Examining Offense Classification Schemes

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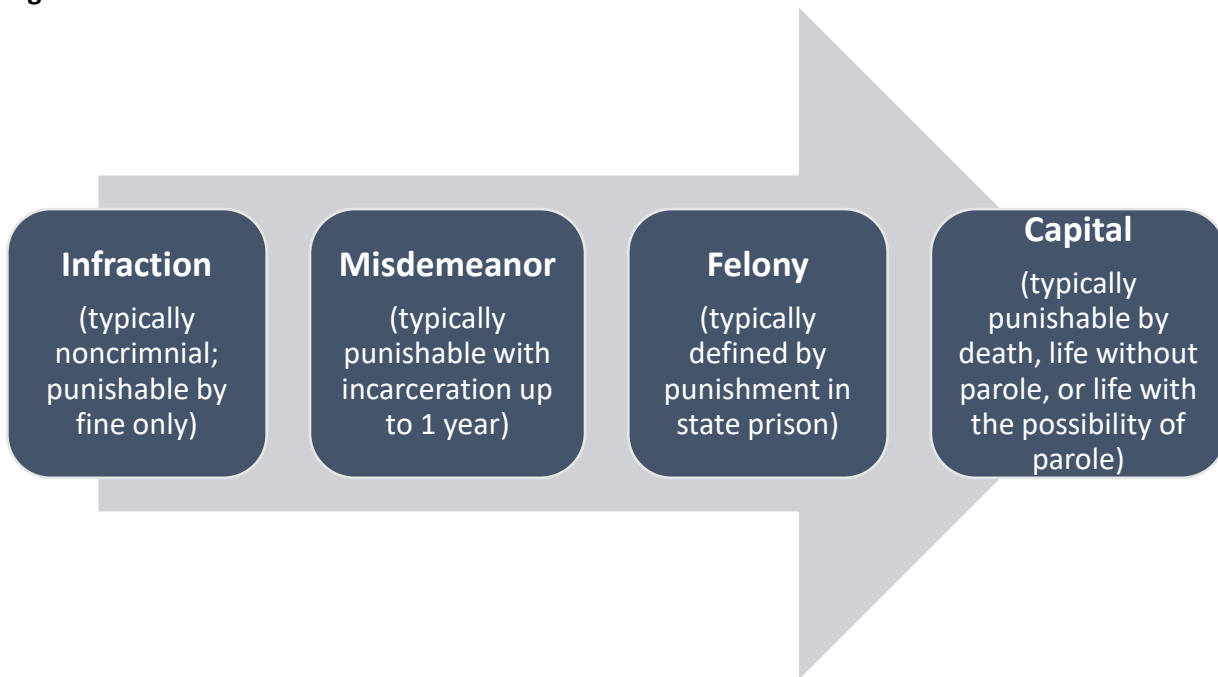
UNIVERSITY OF MINNESOTA

July 3, 2021

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I.   The Purpose of Offense Classification

A key role of the legislature is to define crimes and their penalties. But sentencing falls within the purview of the judiciary, not the legislature, so legislatures often seek mechanisms to guide the sentencing discretion of the court.[1] Offense classification can be one such mechanism.

Criminal behavior exists on a continuum (Figure 1). Behavior constituting the least serious offenses is generally classified as an infraction, violation, or petty misdemeanor and garners penalties of a fine or probation. Behavior constituting the most serious offenses is generally classified as a capital offense meriting a life sentence or the death penalty. In between these two poles lie felonies and misdemeanors, and it is at these levels that some legislatures have chosen to further classify offenses.

