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NEW MEXICO'S JUST DESERTS: HOW THE STATE'S SENTENCING POLICIES HAVE NEGATIVELY AFFECTED CRIMINAL JUSTICE

Oliver M. Stephanz *

ABSTRACT

This Article takes an empirical, data-driven approach to evaluate New Mexico's sentencing program against those used throughout the nation. In so doing, it uses three primary factors to weigh the "success" of the state's sentencing policies: (1) incarceration rates, (2) crime rates, and (3) recidivism. These factors are used because data from the last 40 years show that each one is affected by the type of sentencing system used in a given jurisdiction. Studies further indicate that specific types of sentencing systems are strongly correlated with lower crime, lower numbers of incarcerated individuals, and less recidivism among convicted offenders. This Article also examines the application of New Mexico's current sentencing statutes by relying on a small dataset of convictions from 2019 provided by the New Mexico Sentencing Commission. The result of these analyses suggest that the current statutory program negatively affects criminal justice outcomes and is not functioning as initially intended. This Article urges that New Mexico conduct wholesale reform of its sentencing policies to address these problems. Studies from both within New Mexico and around the United States indicate that adopting a presumptive sentencing guideline and returning to discretionary parole release may help to reduce the state's criminal justice problems. New Mexico should adopt both of these reforms.

INTRODUCTION

A principal aim of modern society is to have the lowest possible crime rate. Criminal justice systems, however, have struggled with achieving this goal since time immemorial. Indeed, it seems inevitable in complex societies that some level

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of criminal activity will always exist.¹ The history of criminal justice is, therefore, a history of differing theories of criminal punishment and how they affect society. These penological theories—now commonly divided into the broad categories of deterrence, retribution, rehabilitation, and incapacitation²—represent different emphases on two competing justifications for punishment: utilitarian goals and retributive consequence.³

Retributivists believe that the primary purpose of criminal justice is to adequately punish offenders for the severity of their crime.⁴ Under this theory, punishment is not a means to some greater end.⁵ Rather, proportional punishment for one's actions is the end itself, regardless of its downstream effects.⁶ In criminal justice, retribution is often characterized by the phrase “just deserts,”⁷ referring to the notion that proportional punishment for a crime is the justified consequence of illegal activity.⁸ Essentially, that one gets what he has coming. Retributive justice, in its pursuit for adequate punishment, is not limited by any potential negative effects on society that such a punishment may cause.⁹ Proponents of just deserts demand

1. JAMES MADISON, FEDERALIST NO. 51, at 319 (Clinton Rossiter ed., 1999) (“If men were angels, no government would be necessary.”).

2. Andrew von Hirsch, *Commensurability and Crime Prevention: Evaluating Formal Sentence Structures and Their Rationale*, 74 J. CRIM. L. & CRIMINOLOGY 209, 210 (1983) [hereinafter von Hirsch, *Commensurability*] (identifying the four predominate sentencing rationales as “deterrence, incapacitation, rehabilitation, or desert”). Desert, in this context, refers to a theory of criminal punishment closely related to retribution. Edward M. Wise, *The Concept of Desert*, 33 WAYNE L. REV. 1343, 1343.

“Desert” is a substantive derived from an obsolete past participle of the old French verb *deservir*, to deserve. It refers to that in conduct or character which deserves reward or punishment, or to that which is deserved: “a due reward or recompense, whether good or evil.” Since criminal law is concerned with punishment rather than reward, “desert” in the context of criminal law generally signifies A deserved punishment—the due “recompense” for the defendant’s Crime. The concept of desert usually is associated with retributive theories of punishment. *Id.* (citations omitted). Note, however, that some scholars point to subtle differences between desert and retribution. Monica M. Gerber & Jonathan Jackson, *Retribution as Revenge and Retribution as Desert*, 26 SOC. JUST. RSCH. 61 (2012). This Article treats desert and retribution as representing the same idea: that punishment should be proportional to the offense without regard for other societal effects.

3. Wise, *supra* note 2, at 1344; see also Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 57–61 [hereinafter von Hirsch, *Proportionality*] (discussing the difference between utilitarian and retributive rationales).

4. See, e.g., IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 194–97 (W. Hastie trans., Augustus M. Kelley 1974) (1887).

5. *Id.* at 195 (“Juridical Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime.*”).

6. *Id.*

7. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 909 (1991); see also ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 45–55 (1976).

8. Wise, *supra* note 2, at 1344.

9. *Id.* Note that while proportional punishment may result in harsh sentences, and thereby cause a deterrent effect on future crime, retributivists do not see that as a justification for punishment. von Hirsch, *Commensurability*, *supra* note 2, at 221–22 (questioning the efficacy of deterrence as a whole).

that one's penalty be equivalent to the evil which he has wrought and are not concerned with a punishment's broader impacts.¹⁰

On the other hand, utilitarian theories of criminal punishment, represented chiefly by offender rehabilitation,¹¹ “assume that punishment can only be justified in terms of its beneficial consequences for either the offender or civil society.”¹² The driving force behind utilitarian penal theory is that both crime and the resulting punishment are evils to be avoided.¹³ According to this theory, punishment “cannot be warranted by the ill deserts of those punished”¹⁴ and may therefore not even be punitive in nature. Rather, the consequences one suffers due to committing a crime are determined by what will most positively affect society.¹⁵ Offender rehabilitation is perhaps the most utilitarian of the four major penological theories in the United States. Deterrence and incapacitation are also considered utilitarian because their purpose extends beyond the mere imposition of punishment.¹⁶ However, these theories offer no consideration of the individual offender and his personal potential for recidivism. Rehabilitation alone among the four common penological theories provides for the care and reform of the individual offender.

Retributive and utilitarian views of punishment serve as the basis for much of the tension around criminal justice. The theories can easily be seen as competing, if not contradictory. Indeed, scholars and jurists often find themselves on one side or the other, with little room for compromise.¹⁷ However, modern criminal punishment requires a balancing act between punishing offenders for their crime and providing them with resources that they might use for reform. In modern society, this balancing act largely boils down to one thing: sentencing.

Through sentencing, society—particularly the sentencing judge—must balance competing interests: society's need to punish offenders and an offender's individual need to reform. But how is that achieved? Consider the following: a convicted felon with substance abuse issues and no income commits an armed robbery. He does this to get money to satisfy his addiction. In the process, the victim is seriously injured and cannot work. She is a single mother with two children, and now she cannot pay her bills. The family faces eviction.

Should the robber go to prison? If so, for how long? Which of the above facts may be rightly considered when determining an appropriate punishment? Can

10. John Braithwaite, *Challenging Just Deserts: Punishing White Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723, 723 (1982).

11. Some scholars argue that restorative justice is the foremost example of utilitarian punishment. See generally John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999). This Article does not discuss restorative justice because it is too far removed from punishment in the United States. Rather, this Article focuses on the more realistic goal of focusing punishment on offender rehabilitation.

12. Wise, *supra* note 2, at 1344–45.

13. von Hirsch, *Proportionality*, *supra* note 3, at 58.

14. *Id.*

15. *See id.*

16. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316–17 (2000).

17. von Hirsch, *Proportionality*, *supra* note 3, at 55 (“The choice among them is sometimes treated as a matter of deciding allegiances: one adheres to “just deserts” or not, just as one decides to be a Democrat or Red Sox fan or not.”).

both utilitarian and retributive theories be satisfied at the same time? If prison is not the right answer, what is? What alternatives are best for this person and for society? Should society even consider the offender's needs or does justice require that his punishment merely fit the crime?

This Article provides a critical evaluation of New Mexico's current sentencing policies and its historical shift from rehabilitation-focused punishment to its modern, retributive form. It asserts that the controlling theory behind the state's sentencing laws has a major impact on crime, for better or worse. Using largely an empirical, data-driven approach, this Article analyzes the following three factors to evaluate the "success" of New Mexico's governing law on criminal punishment—the Criminal Sentencing Act ("CSA")¹⁸: (1) incarceration rates over time, (2) historical crime rates and trends, and (3) felony recidivism rates. This Article also takes a small step toward evaluating real-world compliance with the CSA by analyzing a small dataset of terms of incarceration provided by the New Mexico Sentencing Commission and comparing them to the prison term required by the CSA.¹⁹ This Article evaluates the CSA for both its effect on crime as well as whether actual sentences conform with its mandates.

New Mexico is in dire need of sentencing reform. Not only does the state perform woefully in all three of the above categories, but, due to inherent contradiction within the state's sentencing laws, offenders are rarely incarcerated for the amount of time the CSA requires.²⁰ It appears that the state's shift to retributive punishment in 1977²¹—via the CSA—has perpetuated crime rather than reduced it.²² This conclusion rests on the following findings. First, since the adoption of the CSA in 1977, the incarceration rate of New Mexicans has increased by over 900%.²³ Second, despite now having more prisoners, New Mexico's crime rate has also increased over the last forty years while crime rates throughout the country have declined.²⁴ Third, New Mexico has arguably one of the highest rates of recidivism

18. Criminal Sentencing Act, 1977 N.M. Laws, Ch. 216, §§ 1-12; N.M. STAT. ANN. §§ 31-18-1 to -26 (2022).

19. See *infra* Part II; see also Appendix 1 (sentencing data). Note that these data reflect how long someone was committed to the New Mexico Department of Corrections pursuant to a conviction. As explained in Part II, *infra*, that time period is wholly distinct from the actual sentence imposed.

20. See *infra* Part II.

21. Allison G. Karslake & Kathleen Kennedy Townsend, *Definite Sentencing in New Mexico: The 1977 Criminal Sentencing Act*, 9 N.M. L. REV. 131, 132-34 (1977).

22. This Article does not suggest that New Mexico's sentencing policies are the only causal factor in crime rates. Instances of crime, incarceration rates, and recidivism are all complex issues with numerous driving factors. This Article suggests, based on numerous studies, that sentencing policies are correlated to these statistics and that the right policy choices regarding sentencing may help solve some problems. See DON STEMEN ET AL., VERA INST. OF JUST., OF FRAGMENTATION AND FERMENT: THE IMPACT OF STATE SENTENCING POLICIES ON INCARCERATION RATES, 1975-2002, 10 (2006). As a result of this Article's focus on sentencing, many other valid and related causal factors are not discussed.

23. CHRISTIAN HENRICHSON ET AL., VERA INST. OF JUST., INCARCERATION TRENDS IN NEW MEXICO 1 (2019).

24. FED. BUREAU OF INVESTIGATION, CRIME DATA EXPLORER, <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend> [<https://perma.cc/RSE5-SUKG>] [hereinafter CRIME DATA EXPLORER] (showing the 1985 crime rate in New Mexico was 703.9 incidents per 100,000 people, and in 2020 it was 778.3 incidents per 100,000). The *Crime Data Explorer* also shows that the national average crime rate in 1985 was 558.1 per 100,000 residents, and in 2020 it was 398.5. *Id.*

in the country.²⁵ Additionally, it appears that judicial compliance with the CSA's rigid mandates is low. Out of the 114 incarceration commitments analyzed in this Article, only twenty-three fell within the statutorily authorized range of time.²⁶ This finding suggests that New Mexico's sentencing statutes also cause undue disparity among similarly situated offenders—an ill that compounds the state's sentencing woes.

Ultimately, this Article argues that wholesale replacement of the CSA is necessary to address these issues. Specifically, New Mexico could benefit from the following two reforms. First, it should adopt a presumptive sentencing guideline with wide incarceration ranges to adequately guide judicial discretion and decrease undue sentencing disparity. Second, New Mexico should reestablish offender rehabilitation as the predominant goal of incarceration by reinstating an active parole board that determines prisoner release based on their potential for recidivism.

To help explain these conclusions, Part I of this Article provides a brief history of sentencing policies in New Mexico and throughout the United States in order to provide context for what sentencing programs are available and what has already been tried. Part II then explains the nuances of New Mexico's current sentencing system and the specific provisions that cause confusion and detract from the goals of criminal punishment. Part III concludes by advocating for the adoption of sentencing guidelines that both provide for judicial discretion and adequately guide it and the return of discretionary release, via parole, to better rehabilitate offenders after they become incarcerated.

I. HISTORICAL DEVELOPMENT OF SENTENCING AND NEW MEXICO'S SHIFT FROM REHABILITATIVE TO RETRIBUTIVE PUNISHMENT.

To fully understand why New Mexico's sentencing policies take their current form, it is important to first briefly review the history of criminal punishment both in the state and throughout the nation. This history provides modern stakeholders with insight about sentencing models and theories that have already been tried and informs them as to which ones work best. This Part proceeds by first explaining the types of sentencing systems available and how they allocate discretion.²⁷ It then explains how sentencing was conducted prior to nationwide reform in the 1970s and 1980s.²⁸ This Part finishes by reviewing New Mexico's

25. See VA. DEP'T OF CORR., STATE RECIDIVISM COMPARISON 1 (2018) (showing New Mexico has the 6th highest recidivism rate at 49.1%); see also N.M. CORR. DEP'T, PERFORMANCE REP. CARD: FIRST QUARTER, FISCAL YEAR 2020 3 (2020) (New Mexico's recidivism rate for that quarter was 57%—an increase from the previous four years); KRISTINE DENMAN ET AL., N.M. STAT. ANALYSIS CTR., ABSCONDING AND OTHER SUPERVISION VIOLATIONS: A STUDY OF PROBATIONERS, PAROLEES, AND DUAL SUPERVISION IN NEW MEXICO 2 (2017) (stating that while 30% of the studied population returned to prison on supervised release, 18% of probationers were revoked to prison, 76% of parolees went to back prison, and 72% of those on dual supervision were reincarcerated).

26. See *infra* Part II (explaining how New Mexico's sentencing statutes provide for a sentencing range and appear facially presumptive).

27. Part I(A) *infra*.

28. Part I(B) *infra*.

reaction to that reform²⁹—the CSA—and by identifying other modern sentencing systems which the state might emulate. Because this Article advocates for the adoption of a sentencing guideline, it reviews several examples of guideline systems and discusses their pros and cons.³⁰

A. Sentencing Overview: Sentencing Discretion and Release Discretion

Generally, sentencing systems provide for two forms of discretion: (1) in determining the form and duration of punishment in the first place, called sentencing discretion,³¹ and (2) in determining when an offender is released from that punishment, called release discretion.³² Modern sentencing practices in the United States have varied widely in their constraints on these two forms of decision-making.³³

Sentencing discretion consists of what options are available to a judge when determining what an offender's punishment ought to be.³⁴ The available options derive from statute and offer judges such choices as determining the length of a prison term, deferring or suspending incarceration, or using supervised release such as probation.³⁵ This type of constraint—that which governs sentencing decisions—is called structured sentencing.³⁶ Guideline systems, such as the Federal Sentencing Guidelines, are primary examples of highly structured systems.³⁷ Other examples are states, like New Mexico,³⁸ that use statutes to narrowly define the prescribed punishment for each criminal offense.

