CHARGE MOVEMENT AND THEORIES OF PROSECUTORS

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I. INTRODUCTION

Any quick review of court statistics—or a single afternoon spent in the hallways of a criminal courthouse—will confirm that criminal charges move. The more serious charges filed at the start of the case often move down to less serious charges that form the basis for a guilty plea and conviction. Concurrent charges of less serious crimes are often dismissed outright as part of a plea agreement. Of these two bargaining options, the movement of the primary charge to a less serious one usually has greater consequences, since it is the primary charge that typically carries the most weight in determining the sentence. The reduction of felony charges to misdemeanors is especially consequential because it generally reduces the punishment and has much less impact on an offender's criminal history. For these reasons, the movement from felony to misdemeanor charges has important ramifications for convicted offenders not only in the immediate case, but far into the future.

Although charge movement is routine and conceptually important to an understanding of plea bargaining, the socio-legal literature has not created a very rich account of charge movement, either in empirical or theoretical terms. Scholars note in general that charge movement happens, but they do not document how often, or the size of those movements. We know little about when prosecutors shift the charges instead of engaging in other forms of bargaining, and we know little about what limits the movement of charges. Further, while scholars have debated at great length whether plea bargaining in general is good or bad or inevitable, we have not sorted out whether charge

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bargaining—as opposed to other forms of bargaining—is normatively desirable with respect to its effects on sentencing, particularly when charge bargains operate within highly structured sentencing guideline laws.

In our recent work on charge movement based on data from North Carolina, we tried to answer some of these empirical questions in a preliminary way, describing patterns of charge reductions between indictment and conviction for different types of crimes, and describing the effects of these reductions on the severity of sentences imposed.[1] After noting that charges move at different rates for different crimes, we tried to explain the differences among crimes by looking to the structure of the substantive criminal law. In particular, our account relied on the concept of "depth" in a criminal code. The depth of a criminal code measures the number of plausible criminal charges that are available to the prosecution and defense as they negotiate a guilty plea based on a summary set of facts. Groups of crimes that offer deeper options to the negotiators (such as the many versions of assault) appear to produce more frequent charge movement. Conversely, crimes that present more shallow options (such as the relatively few statutory sections related to kidnapping) appear to produce fewer reductions in the original charges. Thus, the structure of the code has predictable effects on plea negotiations and—particularly in a state with determinate sentencing laws—on the sentencing outcomes. Put another way, criminal codes matter, even in a world of bargained justice.

In Part II of this Essay, we summarize our earlier findings about depth in criminal codes and then expand our account on the empirical side to address the dividing line between felonies and misdemeanors. For a variety of reasons, plea negotiators treat the felony-misdemeanor line as a major hurdle to cross. We explore here the effects of depth of felony charging options on the likelihood that cases move from felonies to misdemeanors. In particular, the deeper the felony options available, the less likely prosecutors are to agree to a misdemeanor outcome. Based on these patterns of charge movement, it appears that while prosecutors frequently reduce the seriousness of charges, they treat misdemeanors as a least-preferred option, perhaps even as a last resort.

In Part III, we shift our focus to the theoretical and normative questions connected to charge movement. Assuming that the structure of the criminal code does affect the frequency and size of charge

1. Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006).

movements, what does this mean for our accounts of criminal prosecutors and criminal codes? What does it say about prosecutors' motivations for reducing charges? Should we favor changes to criminal codes that make charge movement easier? Would different theories of prosecution lead to different normative implications about charge movement and the best structure for a criminal code?

Any evaluation of legal tools, such as the structure of a legal code, will depend on our expectations about the users of those tools—here, the prosecutors. The meaning and desirability of charge movement will differ for those who employ different theories of decision making by prosecutors. In particular, we distinguish here between the "who" and "what" dimensions in theories of prosecutors' decision making. We also distinguish between theories that focus on the priorities of individual line prosecutors versus those that view the prosecutor in a broader organizational context. For instance, some accounts of prosecution emphasize the power relationships among the people in the prosecutor's office and the relationships between prosecutors and other actors in criminal justice. These theories, in one sense, ask "*Who* decides on criminal prosecutions?" For these "who" theories, charge movement is generally negative because it obscures accountability, making it difficult to appreciate which of the actors is making the truly relevant choices.

Theoretical accounts of the prosecutor's work also build on critical assumptions about the objectives of *individual* prosecutors. Some of those objectives might be concerned first and foremost with the public interest (e.g., ensuring public safety or seeking fair and just outcomes). Other objectives might be more self-interested (e.g., maintaining a high conviction rate while managing a large caseload). Still others may be driven by organizational needs (e.g., conserving scarce resources). All of these accounts, however, try to answer a common question: "*What* does the prosecutor want to accomplish and what considerations affect how the prosecutor pursues those goals?"