Figure 1. Continuum for Offense Classification

Infraction	Misdemeanor	Felony	Capital
(typically noncrimnial; punishable by fine only)	(typically punishable with incarceration up to 1 year)	(typically defined by punishment in state prison)	(typically punishable by death, life without parole, or life with the possibility of parole)

The purpose of offense classification is for the legislature to make a statement about the relative seriousness of offenses. Having multiple offense classifications can help the legislature fine tune its statement about the appropriate penalty for each offense by grouping like crimes together. In this way, the legislature can guide the discretion of the court in sentencing, both by providing the outer boundary of the sentence—the maximum sentence—and by demonstrating the relative weight and seriousness of each offense in relation to other offenses by assigning the offense to a particular offense class.[2]

But militating against this overall purpose is the fact that legislative sessions are often hectic and time-compressed, and legislators do not always have the time to determine whether they have made the right judgement in classifying an offense into a certain classification. Moreover, since the membership

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[1] An example of another mechanism often used by legislatures is a mandatory minimum sentence.
[2] In some states—especially those with indeterminate sentencing—the legislature may establish an appropriate sentencing range, thereby setting both the lower *and* upper bounds of the sentence. To facilitate comparison across states, this report includes only the maximum sentences set by statute.

of legislatures changes with each election, few legislators are likely to have a strong overview of how offenses are defined and classified as a whole, and so may not recognize it when they pass a law for which the classification seems disproportionate in comparison to other offenses (being either too lenient or too harsh).

This report presents a 50-state survey exploring the offense classifications in other states. Most states fall into a simple structure or a multi-class structure, but a few are mixed. This report will examine those three main structures, and then explain where New Mexico fits into the mix. Additionally, this report provides some additional detail, upon request, about those states that have misdemeanors punishable by more than a year of incarceration.

II.   Simple Classification Structure

Sixteen states have a simple offense classification structure, defining crimes as felonies and misdemeanors without any further gradation. The majority of these states define felony offenses by the *location* of imprisonment (i.e., state prison or penitentiary). Five states require that the term of confinement must be more than a year for the offense to qualify as a felony (Georgia, Minnesota, Montana, Rhode Island, Wyoming), and one state (Vermont) requires that the term of confinement must be more than two years to qualify as a felony. Maryland takes the most unique approach, choosing not to define the term "felony" at all and simply designating offenses as such.[3] In eleven of these states, misdemeanors are defined as all other crimes, meaning, any crime not fitting the felony definition. Only a few states put more specificity to the definition with California hinging the decision on the *location* of incarceration (county jail), Minnesota limiting confinement to 90 days,[4] and Montana and Rhode Island specifying imprisonment of less than one year.

Though these states have a very generic classification structure, the states generally make up for the lack of detail in offense classifications by adding more detail into the definitions of specific offenses. For example, the crime of assault might be divided into three or four degrees, each carrying unique penalty provisions. Further, these states might also have other mechanisms for establishing the bounds for sentencing, such as sentencing guidelines or a statutory determinate sentencing structure.

III.   Multi-Classification Structures

The majority of states have more complex structures, creating multiple classes of offenses at the misdemeanor and felony levels. These structures are explained in more detail in the next sections.

### A. Classification Structures for Misdemeanors

The most common classification structure for misdemeanors is one with three classes. As shown in Figure 2, fifteen states have this structure. The next most common is two classes, which is the structure in ten states.

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[3] 7 Md. Law Encyclopedia, Criminal Law § 10 (explaining that in Maryland, felonies are those deemed as such at common law, and all other crimes are misdemeanors).
[4] Minn. Stat. § 609.02, subd. 3 (2021). But note that Minnesota also has a gross misdemeanor, which encompasses all crimes that are not otherwise defined as felonies or misdemeanors. Minn. Stat. § 609.02, subd. 4 (2021).