Release discretion, on the other hand, relates to how much latitude the state has in releasing offenders from their sentence.³⁹ Although the duration of one's sentence is necessarily related to the judge-pronounced punishment, an offender's actual release can be theoretically distinct from the judge's sentence.⁴⁰ That is, a

29. Part I(C) *infra*.

30. Part I(C) *infra*. The guidelines reviewed are the Federal Sentencing Guidelines and those of Pennsylvania and North Carolina. The Federal Guidelines were chosen because they serve as the foremost example of guidelines in the United States and are the subject of much debate. Pennsylvania and North Carolina provide examples of other, very different guideline systems useful for comparison with the federal example and with each other.

31. See STEMEN ET AL., *supra* note 22, at 10 (discussing the differences between release decisions and sentencing decisions).

32. *Id.*

33. ALISON LAWRENCE, NAT'L CONF. OF STATE LEGIS., MAKING SENSE OF SENTENCING: STATE SYSTEMS AND POLICIES, 4-5 (2015).

34. STEMEN ET AL., *supra* note 22, at 10.

35. See, e.g., N.M. STAT. ANN. §§ 31-18-15, 15.1 (2022).

36. STEMEN ET AL., *supra* note 22, at 14.

37. U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2018). For more discussion on sentencing guidelines, see Part I(E) *infra*. Appendixes 2 and 3 contain examples of sentencing guidelines.

38. N.M. STAT. ANN. § 31-18-15 (1978) (providing specific prison terms that a court must impose for each felony degree). For discussion on the operation of New Mexico's current sentencing system, see Part II *infra*.

39. STEMEN ET AL., *supra* note 22, at 10.

40. *Id.* States that adopt determinate sentencing generally also confine sentencing discretion by adopting statutes that prescribe minimum and maximum sentences for a crime. However, that is a

judge may be strictly restrained in what punishment she is allowed to impose, yet an offender may be released well before or after that sentence.⁴¹ For example, Pennsylvania currently employs structured sentencing in the form of a sentencing guideline⁴² but allows its parole board to determine when an offender is actually released after he has served the pronounced sentence.⁴³ In such a jurisdiction, it is not the judge but the parole board that governs release decisions. In other jurisdictions, a state may elect to leave release discretion within the power of the sentencing judge.⁴⁴ In these states, the judge determines release by merely imposing a specific sentence length after which the offender is released without any further decision-making or evaluation. These two types of release discretion—either discretionary parole release or mandatory release after completing a sentence—are referred to as either indeterminate or determinate sentencing.⁴⁵

Indeterminate systems are primarily characterized by discretionary release via a parole board.⁴⁶ Under these systems, a judge may be required to pronounce the minimum time an offender must serve, the maximum time he will, or both.⁴⁷ However, with only limited constraint from the judicial sentence, the parole board ultimately determines when an offender is ready for release.⁴⁸ Thus, the actual duration of the offender's punishment is "indeterminate." Ideally, the primary considerations for release are the offender's risk for recidivism and his ability to successfully reenter society. Thus, offender rehabilitation is the driving theory behind indeterminate sentencing because it allows a parole board to determine when a person has successfully reformed.⁴⁹ As discussed below, however, historical abuses of this power prompted numerous states to abolish parole.⁵⁰ Although

secondary function of a determinate sentencing system, rather than its primary goal. *Id.* at 44-48 (discussing how determinate sentencing necessarily constrains judicial decision making but that is not its main purpose).

41. Consider, for example, meritorious deductions to an offender's sentence for good behavior while incarcerated. Generally, corrections authorities, such as probation or parole officers or the prison staff, determine when an inmate has satisfied the criteria for good time deductions. *E.g.*, N.M. STAT. ANN. § 33-2-34 (2022) (investing determination of good time deductions in a "supervisor and [requiring] approv[al] by the warden or the warden's designee").

42. 42 PA. STAT. AND CONS. STAT. ANN. § 303.1-18 (West 2021) (containing Pennsylvania's sentencing guidelines).

43. 61 PA. STAT. AND CONS. STAT. ANN. § 6137 (West 2021) (detailing the parole board's power to release inmates when, after they serve the minimum sentence, "the best interests of the offender justify or require that the offender be paroled").

44. *See infra* Part I(C) (discussing determinate sentencing).

45. *See* STEMEN ET AL., *supra* note 22, at 44. These terms have also been referred to as definite and indefinite, but, for clarity, this Article uses only determinate and indeterminate.

46. STEMEN ET AL., *supra* note 22, at 44.

47. *Id.*

48. *See id.*

49. *Mistretta v. United States*, 488 U.S. 362, 363 (1989) ("Both indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable, rehabilitation. . . ."); *Zerbst v. Kidwell*, 304 U.S. 359, 362-63 (1938) ("Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency, under guidance and control of the Board."); *see also* LAWRENCE, *supra* note 33, at 4 ("Rationale for indeterminate sentencing is a highly individualized penalty that provides an opportunity for rehabilitation and includes review of an offender's progress toward that objective.").

50. *See infra* Part I(B).

modern trends have generally shifted away from indeterminate sentencing, as of 2015, thirty-three states still used some form of discretionary release.⁵¹

Determinate systems, on the other hand, are primarily characterized by the *absence* of discretionary parole release.⁵² Judges pronounce a sentence within statutory constraints, and the offender is automatically released from his sentence when he has served the prescribed amount of time.⁵³ The duration of a person's supervision—incarceration or otherwise—is fixed by the judge and, therefore, has increased “determinacy.” The primary purposes of determinate sentencing are to provide certainty in punishment and to reduce sentencing disparity.⁵⁴ However, due to the absence of discretionary release, there is no consideration of the offender's rehabilitation. Thus, adoption of determinate sentencing represents a marked departure from rehabilitative punishment. Determinate sentencing is not necessarily retributive because the absence of discretionary release does not mean punishment is proportional to the crime committed. However, there is a strong relationship between determinate policies and retributive goals, and, in reality, they often go hand in hand.⁵⁵

Any combination of indeterminate or determinate sentencing (the two forms of release discretion) and structured sentencing (the degree of sentencing discretion) may exist in a jurisdiction.⁵⁶ States have implemented indeterminate release with high degrees of structure just as they have used determinate systems with very limited structure.⁵⁷ In sum, the question essentially becomes: “where is discretion allocated in determining the duration of punishment?” If a judge pronounces a specific punishment duration and the offender is released automatically upon completing it, the sentence is determinate. If, on the other hand, an offender is subject to discretionary parole release, the sentence is indeterminate. The degree to which a judge's sentencing discretion is controlled by statute is the amount of structure in the system. Below is a brief history of the development of these policies and how they affect crime, sentence disparity, and offender reform.

51. LAWRENCE, *supra* note 33, at 4.

52. STEMEN ET AL., *supra* note 22, at 44.

53. This does not take into account early release for good behavior. “Meritorious deductions,” as they are called, are theoretically distinct from discretionary parole release because, while it rewards certain behavior, it is not administered by a parole board. Further, an offender's stay in prison may not be increased if he does not meet “good behavior” requirements. For more discussion of determinate sentencing, see Part I(C) *infra*.

54. LAWRENCE, *supra* note 33, at 4 (“Rationale for determinate sentencing is to increase certainty in the amount of time served, improve proportionality of the sentence to the gravity of the offense, and reduce disparities that might exist when sentences are more indeterminate.”).

55. *See id*; *see also* Karlake & Townsend, *supra* note 21, at 132 (criticizing New Mexico's shift to determinate sentencing). Karlake and Townsend state of the CSA:

The 1977 Act was conceived in response to public pressure ‘to get tough on criminals.’ Its primary objective was to require lengthier periods of incarceration. The impetus of the Act came from the Criminal Justice Study Committee, which thought that sentencing, as administered under [indeterminate sentencing], did not adequately protect society.

Id.

56. *See* LAWRENCE, *supra* note 33, at 4–5.

57. *Id*; *see also* STEMEN ET AL., *supra* note 22, at 67 (Table 4-3 shows how the authors' study characterized each state in terms of determinacy and whether it operated with a sentencing guideline).

B. Sentencing Prior to the 1970s: The Indeterminate Era

Until the 1970s, the federal government and state governments around the country used indeterminate sentencing systems with almost no structure constraining judicial decisions.⁵⁸ During this era, an offender was ordered to serve a broad range of time, rather than a specific number of years.⁵⁹ If incarcerated, parole boards would wait for inmates to become discharge-eligible and then evaluate each person individually for release from prison.⁶⁰ New Mexico, prior to reform in the late 1970s,⁶¹ is a useful illustration of indeterminate sentencing in practice. During that time, a New Mexico offender convicted of a crime would receive a wide sentence range from the judge.⁶² The offender's eventual release was then up to parole to determine.⁶³ The minimum and maximum prison terms announced, however, did directly affect when the prisoner was eligible for parole.⁶⁴ Thus, the judge often inflated a sentence to account for early release.⁶⁵

An old New Mexico case, *Welch v. McDonald*,⁶⁶ exemplifies the judge-parole relationship under indeterminate sentencing. In *Welch*, a man convicted of second-degree murder was sentenced to prison for “not less than 40 nor no more than 90 years.”⁶⁷ In 1931, when *Welch* was decided, a conviction of second-degree murder carried a punishment of “any period of time not less than three years.”⁶⁸ *Welch* appealed, claiming an unlawful sentence.⁶⁹ On appeal, the court considered his early release possibilities, stating:

58. Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2044 (1992) (“We gave lawless power to the judges.”). Depending on the statutory scheme in the jurisdiction, judges using indeterminate sentencing may be considered to have, in fact, very little discretion in issuing a sentence. Rather, it was the parole board that exercised unfettered discretion. For example, prior to reform in 1976, California judges were required to impose a sentence defined under statute. Their only discretion arose in deciding whether to impose a prison sentence or a period of probation. MILLER ET AL., NAT’L CTR. FOR STATE CTS., SENTENCING REFORM: A REVIEW AND ANNOTATED BIBLIOGRAPHY 30 (1981).

59. Julian D’Esposito Jr., *Sentencing Disparity: Causes and Cures*, 60 J. CRIM. L. CRIMINOLOGY POLICY & POLICE SCI. 182, 185 n. 30 (“An indeterminate sentence is the use of a minimum and maximum term, the former set by the judge. Parole eligibility comes upon completion of the minimum.”).

60. *Id.*; see also LAWRENCE, *supra* note 33, at 4 (“A parole board determines when an offender has served sufficient time in prison and when he or she can be safely released on parole.”).

61. N.M. STAT. ANN. § 40A-29-3 (1963) (repealed 1977). For discussion on New Mexico Sentencing reform, see *infra* Part I(C).

62. *Id.* § 40A-29-3 (1963) (repealed 1977).

63. See *State v. Maestas*, 1957-NMSC-057, ¶ 12, 63 N.M. 67, 313 P.2d 337 (upholding a sentence of “not less than three years and not more than life”); see also *McCutcheon v. Cox*, 1962-NMSC-175, ¶ 8, 71 N.M. 274, 377 P.2d 683 (stating that a prison sentence of “not less than two years” with no maximum prescribed either by the judge or in statute carried with it a maximum of life in prison).

64. *Owens v. Swope*, 1955-NMSC-079, ¶ 20, 60 N.M. 71, 287 P.2d 605 (“[C]ompletion of the minimum sentence merely rendered the inmate eligible to parole.”).

65. *E.g.*, *Welch v. McDonald*, 1931-NMSC-067, ¶ 10, 36 N.M. 23, 7 P.2d 292. This practice is still in existence today. *E.g.*, *Ira v. Janecka*, 2018-NMSC-027, ¶ 30, 419 P.3d 161 (quoting the sentencing judge’s consideration of early release).

66. 1931-NMSC-067, 7 P.2d 292.

67. *Id.* ¶ 1, 7 P.2d at 293.

68. N.M. STAT. ANN. § 35-306 (1929).

69. 1931-NMSC-067, ¶ 1, 7 P.2d at 292.

[A] prisoner sentenced to imprisonment for from 40 to 90 years might secure his release in 16 years and 6 months, and, if he did not secure a parole, good behavior would make him eligible to discharge in 36 years and 5 months computed upon the basis of the 90-year period.⁷⁰

Thus, not only was the initial sentence created somewhat arbitrarily but the sentencing court was attempting to account for what parole *might* do in the future. This system inevitably resulted in absurdly varying sentences from judge to judge and left inmates subject to the prejudices of the parole board.

For most of the twentieth century, indeterminate sentencing was the controlling penal practice throughout the United States, but by the 1970s it faced nationwide criticism.⁷¹ Rising crime rates around the country⁷² began to replace rehabilitative punishment with a mantra that “nothing works,” accompanied with high demand for harsher treatment of offenders.⁷³ Indeterminate sentencing as the national norm faced several key criticisms. First, critics claimed that it provides for rampant, unwarranted disparity amongst similarly situated defendants and, thus, undermines society’s faith in our criminal justice system.⁷⁴ Second, indeterminate sentencing too often results in no prison time or releases prisoners too early—in essence, it is weak on crime.⁷⁵ Finally, indeterminate sentencing was recognized as a system that creates confusion and implicit deceit in the imposed sentence, ultimately leaving prisoners with no real idea how long they might stay in prison.⁷⁶ Several seminal studies of the federal judiciary⁷⁷ confirmed unequal treatment of offenders and signaled the end of indeterminate sentencing as a national norm.

70. *Id.* ¶ 10, 7 P.2d at 293.

71. *E.g.*, MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

72. Ryan King, *Balancing the Goals of Determinate and Indeterminate Sentencing Systems*, 28 FED. SENT’G REP. 85, 85 (2015).

73. *E.g.*, Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 36 PUB. INT. 22, 25 (1974) (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have no appreciable effect on recidivism.”). Mr. Martinson has since stated that certain programs can have a positive effect on recidivism. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

74. Edward M. Kennedy, *Criminal Sentencing: A Game of Chance*, 60 JUDICATURE 208, 210 (1976) (claiming that “[s]entencing disparity is national scandal”). Senator Kennedy, a United States Senator, was the sponsor for the Senate Guidelines bill, S. 2699, 94th Cong. 2d Sess., and a major advocate for sentencing reform.

75. *See id.* at 210 (“The critical problem confronting our criminal justice system is that some convicted offenders (including repeat offenders) escape jail altogether while others—convicted of the same crime—go to jail for excessively long periods.”).

76. Karslake & Townsend, *supra* note 21, at 133 n.20 (likening indeterminate sentencing to a kind of “psychological torture”).

77. ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 1* (Fed. Jud. Ctr. 1974); Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT’G REP. 180, 180 (1999) (referencing a Department of Justice study in which one judge sentenced a defendant to 14 years above the average sentence).