For these theories of prosecution, charge movement is neither positive nor negative in itself. One's reaction to charge movement turns on an underlying evaluation of what the prosecutor hopes to accomplish and how well the prosecutor uses his or her considerable discretion. If one assumes the prosecutor is likely to maximize public goods, then charge movements can help the prosecutor do more of a good thing. At the other extreme, if prosecutorial discretion is seen as arbitrary or biased against particular groups, then excessive charge movement may be seen as a source of injustice. An empirical evaluation of charge movement, then, helps clarify our assumptions about prosecutors and

their work and can inform discussions about the normative desirability of criminal codes.

One might view our work on charge movement—both the empirical and theoretical components—as a corrective to overly broad statements about plea bargaining that happens "outside the shadow" of the criminal law and the criminal trial.[2] While it is true that guilty pleas do not closely resemble the results that might flow from application of the criminal laws at trial, it is still demonstrably true that the criminal code matters. The code restricts the bargaining options of the parties and makes some outcomes more difficult, regardless of the desires of the negotiating parties, while facilitating other outcomes.

II. CRIMINAL CODES MATTER

The sentencing laws in North Carolina make for an especially interesting case study for our purposes, in light of its determinate "structured sentencing" laws. Charge movement is especially worth measuring in a system with determinate sentencing laws because charge movement so clearly shifts the sentence. Legal scholars have argued, at least since the 1970s, that such laws will be circumvented through charge bargaining, undermining the goals sought by reformers. As Albert Alschuler famously argued:

> [F]ixed and presumptive sentencing schemes . . . are unlikely to achieve their objectives so long as they leave the prosecutor's power . . . unchecked. Indeed, this sort of reform is likely to produce its antithesis—a system every bit as lawless as the current sentencing regime, in which discretion is concentrated in an inappropriate agency, and in which the benefits of this discretion are made available only to defendants who sacrifice their constitutional rights.[3]

While laws like North Carolina's structured sentencing guidelines may enhance prosecutorial discretion over sentencing, the reality of

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2. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2465 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548–49 (2004); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536–37 (2001).

3. Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 550–51 (1978).

criminal justice nearly thirty years later probably is not as bleak as Alschuler predicted it would be. Indeed, some evidence—limited though it is—suggests that prosecutors did not radically change their behavior in the wake of sentencing guidelines. While charge bargaining may mitigate the effects of sentencing laws in some instances, those laws have not been wholly circumvented either.[4] Our research contributes to this debate. We argue that, as with judicial discretion at the sentencing stage, prosecutorial discretion to control sentencing through charge manipulation is also structured by criminal codes and sentencing laws, though not necessarily in ways that were anticipated or intended by legal reformers who enacted these laws.

The 1994 Structured Sentencing Act ("SSA") in North Carolina created a familiar sentencing guideline grid, with a horizontal axis to measure the extent of the offender's prior criminal record and a vertical axis to measure the seriousness of the crime—for felonies, Classes A through I.[5] Each combination of crime "class" and prior record "level" occupies its own cell in the grid. The cell contains information for the sentencing judge about the available sentence dispositions: active prison terms, intermediate sanctions, or community sanctions. All of the grid cells at Class D and higher allow only for active prison terms, while some cells in the lower portions of the grid allow only for community or intermediate punishments. Cells that are situated on the border between these parts of the grid give the judge a choice between two different dispositions. Each cell in the grid also specifies the durations of the prison terms the judge could select, including a presumptive

4. See Wright & Engen, *supra* note 1, at 1943–44 & nn.28–32 (citing Terance D. Miethe & Charles A. Moore, *Socioeconomic Disparities Under Determinate Sentencing Systems: A Comparison of Preguideline and Postguideline Practices in Minnesota*, 23 CRIMINOLOGY 337, 342 (1985); Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 161 (1987) (showing that charging and plea bargaining practices changed little following the introduction of sentencing guidelines in Minnesota and that reductions in the primary charge were infrequent)), for a review of empirical evidence on the displacement of discretion under determinate and mandatory sentencing laws. *See also* Rodney L. Engen, *Have Sentencing Reforms Displaced Discretion over Sentencing from Judges to Prosecutors?*, *in* THE CHANGING ROLE OF THE AMERICAN PROSECUTOR (John L. Worral & M. Elaine Nugent-Borakove eds.) (forthcoming); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1290–91 (1997) (arguing that federal prosecutors circumvent sentencing guidelines in twenty to thirty-five percent of cases).