Figure 2. Classification Structures for Misdemeanors
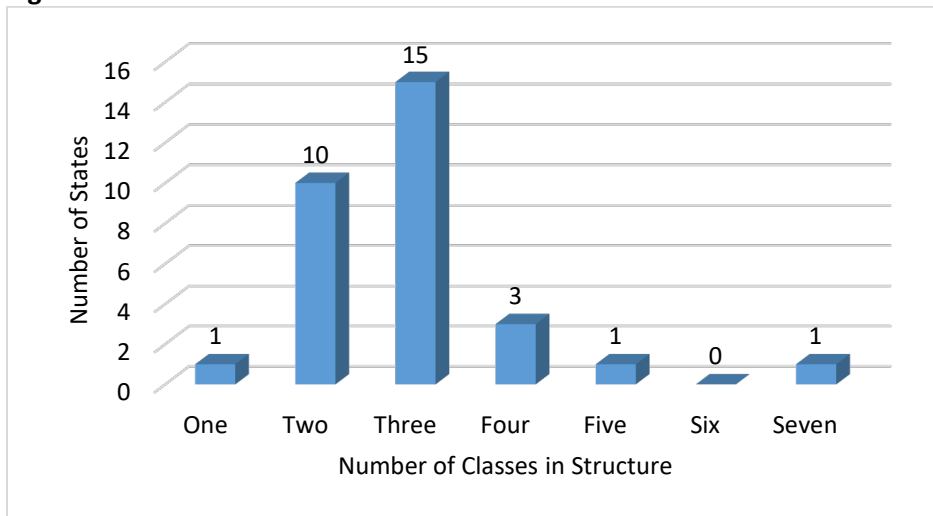
There is wide variation across the states as to the maximum punishments available within each of the classification structures (Table 2, next page). Maximum penalties at the lowest classes vary from fines and probation to up to a year of incarceration while maximum penalties at the highest classes range all the way up to incarceration for up to five years. Table 1 shows the most common maximum penalties by class for the most common two- and three-class grading structures.

Table 1. Most Common Penalties within Most Frequent Misdemeanor Classification Structures

	Three-Class Structure	Two-Class Structure
Class A	1 Year	1 Year
Class B	6 Months	30 or 90 Days
Class C	30 Days	

Only Colorado has five classes of misdemeanors, and within this structure, drug misdemeanors are classified separately. Interestingly, the penalties for drug misdemeanors are not substantially different from the penalties for other misdemeanors, calling into question why the Colorado Legislature felt the need to classify them separately.

Nebraska is also a standout with seven classes of misdemeanors. The structure is highly broken out, with the most serious misdemeanor garnering up to one year of incarceration while the least serious is subject only to a fine. Unlike other states, Nebraska does not appear to have a classification for infractions, so presumably, the two least serious misdemeanor classes, which are punishable by fines, serve this function. Driving while intoxicated offenses are in a separate class, but the penalty is no more severe than the most severe class of misdemeanor, begging the question as to why the Nebraska Legislature did not incorporate the offense into the existing classification scheme.

Table 2. Misdemeanor Classification Structures by State

One Class

	HI
[1/A]	1 year

Two Classes

	AK	DE	FL	KY	ND	NH	NV	NY	SD	WA
[A/1]	1 year	1 year	1 year	1 year	360 days	1 year	364 days	364 days	1 year	364 days
[B/2]	90 days	6 months	60 days	90 days	30 days	Fine / probation	6 months	30 days	30 days	90 days

Three Classes

	AL	AR	AZ	IA	IL	IN	KS	MO	OR	PA
[A/1]	1 year	1 year	6 months	2 years	1 year	1 year	1 year	1 year	364 days	5 years
[B/2]	6 months	90 days	4 months	1 year	6 months	6 months	6 months	6 months	6 months	2 years
[C/3]	3 months	30 days	30 days	30 days	30 days	60 days	30 days	15 days	30 days	1 year

	SC	TN	TX	UT	WI
[A/1]	3 years	11 months 29 days	1 year	364 days	9 months
[B/2]	2 years	6 months	6 months	6 months	90 days
[C/3]	<1 year	30 days	$500 fine	90 days	30 days

Four Classes

	CT	OH	VA
[A/1]	1 year	180 days	1 year
[B/2]	6 months	90 days	6 months
[C/3]	3 months	60 days	$500 fine
[D/4]	30 days	30 days	$250 fine

Five Classes

	CO
[A/1]	18 months
[B/2]	1 year
[C/3]	6 months
[D/4]	18 months*
[E/5]	1 year*

Seven Classes

	NE
[A/1]	1 year
[B/2]	6 months
[C/3]	3 months
[D/4]	7 days
[E/5]	$500 fine
[F/6]	$100 fine
[G/7]	1 year**