C. New Mexico's Criminal Sentencing Act of 1977: Determinate Sentencing

Although substantial federal sentencing reform would not take place until the late 1980s,⁷⁸ New Mexico overhauled its indeterminate sentencing policies in 1977 via the Criminal Sentencing Act (“CSA”).⁷⁹ The CSA abolished indeterminate sentencing in New Mexico by eliminating discretionary release and establishing specific prison terms for each class of felony.⁸⁰ There was no longer a parole hearing to determine eligibility for release once an offender served that time.⁸¹ The intent of the CSA was twofold.⁸² Primarily, it was designed to punish offenders more harshly by requiring longer prison terms and eliminating discretionary release.⁸³ It was also intended, albeit as perhaps a secondary effect, to reduce undue sentencing disparity between similar offenders.⁸⁴ Most importantly, the CSA represents a legislative departure from rehabilitation as a dominant penological theory.⁸⁵ In its place were the more punitive goals of retribution and deterrence.

Although it continues to be the controlling law today, the CSA immediately came under heavy criticism from various fronts. Several judges claimed that the Act limited necessary judicial discretion during sentencing.⁸⁶ They argued that judges must account for the unique characteristics of each crime and each defendant when determining a punishment.⁸⁷ The legislature itself argued about the punitive nature of the bill.⁸⁸ Several scholars urged that the CSA's long and unforgiving prison sentences, without meaningful rehabilitation programs, would ultimately lead to more crime and more people in prison.⁸⁹ In response, however, defendants of the CSA argued that crime was already increasing under indeterminate sentencing and that such policies fail to adequately protect the public.⁹⁰ This discussion revolved—and still revolves—around which theory of punishment should be its controlling purpose: retribution or rehabilitation. Critics of the CSA argue that it removes rehabilitation as the primary purpose of punishment and is, therefore, less effective in the long run.⁹¹ Critics also argue that determinate sentencing does not actually remove unwarranted disparity but merely shifts it from the parole board to the judiciary without any appreciable concern for an offender's capacity to rehabilitate

78. See *infra* Part II(D) for discussion of the adoption of the Federal Sentencing Guidelines.

79. Criminal Sentencing Act, 1977 N.M. Laws, Ch. 216, §§ 1-12.

80. *Id.* § 4(A).

81. *Id.* § 12. This is still the law governing parole today. N.M. STAT. ANN. § 31-21-10 (2022).

82. Karlake & Townsend, *supra* note 21, at 132–34.

83. *Id.*

84. *Id.*

85. *Id.* at n. 19.

86. *Id.* at 134 n.24.

87. *Id.*

88. *Id.* at 134.

89. *Id.* at 144, 147, 149.

90. *Id.* at 132-33 (stating that a sponsor of the bill and several other committee members thought indeterminate sentencing “did not adequately protect society”).

91. See *id.* at 149-51 (“[A] valuable opportunity exists in New Mexico to try innovative alternatives to total incarceration that would concentrate on rehabilitation and education.”).

while incarcerated.⁹² Critics continue that determinate sentencing, without greater statutory limitation on judicial discretion, would “inevitably result in disparity of punishments for similar offenses.”⁹³

D. Other Methods of Sentencing Reform: Introducing Structure

Although New Mexico, in its effort to reform, opted to control release decisions more tightly, several states and the federal government solved the problems of indeterminacy another way: the introduction of structure.⁹⁴ Recall that sentencing structure relates to how much discretion judges have in determining an appropriate sentence.⁹⁵ Since the 1970s, states have varied widely in their control over this facet of criminal justice.⁹⁶ Increasingly, however, states have adopted stricter controls on sentencing decisions.⁹⁷ By 2015, about half of the states in America had adopted some form of structured sentencing in addition to their determinate or indeterminate schemes.⁹⁸ Generally, sentencing structure has been adopted in one of three ways: (1) through presumptive statutes,⁹⁹ (2) by implementing presumptive sentencing guidelines,¹⁰⁰ or (3) through voluntary sentencing guidelines.¹⁰¹ Each is discussed briefly below.

Presumptive sentencing statutes prescribe specific terms of incarceration for each crime or class of crime.¹⁰² They are called presumptive because a judge may not deviate from the identified sentence without a statutorily provided justification—such as aggravating or mitigating circumstances.¹⁰³ The amount a judge may deviate from the identified sentence, or what may be considered as an

92. *Id.* at 151 (“The discretion already exercised by prosecutors and prison authorities is not limited by the 1977 Act and consequently will contribute to disparate punishments for similar offenders.”).

93. *Id.* at 154.

94. Note that with New Mexico’s new statutes necessarily came more structure. *See* Criminal Sentencing Act, 1977 N.M. Laws, Ch. 216, §§ 1-12 (providing a narrower range of years from which a judge may pick a sentence for each crime). No longer could a judge pronounce a sentence along the lines of that shown in *Welch*, *supra* note 66. However, New Mexico’s primary focus in adopting the CSA was to control release discretion, not necessarily to introduce structure. *Karslake & Townsend*, *supra* note 21, at 135 (“The most radical and important feature of the 1977 Act is the elimination of the Parole Board’s discretion to release non-capital felonies on parole.”). The CSA shows a relationship between increased determinacy and increased structure, but that is not necessarily required. As stated above, *supra* notes 42–43 and accompanying text, Pennsylvania (and other jurisdictions) have adopted highly structured systems and maintained discretionary parole release. *See also infra* Part I(E) (discussing Pennsylvania’s system).

95. *See supra* Part I(A).

96. *STEMEN ET AL.*, *supra* note 22, at 1.

97. Don Stemen & Andres Rengifo, *Policies and Imprisonment: The Impact of Structured Sentencing and Determinate Sentencing on State Incarceration Rates, 1978-2004*, 28 *JUST. Q.* 174, 179 (2011) (“Between 1975 and 2004, seven states adopted presumptive sentences, 11 states adopted presumptive sentencing guidelines, and 10 states adopted voluntary guidelines.”); *see also* *STEMEN ET AL.*, *supra* note 22, at 66 (stating that, as of 2006, 26 states used some form of structured sentencing system).

98. *LAWRENCE*, *supra* note 33, at 4-5 (26 states had adopted some form of structure as of 2015).

99. *E.g.*, N.M. STAT. ANN. § 31-18-15 (1978).

100. *E.g.*, U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 2018).

101. *E.g.*, MD. CODE ANN., CRIM. PROC. § 6-216 (West 2001).

102. *STEMEN ET AL.*, *supra* note 22, at 63.

103. *Id.*

aggravating or mitigating circumstance, changes from state to state.¹⁰⁴ In New Mexico, for example, a judge may only deviate by up to one-third of the identified basic sentence by a finding of an aggravating or mitigating circumstance.¹⁰⁵

Sentencing guidelines, as opposed to presumptive statutes, contain a range of years or months from which a judge may select when determining the sentence.¹⁰⁶ This “guideline range” is typically based upon the seriousness of the offense and the offender’s personal criminal history.¹⁰⁷ The formal consideration of the offender’s criminal history is one of the major distinctions between guidelines and a regular presumptive statutory scheme.¹⁰⁸ Generally, guidelines can be considered “presumptive” or “voluntary.”¹⁰⁹ In the former, judges may only depart from the guideline range for authorized reasons which are subject to appellate review.¹¹⁰ Under a voluntary guideline system, a judge may depart from the guideline range for an authorized reason, and the sentence is typically not subject to appeal merely because it is outside the given range.¹¹¹

E. Three Modern Examples of Sentencing Guidelines: The Federal Guidelines, Pennsylvania, and North Carolina

This Article advocates for the adoption of a sentencing guideline to help guide judicial sentencing discretion and avoid the problems presented by indeterminacy. However, with now over 25 states and the Federal Government using guidelines, there are many examples to learn from. This Article briefly reviews three such examples due to their vastly differing structure and application: the Federal Sentencing Guidelines, Pennsylvania’s Guidelines, and North Carolina’s version of the same.¹¹² Ultimately, this Article argues that New Mexico should adopt a

104. *Id.* (“[E]ven within the category of presumptive sentencing systems, state systems are constructed quite differently.”).

105. N.M. STAT. ANN. § 31-18-15.1 (2022). See Part II, *infra*, for discussion on New Mexico’s current laws.

106. STEMEN ET AL., *supra* note 22, at 67.

107. *Id.*

108. *Id.* at 64. Note that traditional penal statutes often contain a provision for enhancement due to “habitual offender” status. *E.g.*, N.M. STAT. ANN. § 31-18-17 (2022) (providing for enhancement of a habitual offender’s sentence in New Mexico). However, in a guideline, there are usually several criminal history categories that any given person may fall into based on their history. See U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 2018). Each category, combined with the “score” the guideline ascribes to the offense, outputs a recommended sentence. *Id.* See also Appendices 2 and 3 for examples of guidelines.

109. STEMEN ET AL., *supra* note 22, at 65.

110. *Id.* at 64.

111. *E.g.*, State v. Grady, 722 N.W.2d 760, 763 (Wis. Ct. App. 2006) (confirming that an offender has “no right to appeal a court’s sentencing decision based on the court’s decision to depart in any way from any guideline”).

112. These three jurisdictions were chosen because they each have different guideline systems that provide a useful overview of guidelines’ varying forms. The Federal Guidelines are a quasi-presumptive system that is extremely complex and rigid. See *infra* notes 119–30 and accompanying text. Pennsylvania, on the other hand, has a voluntary system and has numerous guideline grids rather than one. See *infra* notes 147–56 and accompanying text. North Carolina uses a presumptive guideline with fewer cells and only one grid. See *infra* notes 139–46 and accompanying text. As will be shown, each has its benefits and its limitations.

presumptive guideline with elements from both North Carolina's and Pennsylvania's systems.

i. The Federal Sentencing Guidelines and their problems

The Federal Sentencing Guidelines¹¹³ ("Federal Guidelines"), enacted in 1987, are one of the most widely known examples of sentencing structure in the United States. The Federal Guidelines were originally adopted, in part, to provide predictability in federal criminal sentencing¹¹⁴—a process which had been shown to treat similar offenders differently based solely on the judge they stood in front of.¹¹⁵ While implementation of the guidelines did, in fact, initially reduce unwarranted disparity among similarly situated offenders,¹¹⁶ after thirty years of use, they are now widely criticized for other reasons.¹¹⁷ Critics and supporters of the Federal Guidelines alike recognize that they are now far more complex than originally intended.¹¹⁸ The Federal Guidelines, originally drafted as presumptive,¹¹⁹ were too rigid to allow judges to exercise necessary discretion. To properly allow judges to consider the innumerable factors that might make one offender more or less culpable than another, the Federal Guidelines have been amended nearly 800 times and have grown by 300 pages since their inception.¹²⁰ Mandatory compliance with the Federal Guidelines was also declared unconstitutional.¹²¹ Increased complexity, combined with their now quasi-voluntary nature, has made the Federal Guidelines difficult to apply¹²² and decreased the very predictability they were designed to create.¹²³

In addition to the Federal Guidelines' increasing complexity, they are overly severe. The Sentencing Reform Act of 1984, which contained the first version of the Federal Guidelines, was a product of the "tough on crime" sentiment that characterized the 1970s and 1980s.¹²⁴ Rehabilitation—the driving purpose behind

113. U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2018).

114. Dawinder S. Sidhu, *Towards the Second Founding of Federal Sentencing*, 77 M.D. L. REV. 485, 486 (2018) ("Congress sought to introduce some appreciable level of uniformity into federal sentencing.") (citing *United States v. Booker*, 543 U.S. 220, 253 (2005)).

115. PARTRIDGE, *supra* note 77 (a study of the Second Circuit which revealed vast sentencing disparities for the same among District Court judges).

116. William W. Wilkins Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 585 (1992) (stating that bank robbers could have received a sentence anywhere from 0 months to 120 months under pre-guidelines practices but are now only exposed to 0 to 60 months imprisonment—"a dramatic reduction").

117. See Sidhu, *supra* note 114, at 493.

118. Breyer, *supra* note 77, at 185; Dawinder, *supra* note 114, at 495; Douglas A. Berman, *Reflecting on Parole's Abolition in the Federal Sentencing System*, 81 FED. PROBATION 18, 20 (2017) ("[T]he initial guidelines now look modest compared to their current iteration: After nearly 800 amendments, the Guidelines have grown to more than 500 pages of sentencing instructions.").

119. See *Booker*, 543 U.S. at 259 (declaring the requirement for strict compliance with the Federal Guidelines as unconstitutional).

120. Berman, *supra* note 118, at 20.

121. *Booker*, 543 U.S. at 259.

122. Sidhu, *supra* note 114, at 495 (discussing the overwhelming complexity of the Guidelines).

123. See *id.* at 485, 500-01.

124. Carol P. Getty, *Twenty Years of Federal Criminal Sentencing*, 7 J. OF THE INST. OF JUST. & INT'L STUD. 117, 119 (2007) (The Federal Sentencing Guidelines "abandoned the rehabilitation model and supported the 'tough on crime' philosophy of the 1980s.").

indeterminate sentencing—was not central to the creation of the Federal Guidelines.¹²⁵ The shift away from rehabilitation is also evidenced by the federal abolition of parole and increased prevalence of mandatory minimum laws.¹²⁶ These laws, created to mitigate decreased compliance with the Federal Guidelines, have been widely criticized by the judiciary, including Associate Justice of the United States Supreme Court Stephen Breyer, a member of the United States Sentencing Commission that produced the Federal Guidelines.¹²⁷ He has condemned mandatory minimum laws as impediments to the “development . . . of a rational, coherent set of punishments,” and “imprudent, unwise, and often an unjust mechanism for sentencing.”¹²⁸

The Federal Guidelines’ overly rigid structure also ultimately takes what sentencing discretion was afforded to judges and transfers it to the prosecution.¹²⁹ The Federal Guidelines currently consist of forty-three offense levels (one of which the offender will fall into based on his or her specific conduct) and six offender categories (representing the offender’s criminal history).¹³⁰ The result is 258 “cells” which contain all available prison terms a judge might impose.¹³¹ Thus, the Federal Guidelines, with such a high number of narrow sentence ranges, create a high level of predictability and an almost computer-like form of determining the sentence an offender may be subject to if he or she chooses to go to trial.¹³² This ultra-quantitative scheme allows prosecutors to reliably predict what sentence a defendant will probably receive and use that to negotiate a plea deal.¹³³

125. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974) (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”); Wilkins, *supra* note 116, at 586 (“The sentencing guidelines embody the basic philosophy that the purposes of sentencing are to punish the offender, to deter future crimes by the offender and others, and to protect the public.”).

126. S. Rep. No. 98-225 (1983) (“In the federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. . . . Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting. . . .”).

127. Breyer, *supra* note 77, at 184.

128. *Id.*

129. Getty, *supra* note 124, at 120 (“[P]rosecutors . . . now dominate the federal sentencing process. . . .”); see also Sidhu, *supra* note 114, at 497 (“The numbers-based system also makes the Guidelines an effective tool for prosecutors.”).