5. *See* N.C. GEN. STAT. § 15A-1340.17(c) (2005) (setting out the North Carolina sentencing grid).

range, a lower mitigated range, and a higher aggravated range.[6] A sentencing judge who moves out of the presumptive range must find a legally sufficient aggravating or mitigating fact to justify a departure from the normal range.[7]

Because the seriousness of the charge is one of the two primary inputs into the sentencing calculation under this system, the decision by a prosecutor to reduce the charges that were originally filed can have a measurable effect on the sentence. And before the prosecutor ever makes these crucial choices about charge movement, the structure of the criminal code shapes the options available for the prosecutor to consider.

A. Depth in Criminal Codes

Charge movement does not create identical effects for different types of crimes. For instance, assault crimes resulted in more discounting of charges than kidnapping crimes. As Table 1 indicates, 88% of the assaults originally charged as Class C felonies moved to some less serious version of assault; the same was true for 75% of the original Class E assaults and 67% of the Class F assaults.

6. For a current version of the grids, see North Carolina Court System, http://www.nccourts.org/Courts/CRS/Councils/spac/Punishment.asp (last visited Nov. 4, 2007).

7. *See* § 15A-1340.16 (providing definitions and examples of aggravating and mitigating factors).

Table 1
Offense Class of Conviction by Class of Most Serious Charged Offense: Assault[8]

		Charged Offense			
		Class C (N = 675)	Class E (N = 928)	Class F (N = 146)	Total (N = 1,749)
Conviction Offense Class	**Most Common Offense**	AWDW IKSI	AWDW IK or SI	ASSAULT SI	
Felony					
C	AWDW IKSI	80 (12%)	2 (<1%)	0	82 (5%)
D	Vol. Manslaughter, Robbery w/DW	28 (4%)	1 (<1%)	0	29 (2%)
E	AWDW IK or SI	265 (39%)	234 (25%)	4 (3%)	503 (29%)
F	Assault SI	66 (10%)	65 (7%)	43 (30%)	174 (10%)
G	Robbery, Assault, Weapon Possession	17 (2%)	16 (2%)	3 (2%)	36 (2%)
H	Other Assault, B&E, Larceny, Drug Possession	14 (2%)	34 (4%)	6 (4%)	54 (3%)
	Total Felony	**479 (71%)**	**367 (40%)**	**58 (40%)**	**904 (52%)**
Misdemeanor					
A1	Assault SI (m), AWDW (m), Assault on Female, Pointing a Gun	161 (24%)	465 (50%)	69 (47%)	695 (40%)
1, 2, or 3	Simple Assault	35 (5%)	96 (10%)	19 (13%)	149 (8%)
	Total Misdemeanor	**196 (29%)**	**561 (60%)**	**88 (60%)**	**845 (48%)**

8. Wright & Engen, *supra* note 1, at 1960 & n.105 ("The sum of cases contained in the rows for different offense classes do not correspond exactly to the total number of felonies and misdemeanors because we have removed a few final charges that include very small numbers. The same observation holds true for subsequent tables in this Article.").

As for kidnapping, Table 2 indicates that only 70% of the cases originally charged as Class C kidnapping eventually moved to less serious charges; only 59% of the Class E kidnappings moved to lesser charges.

Table 2
Offense Class of Conviction by Class of Most Serious Charged Offense: Kidnapping[9]

		Charged Offense		
		Class C (N = 163)	Class E (N = 101)	Total (N = 264)
Conviction Offense Class	**Most Common Offense**	Kidnap 1	Kidnap 2	
Felony				
C	Kidnap 1 or 2, AWDS IKSI	49 (30%)	0	49 (19%)
D	Robbery w/DW	22 (14%)	0	22 (8%)
E	Kidnap 2	28 (17%)	41 (41%)	69 (26%)
F	Felonious Restraint	24 (15%)	23 (23%)	47 (18%)
	Total Felony	**141 (86%)**	**69 (68%)**	**210 (80%)**
Misdemeanor				
A1	AWDW, Assault on Female	13 (8%)	22 (22%)	35 (13%)
1	False Imprisonment	9 (6%)	10 (10%)	19 (7%)
	Total Misdemeanor	**22 (14%)**	**32 (32%)**	**54 (20%)**

We hypothesize that these differences among crimes result, in part, from the structure of the criminal code. Where the criminal code offers the attorneys a deeper set of plausible charges as landing spots in the negotiations, more charge movement happens. Because the criminal code offers so many different versions of assault, those charges move down more often than charges for kidnapping, where the available

9. Wright & Engen, *supra* note 1, at 1964.

statutory options are not so deep.