* Drug Misdemeanor
**Misdemeanor DWI

B. High Misdemeanors

Only five states have misdemeanors that are punishable by more than one year incarceration: Colorado, Iowa, Pennsylvania, South Carolina, and Vermont. Pennsylvania has the highest maximum punishment for a misdemeanor, at five years, while the maximum penalty in the other states ranges from eighteen months to three years. As Table 3 shows, these higher-level misdemeanors encompass a range of offenses including certain weapons offenses, prostitution, property crimes, careless driving, simple assault, and drug possession. There was no easily discernable pattern to the types of offenses subject to these higher penalties (though Robina did not conduct an extensive survey on this issue). In fact, in Vermont, by definition, *all* misdemeanors are subject to up to two years incarceration. Thus, like all other classification decisions, whether to classify a misdemeanor offense as being subject to one of these longer penalties appears to be a function of setting the punishment relative to the penalties for other offenses.

Table 3. Examples of Offenses Classified as High Misdemeanors

State	Type	Maximum Punishment	Examples of Types of Offenses
Colorado	Class 1	18 months	• Defacing a firearm • Failure to register as a sex offender • Patronizing a prostitute • Careless driving
Iowa[5]	Aggravated misdemeanor	2 years	• 3rd Degree Burglary (unoccupied dwelling) • Solicitation to commit an aggravated misdemeanor • Involuntary manslaughter
Pennsylvania	First Degree	5 years	• Identity theft • Damage to property • Unlawful restraint • Possession of weapon on school grounds
	Second Degree	2 years	• False imprisonment • Theft • Fleeing a police officer • Simple assault
South Carolina	Class A	3 years	• Carrying/discharging firearm on capitol grounds • 2nd degree assault • Harassment • Retail theft
	Class B	2 years	• Use of firearm under the influence • First-time drug possession • Cruelty to animals
Vermont	All Misdemeanors	2 years	• Generally applicable to any misdemeanor

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[5] Iowa Code Ann. § 903.1 (2021).

C. Infractions

Most states also have an additional lower grade of offense, often referred to as an infraction, petty misdemeanor, or violation. Offenses at this grade are usually not considered to be criminal convictions. They are typically punishable by a fine only, though some also refer to the possibility of probation, forfeiture, or a civil penalty.

D. Classification Structures for Felonies

There is more variation in how states grade felony offenses. Besides the number of classes, there is variation in whether states incorporate the most serious offenses (i.e., murder) into the classification structure at all. For example, Missouri ranks murder as a Class A offense[6]—the most serious—while Florida has separate classifications for "capital felony" and "life felony" that sit over the top of felonies in the first through third degrees.[7] Indiana, in contrast keeps murder completely out of the felony classification system, and includes the maximum penalty within the definition of the offense.[8] In order to facilitate comparison across states, we chose to code the penalty structure for the most serious offenses as "capital." This allowed us to add a class on top of the current class structure in those states that did not already incorporate such offenses. Thus, in some states, our "capital" designation would represent a class of crimes outside of the formal felony classification system, and in others, it would represent a class of crimes that are already incorporated into the felony classification system. The net result of our coding method is to provide a comparative view into the total number of felony offense classes in each state. With this coding in place, the most common felony grading structures are those consisting of four classes (six states), five classes (seven states), and six classes (five states) (Figure 3).

Figure 3. Classification Structures for Felonies
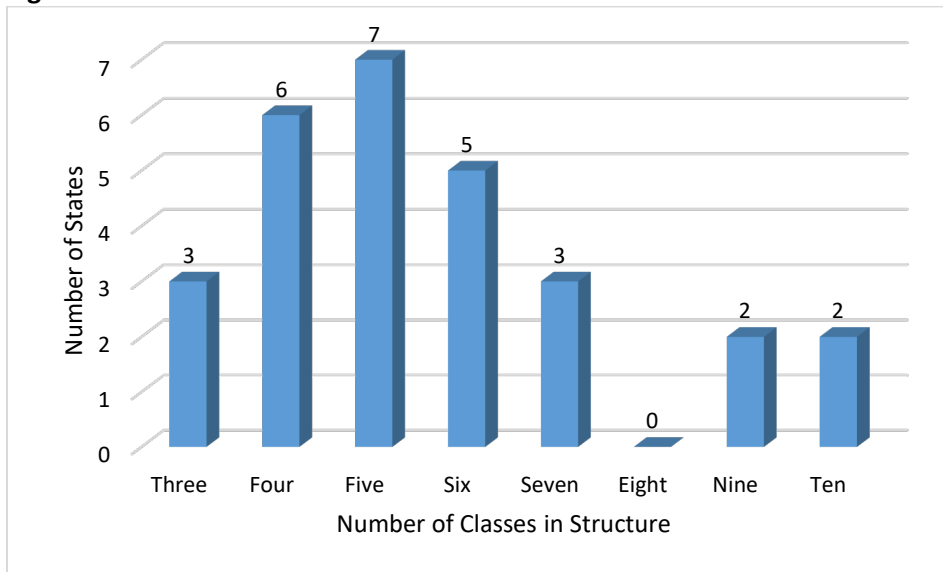
When looking at the individual class structures, there is a lot of variation in the maximum penalties available at each class level. But interestingly, states that have four classes have the most similar classification structures. Here, the maximum penalties for four of the six states are death, life without parole, or life for capital offenses, 20 years for offenses in the first class, 10 years for offenses in the

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[6] Mo. Ann. Stat. § 565.020 (2021).
[7] Fla. Stat. Ann. § 775.081 (2021).
[8] Ind. Code Ann. §§ 35-50-2-1; 35-50-2-3 (2021).

second class, and 5 years for offenses in the third class. There's no similarly discernable pattern for the other class structures, except that those states with more classes generally have finer gradations of felony offenses.

Of the two states that have ten classes, Colorado is the most unique. Four of the ten classes are for drug felonies, and the other six are for all other felonies. The two most serious drug felonies carry maximum punishments that are higher than for other felonies (32 vs. 24 years for the highest non-capital class; 16 vs. 12 years for the second highest non-capital class), but the maximum penalties for the remaining classes are identical.

[Rest of page intentionally left blank. See felony offense classifications on next page.]

Table 4. Felony Classification Structures by State

Three Classes

	NH	UT	WA
Capital	Life	life	life
[A/1]	15 years	15 years	10 years
[B/2]	7 years	5 years	5 years

Four Classes

	AK	HI	IA	ND	OR	PA
Capital	99 years	LWOP; Life	LWOP	LWOP	Life	Death; Life
[A/1]	20 years	20 years	25 years	20 years	20 years	Life
[B/2]	10 years	10 years	10 years	10 years	10 years	10 years
[C/3]	5 years	5 years	5 years	5 year	5 years	7 years

Five Classes

	AL	FL	IL	KY	MO	NV	NY
Capital	Death; LWOP	Death; Life	Death; 60 years	Death; Life	Life	Death; Life	Life
[A/1]	Life	Life	15 years	50 years	15 years	20 years	25 years
[B/2]	20 years	Life	7 years	20 years	10 years	5 years	15 years
[C/3]	10 years	15 years	5 years	10 years	7 years	4 years	7 years
[D/4]	5 years	5 years	3 years	5 years	4 years	4 years	4 years

Six Classes

	AR	CT	TN	TX	VA
Capital	Death; LWOP	Death; LWOP	Death, LWOP, or Life	Death, LWOP, or Life	Life
[A/1]	Life	Life	60	Death, LWOP, or Life	20 years
[B/2]	20 years	40 years	30 years	Death; Life	20 years
[C/3]	20 years	10 years	15 years	20 years	10 years
[D/4]	10 years	5 years	12 years	10 years	10 years
[E/5]	6 years	3 years	6 years	2 years	5 years

Note: LWOP means life without parole.

Table 4. Felony Classification Structures by State (Cont'd)

Seven Classes				
	AZ	DE	IN	SC
Capital	Death; LWOP	Life	65 years	Life
[A/1]	Life	25 years	40 years	30 years
[B/2]	35 years	15 years	30 years	25 years
[C/3]	25 years	8 years	16 years	20 years
[D/4]	16 years	5 years	12 years	15 years
[E/5]	8 years	3 years	8 years	10 years
[F/6]	6 years	2 years	2.5 years	5 years

Nine Classes		
	SD	WI
Capital	Death; Life	life
[A/1]	Life (mandatory)	60 years
[B/2]	Life (optional)	40 years
[C/3]	50 years	25 years
[D/4]	25 years	15 years
[E/5]	15 years	12.5 years
[F/6]	10 years	10 years
[G/7]	5 years	6 years
[H/8]	2 years	3.5 years

Ten Classes		
Capital	NE	CO
	Death	Life
[A/1]	Life	24 years
[B/2]	life	12 years
[C/3]	50 years	6 years
[D/4]	50 years	3 years
[E/5]	50 years	1.5 years
[F/6]	20 years	32 years[*]
[G/7]	4 years	16 years[*]
[H/8]	3 years	6 years[*]
[I/9]	2 years	2 years[*]

*Denotes drug felony
Note: LWOP means life without parole.

IV.   Mixed Classification Structures

Three states—Kansas, Maine, and New Jersey—have mixed classification structures. Kansas defines felonies very simply as "a crime punishable by death or imprisonment in any state correctional institution,"[9] but finely grades misdemeanors into three classes, and two types of infractions.[10] This may be because Kansas also has sentencing guidelines so there is no need to further differentiate felonies; the guidelines make the necessary distinctions.

Maine and New Jersey are unique in that both states have offense grading structures that do not differentiate between felonies and misdemeanors. Instead, both have a unified offense class structure that encompasses crimes that would have traditionally been referred to as both felonies and misdemeanors. Traces of the felony and misdemeanor terms remain in both codes (e.g., Maine has the offense of "felony murder"), but the class structure, rather than categorization as felony or misdemeanor drives the punishment scheme.

V.   New Mexico's Classification Structure

New Mexico's classification scheme is unique. First, New Mexico categorizes all crimes as felonies, misdemeanors, and petty misdemeanors.[11] Felonies are offenses that are punishable by death or a term of imprisonment of one year or more. Misdemeanors are offenses punishable by imprisonment for more than 6 months or less than one year. And petty misdemeanors are offenses punishable by imprisonment for 6 months or less.[12] Thus, at a minimum, New Mexico has a simple structure (Figure 4).

Figure 4. New Mexico's Simple Structure

| Petty Misemeanor (< 6mos) | Misdemeanor (> 6mos to < 1year) | Felony > 1year |

But there are additional elements in New Mexico's statutes. Felonies are subdivided into capital felonies and felonies of the first through fourth degrees, but unlike the classification structures in other states, there are no maximum sentences stated in the definitions of these classes.[13] Instead, one must look to the sentencing provisions in state law to determine the appropriate penalties. Misdemeanors are not further subdivided. The presence of felony classes suggests that New Mexico is a mixed system.

Like other states with simple structures, the finer gradation of offenses and appropriate penalties is found in New Mexico's sentencing provisions. New Mexico is a determinate sentencing system, meaning

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[9] Kan. Stat. Ann. § 21-5102 (2021).
[10] Kan. Stat. Ann. §§ 21-5102; 21-6602 (2021).
[11] N.M. Stat. Ann. § 30-1-5 (2021).
[12] N.M. Stat. Ann. § 30-1-6 (2021).
[13] N.M. Stat. Ann. § 30-1-7 (2021).

that individuals are given a definite sentence, and must generally serve the pronounced term subject to good time before being released from prison.

For felony offenses, sentencing involves identifying the "basic sentence," considering aggravating and mitigating circumstances, and applying any applicable sentencing enhancements. The basic sentence is defined by statute, and is assigned based on the felony class and a few additional offense elements, including whether the offense involved the death of an individual, an offense against a child, or sexual penetration.[14] From the basic sentence, the court can adjust the sentence up or down by one-third based on findings of aggravated or mitigated sentences.[15] Additionally, there are numerous provisions in state law that provide for alteration of the basic sentence. For example, the habitual offender law is essentially a criminal history provision, increasing the basic sentence by 1, 4 or 8 years if a person has one, two, or three or more prior felony convictions.[16] Other provisions function as sentencing enhancements. For example, if there is a finding that the crime was motivated by hate or bias, the basic sentence can be increased by 1 or 2 years.[17] This quick description has not been intended to be a complete summary of sentencing provisions in New Mexico, but rather to make the point that though New Mexico has either a simple or mixed classification structure, it also has very detailed sentencing laws that do some of the work of offense classification schemes.

The Criminal Code Update project has been undertaken in part because there is a sense among practitioners that there is disproportionality in New Mexico's sentencing provisions. Table 5 shows the basic sentences by class and additional facts. Although the basic sentences are proportionate for offenses that share the same additional facts, the basic sentences are *disproportionate* when comparing offenses within each felony class and between classes. For example, the basic sentence for a baseline fourth degree felony is 1.5 years. But if the offense resulted in exploitation of a child, the basic sentence increases to 10 years, which is more than 6-1/2 times greater than the baseline penalty. And this 10-year sentence is one year higher than the basic sentence for a baseline second-degree felony (which is 9 years).

Table 5. Basic Sentences[18]

| | Basic Offense | Additional Facts | | | | |
		Resulting in death of a human	Resulting in death of a child	Resulting in exploitation of a child	Sexual offense against a child	Criminal aggravated sexual penetration
First Degree	18 years		Life			Life
Second Degree	9 years	15 years		12 years	15 years	
Third Degree	3 years	6 years		11 years	6 years	
Fourth Degree	1.5 years			10 years		

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[14] N.M. Stat. Ann. § 31-18-15 (2021).
[15] N.M. Stat. Ann. § 31-18-15.1 (2021).
[16] N.M. Stat. Ann. § 31-18-17 (2021).
[17] N.M. Stat. Ann. § 31-18B-3 (2021).
[18] N.M. Stat. Ann. § 31-18-15 (2021).

The disproportionality in basic sentences is exacerbated with the application of the prior criminal history provision. As shown in Table 6, while there is arguably proportionality within each category of offense (i.e., a basic second degree offense has a higher sentence than a basic third degree sentence), when the additional facts are added into the mix, disproportionality arises. A fourth-degree felony resulting in exploitation of a child for a person who has three or more prior felony convictions garners an 18-year sentence, which is more severe than a baseline third degree felony for a person with similar criminal history (11 years) as well as a baseline second degree felony for a person with similar criminal history (17 years). Thus, the disproportionality appears to be a product of the *sentencing scheme* rather than the offense classification scheme, and could potentially be remedied by refining the classification scheme, sentencing provisions, or both.

Table 6. Habitual Offender Alteration to Basic Sentences

	No prior Criminal History	One Prior Felony Conviction	Two Prior Felony Convictions	Three Prior Felony Convictions
Basic Second Degree Offense	9 years	10 years	13 years	17 years
Resulting in death of a human	15 years	16 years	19 years	23 years
Resulting in exploitation of a child	12 years	13 years	16 years	20 years
Sexual offense against a child	15 years	16 years	19 years	23 years

	No prior Criminal History	One Prior Felony Conviction	Two Prior Felony Convictions	Three Prior Felony Convictions
Basic Third Degree Offense	3 years	4 years	7 year	11 years
Resulting in death of a human	6 years	7 years	10 years	14 years
Resulting in exploitation of a child	11 years	12 years	15 years	19 years
Sexual offense against a child	6 years	7 years	10 years	14 years

	No prior Criminal History	One Prior Felony Conviction	Two Prior Felony Convictions	Three Prior Felony Convictions
Basic Fourth Degree Offense	1.5 years	2.5 years	5.5 years	9.5 years
Resulting in exploitation of a child	10 years	11 years	14 years	18 years

Appendix – Statutory References by State

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