130. U.S.S.G. Ch. 5, Pt. A (The Guidelines Charts).

131. *Id.*

132. Sidhu, *supra* note 114, at 496 (discussing the views of a former federal district court judge that the Guidelines require that sentencing judges simply “do the math” rather than consider the gravity of their decisions).

133. *United States v. Kupa*, 976 F. Supp. 2d 417, 419–20 (E.D.N.Y. 2013). The court states:
[T]he government abuses its power to file prior felony information in drug trafficking cases. . . . To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that no one—not even the prosecutors themselves—thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.

Id. This Article makes no comment as to whether such a practice is appropriate, nor does it embrace the above criticism that the government “abuses its power.” Rather, it merely asserts that such a dynamic exists under the Federal Guidelines.

These criticisms of the Federal Guidelines are well-founded and cause guidelines generally to be approached with skepticism. However, the federal structure is not the only example of guideline systems available. The following sub-Part details two state guideline systems that offer widely differing approaches to sentencing.

ii. North Carolina's and Pennsylvania's guidelines

By 2008, at least twenty-one states had adopted some form of sentencing guidelines.¹³⁴ These systems vary from entirely voluntary regimes to strictly presumptive ones.¹³⁵ No state has elected to replicate the Federal Guidelines in either their complexity or their high number of cells.¹³⁶ The guidelines systems of North Carolina and Pennsylvania offer an informative comparison of states that use sentencing guidelines both with and without indeterminate release.¹³⁷

North Carolina uses a presumptive guideline that contains fifty-four separate cells (compared to the Federal Guidelines' 258).¹³⁸ These cells are created by combining the offender's criminal history—indicated by categories I-VI—and the offense level.¹³⁹ Unlike the federal system, North Carolina's guideline only has nine offense levels, rather than forty-three.¹⁴⁰ These offense levels are determined by the category of the offense committed, much like New Mexico's felony degrees.¹⁴¹ As a unique characteristic, North Carolina's grid also provides ranges above and below the basic sentence range if a judge finds that an aggravating or mitigating circumstance exists.¹⁴² This is a key difference from the federal system in which these circumstances alter the actual offense level through a complex series of rules and change the "cell" into which an offender might fall. In North Carolina's system, if the judge finds reason to aggravate or mitigate the sentence, the appropriate range is presented within the original cell and the judge pronounces a sentence contained therein.¹⁴³ North Carolina also employs a comprehensive list of factors that may be properly considered as aggravating or mitigating circumstances¹⁴⁴—a factor notably absent from New Mexico's sentencing statutes.¹⁴⁵

134. NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE CTS., STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM, at 4 (2008).

135. *Id.* at 5.

136. Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, 81 no. 2 FED. PROB. J. 28, 28 (2017).

137. These two states were chosen because they are a good representation of the varying forms of guideline systems. See *supra* note 112. They differ in terms of voluntary and presumptive as well as their structure. Finally, Pennsylvania's is used in a state that employs indeterminate sentencing while North Carolina's guideline operates in a determinate system. For further discussion, see *infra*.

138. N.C. GEN. STAT. § 15A-1340.17 (2022); see also Appendix 4 (containing North Carolina's guidelines chart).

139. § 15A-1340.17.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*; see also N.C. GEN. STAT. § 15A-1340.16 (2022) (explaining that "the decision to depart from the presumptive range is in the discretion of the court").

144. N.C. GEN. STAT. § 15A-1340.16(d), (e) (2002).

145. N.M. STAT. ANN. § 31-18-15 (2022).

Pennsylvania, on the other hand, employs a voluntary guideline system.¹⁴⁶ Thus, a sentencing judge need only consider the guideline-recommended sentence rather than strictly follow it.¹⁴⁷ The guidelines themselves, however, contain significant structural and policy differences from North Carolina's. First, the Pennsylvania system utilizes a "dispositional line" that indicates when an offender is recommended for prison or a lesser restrictive intermediate punishment ("RIP").¹⁴⁸ Essentially, offenders that fall above the line are recommended for some term of incarceration.¹⁴⁹ Those that fall below it are recommended for another form of punishment, such as community supervision.¹⁵⁰ Pennsylvania also uses another dispositional line to differentiate between a recommendation of RIP and one of incarceration in a local or county jail, rather than prison.¹⁵¹ Thus, the guidelines guide judicial decisions as to the form of punishment as well as its duration.¹⁵² Another significant difference from North Carolina's guideline system is that Pennsylvania uses multiple, separate grids, rather than just one, based on the type of offense committed.¹⁵³ Thus, while the Basic Sentencing Matrix accounts for general crimes, a judge may use other matrices if appropriate for the offender's conduct.¹⁵⁴ An important similarity between this sentencing program and that of North Carolina—in addition to the majority of states—is the low number of cells in the grid. In most state systems, the offense level is broken out into ten or fifteen categories instead of the forty categories used in the federal system.¹⁵⁵ Each cell, therefore, contains a much broader range of time within which a sentencing judge may use her discretion to determine the appropriate sentence.

This Article advocates for the adoption of a presumptive guideline with elements from both North Carolina's and Pennsylvania's system. The specifics and justifications are laid out below.¹⁵⁶ The next Section explains New Mexico's current sentencing program and its inherent shortcomings.

146. 42 PA. STAT. AND CONS. STAT. ANN. § 303.1–.18 (West 2022).

147. *Id.* § 303.1 (stating that a court must consider the sentence proposed in the guideline).

148. *Id.* at § 303.16(a); *see also* Appendix 3 (containing Pennsylvania's guidelines charts).

149. § 303.16(a).

150. *Id.*

151. *Id.*

152. *See id.*

153. Basic Sentencing Matrix for Offenders Convicted of 1st or 2nd Degree Murder, 42 PA. STAT. AND CONS. STAT. ANN. § 303.16(b) (West 2022); Deadly Weapon Enhancement/Possessed Matrix, 42 PA. STAT. AND CONS. STAT. ANN. § 303.17(a) (West 2022); Deadly Weapon/Used Matrix, 42 PA. STAT. AND CONS. STAT. ANN. § 303.17(b) (West 2022); School Enhancement Matrix, 42 PA. STAT. AND CONS. STAT. ANN. § 303.18(a) (West 2022); Youth Enhancement Matrix, 42 PA. STAT. AND CONS. STAT. ANN. § 303.18(b) (West 2022); School and Youth Enhancement Matrix, 42 PA. STAT. AND CONS. STAT. ANN. § 303.18(c) (West 2022).

154. *See* Appendix 3 to reference Pennsylvania's different matrices.

155. Mitchell, *supra* note 136, at 33 (Out of 11 states surveyed that used offense levels as a static factor, 10 had 15 or fewer offense categories.).

156. *See infra* Part III.

II. NEW MEXICO'S CURRENT SENTENCING SYSTEM

New Mexico's current sentencing program can most easily be described as determinate and quasi-structured.¹⁵⁷ As to its level of determinacy, New Mexico abolished discretionary release in its 1977 reform.¹⁵⁸ It still maintains a parole board, but the board predominately monitors the behavior of persons released from prison rather than determines their release.¹⁵⁹ This should not be confused with discretionary parole release. Parole in New Mexico operates primarily as a form of post-release supervision similar to probation, and virtually all of the Board's discretionary release powers have been eliminated, except over those convicted of a capital offense.¹⁶⁰ However, the parole board does have significant power over parolees and determines—within some limits—what punishment violators may face.¹⁶¹ When a person is released from prison, he is placed on a term of supervision: parole.¹⁶² If he violates his conditions of release, he is not brought back before a court for resentencing but before the parole board.¹⁶³ New Mexico appears unique in that it utilizes a form of “dual supervision” in which the court can impose both probation and parole as consecutive forms of post-release supervision.¹⁶⁴ Nonetheless, post-release supervision is separate from deciding whether an inmate should be released in the first place. Thus, New Mexico's sentencing system is fairly characterized as determinate.

The degree of structure in New Mexico's statutes is slightly more complicated. In fact, several multi-state reviews of sentencing systems have separately characterized New Mexico as both a structured and an unstructured system.¹⁶⁵ This confusion is almost certainly due to a statutory provision that allows judges to impose a sentence but suspend all or part of its execution. The governing statutory scheme contains facially presumptive prison terms based on the felony-degree of the offense.¹⁶⁶ This statute contains mandatory language that the basic sentence of imprisonment “shall be provided” unless the court “alters the sentence

157. See N.M. STAT. ANN. § 31-18-15 (2022) (providing that the court shall impose the following sentences: For a first-degree felony, eighteen years imprisonment; for a second-degree felony, nine years imprisonment; for a third-degree felony, three years imprisonment; and for a fourth-degree felony, eighteen months imprisonment).

158. Karlake & Townsend, *supra* note 21, at 132–33 (describing how a major purpose of the CSA was to abolish discretionary release).

159. N.M. STAT. ANN. § 31-21-10 (2022).

160. See *id.* at § 31-21-10(D) (stating that prisoner who have served the sentence imposed by the court “shall be required to undergo a two-year period of parole”) (emphasis added).

161. N.M. STAT. ANN. 31-21-14(C) (2022) (“If violation is established, the board may continue or revoke the parole or enter any other order as it sees fit.”).

162. *Id.* § 31-21-10.

163. *Id.* § 31-21-14(A), (C) (“At any time during release on parole the board or the director may issue a warrant for the arrest of the released prisoner for violation of any of the conditions of release. . . . Upon arrest and detention, the board shall cause the prisoner to be promptly brought before it for a parole revocation hearing on the parole violation charged.”).

164. DENMAN, *supra* note 25, at 6 (defining dual supervision).

165. Compare LAWRENCE, *supra* note 33, at 5, fig. 2 (identifying New Mexico as an unstructured system), with STEMEN ET AL., *supra* note 22, at 63 n.48 (identifying New Mexico as a presumptive statute system).

166. § 31-18-15(A).

pursuant to the provisions of the Criminal Sentencing Act.”¹⁶⁷ Sentences may be altered only by a finding of an aggravating or mitigating circumstance, as determined by the judge.¹⁶⁸ While what may be considered as an aggravating or mitigating circumstance is not identified, any alteration may not exceed one-third of the basic sentence.¹⁶⁹ For example, the basic sentence for a second-degree felony is “nine years imprisonment.”¹⁷⁰ One-third of nine being three, a person convicted of a generic second-degree felony may be incarcerated anywhere from six to twelve years if the judge finds appropriate aggravating or mitigating circumstances surrounding the crime.¹⁷¹ New Mexico law does provide several factors that *require* an enhancement, such as a prior conviction¹⁷² or use of a firearm,¹⁷³ but what may be considered as an aggravating circumstance is never identified. If no circumstance requiring alteration exists, the basic sentence “shall be imposed.”¹⁷⁴

Despite this statutory language, New Mexico judges still exercise broad discretion to determine how much prison time a felony offender must serve.¹⁷⁵ This is because another statute, outside of the CSA, allows a judge to suspend or defer all or part of the sentence imposed.¹⁷⁶ Suspension of a sentence means that the court imposed a sentence but suspended its execution.¹⁷⁷ A deferral means that the court (or jury) finds the offender guilty but postpones sentencing altogether.¹⁷⁸ Both suspension and deferral are followed by a period of probation which, in most cases, cannot exceed five years.¹⁷⁹ This, in essence, creates a legal fiction in which a

167. § 31-18-15(A), (B); *see also* 1977 N.M. Laws, Ch. 216 §§ 1–19. The only portion of that act which allows a judge to alter a sentence under subsection (A) was codified as N.M. STAT. ANN. Section 31-18-15.1 (1978).

168. *Id.* § 31-18-15.1(G).

169. *Id.* § 31-18-15(B).

170. *Id.* § 31-18-15(A). Note that nine years is the basic sentence for only some kinds of second-degree felonies. Other second-degree felonies are identified in the same statute.

171. One-third of nine is three. Thus, the basic sentence may be enhanced or reduced by a maximum of three years—resulting in six to twelve years.

172. N.M. STAT. ANN. § 31-18-17 (2022) (requiring sentence enhancement for a prior felony conviction).

173. N.M. STAT. ANN. § 31-18-16 (2022) (requiring sentence enhancement for brandishing a firearm during the commission of a felony).

174. *Id.* § 31-18-15(B).

175. N.M. STAT. ANN. § 31-20-3 (2022) (“[A]ny court having jurisdiction when it is satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may either: A. enter an order deferring the imposition of sentence; [or] B. sentence the defendant and enter an order suspending in whole or in part the execution of the sentence. . . .”).

176. *Id.*

177. *State v. Kenneman*, 1982-NMCA-145, ¶ 8, 98 N.M. 794, 653 P.2d 170.

178. *Id.*

179. N.M. STAT. ANN. § 31-20-5 (2022). The statute provides:

When a person has been convicted of a crime for which a sentence of imprisonment is authorized and when the magistrate, metropolitan or district court has deferred or suspended sentence, it shall order the defendant to be placed on probation for all or some portion of the period of deferment or suspension if the defendant is in need of supervision, guidance or direction that is feasible for the corrections department to furnish. . . . [T]he total period of probation for district court shall not exceed five years. . . .

Id.

sentencing judge may comply with the rigid requirements of the CSA, yet the offender is not required to serve its mandatory terms. For example, a person may be found guilty of, say, a second-degree felony. The CSA provides that such an offense requires “nine years imprisonment.”¹⁸⁰ It further states that that sentence “shall be imposed.”¹⁸¹ After considering the provisions allowing for suspension or deferral, however, the judge may order the offender sentenced to “nine years imprisonment with nine years suspended.” In the case of deferral, the judge would not technically sentence at all but rather defer sentencing until some point in the future. In the above hypothetical, regardless of whether the judge chooses to suspend or defer the sentence, the offender will serve only probation.¹⁸² The decision whether to suspend or defer rests solely within the discretion of the sentencing judge.¹⁸³

This legal fiction explains the data in Appendix 1 which show that the vast majority of commitments to the Department of Corrections (“DOC”) fell outside of the statutorily authorized range.¹⁸⁴ To get a small glimpse into current sentencing realities in New Mexico, the Author obtained a very limited dataset consisting of all commitments to the state DOC in 2019 for two crimes. Importantly, the limitations of these data must be identified. First and foremost, these data are from the Department of Corrections and, therefore, only represent the time a jail or prison was supposed to house the offender. The actual sentence imposed by the judge is not reflected in the data. The data, therefore, do not represent sentencing but how much of a sentence was to be served through incarceration. The sentencing data itself consist of all sixty-four convictions for armed robbery (with a deadly weapon)¹⁸⁵ and all fifty-two convictions for aggravated assault¹⁸⁶ that occurred in New Mexico in 2019.¹⁸⁷ The data are too small to be indicative of large, systemic patterns in New Mexico’s sentencing system but are used here merely to examine how these sentences fit the CSA’s mandates. They are also used to examine the level of disparity between sentences for the two crimes studied. The charging information collected also only reflects the most serious offense committed, but there may be other, lesser charges present that added to the term of incarceration. Finally, several offenders for each offense were resentenced as probation violations. It is therefore not clear whether the resulting sentence is strictly for the new charge or the imposition of a remaining sentence from the previous crime. For that reason, the probation violations will not be used in discussing the data.

180. *Id.* § 31-18-15(A).

181. *Id.* § 31-18-15(B).

182. Note that if a person fails to comply with the terms of probation, the court may impose the balance of the sentence remaining (in the case of suspension) or actually pronounce a sentence (in the case of deferral).

183. *Id.* § 31-20-3 (stating that the court “may” suspend any portion of the sentence or defer sentencing).

184. *See* Appendix 1.

185. N.M. STAT. ANN. § 30-16-2 (2022).

186. N.M. STAT. ANN. § 30-3-2(A) (2022).

187. These crimes were selected somewhat arbitrarily for their low-frequency and varying felony-degrees. For those reasons, they provided this Author with an easily manageable dataset covering two crimes at opposite ends of the felony degrees.

The most striking finding in each offense is how many commitments are outside of any time authorized by the CSA.¹⁸⁸ For example, armed robbery is a second-degree felony when it is committed the first time.¹⁸⁹ Thus, the statutory basic sentence is nine years imprisonment.¹⁹⁰ The presumed statutory range for this crime, if accounting for aggravating or mitigating circumstances, is between six and twelve years. While there are many reasons a term of incarceration might be higher than that, such as habitual offender laws, firearms enhancements, and violent criminal enhancements, it is hard to imagine any reason—authorized by the CSA—the sentence could be *shorter* than six years. Nonetheless, out of the forty-five armed robbery convictions (that are not probation violations), twenty-two have commitments shorter than six years.¹⁹¹ In fact, only seventeen of the total number (including probation violations) actually do fall within the statutory range of six to twelve years.¹⁹² The shortest prison term was one year, while the longest was thirty-nine years.¹⁹³

Likewise, the commitments for aggravated assault tell a similar tale. Out of the fifty-two total convictions, only thirty-two were not persons returned for probation violations.¹⁹⁴ Aggravated assault is a fourth-degree felony punishable by eighteen months imprisonment.¹⁹⁵ The statutory range, if accounting for aggravating and mitigating circumstances, is twelve months to twenty-four months.¹⁹⁶ Of the thirty-two non-probation violations, only six were sentenced within that range.¹⁹⁷ There are only two cases, including all probation violators, in which the offender received a prison sentence shorter than twelve months.¹⁹⁸ All the rest exceeded twenty-four months.

While these data should not be relied on too heavily, they do provide interesting insight into the probable level of judicial compliance with the CSA. It is likely that one of the main reasons terms of incarceration are falling below the statutory mandate is due to the possibility of suspension and deferral. Regardless of the reason, however, the data show that, despite mandatory language in the state's sentencing statutes, judges retain substantial discretion in determining the length of incarceration. Whether this is due to the availability of suspended and deferred sentences or some other reason, it is clear that New Mexico currently operates in a relatively unstructured but determinate system. One key finding of this Article is that further, in-depth study of judicial sentencing decisions in New Mexico is needed.

188. See Appendix 1.

189. *Id.* § 30-16-2.

190. *Id.* § 31-18-15.

191. Appendix 1.

192. *Id.*

193. *Id.* These figures are presented by this Article merely to review judicial compliance with the CSA. Without knowing the background of each case—which is beyond the scope of this Article—these data should not be used to infer great levels of disparity throughout New Mexico's sentencing system.

194. *Id.* On a separate note, this is telling of how many reoffenders there are in New Mexico jails and prisons.

195. *Id.* § 31-18-15.

196. *Id.* § 31-18-15.1.

197. Appendix 1.

198. *Id.*

This Article recommends conducting a study of the state's sentencing judges similar to that done in the Second Circuit in the 1970s.¹⁹⁹ If the study includes the option to suspend or defer any part or all of a sentence, this Author suspects vast sentencing disparities will be revealed. Such a study will also lend invaluable insight into the actual sentencing realities in New Mexico, since, as the data in Appendix 1 seems to suggest, the CSA is not functioning in practice as a presumptive sentencing scheme.

Ultimately, it appears that New Mexico has, at least facially, a highly structured system in which judges must impose the statutory sentence with almost no room for discretion. However, because a judge has discretion to suspend or defer all or part of the sentence, the system is structured in name only.

III. THE PATH FORWARD: SENTENCING GUIDELINES AND REHABILITATION

New Mexico's current determinate, quasi-structured sentencing program causes more criminal justice problems than it solves. Its focus on retributive punishment results in long sentences during which there is little to no incentive for offenders to reform. Without discretionary parole release, offenders reenter society regardless of their ability to do so successfully. The CSA's specific, mandatory sentences offers judges no room for sentencing discretion and forces them to use their power to suspend all or part of the sentence as they deem appropriate. Without guardrails on this power, disparate treatment of similar offenders seems commonplace. These problems all result in people stuck in prison for long periods and released into society without reforming. The ultimate consequence is high incarceration rates, high recidivism rates, and increased crime.

Since the fragmentation of sentencing practices after the 1970s, numerous studies have concluded that a state's sentencing policies are strongly correlated with its criminal justice outcomes.²⁰⁰ Specifically, high rates of incarceration, crime, and recidivism, when analyzed together, suggest errant sentencing practices may be at least one causal factor. New Mexico is no exception, and all three of these factors suggest the need for sentencing reform. To begin, the state's incarceration rate has increased significantly since adopting the Criminal Sentencing Act.²⁰¹ Additionally, contrary to trends throughout most of the nation, New Mexico's crime rates have

199. See PARTRIDGE, *supra* note 77. In the study, District Judges were asked to sentence a series of hypothetical defendants, each with a factual background similar to factors the judges might encounter in real life. *Id.* The results revealed profound issues in federal sentencing and prompted the adoption of the Federal Sentencing Guidelines. *See id.*

200. See STEMEN ET AL., *supra* note 22, at ii (identifying that certain types of sentencing policies result in statistically lower incarceration rates); DENMAN, *supra* note 25, at 6 (remarking on how New Mexico's unique post-incarceration supervision programs, specifically, dual supervision, lead to higher recidivism); Stemen & Andres Rengifo, *Policies and Imprisonment: The Impact of Structured Sentencing and Determinate Sentencing on State Incarceration Rates, 1978-2004*, 28 JUST. Q. 174, 196 (2011) ("The twin desires of structure and determinacy that have guided the creation of sentencing and corrections policies since the in 1970s, have affected state incarceration rates.").

201. HENRICHSON, *supra* note 23, at 1.

also increased since adopting the CSA.²⁰² Finally, New Mexico's recidivism rate is alarmingly high and continues to rise.²⁰³ Adopting a presumptive sentencing guideline to guide judicial discretion while reintroducing rehabilitation via discretionary parole release will help reverse the tide. Below, this Article explains how adopting a presumptive sentencing guideline will lower incarceration rates and why such a decrease is necessary. It follows by explaining how reintroducing discretionary parole release will reduce recidivism and, therefore, crime rates.

A. Introducing a Presumptive Sentencing Guideline with a Dispositional Line is Strongly Correlated with Lowering Incarceration Rates

Since adopting the CSA in 1977, New Mexico's incarceration rate has increased by over 900%.²⁰⁴ Since 2000, it has increased by 49%.²⁰⁵ Notably, these statistics, on their own, are not directly indicative of any shortcoming in New Mexico's sentencing system. After all, while the state's incarceration rate increased, so did prison populations around the country despite the fact that many jurisdictions adopted different sentencing policies.²⁰⁶ According to one estimate, the national incarceration rate in 1970 was eighty-seven prisoners per 100,000 people.²⁰⁷ By 2002, the national rate had increased by 390% to 427 inmates per 100,000 people.²⁰⁸ In 2019, despite steady national decline since 2009, 810 people per 100,000 were in some form of incarceration in the United States²⁰⁹—the highest verifiable rate of any democratic nation in the world.²¹⁰ Unfortunately, New Mexico shared this distinction with the nation. In 2019, New Mexico's incarceration rate was also 810 inmates per 100,000 people.²¹¹

Despite the universal rise of incarceration rates, modern research has shown that policy choices regarding sentencing have a direct effect on prison populations.²¹²

202. CRIME DATA EXPLORER, *supra* note 24 (showing the 1985 crime rate in New Mexico was 703.9 incidents per 100,000 people, and in 2020 it was 778.3 incidents per 100,000). The *Crime Data Explorer* also shows that the national average crime rate in 1985 was 558.1 per 100,000 residents, and in 2020 it was 398.5. *Id.*

203. N.M. CORR. DEP'T, PERFORMANCE REP. CARD: FIRST QUARTER, FISCAL YEAR 2020 at 3 (2020) (stating that New Mexico's recidivism rate for that quarter was 57%—an increase from the previous four years).

204. HENRICHSON, *supra* note 23, at 1.

205. *Id.*

206. John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR., August 16, 2021, <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/> [<https://perma.cc/H2JZ-EJZX>].

207. STEMEN ET AL., *supra* note 22, at 3.

208. *Id.*

209. Gramlich, *supra* note 206.

210. *Id.*

211. TODD D. MINTON, LAUREN G. BEATTY, & ZHEN ZENG, BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2019 – STATISTICAL TABLES, 12 (2021).

212. Stemen & Andres Rengifo, *Policies and Imprisonment: The Impact of Structured Sentencing and Determinate Sentencing on State Incarceration Rates, 1978-2004*, 28 JUST. Q. 174, 196 (2011) (“[T]he policy choices made by states . . . mattered.”). This study found that the states observing the slowest prison population growth over the last forty years—or even reversing it—were states that adopted both

One such policy choice is that of adopting a presumptive sentencing guideline. If a sentencing guideline is structured the right way, it can significantly reduce the number of people in prison. A 1985 study of New Mexico by the state's own Sentencing Guidelines Committee ("the Committee") to the New Mexico Supreme Court came to this exact conclusion.²¹³

That study, called "Sentencing Felons in New Mexico: A Proposal for Guidelines" ("the Proposal"), was produced in 1985 to answer two questions: (1) should New Mexico have sentencing guidelines, and (2) if so, what form they should take.²¹⁴ The Proposal found that the state should adopt presumptive sentencing guidelines to help guide judicial discretion which had caused unjust sentencing disparities around the state and inflated prison populations.²¹⁵ Most significantly for incarceration rates, the Proposal recommended implementing a guideline with a dispositional line similar to that in Pennsylvania's current system.²¹⁶ The purpose of this line, as in Pennsylvania's grid, is to guide judicial discretion as to the *type* of punishment one should receive in addition to its duration.²¹⁷ That is, those offenders who fell below the line would receive a sentence other than imprisonment. The Committee found that, if the proposed guidelines were adopted, approximately 70% of those incarcerated for a fourth-degree felony in 1985 would have never been imprisoned.²¹⁸

In addition to reducing prison populations through use of a dispositional line, the Committee found that a guideline's increased structure would reduce the number of New Mexico prisoners in two other ways. First, it would reduce the average prison term for more serious crimes, and thereby release some offenders sooner.²¹⁹ Second, it would provide necessary guidance to judicial sentencing

greater structure and more determinate programs. This finding somewhat contradicts this Article's assertion that New Mexico should reinstate discretionary release via parole. However, the study's findings rest on a broad review of guideline systems around the country and aggregating their effect on incarceration. Other research has shown that adopting the right rehabilitative programs has a direct effect on recidivism and, therefore, prison populations and crime rates. DEP'T OF JUST., *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, https://www.justice.gov/archives/prison-reform#_ftn2 [<https://perma.cc/3UEK-3BL6>] (last updated Mar. 6, 2017) [hereinafter *Prison Reform*] ("Research shows that recidivism risk can be effectively reduced through evidence-based programming that targets criminogenic needs, such as courses in cognitive behavioral therapy and other topics."). See *infra* Part III(B) for discussion on discretionary parole release and recidivism.

213. NAT'L CTR. FOR STATE CTS., SENTENCING FELONS IN NEW MEXICO: A PROPOSAL FOR GUIDELINES 19 (1985) ("Applying [the proposed guidelines] to the current prison populations in New Mexico . . . 70 percent of those in prison for fourth degree felonies would have received sentences other than incarceration. . . . In fact, guideline sentences for second degree felonies would be shorter than in all but a few categories of offenders and in some cases would be strikingly lower than actual sentences imposed on current inmates."). For a copy of the proposed guidelines, see Appendix 2.

214. *Id.* at 1.

215. *Id.* at 9.

216. *Id.* at 17.

217. *See id.*

218. *Id.* at 19.

219. *Id.* at 44 ("[R]eliance on the proposed sentencing guidelines would also reduce prison populations by decreasing the length of sentences served by inmates.").

decisions that is absent under the CSA.²²⁰ The Committee discovered that, under the CSA, “those convicted of the most violent crimes were sentenced to shorter terms than those convicted of less violent crimes.”²²¹ The Proposal further reveals that “those with few or no prior convictions were given longer prison terms than those with more serious criminal records.”²²² The likely cause is the CSA’s lack of guidance on judicial sentencing decisions regarding suspension or deferral of an offender’s sentence. While the CSA prescribes a mandatory sentence for each felony offense, it leaves judges to determine, on their own, whether all or part of that sentence should be suspended.²²³ The result is widely disparate treatment of similar offenders and inflated prison populations, as shown by the Proposal’s findings.

Adoption of a presumptive sentencing guideline with a dispositional line will help reduce New Mexico’s prison populations because it will assist judicial decisions about whether to incarcerate an individual. If the sentence ranges were wide enough to provide for substantial judicial sentencing discretion, the practice of suspending all or part of a sentence will be unnecessary. Such a change will, therefore, provide help to address the obviously disparate treatment of similar offenders found in the Proposal and implicated by the data in Appendix 1.

If New Mexico’s high incarceration rate is not evidence enough of the need for reform, there are strong economic and legal justifications for decreasing prison populations as well. In terms of the economy, it currently costs approximately \$45,000 to house one inmate in a New Mexico Corrections Department (“NMCD”) facility for a year.²²⁴ According to the New Mexico Sentencing Commission, there were a maximum of 6,315 inmates in New Mexico prisons in 2021.²²⁵ Thus, New Mexico spends roughly \$285 million per year to house its incarcerated population.²²⁶ However, the expenditures on incarceration do not stop there. New Mexico prisons are aging and in dire need of update and maintenance.²²⁷ The New Mexico Legislative Finance Committee currently estimates that NMCD’s deferred maintenance needs are approaching \$300 million.²²⁸ The high cost of maintaining these facilities, and of housing inmates in general, creates a strong economic incentive to decrease prison populations.

These costs also relate to strong legal incentives to begin lowering the number of incarcerated New Mexicans. New Mexico prisons are chronically

220. *See id.* at 18 (discussing the disparate treatment of offenders and how that treatment results in unduly long prison sentences for persons convicted of lesser offenses).

221. *Id.*

222. *Id.*

223. *See supra* Part II.

224. N.M. LEGIS. FIN. COMM., PROGRESS REPORT: CORRECTIONS DEPARTMENT CAPITAL OUTLAY, Reg. Sess., at 3 (Oct. 29, 2019) [hereinafter PROGRESS REPORT] (stating that, at the end of 2018, the daily cost of housing one inmate in a public facility was \$124). Multiplied by 365, the total amount to house one inmate for a year is \$45,260. A 2015 study by the VERA Institute of Justice places the number at just over \$36,000 per year, so the actual cost may be lower than \$45,000. CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUST., THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015 8 (2017).

225. *See* N.M. SENT’G COMM’N, NEW MEXICO PRISON POPULATION FORECAST: FY 2022–FY2031 2–3 (2021) (stating that there was a peak of 5,708 male prisoners and 607 female prisoners during that year).

226. 6,315 multiplied by \$45,000 yields \$285,816,900.

227. PROGRESS REPORT, *supra* note 224 at 2.

228. *Id.*

operating at or near maximum capacity, and in *Brown v. Plata*,²²⁹ the United States Supreme Court gave a clear warning to states that they are required to provide humane housing facilities for convicted offenders, including preventing overcrowding. Furthermore, in *Duran v. Grisham*,²³⁰ which serves as the newest installment in a long-running consent decree regarding conditions in New Mexico prisons, the Tenth Circuit remarked that the consent decree's overcrowding provisions were "to exist in perpetuity."²³¹ New Mexico, therefore, has obligations under both state and federal law to provide humane housing for convicted offenders, and keeping prison populations below certain thresholds is a key part of that mandate. As stated above, however, New Mexico prisons are operating near maximum capacity.²³² In 2021, the total capacity for male prisoners in NMCD was 6,984 and the maximum number of male inmates incarcerated at one time that year was 5,708.²³³ While that is not maximum capacity, the number of inmates has the potential to change relatively quickly. For example, the total number of males incarcerated at one time in 2016 was 6,727, roughly 200 inmates short of maximum capacity.²³⁴ In 2020, it was 6,331.²³⁵ While these numbers suggest that the male prison population is decreasing, the trend is anecdotal at best. A broader view of prison populations in the state—such as the 900% increase since the 1980s—indicates a substantial rise in the number of male inmates in New Mexico prisons. Female prison capacity presents an even closer margin. As of 2021, the maximum number of female prisoners NMCD could hold at one time was 661.²³⁶ In the same year, there were less than sixty beds to spare with a peak of 607 female inmates held simultaneously.²³⁷ Notably, 2021 was the first year since 2014 that the number of female inmates was *lower* than maximum capacity.²³⁸ These margins are narrow indeed and indicate that New Mexico's increasing incarceration rate is both economically and legally unsustainable.

While there are many causes and cures for high incarceration rates, New Mexico's CSA exacerbates the problem rather than alleviates it. As identified by the Proposal, it causes long prison terms for those convicted of lesser offenses and relatively short prison terms for those convicted of more serious offenses. Adoption of a sentencing guideline with wide sentence ranges and a dispositional line will address these issues by providing more judicial discretion where needed. Most importantly, a guideline with a dispositional line similar to that in the Proposal and in Pennsylvania's system should be adopted to help guide judicial decisions about incarceration in the first place.

229. 563 U.S. 493, 509–10 (2011) (upholding a lower court order to substantially reduce prison populations within two years).

230. 853 F. App'x 252 (10th Cir. 2021).

231. *Id.* at 255.

232. See N.M. SENT'G COMM'N, NEW MEXICO PRISON POPULATION FORECAST: FY 2022–FY2031 4 (2021).

233. *Id.* at 2.

234. *Id.*

235. *Id.*

236. *Id.* at 4.

237. *Id.* at 2.

238. *Id.*

B. Recidivism, and Therefore Crime Rates, Can Be Reduced by Reintroducing Discretionary Parole Release and Focusing Punishment on Offender Rehabilitation

In addition to rising incarceration rates, crime in New Mexico has increased since adopting the CSA.²³⁹ While more crime may seem to justify higher incarceration rates, crime has not risen to such a degree that it justifies the 900% increase in prison populations addressed above. One of the likely culprits is the CSA's focus on retributive punishment and lack of attention on offender rehabilitation. Crime has many causal factors that are as complex as they are innumerable, and this Article does not argue that sentencing practices are the primary cause. The CSA and its underlying policies, however, do directly affect recidivism and reoffending (and therefore crime rates) because offender rehabilitation is no longer the purpose of criminal punishment. Reintroducing discretionary parole release may help curb crime rates by lowering the potential for recidivism and allowing former inmates to successfully reenter society.²⁴⁰

In New Mexico, recidivism is commonly defined as a return to prison for any reason after release from incarceration, and it is generally analyzed in three-year increments.²⁴¹ Despite the clear definition, New Mexico's recidivism rate is hard to identify.²⁴² One estimate placed New Mexico's three-year return-to-prison rate in 2014 at 49.9%.²⁴³ Another study, however, gave more detail.²⁴⁴ It stated that 18% of probationers, 76% of parolees, and 72% of those on dual supervision—a program that is explained below—returned to prison within three years.²⁴⁵ What is consistent across studies, however, is that New Mexico's recidivism rate is on the rise.²⁴⁶ For national context, results from a survey of thirty-four states show that, between 2012 and 2017, 62% of offenders in those states were arrested within three years of release.²⁴⁷ While it is true that the sentencing reform efforts of the 1970s and 1980s condemned rehabilitation in favor of a “just deserts” philosophy,²⁴⁸ the rise of incarceration rates and recidivism brightly illuminate the need to successfully

239. CRIME DATA EXPLORER, *supra* note 24 (showing the 1985 crime rate in New Mexico was 703.9 incidents per 100,000 people, and in 2020 it was 778.3 incidents per 100,000).

240. Yan Zhang, et al., *Indeterminate and Determinate Sentencing Models: A State-Specific Analysis of Their Effects on Recidivism*, 60 CRIME & DELINQUENCY 693, 709 (2014) (showing that several of the states studied saw lower recidivism (crime) after adopting discretionary release).

241. LINDA FREEMAN, N.M. SENT'G COMM'N, UPDATED: UNDERSTANDING RECIDIVISM: DEFINITIONS AND RETURN TO PRISON RATES FOR INDIVIDUALS RELEASED FROM NEW MEXICO PRISONS FY 2007—FY 2014 COHORTS, AT 1 (2018).

242. *Compare id.* at 2, with DENMAN *supra* note 25.

243. FREEMAN, *supra* note 241, at 2.

244. DENMAN, *supra* note 25.

245. *Id.* at 2.

246. FREEMAN, *supra* note 241, at 2; *see also* DENMAN, *supra* note 25, at 2; NEW MEXICO LEGISLATIVE FINANCE COMMITTEE, PERFORMANCE REPORT CARD: NEW MEXICO CORRECTIONS DEPARTMENT, FIRST QUARTER, FISCAL YEAR 2020.

247. MATTHEW R. DUROSE & LEONARDO ANTENANGELI, BUREAU OF JUSTICE STAT., RECIDIVISM OF PRISONERS RELEASED IN 34 STATES IN 2012: A 5-YEAR FOLLOW-UP PERIOD (2012–2017), at 1 (2021). New Mexico was not among the states surveyed.

248. *See* Sidhu, *supra* note 114, at 524.

reintroduce prisoners into society. The failure to do so is one of the principal shortcomings of New Mexico's sentencing system.

One of the main causes of recidivism in New Mexico is the "dual supervision" program used after prisoners are released from incarceration.²⁴⁹ Generally speaking, if an offender is not sentenced to any term of incarceration, he is released on probation.²⁵⁰ If incarcerated, however, he is required to complete a term of parole upon release.²⁵¹ Under New Mexico's dual supervision program, parolees can also be assigned to serve a term of probation that usually runs consecutive to the end of their parole.²⁵² These long periods of dual supervision increase the chance for released inmates to violate their conditions of release.²⁵³ This system significantly contributes to recidivism in New Mexico because it releases offenders into lengthy periods of intense supervision without incentivizing their reform while incarcerated.²⁵⁴

It may, of course, be argued that the long period of supervision is a good thing if, in fact, a released inmate is going to recidivate. This Article argues, however, that the cycle of long periods of dual supervision followed by likely reincarceration can be avoided if inmates are only released when their potential for recidivism is reduced by mandatory rehabilitative programs and discretionary parole release.

Data has shown that the correct type of rehabilitative programs have a direct effect on recidivism.²⁵⁵ For example, one study on the effectiveness of formal educational opportunities for incarcerated persons "found that the odds of recidivating among treatment group members are 43 percent lower than the odds of recidivating among comparison group members."²⁵⁶ Furthermore, programs that target individual needs such as anger management, therapy, and substance use treatment have been proven to reduce recidivism.²⁵⁷ Importantly, many of these programs, or similar versions of them, are already offered to New Mexico inmates. However, if satisfactory completion of these programs resulted in significant reductions in their prison sentence, more inmates might make meaningful use of

249. DENMAN, *supra* note 25, at 6 ("[S]ome released prisoners serve both a parole term and a term of probation, usually consecutively (referred to as 'dual supervision')."). Post-release supervision is outside of the CSA, but it is a part of an offender's sentence and therefore falls within this Article's discussion of sentencing reform. N.M. STAT. ANN. § 31-20-5(B) (2022) (providing that the court may require an offender to serve probation or parole after a period of incarceration).

250. DENMAN, *supra* note 25, at 6.

251. N.M. STAT. ANN. § 31-21-10(D) (2022).

252. N.M. STAT. ANN. § 31-20-5 (2022).

253. DENMAN, *supra* note 25, at 6.

254. *Id.* ("Those supervised under dual supervision were both more likely to have one or more violations (73%), and had a greater average number of violations (mean=2.21) than those supervised under probation only (64%; mean=1.95) or parole only (61%; mean=1.25).").

255. *Prison Reform*, *supra* note 212 ("Research shows that recidivism risk can be effectively reduced through evidence-based programming that targets criminogenic needs, such as courses in cognitive behavioral therapy and other topics.").

256. LOIS M. DAVIS, ET AL., RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS, 39 (2013).

257. *Id.* (discussing "evidence-based programs with a proven track record of reducing recidivism").

them. In other words, if discretionary parole release relied on an inmate's progress in key programs identified by the court, he would be incentivized to participate in them and would engage in meaningful rehabilitation. If the correct offender-related policies are adopted, and thorough rehabilitative programs offered to inmates, providing for discretionary release may significantly reduce recidivism and crime rates. The Department of Justice has compiled a list of fifty programs proven to reduce recidivism among certain offender groups that New Mexico should consider when determining what programs will most significantly reduce recidivism in the state.²⁵⁸

On this point, Pennsylvania presents another promising solution. Pennsylvania's Recidivism Risk Reduction Incentive sentencing program "allows certain individuals convicted of nonviolent offenses to participate in programs, and, upon successful completion, accelerates eligibility for their release after serving a reduced minimum sentence."²⁵⁹ Since the program's inception in 2008, over 9,000 inmates have been admitted to the program, and Pennsylvania estimates that it has saved over \$134 million and "more than 700 prison beds as a result of reduced time served."²⁶⁰ Importantly, this program requires active monitoring of an inmate's progress during incarceration and is a form of discretionary release that requires parole.

New Mexico should adopt a similar program that allows inmates to meaningfully reduce their sentence if they comply with certain criteria while incarcerated. To avoid perpetual languishment in prison as was seen prior to the 1970s, a prisoner should not be allowed to stay in prison past the sentence pronounced by the judge or the guideline range. However, to decrease recidivism, New Mexico should have programs available to qualifying inmates that would significantly reduce their sentence.

CONCLUSION

New Mexico needs sentencing reform. The Criminal Sentencing Act of 1977 has failed to reduce sentencing disparity and, while it has increased the retributive nature of punishment, it has failed the ultimate goal of criminal justice policies: reducing overall crime. In almost every category used to measure criminal justice programs, New Mexico lags behind the majority of the nation. Additionally, it appears the CSA may not even be functioning as intended, because judges may suspend or defer the sentence, rather than incarcerate an offender for its mandatory period.

Adoption of a presumptive sentencing guideline with wide sentence ranges like that of North Carolina or New Mexico's 1985 Proposal will help solve these

258. *Prison Reform, supra* note 212 (discussing an "Inmate Model Programs Catalog" it encourages states to consider when adopting rehabilitative programs). This Article does not, and cannot, identify specific programs that should be adopted as mandatory requirements for discretionary parole release. Such decisions are complex and involve intimate knowledge of the state's budget and specific problems facing New Mexico's released inmates. Determining which programs may be suitable to the state is beyond the scope of this Article. Rather, this Article merely asserts that discretionary parole release coupled with mandatory participation in, or completion of, such programs will help reduce recidivism.

259. *King, supra* note 72, at 86.

260. *Id.*

problems. Currently, New Mexico judges are not given enough tools or guidance to consistently dispose of criminal convictions in a way that best serves the state and the interests of justice. The CSA's overly restrictive statutes constrain judicial discretion to such a degree that they must pronounce the required sentence while at the same time suspend execution of that sentence. Furthermore, use of a dispositional line will guide judicial decisions about incarceration and reduce prison populations for low-level offenders.

Equally as important as the form of the system are the policies it must embrace. Rehabilitation of prisoners is essential to reincorporating them into society and reducing risk to potential future victims. New Mexico currently operates a system that places little value on rehabilitating offenders and sets the stage for them to commit a new offense upon release. Moreover, New Mexico's crime rate, incarceration rate, and recidivism rate all suggest that the state's shift to determinate sentencing in 1977 has not worked. If the CSA is not the cause, it certainly has not been the solution. Continuing to use the same sentencing laws and relying on retributive punishment invites the trend to persist. If just deserts are the consequences of one's actions, New Mexico's high crime, incarceration, and recidivism are the just deserts of its policy choices.

New Mexico can use the lessons learned from the last forty years of sentencing experiments around the country and adopt the one that evidence and practice support: presumptive sentencing guidelines and discretionary release through a system of parole.

APPENDIX 1

Sentences in New Mexico for 2019 Convictions of Aggravated Assault and Armed Robbery.

All sentences in both tables are sorted by shortest sentence to longest. See below for data regarding armed robbery.

AGGRAVATED ASSAULT

Offense Description	Statute Violated	Sentence In Days	Sentence In Years	Sentenced as a Probation Violator or as a New Admit?
Aggravated Assault	30-3-2A	320	0.88	Probation Violation
Aggravated Assault	30-3-2A	325	0.89	Probation Violation
Aggravated Assault	30-3-2A	365	1.00	New Admit
Aggravated Assault	30-3-2A	407	1.12	Probation Violation
Aggravated Assault	30-3-2A	548	1.50	New Admit
Aggravated Assault	30-3-2A	549	1.50	New Admit
Aggravated Assault	30-3-2A	549	1.50	New Admit
Aggravated Assault	30-3-2A	550	1.51	Probation Violation
Aggravated Assault	30-3-2A	731	2.00	New Admit
Aggravated Assault	30-3-2A	731	2.00	Probation Violation
Aggravated Assault	30-3-2A	733	2.01	New Admit
Aggravated Assault	30-3-2A	832	2.28	Probation Violation
Aggravated Assault	30-3-2A	862	2.36	New Admit
Aggravated Assault	30-3-2A	888	2.43	Probation Violation
Aggravated Assault	30-3-2A	912	2.50	New Admit
Aggravated Assault	30-3-2A	914	2.50	New Admit

Aggravated Assault	30-3-2A	913	2.50	Probation Violation
Aggravated Assault	30-3-2A	912	2.50	Probation Violation
Aggravated Assault	30-3-2A	913	2.50	Probation Violation
Aggravated Assault	30-3-2A	915	2.51	New Admit
Aggravated Assault	30-3-2A	915	2.51	New Admit
Aggravated Assault	30-3-2A	1096	3.00	Probation Violation
Aggravated Assault	30-3-2A	1096	3.00	New Admit
Aggravated Assault	30-3-2A	1096	3.00	New Admit
Aggravated Assault	30-3-2A	1096	3.00	New Admit
Aggravated Assault	30-3-2A	1096	3.00	New Admit
Aggravated Assault	30-3-2A	1096	3.00	Probation Violation
Aggravated Assault	30-3-2A	1096	3.00	New Admit
Aggravated Assault	30-3-2A	1222	3.35	Probation Violation
Aggravated Assault	30-3-2A	1279	3.50	New Admit
Aggravated Assault	30-3-2A	1277	3.50	New Admit
Aggravated Assault	30-3-2A	1332	3.65	Probation Violation
Aggravated Assault	30-3-2A	1461	4.00	New Admit
Aggravated Assault	30-3-2A	1461	4.00	Probation Violation
Aggravated Assault	30-3-2A	1461	4.00	New Admit
Aggravated Assault	30-3-2A	1461	4.00	New Admit
Aggravated Assault	30-3-2A	1462	4.01	New Admit
Aggravated Assault	30-3-2A	1772	4.85	Probation Violation
Aggravated Assault	30-3-2A	1826	5.00	New Admit

Aggravated Assault	30-3-2A	1829	5.01	Probation Violation
Aggravated Assault	30-3-2A	2008	5.50	Probation Violation
Aggravated Assault	30-3-2A	2008	5.50	New Admit
Aggravated Assault	30-3-2A	2010	5.51	New admit
Aggravated Assault	30-3-2A	2010	5.51	New admit
Aggravated Assault	30-3-2A	2324	6.37	New admit
Aggravated Assault	30-3-2A	2324	6.37	New admit
Aggravated Assault	30-3-2A	2922	8.01	New admit
Aggravated Assault	30-3-2A	3425	9.38	New admit
Aggravated Assault	30-3-2A	4197	11.50	New admit
Aggravated Assault	30-3-2A	4336	11.88	Probation Violation
Aggravated Assault	30-3-2A	5014	13.74	Probation Violation
Aggravated Assault	30-3-2A	No data	No data	New admit

ARMED ROBBERY

Two of the below convictions were for Armed Robbery 2nd Offense. These offenses are highlighted for clarity.

Offense Description	Statute Violated	Sentence In Days	Sentence In Years	Sentenced as a Probation Violator or as a New Admit?
Armed Robbery 1st Offense	30-16-2B1	237	0.65	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	366	1.00	New admit

Armed Robbery 1st Offense	30-16-2B1	730	2.00	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	730	2.00	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	731	2.00	New admit
Armed Robbery 1st Offense	30-16-2B1	731	2.00	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	731	2.00	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	731	2.00	New admit
Armed Robbery 1st Offense	30-16-2B1	912	2.50	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	1096	3.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1096	3.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1096	3.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1096	3.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1096	3.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1096	3.00	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	1096	3.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1255	3.44	New admit

Armed Robbery 1st Offense	30-16-2B1	1460	4.00	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	1461	4.00	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	1461	4.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1461	4.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1461	4.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1461	4.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1461	4.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1492	4.09	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	1826	5.00	New admit
Armed Robbery 2nd Offense	30-16-2B2	1826	5.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1826	5.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1826	5.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1826	5.00	New admit
Armed Robbery 1st Offense	30-16-2B1	1826	5.00	New admit
Armed Robbery 2nd Offense	30-16-2B2	1827	5.01	New admit

Armed Robbery 1st Offense	30-16-2B1	2192	6.01	New admit
Armed Robbery 1st Offense	30-16-2B1	2376	6.51	New admit
Armed Robbery 1st Offense	30-16-2B1	2557	7.01	New admit
Armed Robbery 1st Offense	30-16-2B1	2557	7.01	New admit
Armed Robbery 1st Offense	30-16-2B1	2851	7.81	New admit
Armed Robbery 1st Offense	30-16-2B1	2922	8.01	New admit
Armed Robbery 1st Offense	30-16-2B1	2922	8.01	New admit
Armed Robbery 1st Offense	30-16-2B1	3106	8.51	New admit
Armed Robbery 1st Offense	30-16-2B1	3288	9.01	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	3653	10.01	New admit
Armed Robbery 1st Offense	30-16-2B1	3653	10.01	New admit
Armed Robbery 1st Offense	30-16-2B1	3653	10.01	New admit
Armed Robbery 1st Offense	30-16-2B1	4018	11.01	New admit
Armed Robbery 1st Offense	30-16-2B1	4288	11.75	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	4383	12.01	New admit

Armed Robbery 1st Offense	30-16-2B1	4383	12.01	New admit
Armed Robbery 1st Offense	30-16-2B1	4383	12.01	New admit
Armed Robbery 1st Offense	30-16-2B1	4550	12.47	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	4567	12.51	New admit
Armed Robbery 1st Offense	30-16-2B1	4725	12.95	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	4749	13.01	New admit
Armed Robbery 1st Offense	30-16-2B1	5183	14.20	New admit
Armed Robbery 1st Offense	30-16-2B1	5351	14.66	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	5479	15.01	New admit
Armed Robbery 1st Offense	30-16-2B1	6280	17.21	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	6575	18.01	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	7306	20.02	New admit
Armed Robbery 1st Offense	30-16-2B1	7487	20.51	Probation Violation
Armed Robbery 1st Offense	30-16-2B1	9131	25.02	New admit
Armed Robbery 1st Offense	30-16-2B1	10940	29.97	Probation Violation

Armed Robbery 1st Offense	30-16-2B1	11827	32.40	New admit
Armed Robbery 1st Offense	30-16-2B1	14245	39.03	New admit

APPENDIX 2

Sentencing Felons in New Mexico: A Proposal for Guidelines, Guidelines Charts, at 13–16.

*Note that this Appendix has been converted from its original .pdf form. Thus, some formatting discrepancies may exist. For a view of the original, please view the cited source.

c. Fourth Degree Felonies Sentencing Guidelines

<u>Offense Category*</u>	<u>Criminal History Score</u>					
	0	1	2-4	5-6	7-10	Over 10
1. Receiving stolen property; Larceny; Shoplifting	12 mos	13 mos	14 mos	15 mos	17 mos	19 mos
2. Burglary, Arson	13 mos	14 mos	15 mos	16 mos	19 mos	21 mos
3. Aggravated assault	14 mos	15 mos	16 mos	18 mos	20 mos	22 mos
4. Criminal sexual contact; Involuntary manslaughter	16 mos	17 mos	18 mos	20 mos	22 mos	24 mos

* Designations are for illustration. All crimes within each category are set forth in Attachment B, page 62.

d. Third Degree Felonies Sentencing Guidelines

<u>Offense</u> <u>Category*</u>	<u>Criminal History Score</u>					
	0	1	2-4	5-6	7-10	Over 10
1. Fraud; Receiving stolen property; Larceny	24 mos	25 mos	26 mos	27 mos	30 mos	32 mos
2. Burglary, Robbery	26 mos	27 mos	28 mos	29 mos	JS mos	40 mos
3. Rape; Aggravated battery	30 mos	32 mos	34 mos	36 mos	40 mos	44 mos
4. Voluntary manslaughter	36 mos	38 mos	40 mos	40 mos	46 mos	48 mos

* Designations are for illustration. All crimes within each category are set forth in Attachment B, page 66.

e. [Second] Degree Felonies Sentencing Guidelines

<u>Offense</u> <u>Category*</u>	<u>Criminal History Score</u>						
	0	1	2-4	5-6	7-8	8-10	Over 10
1. Armed burglary; Robbery; Larceny	6 yrs	6 yrs 6 mos	7 yrs	7 yrs 6 mos	8 yrs	8 yrs 6 mos	9 yrs
2. Rape	7 yrs	7 yrs 6 mos	8 yrs	9 yrs	10 yrs	11 yrs	12 yrs
3. Murder	9 yrs	9 yrs 6 mos	10 yrs	10 yrs 6 mos	11 yrs	11 yrs 6 mos	12 yrs

* Designations are for illustration. All crimes within each category are set forth in Attachment B, page 69.

f. Controlled Substances Felonies Sentencing Guidelines

<u>Offense*</u>	<u>Criminal History Score</u>						
	0	1	2-4	5-6	7-8	8-9	Over 10
<u>Fourth Degree</u> Example: distribution of marijuana – first conviction	12 mos	13 mos	14 mos	16 mos	20 mos	22 mos	24 mos
<u>Third Degree</u> Example: distribution of marijuana to a minor	6 mos	10 mos	16 mos	24 mos	34 mos	40 mos	48 mos
<u>Second Degree</u> Example: trafficking in controlled substances	6 yrs	6.5 yrs	7 yrs	8yrs	10 yrs	11 yrs	12 yrs

* Each offense is set forth by category in Attachment B, page 71.

APPENDIX 3

PENNSYLVANIA SENTENCING GUIDELINE MATRICES

§ 303.16(a). Basic Sentencing Matrix.

Level	OGS	Prior Record Score						RFEL	REVOC	AGG/MIT
		0	1	2	3	4	5			
LEVEL 5	14	72-SL	84-SL	96-SL	120-SL	168-SL	192-SL	204-SL	SL	~/-12
	13	60-78	66-84	72-90	78-96	84-102	96-114	108-126	240	+/- 12
	12	48-66	54-72	60-78	66-84	72-90	84-102	96-114	120	+/- 12
	11	36-54	42-60	48-66	54-72	60-78	72-90	84-102	120	+/- 12
	10	22-36	30-42	36-48	42-54	48-60	60-72	72-84	120	+/- 12
	9	12-24	18-30	24-36	30-42	36-48	48-60	60-72	120	+/- 12
LEVEL 4	8	9-16	12-18	15-21	18-24	21-27	27-33	40-52	NA	+/- 9
LEVEL 3	7	6-14	9-16	12-18	15-21	18-24	24-30	35-45	NA	+/- 6
	6	3-12	6-14	9-16	12-18	15-21	21-27	27-40	NA	+/- 6
LEVEL 2	5	RS-9 P2 (225-250)	1-12	3-14	6-16	9-16	12-18	24-36	NA	+/- 3
	4	RS-3 P1 (100-125)	RS-9 P2 (225-250)	RS-<12 P2 (300-325)	3-14	6-16	9-16	21-30	NA	+/- 3
	3	RS-1 P1 (50-75)	RS-6 P1 (150-175)	RS-9 P2 (225-250)	RS-<12 P2 (300-325)	3-14	6-16	12-18	NA	+/- 3
LEVEL 1	2	RS (25-50)	RS-2 P1 (75-100)	RS-3 P1 (100-125)	RS-4 P1 (125-150)	RS-6 P1 (150-175)	1-9	6- <12	NA	+/- 3
	1	RS (25-50)	RS-1 P1 (50-75)	RS-2 P1 (75-100)	RS-3 P1 (100-125)	RS-4 P1 (125-150)	RS-6 P1 (150-175)	3-6	NA	+/- 3

Restorative Sanctions (RS) are non-confinement sentence recommendation (204 Pa.Code §303.9(f))
 Guilt without further penalty (42 Pa.C.S. § 9723)
 Fines (18 Pa.C.S. § 1101) including Fines/Community Service Guidelines (204 Pa.Code § 303.14(a)(4))
 Community Service (range of hours) including Fines/Community Service Guidelines (204 Pa.Code § 303.14(a)(4))
 Restitution (18 Pa.C.S. § 1106)
 Probation (42 Pa.C.S. §§ 9722, 9763(b)), including recommendations for duration of probation
 P1: 1 year P2: 2 years Probation as Restorative Sanction = Recommended aggregate term not to exceed **5 years**.

Confinement sentence recommendations (204 Pa.Code § 303.9(e)) are ranges of minimum terms in months
 Confinement in state facility (§ 303.9(e)(1))
 Confinement in county facility (§ 303.9(e)(2), (3))
 Probation with restrictive conditions (§ 303.9(e)(2), (3)) are CIP programs (42 Pa.C.S. Chapter 98), subject to the following recommendations:
 Sentencing guidelines . Duration of restrictive conditions and confinement recommended not to exceed sentence range.
 DUI mandatory minimum requirement . Duration of restrictive conditions and confinement equivalent to mandatory minimum requirement.
 Clinical evaluation . Diagnostic evaluation of dependency on alcohol and other drugs consistent with clinically prescribed treatment.
 RNR assessment . Validated assessment of risk, needs, and responsivity may guide decisions related to: intensity of intervention, use of restrictive conditions, and duration of community supervision.
 Probation supervision period = Recommended aggregate term not to exceed **10 years**.

Omnibus Offense Gravity Score (OGS) assignments. See Omnibus policy (§ 303.3(f)) and OGS assignments (§ 303.15):
 M3 = OGS 1 M2 = OGS 2 M1 = OGS 3
 F3 = OGS 5 F2 = OGS 7 F1 = OGS 8 F1 (maximum>20 years) = OGS 10

§ 303.17(a). Deadly Weapon Enhancement/Possessed Matrix

Level	OGS	Deadly Weapon	Prior Record Score								
									RF EL	REV OC	AGG/ MIT
Level 5	14	Possessed	81- SL	93- SL	105- SL	129- SL	177- SL	201- SL	213 -SL	240	~/-12
	13	Possessed	69-87	75-93	81-99	87- 105	93- 111	105- 123	117 - 135	240	+/-12
	12	Possessed	57-75	63-81	69-87	75-93	81-99	93- 111	105 - 123	120	+/-12
	11	Possessed	45-63	51-69	57-75	63-81	69-87	81-99	93- 111	120	+/-12
	10	Possessed	31-45	39-51	45-57	51-63	57-69	69-81	81- 93	120	+/-12
	9	Possessed	21-33	27-39	33-45	39-51	45-57	57-69	69- 81	120	+/-12
Level 4	8	Possessed	15-22	18-24	21-27	24-30	27-33	33-39	46- 58	NA	+/-9
	7	Possessed	12-20	15-22	18-24	21-27	24-30	30-36	41- 51	NA	+/-6
	6	Possessed	9-18	12-20	15-22	18-24	21-27	27-33	33- 46	NA	+/-6
Level 3	5	Possessed	6-15	7-18	9-20	12-22	15-22	18-24	30- 42	NA	+/-3
	4	Possessed	3-6	3-12	3-<15	6-17	9-19	12-19	24- 33	NA	+/-3
	3	Possessed	3-4	3-9	3-12	3-<15	6-17	9-19	15- 21	NA	+/-3
	2	Possessed	3-3	3-5	3-6	3-7	3-9	4-12	9- <1 5	NA	+/-3
	1	Possessed	3-3	3-4	3-5	3-6	3-7	3-9	6-9	NA	+/-3

1. Level 3 and Level 4 indicate restrictive intermediate punishments may be substituted for incarceration.

2. When probation with restrictive conditions is appropriate, the duration of the restrictive intermediate punishment program(s) shall not exceed the guideline ranges.

3. In no case where the enhancement is applied may the mitigated sentence recommendation be lower than the duration of the enhancement of the standard range described in § 303.10(a)(5) (I.e., OGS 1-4 = 3 months; OGS 5-8 = 6 months; OGS 9-14 = 9 months). See § 303.13(b)(6).

4. All numbers in sentence recommendations suggest months of minimum confinement pursuant to 42 Pa.C.S. § 9755(b) and § 9756(b).

5. If the standard range includes the statutory limit, there is no aggravated recommendation.

6. If any recommendation is longer than the statutory limit, see § 303.9(g).

§ 303.17(b). Deadly Weapon Enhancement/Used Matrix

Level	OGS	Deadly Weapon	Prior Record Score								
			0	1	2	3	4	5	RF EL	REV OC	AGG/ MIT
Level 5	14	Used	90-SL	102-SL	114-SL	138-SL	186-SL	210-SL	222-SL	SL	-/-12
	13	Used	78-96	84-102	90-108	96-114	102-120	114-132	126-144	240	+/-12
	12	Used	66-84	72-90	78-96	84-102	90-108	102-120	114-132	120	+/-12
	11	Used	54-72	60-78	66-84	72-90	78-96	90-108	102-120	120	+/-12
	10	Used	40-54	48-60	54-66	60-72	66-78	78-90	90-102	120	+/-12
	9	Used	30-42	36-48	42-54	48-60	54-66	66-78	78-90	90	+/-12
Level 4	8	Used	21-28	24-30	27-33	30-36	33-39	39-45	52-64	NA	+/-9
	7	Used	18-26	21-28	24-30	27-33	30-36	36-42	47-57	NA	+/-6
	6	Used	15-24	18-26	21-28	24-30	27-33	33-39	39-52	NA	+/-6
	5	Used	12-21	13-24	15-26	18-28	21-28	24-30	36-48	NA	+/-3
Level 3	4	Used	6-9	6-15	6-<18	9-20	12-22	15-22	27-36	NA	+/-3

	3	Used	6-7	6-12	6-15	6-<18	9-20	12-22	18-24	NA	+/-3
	2	Used	6-6	6-8	6-9	6-10	6-12	7-15	12-<18	NA	+/-3
	1	Used	6-6	6-7	6-8	6-9	6-10	6-12	9-12	NA	+/-3

1. Level 3 and Level 4 indicate restrictive intermediate punishments may be substituted for incarceration.

2. When probation with restrictive conditions is appropriate, the duration of the restrictive intermediate punishment program shall not exceed the guideline ranges.

3. In no case where the enhancement is applied may the mitigated sentence recommendation be lower than the duration of the enhancement of the standard range described in § 303.10(a)(6) (i.e., OGS 1-4 = 6 months; OGS 5-8 = 12 months; OGS 9-14 = 18 months). See § 303.13(b)(6).

4. All numbers in sentence recommendations suggest months of minimum confinement pursuant to 42 Pa.C.S. § 9755(b) and § 9756(b).

5. If the standard range includes the statutory limit, there is no aggravated recommendation.

6. If any recommendation is longer than the statutory limit. See § 303.9(g).

§ 303.1B(b). Youth Enhancement Matrix

Level	OGS	Prior Record Score								Agg/ Mit	
		0	1	2	3	4	5	RF EL	REV OC		
5	14	84-SL	96-SL	108 - SL	SL	SL	SL	SL	SL	SL	~/-12
	13	72 -102	78- 108	84-17 4	90 -120	96-SL	108- SL	SL	SL	SL	+/-12
	12	60-90	66-96	72-102	78 -108	84-114	96- SL	108 - SL	SL	SL	+/-12
	11	48-78	54-84	60 – 90	66-96	72 - 102	84-114	96- 120	108	120	+/-12
	10	34-60	42-66	48- 72	54- 78	60 -84	72-96	84 - 108	108	120	+/-12
	9	24-48	30 -54	36- 60	42- 66	48 - 72	60- 84	72- 96	96	120	+/-12
4	8	21 -40	24-42	27-45	30-48	33 - 57	39- 57	52- 76	NA	NA	+/-9
	7	18-38	21 -40	24-42	27-45	30 -48	36- 54	47- 69	NA	NA	+/-6

	6	15-36	18 - 38	21 -40	24-42	27-45	33 – 51	39-64	NA	+/-6	
	5	12-33	13-36	15-38	18-40	21 -40	24-42	36-60	NA	+/-3	
		4	12 - 27	12- 33	12 - <36	15 - 38	18 - 40	21 -40	33-54	NA	+/-3
		3	12-25	12- 30	12-33	12- <36	15 - 38	18-40	24-42	NA	+/-3

1. This enhancement may only be applied to violations of 35 P.S. § 780-113(a)(14) and (a)(30).

2. Level 4 indicates restrictive intermediate punishments may be substituted for incarceration.

3. When restrictive conditions of probation are appropriate, the duration of the restrictive intermediate punishment program shall not exceed the guideline ranges.

4. The mitigated recommendation is never less than twelve months (§ 303.10(b)).

5. All numbers in sentence recommendations suggest months of minimum confinement pursuant to 42 Pa.C.S. § 9755(b) and § 9756(b).

6. If the standard range includes the statutory limit, there is no aggravated recommendation.

7. If any recommendation is longer than the statutory limit, see § 303.9(g).

§ 303.1B(a). School Enhancement Matrix

Level	OGS	Prior Record Score							RF EL	REV OC	ACICI/ Mit
		0	1	2	3	4	5				
5	14	78-SL	90-SL	102-SL	SL	SL	SL	SL	SL	SL	~/-12
	13	66-90	72-96	78 -102	84 -108	90 -114	102- SL	114 -SL	SL	SL	+/-12
	12	54-78	60-84	66-90	72-96	78-102	90-114	102 -SL	SL	SL	+/-12
	11	42-66	48 - 72	54- 78	60-84	66-90	78 -102	90 - 114	120	120	+/-12
4	10	28-48	36- 54	42- 60	48- 66	54- 72	66- 84	78- 96	120	120	+/-12
	9	18-36	24-42	30-48	36- 54	42-60	54- 72	66- 84	120	120	+/-12
	8	15-28	18 - 30	21 -33	24-36	27-39	33-45	46- 64	NA	NA	+/-9

	7	12-26	15- 28	18-30	21 - 33	24-36	30-42	41 - 57	NA	+/-6
3	6	9 -24	12-26	15- 28	18-30	21 - 33	27-39	33- 52	NA	+/-6
	5	6 - 21	7-24	9-26	12- 28	15 - 28	18 - 30	30- 48	NA	+/-3
	4	6 -15	6- 21	6- <24	9 - 26	12 - 28	15 - 28	27- 42	NA	+/-3
	3	6 -13	6-18	6-21	6-<24	9- 26	12-28	18- 30	NA	+/-3

1. This enhancement may only be applied to violations of 35 P.S. § 780-17 3(a)(14) and (a)(30).
2. Levels 3 and 4 indicate restrictive intermediate punishments may be substituted for incarceration.
3. When restrictive conditions of probation are appropriate, the duration of the restrictive intermediate punishment program shall not exceed the guideline ranges.
4. The mitigated recommendation is never less than six months (§ 303.10(b)).
5. All numbers in sentence recommendations suggest months of minimum confinement pursuant to 42 Pa.C.S. § 9755(b) and § 9756(b).
6. If the standard range includes the statutory limit, there is no aggravated recommendation.
7. If any recommendation is longer than the statutory limit, see § 303.9(g).

§ 303.16(b). Basic Sentencing Matrix for Offenders Convicted of 1st or 2nd Degree Murder.

Sentencing Guideline Recommendations for Murder of 1st or 2nd Degree										
	O GS	0	1	2	3	4	5	RFEL	REVOC	Agg/Mit
Murder of 1st Degree										
Offen- der >=18	15	LWOP or Death	LWOP or Death	LWOP or Death	LWOP or Death	LWOP or Death	LWOP or Death	LWOP or Death	LWOP or Death	N/A
Offen- der Age 15 to < 18	15	420- Life	456- Life	492- Life	552-Life	612-Life	672-Life	732-Life	LWOP	+/60
Offen- der Age <15	15	300- Life	324- Life	348- Life	396-Life	444-Life	492-Life	540-Life	LWOP	+/48
Murder of 2nd Degree										
Offen- der >=18	15	LWOP	LWOP	LWOP	LWOP	LWOP	LWOP	LWOP	LWOP	N/A
Offen- der Age 15 to< 18	15	360- 624	384- 624	408- 624	444-624	480-624	516-624	552-624	588-624	+/36
Offen- der Age <15	15	240- 588	252- 588	264- 588	288-588	312-588	336-588	360-588	384-588	+/24

1. Murder of the 1st Degree also includes 1st Degree Murder of Unborn Child and 1st Degree Murder of Law Enforcement Officer
2. Murder of the 2nd Degree also includes 2nd Degree Murder of Unborn Child and 2nd Degree Murder of Law Enforcement Officer
3. LWOP = Life without Parole
4. The Offense Gravity Score (OGS) of 15 is assigned only for Murder 1 and Murder 2.

5. Commonwealth must provide reasonable notice to offender of its intention to seek a sentence of life imprisonment without parole for Murder of 1st Degree when committed by an offender under age 18 (18 Pa.C.S. § 1102.1(b)).

6. Recommendations for Murder 1 and 2 apply to offenders under age 18 at the time of the offense and the conviction occurred after June 24, 2012.

APPENDIX 4

NORTH CAROLINA SENTENCING GUIDELINE

FELONY PUNISHMENT CHART
PRIOR RECORD LEVEL

	I 0-1 Pt	II 2-5 Pts	III 6-9 Pts	IV 10-13 Pts	V 14-17 Pts	VI 18+ Pts	
A	Death or Life Without Parole Defendant Under 18 at Time of Offense: Life With or Without Parole						
B1	A 240 - 300	A 276 - 345	A 317 - 397	A 365 - 456	A <i>Life Without Parole</i>	A <i>Life Without Parole</i>	DISPOSITION <i>Aggravated Range</i>
	192 - 240	221 - 276	254 - 317	292 - 365	336 - 420	386 - 483	PRESUMPTIVE RANGE
	<i>144 - 192</i>	<i>166 - 221</i>	<i>190 - 254</i>	<i>219 - 292</i>	<i>252 - 336</i>	<i>290 - 386</i>	<i>Mitigated Range</i>
B2	A 157 - 196	A 180 - 225	A 207 - 258	A 238 - 297	A 273 - 342	A 314 - 393	
	125 - 157	144 - 180	165 - 207	190 - 238	219 - 273	251 - 314	
	<i>94 - 125</i>	<i>108 - 144</i>	<i>124 - 165</i>	<i>143 - 190</i>	<i>164 - 219</i>	<i>189 - 251</i>	
C	A 73 - 92	A 83 - 104	A 96 - 120	A 110 - 138	A 127 - 159	A 146 - 182	
	58 - 73	67 - 83	77 - 96	88 - 110	101 - 127	117 - 146	
	<i>44 - 58</i>	<i>50 - 67</i>	<i>58 - 77</i>	<i>66 - 88</i>	<i>76 - 101</i>	<i>87 - 117</i>	
D	A 64 - 80	A 73 - 92	A 84 - 105	A 97 - 121	A 111 - 139	A 128 - 160	
	51 - 64	59 - 73	67 - 84	78 - 97	89 - 111	103 - 128	
	<i>38 - 51</i>	<i>44 - 59</i>	<i>51 - 67</i>	<i>58 - 78</i>	<i>67 - 89</i>	<i>77 - 103</i>	
E	I/A 25 - 31	I/A 29 - 36	A 33 - 41	A 38 - 48	A 44 - 55	A 50 - 63	
	20 - 25	23 - 29	26 - 33	30 - 38	35 - 44	40 - 50	
	<i>15 - 20</i>	<i>17 - 23</i>	<i>20 - 26</i>	<i>23 - 30</i>	<i>26 - 35</i>	<i>30 - 40</i>	

OFFENSE CLASS

F	I/A 16 - 20	I/A 19 - 23	I/A 21 - 27	A 25 - 31	A 28 - 36	A 33 - 41
	13 - 16	15 - 19	17 - 21	20 - 25	23 - 28	26 - 33
	10 - 13	11 - 15	13 - 17	15 - 20	17 - 23	20 - 26
G	I/A 13 - 16	I/A 14 - 18	I/A 17 - 21	I/A 19 - 24	A 22 - 27	A 25 - 31
	10 - 13	12 - 14	13 - 17	15 - 19	17 - 22	20 - 25
	8 - 10	9 - 12	10 - 13	11 - 15	13 - 17	15 - 20
H	C/I/A 6 - 8	I/A 8 - 10	I/A 10 - 12	I/A 11 - 14	I/A 15 - 19	A 20 - 25
	5 - 6	6 - 8	8 - 10	9 - 11	12 - 15	16 - 20
	4 - 5	4 - 6	6 - 8	7 - 9	9 - 12	12 - 16
I	C 6 - 8	C/I 6 - 8	I 6 - 8	I/A 8 - 10	I/A 9 - 11	I/A 10 - 12
	4 - 6	4 - 6	5 - 6	6 - 8	7 - 9	8 - 10
	3 - 4	3 - 4	4 - 5	4 - 6	5 - 7	6 - 8

A – Active Punishment I – Intermediate Punishment C – Community Punishment

Numbers shown are in months and represent the range of minimum sentences