A group of crimes shows great depth if it offers a large number of charges at different levels of sentencing. A group that is perfectly deep might offer viable options at each offense class below the most serious form of the crime. For instance, a group might present options at felony Classes D, E, F, G, H, and I, along with misdemeanor Classes A1, 1, 2, and 3.

B. The Felony-Misdemeanor Line

Just as the "depth" of negotiating options seems to influence the amount of charge movement, the "distance" among options might do the same. Two crimes might stand a great distance apart if the sentences that flow from those crimes are spaced far apart. For instance, a crime group might start with a Class C felony as the most serious available charge (with a presumptive range of 58–73 months for Prior Record Level I), while the next most serious crime appears all the way down at Class G (with a presumptive range of 10–13 months). A shift from Class C to Class D (51–64 months) would involve a lesser distance.

Although we have explored the distance concept less than the depth concept so far,[10] we can hypothesize the effects of distance.[11] Predictions about the effects of distance on charge movement depend on whether one takes the perspective of the defendant or the prosecutor. As the distance increases between the current charge and a proposed lower charge, the amount of the sentence reduction increases, so the incentive for the defendant to plead guilty also probably increases. From this perspective, one would predict that charge reductions will increase as the distance (i.e., the size of the reduction) increases. Conversely, if we surmise that district attorneys are less willing to reduce the top charge when it requires a larger concession, then we would predict that as distance increases, charge reductions should be less likely.[12]

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10. Our work so far leaves open some pivotal empirical questions about charge movement. It may be possible to compare code features to other possible causes of charge movement, such as defendant characteristics, structural features of a prosecutor's office, or a defense attorney organization.

11. For our earlier discussion of distance in a criminal code, see Wright & Engen, *supra* note 1, at 1940.

12. Based on consumer behavior in other negotiating contexts, it is also a plausible hypothesis that the effects of distance between the available charges are contingent on the absolute value of the punishment in question—higher absolute values require bigger discounts to produce comparable plea rates. That is, a defendant facing a severe sentence would insist on a greater concession before giving up a chance of acquittal. Negotiators in other settings think about proposed discounts in proportional rather than absolute values.

As we mentioned briefly in our earlier article, the movement from a felony to a misdemeanor effectively increases the distance between the two charges.[13] Felony convictions carry longer term consequences than misdemeanors, such as exposure to habitual felon sentences in future cases, and quicker build-up of criminal history points.[14] Thus, a reduction that results in conviction for a misdemeanor rather than a felony should be especially attractive to defendants. At the same time, prosecutors should be less willing to reduce felony charges if it would require moving to a misdemeanor. Thus, it is difficult to predict when felony charges are likely to be reduced to misdemeanor status. However, research and experience suggest that (a) prosecutors generally have the upper hand in negotiating guilty pleas and in setting the terms of negotiation, and (b) defendants generally will be motivated to accept any offer that reduces their sentence, even if it is not their preferred option. Therefore, we predict that the increased distance, in theory, should reduce the number of deals that cross the felony-misdemeanor dividing line. The parties would naturally think of lower felony charges as less costly to the prosecution (and less valuable for the defense) than any misdemeanor charge that is also on the negotiating table.[15] Lower felony charges also provide value for the defendant and thus facilitate compromise as the parties can agree to the "intermediate" option (i.e., a lesser felony) if one is available.

It is also easy to imagine that depth and distance interact with each other. We would expect that a set of crimes offering a larger number of felony options with larger distances between them would produce fewer misdemeanor outcomes because the code is structured to give the negotiators many possible resting places before crossing the felony-misdemeanor divide.

1. A Measurement of Depth in Felony Charge Options

To test whether depth in the criminal code affects the likelihood of felony charges being reduced to misdemeanors, we examine North

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For instance, classic research into economic behavior confirms repeatedly that buyers value a savings of $15 on a $100 item more than they value a savings of $15 on a $1,000 item.

13. Wright & Engen, *supra* note 1, at 1967.

14. *See* N.C. GEN. STAT. § 15A-1340.17 (2005); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 603 (2005).

15. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. (forthcoming 2007) (detailing different negotiating postures of prosecution and defense in low-level cases versus felonies).

Carolina felony data.[16] We select cases in which the most serious originating charge was a common crime of violence (non-sexual assaults, kidnapping, and robbery) or a high-volume non-violent crime (burglary/breaking and entering and sale, delivery, or possession of cocaine). These offenses vary in the depth of charging options available to prosecutors, and they represent a range of seriousness levels, from Class H up to Class C.

Our previous analysis using these data from North Carolina suggested that the rate of charge movement (i.e., reductions in the seriousness of the primary charge) is a function of the depth and distance within the criminal code. The empirical analysis, however, was primarily illustrative. The present analysis goes a step further by measuring the depth of the criminal code for each of these offenses in a more precise fashion, and presenting a more rigorous empirical test of our predictions.

To measure the depth of charging options for each originating charge we look first to the criminal code to identify crimes that constitute lesser included forms of each offense, and then examine the actual distribution of conviction offenses to identify the less-serious charges that prosecutors frequently used in these cases. We count an offense as a readily available charging option if it meets the following criteria: (1) it clearly constitutes a lesser included form of the originating offense, *or* it accounts for 5% or more of all convictions of cases charged with the originating offense; and (2) it has a lower offense class than the originating charge. The total number of these less-serious charges that we identify, plus the original charge, equals the total charging options or "depth" for that crime. In all but one instance, the charging options we identify based on the frequency of convictions are also the lesser included charges from the criminal code. We describe the sample offenses and the coding of depth in detail below. Tables 3 and 4 present the distribution of conviction charges and the depth rating for each originating charge in our sample.

16. Our data, provided by the North Carolina Sentencing Policy and Advisory Commission, covers all felonies charged in the state of North Carolina for fiscal year 1999–2000. For further description of the data, see Wright & Engen, *supra* note 1, at 1961–67.

Table 3
Offense of Conviction by Most Serious Charged Offense:
Violent Crimes[17]

Conviction Offense Class	Most Common Offenses	Charged Offense Class C (N = 675) AWDW IKSI	Class C (N = 163) Kidnap 1	Class D (N = 1,302) Robbery w/DW + Attempt	Class E (N = 928) AWDW IK or SI	Class E (N = 101) Kidnap 2	Class F (N = 146) ASSAULT SI	Class G (N = 716) Common Law Robbery
Felony								
C	AWDW IKSI, Kidnap 1	**80 (12%)**	**49 (30%)**		2 (<1%)			
D	Robbery w/DW, Vol. Manslaughter	28 (4%)	**22 (14%)**	**492 (38%)**	1 (<1%)			1 (<1%)
E	AWDW IK *or* SI, Conspire to Rob Kidnap 2	**265 (39%)**	**28 (17%)**	**99 (8%)**	**234 (25%)**	**41 (41%)**	4 (3%)	
F	Assault SI Felonious Restraint	**66 (10%)**	**24 (15%)**		**65 (7%)**	**23 (23%)**	**43 (30%)**	
G	Robbery, Assault, Weapon Possession	17 (2%)		**463 (36%)**	16 (2%)		3 (2%)	**325 (45%)**
H	Other Assault, Larceny, B&E, Drug Possession, Attempted Robbery, Larceny from Person	14 (2%)		**89 (7%)**	34 (4%)		6 (4%)	**168 (24%)**
	Total Felony	**479 (71%)**	**141 (86%)**	**1,220 (94%)**	**367 (40%)**	**69 (68%)**	**58 (40%)**	**508 (71%)**
	Felony Depth	*3*	*4*	*4*	*2*	*2*	*1*	*2*
Misdemeanor								
A1	Assault SI (m), AWDW (m), Assault on Female, Pointing a Gun	161 (24%)	13 (8%)	22 (2%)	465 (50%)	22 (22%)	69 (47%)	21 (3%)
1, 2, or 3	Simple Assault, False Imprisonment, Larceny, B&E	35 (5%)	9 (6%)	60 (4%)	96 (10%)	10 (10%)	19 (13%)	186 (26%)
	Total Misdemeanor	**196 (29%)**	**22 (14%)**	**82 (6%)**	**561 (60%)**	**32 (32%)**	**88 (60%)**	**207 (29%)**

17. *Id.* at 1960.

Table 4
Offense of Conviction by Most Serious Charged Offense:
Selected Non-Violent Offenses[18]

Conviction Offense Class	Most Common Offenses	Charged Offense: Class D (N = 440) Burglary 1	Class G (N = 224) Burglary 2	Class G (N = 1,272) Sell/ Consp. to Sell Cocaine	Class H (N = 4,649) Break/ Enter	Class H (N = 3,362) PWI, Deliver Cocaine
Felony						
D	Burglary 1	**47 (11%)**				
E	Att. Burglary 1	**21 (5%)**				
G	Burglary 2	**90 (20%)**	**78 (35%)**		3 (<1%)	
	Sell or Conspire to Sell Cocaine			**851 (68%)**		81 (2%)
H	Break/Enter, PSP, Larceny	**129 (29%)**	**82 (37%)**		**2,905 (62%)**	
	PWI or Deliver Cocaine			**298 (23%)**		**1,789 (53%)**
I	Break/Enter Veh., Possess Cocaine, misc.	7 (2%)	4 (2%)	**80 (6%)**	79 (2%)	**1,102 (33%)**
	Total Felony	**305 (69%)**	**164 (73%)**	**1,232 (97%)**	**2,993 (64%)**	**2,979 (89%)**
	Felony Depth	***4***	***2***	***3***	***2***	***2***
Misdemeanor						
A1	AWDW, Assault-SI, Assault on Female	19 (4%)	3 (1%)		26 (<1%)	
1, 2, or 3	Break/Enter (m), Larceny	116 (26%)	57 (25%)		1,630 (35%)	
	Paraphernalia, Marijuana, Simple assault, weapon			31 (2%)		383 (11%)
	Total Misdemeanor	**135 (31%)**	**60 (27%)**	**31 (2%)**	**1,656 (36%)**	**383 (11%)**

18. *Id.* at 1965–66.

Assault. The felony assault crimes we examine include assault with a deadly weapon with intent to kill inflicting serious injury (Class C),[19] assault with a deadly weapon with intent to kill (Class E),[20] assault with a deadly weapon inflicting serious injury (also Class E),[21] and assault inflicting serious injury (Class F).[22] No other felony charges accounted for more than 4% of convictions in these cases. Thus the most serious assault (Class C) has a depth of four charging options, while Class E assaults have a depth of two, and Class F assault has a depth of one.

Robbery. The robbery charges we selected for analysis include robbery with a deadly weapon (Class D),[23] common law robbery (Class G),[24] and attempted common law robbery (Class H).[25] The North Carolina Code includes two other felony crimes that may also be supported in these cases: conspiracy to commit robbery with a deadly weapon (Class E)[26] and larceny from a person (Class H).[27] Based on these designations in the code and the distribution of conviction charges, robbery with a deadly weapon (Class D) has a depth of five felony charging options, while common law robbery (Class G) and attempted common law robbery (Class H) have depths of two and one felony charging options respectively.

Kidnapping. Cases could originate with kidnapping in the first degree (Class C)[28] or kidnapping in the second degree (Class E).[29] Facts that support either of these originating charges would likely also support a charge of felonious restraint (Class F).[30] Thus, there are relatively few viable options for reducing kidnapping charges to lesser included offenses. However, 14% of cases charged with Class C kidnapping were

19. N.C. GEN. STAT. § 14-32(a) (2005). Other less-frequently charged assaults at Class C include malicious castration, *id.* § 14-28, and malicious maiming, *id.* § 14-30.

20. *Id.* § 14-32(c).

21. *Id.* § 14-32(b). Other less common assaults at Class E include castration or maiming without malice aforethought, *id.* § 14-29, malicious throwing of corrosive acid or alkali, *id.* § 14-30.1, malicious assaulting in a secret manner, *id.* § 14-31, or patient abuse and neglect, *id.* § 14-32.2(b)(2).

22. *Id.* § 14-32.4(a). Other less common options at Class F are an aggravated assault or assault and battery on a handicapped person, *id.* § 14-32.1(e), or patient abuse, *id.* § 14-32.2(b)(3).

23. *See id.* § 14-87.

24. *Id.* § 14-87.1.

25. *See id.* § 14-2.5.

26. *See id.* § 14-2.4.

27. *Id.* § 14-70.

28. *Id.* § 14-39(b).

29. *Id.*

30. *Id.* § 14-43.3.

convicted of robbery with a deadly weapon (Class D). The latter is the one instance where we count a charge as a readily available charging option that is not also a lesser included offense. This may indicate that kidnapping frequently occurs in the course of robbery. Although robbery may better describe the motives and intent of the offender, the criminal code and sentencing guidelines designate kidnapping as the more serious offense. Thus, first degree kidnapping has a depth of four viable options, while second degree kidnapping has a depth of two.

Burglary. We selected cases originating with three different burglary-related crimes: burglary in the first degree (Class D),[31] burglary in the second degree (Class G),[32] and breaking and entering a building (Class H).[33] The North Carolina Code also includes attempted first-degree burglary (Class E), which provides an additional lesser included option for the most serious burglary charges.[34] No other felony charges accounted for more than 2% of convictions in these cases. Thus, first degree burglary (Class D) has a depth of four charging options, while second degree burglary (Class G) has a depth of two. Below breaking and entering (Class H), the only lesser felony charges not requiring proof of a specialized fact (such as breaking and entering a vehicle, a Class I felony)[35] are misdemeanors.[36] Thus, we designate breaking and entering a building as having only one felony charging option (that is, a depth of one).

Sale/Possession of Cocaine. Drug crimes pose additional difficulties for this analysis because trafficking offenses are subject to mandatory minimum sentences, they follow a separate punishment chart, and the available data do not allow us to determine precisely the exact originating offense (which turns on drug quantity).[37] Therefore, we limit the present analysis to offenses originating as one of two non-trafficking crimes: sale or conspiracy to sell cocaine (Class G)[38] and delivery or possession with intent to deliver cocaine (Class H).[39] These charges would also support a charge of simple possession of cocaine, a lesser

31. *Id.* § 14-52.

32. *Id.*

33. *See id.* § 14-54(a) (breaking or entering building with intent to commit felony or larceny therein).

34. *See id.* § 14-2.5.

35. *Id.* § 14-56.

36. *Id.* § 14-54(b).

37. *See id.* § 90-95.

38. *See id.*

39. *See id.*

included felony (Class I).[40] Therefore, cases originating as sale or conspiracy to sell cocaine have a depth of three felony charging options, and cases charged with delivery or possession with intent have a depth of two.

2. Results and Analysis: Effects of Code Depth on Misdemeanors

Previously we observed that charge reductions in North Carolina are more frequent among more serious than less serious cases. We suggested that this counter-intuitive finding (counter-intuitive if one assumes that prosecutors would be less likely to show leniency in more serious cases) could be explained by the depth of charging options available. That is, the more options available the *more likely* prosecutors are to reduce charges. Here we test a corollary hypothesis: the greater the depth of felony charging options, the *less likely* prosecutors are to reduce felony charges to misdemeanors.

To test this prediction, we compare the percentage of cases resulting in a felony conviction (as opposed to a misdemeanor) by the depth of available charging options for all of the cases in our sample (N = 13,962). Results of this analysis appear in Table 5. Consistent with our prediction, cases with more felony options result in felony convictions at much higher rates than cases with fewer options.

40. *See id.* § 90-95(b)(2).

Table 5
Felony Convictions (vs. Misdemeanor) by Depth of Felony Charging Options

Depth of Options	% Felony Convictions	N
All Cases		
1	64%	4,795
2	76%	5,328
3	88%	1,934
4	88%	1,905
Total	**75%**	**13,962**
Class C, D, E only		
1	n/a	0
2	42%	5,328
3	71%	1,934
4	88%	1,905
Total	**72%**	**3,636**
Class F, G, H only		
1	64%	4,795
2	85%	4,299
3	98%	1,232
4	n/a	0
Total	**76%**	**10,326**

The differences are quite striking. Among cases where the originating charge has only one felony option, 64% are convicted of felonies, with 36% being reduced to misdemeanors. As the depth of options increases to two or three, the percentage of felony convictions increases to 76% and 88%, respectively, a 12% increase with each additional felony option. However, when the depth of options increases to four, the percentage of felony convictions remains at a substantial 88%. Thus, while the percentage of felony convictions is maximized at a depth of three, the pattern is clear and strong—the more felony options available for an originating offense type, the higher the percentage of

those cases resulting in a felony conviction.[41]

It is worth asking, however, whether the relationship between felony options and felony convictions simply reflects an unmeasured effect of offense seriousness. That is, in general we would expect that prosecutors in cases involving more serious felonies would have more lower felonies to choose from. Prosecutors might also be less inclined to reduce higher felonies than lower felonies down to misdemeanors, simply because they are more serious. Thus, the association between depth of options and conviction on a felony versus misdemeanor charge could be spurious and due to the effects of offense class.

To explore this alternative explanation for the pattern, we perform three additional tests. First, we divide our sample into two groups, cases originating at Class C, D, or E versus cases originating at Class F, G, or H; then we examine the percentage of felony convictions by depth separately for these groups. The results, also presented in Table 5, are unambiguous. For the less serious as well as the more serious felonies, there is a clear and consistent increase in the percentage of cases convicted of felony charges as the number of charging options increases. In fact, the relationship is more consistent than when we examined all cases together. For each group, the likelihood of a felony conviction increases sharply with each increase in the number of felony options.[42]

As a second test, we examine the percentage of felony convictions by the offense class of the originating charge, ignoring for the moment the depth of charging options. These results, which appear in Table 6, provide additional evidence that offense class cannot account for the pattern we observe regarding depth. Although the percentage of cases resulting in felony convictions clearly varies by the offense class of the originating charge, the relationship is not linear, nor is it monotonic. In fact, the most serious (Class C) and the least serious (Class H) originating offenses in our sample are *equally likely* to result in felony convictions (74% of each class). The cases *most likely* to result in felony convictions are Class D (88%) and Class G (86%), which are the second *most* serious and second *least* serious classes of offenses, respectively, and the originating offenses with the smallest percentage of felony

41. A chi-square test indicates that the association between depth of options and felony convictions is statistically significant (Chi-square = 664.5; df = 3; $p < .001$), meaning that the probability of the pattern observed in our sample occurring by chance is less than one in one thousand, or 0.1%.

42. Again, chi-square tests indicate that the association is highly statistically significant for Class C–E charges (Chi-square = 898; df = 2; $p < .001$) and for Class F–H charges (Chi-square = 666; df = 2; $p < .001$).

convictions are mid-level felonies at Class E (43%) and Class F (40%). Finally, as we observed previously, the more serious originating charges (Class C, D, and E) are slightly *less likely* to be convicted of felonies than the less serious originating charges.[43] Thus, there is no evidence that charge movement from felony to misdemeanor is less likely among more serious than less serious offenses.

Table 6
Percentage of Felony Charges Convicted as Felony (vs. Misdemeanor) by Felony Offense Class

Offense Class Charged	% Felony Convictions	N
C	74%	838
D	88%	1,742
E	43%	1,056
Subtotal C–E	**72%**	**3,636**
F	40%	146
G	86%	2,172
H	74%	8,008
Subtotal F–H	**76%**	**10,326**
Total	**75%**	**13,962**

In our third test, we computed the partial correlation coefficient measuring the association between depth of options and conviction on a felony charge, controlling for the offense class of the originating charge. The partial correlation ($r = .338$) is highly statistically significant ($p < .001$), indicating a strong, positive, linear relationship between the number of available felony charging options and the likelihood that a case will result in a felony conviction that is *independent* of the seriousness of the original felony charge.

In summary, it appears that crimes with deeper options for felony outcomes encourage negotiators to resolve the case as a felony, even when a misdemeanor is also an option, and even when the original charge is not very serious. In these areas of greatest depth, the criminal code is structured to make prosecutors especially reluctant to cross the

43. *See* Wright & Engen, *supra* note 1, at 1958.

felony-misdemeanor line. The parties seem to treat misdemeanor outcomes as the least favored option—if not a last resort—even though such outcomes would be the most attractive for defendants, a likely reflection of the prosecutor's domination of plea negotiations. These findings are all the more striking given that our sample includes violent crimes as well as drug and property crimes.

III. THEORIES OF PROSECUTION

The first phase of this project remained at the empirical level. In this part, we start exploring both theoretical and normative implications: Having documented some of the features of criminal codes that foster more charge movement, *should* we favor criminal codes that make charge movement easier? Would different theories of prosecution lead one to different normative conclusions about charge movement and the best structure for a criminal code?

One of the challenges for this enterprise arises from a gap in the socio-legal literature. There is not a well-recognized set of self-conscious theories about prosecution in the legal and criminological literature.[44] We will, therefore, offer an organizational scheme for understanding the various partial and implicit theories of prosecution. For each of the major groups, we ask about the likely posture of the theories towards charge movement.

In particular, theories of prosecutor decision making can be seen as addressing two overarching questions. First, *what* is the prosecutor's main objective, and what factors do prosecutors routinely consider when selecting charges or when negotiating a plea agreement? Second, and particularly salient in jurisdictions with more determinate and less discretionary sentencing laws, *who* in fact controls charging and sentencing decisions?

Theories of prosecution differ in another important respect, as well. Some theories emphasize the work of individual line prosecutors, often from microeconomic or sociological perspectives that emphasize the subjective judgments of prosecutors. Other theoretical perspectives view prosecutors and the decisions they make in the context of

44. As we will see, there are many theories to explain some aspects of the prosecutor's work, such as plea negotiations, and there are many accounts of prosecution more generally that rely on theories that are less than fully articulated. For other observations about the incomplete and implicit nature of current theories of prosecution, see Bibas, *supra* note 2, at 2464–66; