change, but the possibility of parole release springs into existence and moves backwards to earlier and earlier dates.⁵⁸ Figure 4 thus represents the release-eligibility situation on the day a prisoner is admitted—a situation that will persist as long as the prisoner earns no good-time credits throughout his stay.

If a prisoner earns all available good-time credits, however, he becomes eligible for release at the 50% mark of his judicially-

55. KEVIN R. REITZ ET AL., ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, PROFILES IN PAROLE RELEASE AND REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN THE UNITED STATES: COLORADO 8 (2016) [hereinafter COLORADO PAROLE PROFILE], https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/602501_colorado_legal_parole_profile_final.pdf [https://perma.cc/6DDD-296Q].

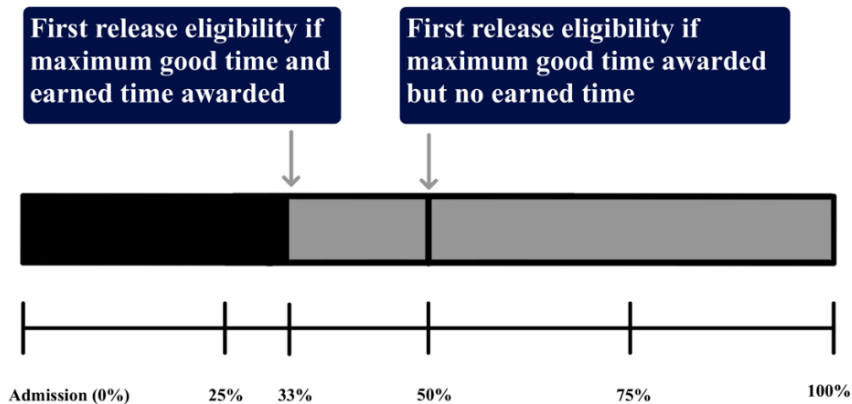
56. *See id.*

57. COLO. REV. STAT. § 17-22.5-301 (2019); COLORADO PAROLE PROFILE, *supra* note 55.

58. *See* COLO. REV. STAT. § 17-22.5-403; *see also* COLORADO PAROLE PROFILE, *supra* note 55.

imposed maximum term.⁵⁹ Thus, with the prerequisite decisions by corrections officials, the parole board can gain as much as 50/100 release-denial discretion. To complicate matters a bit further, corrections officials in Colorado also have authority to award earned-time credits to prisoners who participate in prison programs, which are added on top of good-time credits.⁶⁰ If prisoners receive both discounts in their full amounts, their date of first parole-release eligibility moves all the way back to the 33% mark of the maximum term,⁶¹ as shown in Figure 5. This now resembles the 67/200 formula Georgia uses automatically for most prisoners, as depicted in Figure 1, but in Colorado there are many preliminary steps to getting there.

Figure 5. Prison-Release Discretion Diagram: Colorado — Maximum Good Time Alone; Maximum Earned Time Added



59. See COLO. REV. STAT. § 17-22.5-403; *see also id.* § 17-22.5-401 (“The general assembly hereby declares that if any inmate does not demonstrate positive behavior during incarceration, such inmate should be required to serve out the full sentence imposed upon such inmate. If any inmate does demonstrate positive behavior during incarceration, such inmate should be considered for release from incarceration prior to the end of the full sentence imposed upon him.”); COLORADO PAROLE PROFILE, *supra* note 55.

60. COLO. REV. STAT. § 17-22.5-405; *see also* COLORADO PAROLE PROFILE, *supra* note 55 (discussing the difference between good time and earned time).

61. See COLO. REV. STAT. §§ 17-22.5-302, -405.

Colorado has a number of prison cases that are subject to much greater degrees of prison-release discretion than shown in Figures 4 and 5. Many classes of sex offenders receive highly indeterminate prison sentences, such as one year to life, two years to life, or four years to life.⁶² These people enter prison with established release-eligibility dates that are not dependent on earned credits of any kind, but the parole board has sweeping release-denial discretion.⁶³ There is no mechanism by which the maximum ceiling of life imprisonment can be reduced, so the board's parole-denial discretion always extends across the remainder of the prisoner's life.⁶⁴ Prison population size in Colorado for those serving such sentences is overwhelmingly within the parole board's control.

The examples above are merely illustrations of the scope and power of prison-release discretion to affect time served, prison populations, and prison rates in the two-thirds of American states that use indeterminate sentencing systems. In many such states, the parole board is the chief repository of such authority, while in other cases there is a complex sharing of prison-release power between parole boards and corrections departments. What is consistent in the illustrations above is that the *combined* discretionary powers of back-end officials over time actually served after the judicial pronouncement of a prison sentence is enormous. Based on the sheer mathematics of prison-release discretion, we would expect these officials to be largely responsible for a state's prison rate at any point in time.

III. SLIPPAGE VERSUS STICKINESS

One key characteristic of parole-release authority is that it is a low-friction mechanism for the production of large changes in prison policy, even in short amounts of time.⁶⁵ A state's prison

62. See *id.* § 18-1.3-1004 (stating that sex offenders shall be sentenced to "an indeterminate term of at least the minimum of the presumptive range specified in section 18-1.3-401 for the level of offense committed and a maximum of the sex offender's natural life"); *id.* § 18-1.3-401 (defining the minimum presumptive sentences for felonies based on classification).

63. See COLORADO PAROLE PROFILE, *supra* note 55 ("For most felonies, prisoners become eligible for discretionary parole release after they have served 50 percent of the sentence imposed by the court.").

64. See *id.* (discussing life sentences and eligibility for release).

65. See *supra* Part II for discussion of parole-release authority through case studies of Georgia, Iowa, and Colorado.

policy as determined by its parole board can turn on a dime without any changes in law or in the behavior of officials (other than the parole board) in the prosecution and sentencing system. Just as importantly, parole boards' release patterns can drift significantly over longer periods of time—say, a decade or more—without any formal changes in the law of sentencing or prison release, but with large ramifications for the state's prison population.

In contrast, determinate sentencing structures tend to be stickier. Dramatic changes in prison policy require legislation, amendments to sentencing guidelines, or some other coordinating force that can alter the sentencing practices of judges or corrections officials en masse across the state. A review of the prison-release rules in Minnesota⁶⁶ and Virginia⁶⁷ will illustrate the relatively fixed relationship that can exist in determinate systems between judicially-pronounced prison sentences and the amount of time actually served on those sentences.

A. MINNESOTA

In Minnesota, most people begin a prison sentence with a presumptive release date marked at two-thirds of the maximum sentence imposed by the court.⁶⁸ Release may be postponed only if “the defendant commits [a] disciplinary offense in prison that results in the imposition of a disciplinary confinement period.”⁶⁹ A disciplinary confinement period is a delayed sanction that is tacked on as “extended incarceration” to a prisoner's former presumptive release date.⁷⁰ Thus, if a prisoner is admitted with a

66. See *infra* Part III.A.

67. See *infra* Part III.B.

68. See MINN. STAT. § 244.101, subd. 1 (2019) (“When a felony offender is sentenced to a fixed executed sentence for an offense committed on or after August 1, 1993, the executed sentence consists of two parts: (1) a specified minimum term of imprisonment that is equal to two-thirds of the executed sentence; and (2) a specified maximum supervised release term that is equal to one-third of the executed sentence.”).

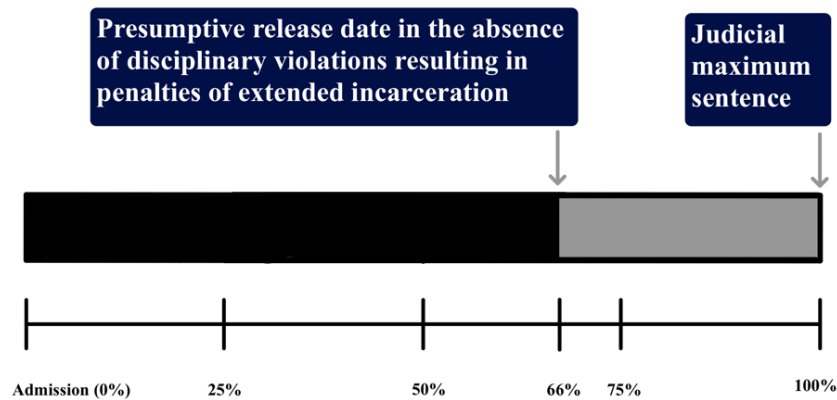
69. See *id.*, subd. 2; see also *Johnson v. Fabian*, 735 N.W.2d 295, 299 (Minn. 2007) (“[A]n inmate's term of imprisonment can be extended if the inmate commits any disciplinary offenses while in prison. Such extensions can result in the inmate serving as much as the entire executed sentence in prison.” (citation omitted)).

70. See MINN. DEP'T OF CORR., POLICIES, DIRECTIVES AND INSTRUCTIONS MANUAL § 303.010 (2020) (defining “extended incarceration”). The penalty either extends the imprisonment period or prevents the accumulation of additional good-time credits. *Id.*

presumptive release date of January 1, 2025, a disciplinary penalty of six months of extended incarceration would push back the expected release date to July 1, 2025. At the extreme, the accumulation of disciplinary violations and confinement periods can postpone a prisoner's release to the full judicially-designated maximum.⁷¹

In essence, Minnesota operates with a “bad-time” system, in which the minimum length of stay can be extended by as much as 50% if the requisite determinations are made by the Department of Corrections. This configuration is diagrammed in Figure 6. In mathematical measurement, Minnesota has a 33/50 release-denial system for the majority of prisoners.

**Figure 6. Prison-Release Discretion
Diagram: Minnesota**



This mathematical descriptor tells us little, however, about how release decisions actually play out in practice. As far as we know simply from a review of statutory law, the powers of the

71. See MINN. STAT. § 244.101, subd. 2. For prisoners released at first eligibility, the remaining one-third of their judicial sentence is served on community supervision. If a prisoner's release date is pushed back for disciplinary infractions, however, the period of postrelease supervision is proportionately shortened. As in many other states, a Minnesota prisoner who “maxes out” receives no supervision or aftercare following release. The new Model Penal Code: Sentencing disapproves of this common arrangement. See MPCs, *supra* note 1, § 6.13(5) (“The length of term of postrelease supervision shall be independent of the length of the prison term, served or unserved, and shall be determined by the court with reference to the purposes [of such supervision].”).

Minnesota Department of Corrections could be exercised honorably or arbitrarily. There is no way to tell simply by looking at the technical design of the system.⁷² If we assume an honorable and restrained assessment of bad-time penalties, then the “time-served discretion” held by corrections officials is in practice legally-encumbered by such things as defined decisional criteria, required adjudication procedures, and the necessity of credible proof of the facts of each case.⁷³ On the other hand, experience teaches that the administration of good-time credits and the like can be shoddy and ill-motivated in some American prisons.⁷⁴ If we assume a corrupt process in Minnesota in which prison officials treat inmates with unmitigated punitiveness, then we could hardly say that corrections officials’ release authority has been hemmed in by effective substantive or procedural constraints. Indeed, a rogue corrections department might grab for itself more de facto release-denial power—within the mathematically-circumscribed zone of possibility—than the typical parole board exercises in an indeterminate system.⁷⁵

As it happens, there is reason to think that Minnesota’s presumption of release at two-thirds of the maximum term is honored in most cases. The Minnesota Supreme Court has stated

72. This is unlike Colorado’s system, which has established statutory principles and criteria for parole release decisions, as well as parole release guidelines. See COLORADO PAROLE PROFILE, *supra* note 55, at 8–10.

73. Within mathematical limits, we should have a way of recognizing that a discretionary power that is meaningfully confined by rules, norms, and procedures is a “smaller” discretion than when a decision maker exercises free-wheeling power to make any decision it wants. See generally KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 3–4 (1969) (concluding that in order to “minimize injustice from exercise of discretionary power,” we must determine the “optimum degree [of discretionary power] . . . in each set of circumstances”). In the context of decisions concerning time served in prison, this would call for a qualitative model of discretionary prison-release power that no one has yet developed.

74. See James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 234–35, 269–70 (1982) (“[Good time is] subject to more abuse because prison officials cannot help but be tempted to use good time to reinforce their institutional authority and interests, as they define them. Therefore, good time should be abolished.”).

75. Procedural constraints on prison disciplinary actions are usually quite low. However poorly-regulated and non-transparent the parole-release process may be in most states, systems of good-time and bad-time allocation tend to be even further below radar. *Id.* at 270 (“If good time is retained, it is vital to limit the types of infractions for which forfeitures can be imposed, the amount of time that can be taken for any single violation, and the amount of a prisoner’s time that is vulnerable to forfeiture at all.”).

that the extension of incarceration beyond the presumptive release date should be regarded as a serious matter with high threshold conditions. In its 2005 decision *Carrillo v. Fabian*, the court emphasized that there is a “presumption” a prisoner will be released at the two-thirds mark.⁷⁶ The *Carrillo* court characterized the postponement of a prisoner’s release date as “a significant departure from the basic conditions of the inmate’s sentence” and went on to hold that, “under the Due Process Clause of the United States Constitution, [a prisoner] . . . has a protected liberty interest in his [presumptive] . . . release date that triggers a right to procedural due process before that date can be extended.”⁷⁷

In 2017, I asked the Minnesota Department of Corrections to supply me with any data they had on hand that would show whether most prisoners were being released on or close to their presumptive release dates. Among all releasees in fiscal year 2017, the department reported that 63% had been released “on or before their actual projected release date.”⁷⁸ Most of the remaining 37% were late releasees, although a small number were prisoners who had been serving indeterminate sentences.⁷⁹ The department provided data on the length of extended incarceration periods for about 10% of the late releasees (leaving quite a few cases unaccounted for). For that small group, the average amount of extended incarceration was between one and two weeks.⁸⁰

We can say the following about Minnesota’s prison-release system with a low-to-acceptable degree of confidence: In practice, the state’s back-end releasing authorities wield dramatically less influence over prison population size than that routinely exercised by parole boards (often in combination with departments of corrections) in indeterminate systems. First, officials with release discretion in Minnesota have less mathematical scope in

76. *Carrillo v. Fabian*, 701 N.W.2d 763, 771–72 (Minn. 2005) (“[U]nder Minnesota’s current sentencing scheme, there is a presumption from the moment that a court imposes and explains the sentence that the inmate will be released from prison on a certain date—and that presumption is overcome only if the inmate commits a disciplinary offense.”).

77. *Id.* at 773.

78. Memorandum from the Cent. Office of Minn. Dep’t of Corr. to author (Nov. 22, 2017) (on file with author).

79. *Id.*

80. *Id.*

which to act (under the state's 33/50 formula) than in indeterminate states where parole boards routinely hold the power to triple or quadruple minimum sentences. Second, back-end releasing authority in Minnesota is subject to *substantive* constraints that simply do not exist in most paroling jurisdictions. Decisions to prolong prison stays are not freely taken. The available evidence suggests that prisoners' presumptive release dates are honored in most instances and periods of extended incarceration are not terribly long. All of this means that, when a judge imposes a prison sentence in Minnesota, the judge (and everyone else) knows within a reasonable margin of error what the actual time served under that sentence will be.

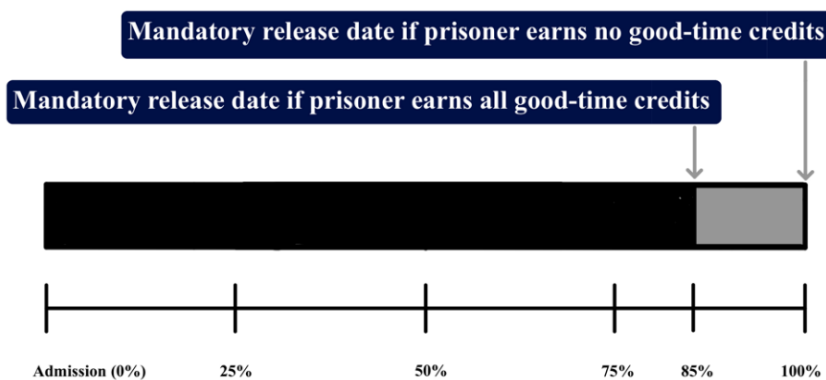
One side effect of Minnesota's system design is that large changes in prison-release practices cannot easily occur without formal amendments of the generally-applicable positive law such as the overall statutory framework, sentencing guidelines, controlling judicial precedent, or the rules, procedures, and practices attendant to prison discipline.⁸¹ It would go too far to say that the amount of time served for particular classes of judicial sentences is "set in stone" in Minnesota, but there is far less play in the system than in paroling states. It is hard to imagine a large surge in the Minnesota prison population that would be attributable to low-visibility slippage in back-end releasing practices.

81. To be sure, drastic changes in the culture of the Department of Corrections could also make a big difference. Imagine that, in week one, corrections officials throughout Minnesota are careful stewards of the law and almost never extend prisoners' terms in the absence of persuasive evidence of serious misconduct. Beginning in week two, however, a far different outlook sets in. Prison officials "go rogue" statewide and begin to hand out bad-time extensions on a whim to large numbers of prisoners. Indeed, they do so often enough that average expected terms of stay are now thrown close to the limits of judicial maximum sentences. Such a sharp transition in institutional behavior would have a big effect on the state's prison population before too long—and the impact would be in the same ballpark as what parole boards are capable of doing in indeterminate jurisdictions. However, this is a practical risk that is different-in-kind from the potentiality for swift change that is ever-present in paroling states. In indeterminate systems, parole boards need not dive off the cliff into lawless behavior to exert extreme leverage on prison policy. For example, a single phone call from the governor might do the trick.

B. VIRGINIA

Virginia's prison-release system, in its formal architecture, is even more determinate than Minnesota's. As Figure 7 indicates, most felony offenders sent to prison in Virginia must serve at least 85% of their maximum sentences as imposed by the court. Prisoners can earn good-time credits that allow release sooner than the full maximum term, but these are available at a modest rate of only four and a half days per month.⁸²

**Figure 7. Prison-Release Discretion
Diagram: Virginia**



Mathematically, this can be described as a 15/17 prison-release system—possibly the most determinate of any current state system. In Virginia, a judge's prison sentence dominates in importance any discretion held at the back end of the system. No matter what expectation a sentencing judge may hold for a defendant's actual date of release, it is impossible for the judge to be disappointed by a margin of more than 15 to 17%.

Arguably, from a prison policy perspective, the most important number in Virginia's determinate prison-release system is the low ceiling on releasing officials' capacity to push prison populations upward. For example, taking the group of prisoners subject to the 15/17 rule, let us first suppose that everyone will earn all available good-time credits. Let us further assume that, under these conditions, the statewide prison rate for inmates in this group would rest at 100 per 100,000. If we then change our

82. VA. CODE ANN. §§ 53.1-202.2–3 (2019).

assumptions to imagine that the corrections department withholds all good-time credits from everyone, the prison rate for the group would grow only to 117 per 100,000.

What is the vulnerability of a system like Virginia's to uncontrolled prison growth due to swift or prolonged slippage in the behavior of back-end releasing officials? Compared to states like Georgia, Iowa, and Colorado, it is very low indeed. Under Virginia's current system, if we were to see dramatic increases in average amounts of time served for specified types of cases, the most likely cause would be changes in the lengths of prison terms pronounced in court. We would be on firm ground to aim policy scrutiny at front-end actors such as legislatures, sentencing commissions, prosecutors, and judges in producing such results.

IV. WHICH PRISON-RELEASE SYSTEMS WERE ASSOCIATED WITH THE MOST AND LEAST PRISON-RATE GROWTH DURING THE GREAT BUILDUP PERIOD?

We now turn to the actual prison-growth history of states using different types of sentencing and prison-release systems during the buildup years. Research suggests that determinate-release systems tended to experience the least amount of prison growth, especially in states that had also adopted judicial sentencing guidelines for the regulation of front-end sentencing discretion.⁸³ One way to test this possibility is to classify states according to their "sentencing system types" and then trace their

83. See David F. Greenberg & Valerie West, *State Prison Populations and Their Growth, 1971–1991*, 39 CRIMINOLOGY 615, 638 (2001) ("Contrary to popular opinion, the adoption of determinate sentencing legislation did not increase imprisonment rates; it moderately reduced them."); David Jacobs & Jason T. Carmichael, *The Politics of Punishment Across Time and Space: A Pooled Time-Series Analysis of Imprisonment Rates*, 80 SOC. FORCES 61, 81 (2001) ("[D]eterminate sentencing legislation reduces the size of incarcerated populations."); Kevin B. Smith, *The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates*, 66 J. POL. 925, 933 tbl.1 (2004) (reporting statistically significant correlation between determinate sentencing laws and lower state incarceration rates from 1980 to 1995); Don Stemen & Andres F. Rengifo, *Policies and Imprisonment: The Impact of Structured Sentencing and Determinate Sentencing on State Incarceration Rates, 1978–2004*, 28 JUST. Q. 174, 175–76 (2011) (finding that sentencing guidelines produce lower incarceration rates when implemented along with determinate sentencing); see also Thomas B. Marvell & Carlisle E. Moody, *Determinate Sentencing and Abolishing Parole: The Long-Term Impacts on Prisons and Crime*, 34 CRIMINOLOGY 107, 122 (1996) ("There is no apparent relationship between the impact on prisons and the [determinate sentencing laws] On the other hand, the 2 [determinate states] that clearly reduced prison populations . . . are the only 2 with sentencing guidelines");

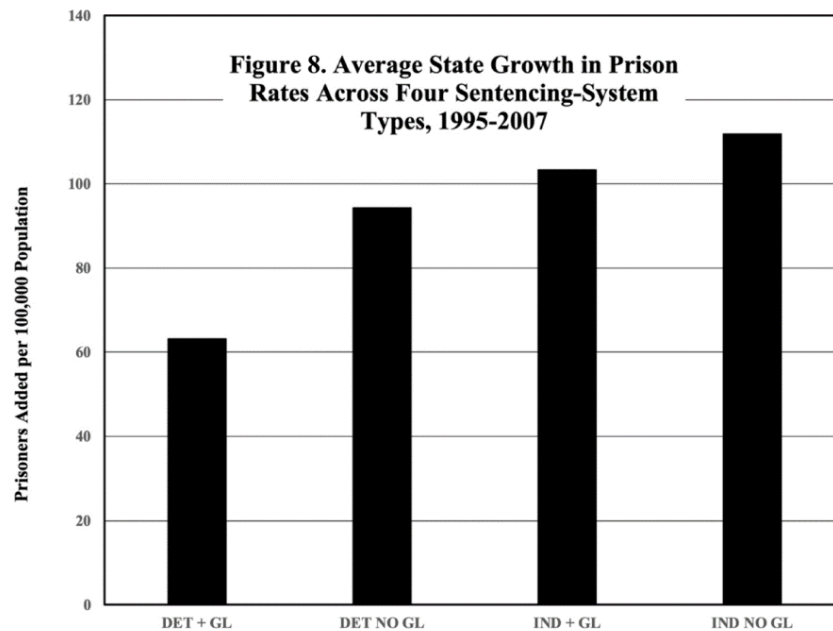
prison-growth trajectories. Figure 8 divides all states into four categories: (1) determinate with guidelines; (2) determinate without guidelines; (3) indeterminate with guidelines; and (4) indeterminate without guidelines. The figure shows the average amount of prison-rate growth for each of these four system types from 1995 to 2007.⁸⁴

Prison-rate growth, in Figure 8 and throughout this Article, is measured as the number of prisoners added to a state's prison population over the relevant time period, corrected for population. Thus, for example, imagine a state that had a prison rate of 75 per 100,000 in 1972, but its rate grew to 375 per 100,000 in 2007. The change in the state's prison rate would be measured as +300 per 100,000 over the thirty-five-year period.⁸⁵

William Spelman, *Crime, Cash, and Limited Options: Explaining the Prison Boom*, 8 CRIMINOLOGY & PUB. POL'Y 29, 32 tbl.1, 59 (2009) (collecting findings of three previous studies, and also finding that presumptive sentencing guidelines "reduce prison populations in both the short run and the long run"). There is evidence that sentencing guidelines tend to suppress prison-rate growth only when they are deliberately designed to further such results. See Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 707 (1995) ("Sentencing guidelines are strongly associated with comparatively slow prison population growth whenever the legislature charged the sentencing commission to consider prison capacity when establishing presumptive sentence ranges."); Sean Nicholson-Crotty, *The Impact of Sentencing Guidelines on State-Level Sanctions: An Analysis Over Time*, 50 CRIME & DELINQ. 395, 406–07 (2004) (distinguishing between mandatory sentencing guidelines linked to correctional resources and those that are not linked to resources: "the implementation of such guidelines [that were linked to correctional resources] decreased the rate of admissions to state prisons by an average of 29.8 inmates per 100,000 population each year" from 1975 to 1998).

84. This time period was selected because virtually all states had settled into their current sentencing systems by the mid-1990s. When grouping states under similar headings for earlier periods, it is necessary to classify states according to the types of sentencing system they were using for *most of* the examined years. This introduces confounding data for some states. For example, Arizona, Kansas, North Carolina, and Virginia all adopted their current systems between 1993 and 1995. It is unhelpful to assign one system-type classification to them for the entire prison buildup period. One must settle for the "most-years" approach. Even with this compromise in classification integrity, the relative positions of the four system types shown in Figure 8 remain the same when data are pooled from 1990 to 2007 or even 1980 to 2007. Figure 9, *infra*, attempts to address the problem of changing system types by tracking the prison-growth histories of individual determinate states for the specific time periods in which they have used their present systems.

85. For a comprehensive discussion of this method, and why it is more useful for policy purposes than a percentage measurement, see Kevin R. Reitz, *Measuring Changes in Incarceration Rates: Shifts in Carceral Intensity as Felt*



Sources: WEST & SABOL, *supra* note 11; UNIV. AT ALBANY, SOURCE-BOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2012), <https://www.albany.edu/sourcebook/pdf/t6292012.pdf> [<https://perma.cc/MAX7-BBAL>].

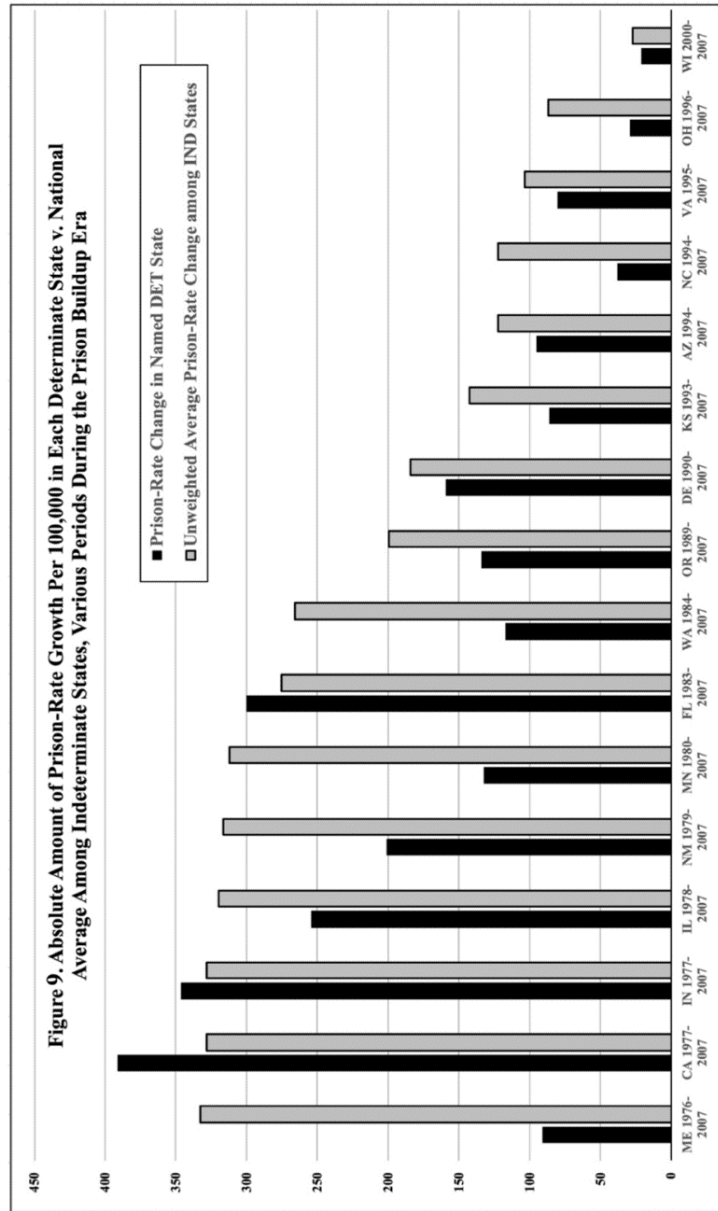
Figure 8 shows substantial differences across the four system types, especially when the “determinate-with-guidelines” states, the lowest group, are compared with the “indeterminate-without-guidelines” states at the high end of the growth chart. Even ignoring the use of judicial sentencing guidelines, both determinate groups are in lower prison-rate-growth positions than the two types of indeterminate systems.

We can turn to state-specific analysis by charting the prison-growth experiences of individual determinate systems against national averages for indeterminate states, as shown in Figure 9. This approach has two advantages over the categorical comparisons in Figure 8. First, Figure 9 allows us to look at individual states in the “determinate” category rather than smoothed-

by *Communities*, 24 BERKELEY J. CRIM. L. 1, 36–37 (2019). A percentage measurement of the prison-rate change in the example above would indicate that the hypothetical state had prison growth of 400% from 1972 to 2007.

out averages. Second, it allows us to chart the experience of individual states over the full time periods in which they had been using their determinate systems—a tailoring of inquiry not available when sorting states into four bins as in Figure 8.

Figure 9 shows that sixteen states moved from indeterminate to determinate prison-release systems at various times during the buildup years, with adoption years spreading from 1976 in Maine to 2000 in Wisconsin. For each of the sixteen states, the bar chart shows the amount of prison growth per capita experienced within that state after adoption of its determinate system. The prison-rate change for each state is measured up until the peak year of the buildup period in 2007. Also, for each of the sixteen determinate states, the state's prison-rate growth is compared with the average prison-rate growth among all indeterminate states over the same period. Thus, for the first state, Figure 9 shows that Maine instituted its determinate prison-release system in 1976. The black bar represents the change in Maine's prison rate from that date through 2007 (+91 per 100,000). The gray bar shows the average change in prison rates among all indeterminate prison-release states over the same years (+333 per 100,000).



Note: All states had indeterminate sentencing systems before the periods shown on the chart.

Sources: LANGAN ET AL., *supra* note 11; UNIV. OF ALBANY, *supra* Figure 8; WEST & SABOL, *supra* note 11.

Figure 9 yields findings that are consistent with Figure 8. Thirteen out of sixteen states that abolished their indeterminate prison-release systems during the buildup period saw less prison-rate growth thereafter than states that had retained their systems of indeterminate release. The three exceptions were California, Indiana, and Florida, which saw absolute increases in their prison rates that were 19%, 5%, and 9% higher, respectively, than the comparison group of indeterminate jurisdictions over the same years. Among the thirteen “lower-growth” states in Figure 9, many had *dramatically* less change in their prison rates than experienced in indeterminate states. Calculated as percentage differences, the range was: -73% prison-rate growth (Maine), -69% (North Carolina), -67% (Ohio), -58% (Minnesota), -56% (Washington), -47% (Kansas), -37% (New Mexico), -33% (Oregon), -22% (Arizona, Virginia, and Wisconsin), -21% (Illinois), and -14% (Delaware).

To illustrate the magnitude of these differences, the state-specific observations above can be translated into counterfactual projections. For example, if all fifty states had experienced the same amount of prison-rate growth as Minnesota in the years 1980 through 2007, then the 2007 prison rate for all American states would have peaked at 262 per 100,000 instead of the actual high mark of 447 per 100,000. Because there were 1.4 million people in state prisons at yearend 2007,⁸⁶ a superimposition of Minnesota’s prison-rate change onto all states would have meant 579,460 fewer people in state prisons.

Two major conclusions can be offered from the raw historical statistics of the Great Prison Buildup, in descending order of confidence. First, we can be relatively certain that the abolition of parole-release discretion in sixteen states was *not* one of the causes of mass incarceration. As I urged readers many years ago, “Don’t blame determinacy” for American prison growth.⁸⁷ By all appearances, determinate sentencing reforms tended to help enacting states put the brakes on uncontrolled prison expansion—almost never attaining a full stop, but slowing things down. Second, if we see the Great Prison Buildup as a time in which all states came under immense pressure to increase their prison populations, it was the indeterminate prison-release states that proved least able to resist that pressure. This supports a theory

86. WEST & SABOL, *supra* note 11, at 1 tbl.1.

87. Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787 (2006).

that politically-vulnerable parole boards were a weak link in the prison policy-making of state systems.

V. WHICH PRISON-RELEASE SYSTEMS HAVE BEEN ASSOCIATED WITH THE MOST AND LEAST PRISON-RATE GROWTH IN THE POST-BUILDUP PERIOD?

As Professor Zimring has argued in his forthcoming book, *The Insidious Momentum of Mass Incarceration*, careful study of state-by-state experience after the nationwide prison-rate peak in 2007 reveals no dramatic trends or consistent patterns.⁸⁸ We have not yet entered an era of significant decarceration. We might call the years since 2007 the beginning of the “Post-Buildup Period.”

Table 1 below breaks out the amount of prison-rate change in each of the fifty states from 2007 to 2017 and ranks the states from most prison-rate growth to most prison-rate decline.⁸⁹ The sixteen determinate states are shown in bold characters, with the thirty-four indeterminate states in regular font.

From 2007 to 2017, the (unweighted) average prison rate across all states dropped from 429 to 380 per 100,000, roughly an 11% decline. During this period, thirty-five states saw decreases in their prison-rates while fifteen states had prison-rate growth. Among the fifteen still-growing states, four were determinate systems, and the top five were all indeterminate. Among the states in the middle of the pack in Table 1, states with different types of systems are all mixed together. It is hard to draw conclusions from this jumble.

Only one suggestive pattern emerges. Among indeterminate states, the average change in prison rates was -49 per 100,000 compared with -23 per 100,000 in determinate states. These are not enormous drops for either system type across a full decade. (In the 1980s and 1990s, an absolute ten-year change in prison rates of 49 per 100,000 would have ranked in the lowest five states.) Nonetheless, it is intriguing that indeterminate states have had more than twice as much prison-rate decline as determinate states in the post-growth period. This raises the possibility that the low-friction quality of indeterminate prison-release

88. ZIMRING, *supra* note 29 (manuscript ch. 5 at 14–18).

89. I use a different measure of prison-rate growth than Professor Zimring, which leads to a somewhat different set of statistical conclusions and state-by-state rankings than in Zimring’s analysis. For a full explanation of my method and why I believe it is the best available approach, see Reitz, *supra* note 85, at 9–12, 36–37.

systems could make it easier to reverse course than in stickier determinate regimes. Parole boards are very good at reflecting the political pressures brought to bear upon them at any particular time and can turn the battleship of prison policy without waiting for legislatures, sentencing commissions, prosecutors, or courts to give them a push.

Table 1. State-by-State Growth in Prison Rates by Rank (Most to Least) and by Prison-Rate Change per 100,000 Population, 2007–2017 (Determinate States in Bold)

Rank	State	Prison-Rate Change
1	Arkansas	96
2	West Virginia	59
3	South Dakota	40
4	Oklahoma	39
5	Wyoming	35
6	New Mexico	31
7	Nebraska	30
8	Missouri	26
9	Kansas	20
10	Arizona	15
11	Kentucky	15
12	Minnesota	10
13	Pennsylvania	10
14	North Dakota	5
15	Tennessee	5
16	Ohio	-1
17	Oregon	-5
18	Iowa	-6
19	Montana	-6
20	Wisconsin	-6
21	Washington	-11
22	Maine	-14

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23	New Hampshire	-18
24	North Carolina	-20
25	Illinois	-26
26	Utah	-33
27	Idaho	-36
28	Indiana	-37
29	Nevada	-44
30	Virginia	-53
31	Georgia	-57
32	Delaware	-62
33	Rhode Island	-65
34	Florida	-69
35	New York	-73
36	Vermont	-80
37	Maryland	-87
38	New Jersey	-91
39	Hawaii	-98
40	Michigan	-102
41	Colorado	-114
42	Mississippi	-115
43	Texas	-116
44	Alabama	-129
45	Massachusetts	-129
46	South Carolina	-138
47	Connecticut	-142
48	California	-143
49	Louisiana	-146
50	Alaska	-189

Sources: BRONSON & CARSON, *supra* note 17; WEST & SABOL, *supra* note 11.

CONCLUSION

This Article makes a series of modest claims in support of a larger argument that is exceedingly important: the changing use of prison-release discretion over the past several decades was likely one of the important causes of runaway prison expansion across the United States—not alone, but among other causal forces. No one has done the research that would be needed to estimate the degree of responsibility that indeterminate prison-release systems bear for the advent of mass incarceration. It is not clear that many people even regard this as an important question.

Given the possible magnitude of prison-release discretion as a causal variable, it merits far more attention than it has received. We should be taking a hard look at the prison-growth histories of paroling states during the prison buildup. It is possible such research will confirm that such systems were uniquely helpless to resist external pressures to increase the severity of prison sentences (see Figures 8 and 9 above). If we care about insulating state criminal justice systems from uncontrolled prison growth in the future, that would be a critical thing to know.

In addition, we should be studying how indeterminate systems fare when there are external pressures to *reduce* prison populations. There may be ways to harness and control prison-release discretion in service of engineered decarceration policy. For example, the evidence from the last ten years suggests that indeterminate sentencing schemes may be freer to achieve meaningful prison-rate drops than the stickier determinate systems.⁹⁰ Researchers and policy makers should be exploring whether that is indeed the case and how exactly it has been happening.

Finally, in addition to asking whether we can redesign American prison-release laws and institutions to better support planned decarceration in the near future—we should give equal concern to equipping indeterminate systems to resist runaway prison growth if and when the political environment shifts back to a lock-'em-up orientation.⁹¹ On a national scale, a failure to

90. See *supra* Part V.

91. I believe that better use of actuarial risk assessment tools to promote more aggressive programs of prison diversion and prison release is a promising avenue to pursue, but that is a subject of a different article. See Kevin R. Reitz, *The Compelling Case for Low-Violence-Risk Preclusion in American Prison Policy*, 38 BEHAV. SCI. & L. (forthcoming 2020) (manuscript at 1–2), <https://>

learn from the history of the Great Prison Buildup would be unforgivably negligent.

The main message of this Article is that we have been ignoring a critical piece of the mass incarceration puzzle and a potentially powerful tool for its remedy. Just as sentencing-guidelines reform was an important movement in the 1980s and 1990s, attracting the attention of many researchers and yielding a slate of successful reforms, we now require a comparable investment in prison-release reform. Unfortunately, nothing of the sort has been gathering steam. Prison-release reform is a field that awaits recruits, funding, field work, experimentation, and even the bare acknowledgment of its significance. Nevertheless, it is a field with an upside potential that should not be left on the table in the coming years. While the main effect of the sentencing-guidelines reform era was to design new institutions that could resist upward prison growth and even wrest it under control, the mission for the coming decades is to unwind the excesses of mass incarceration across the states—and, importantly, to do so in sustainable ways. It is hard to believe we will succeed in this urgent task if we leave prison-release discretion out of the picture.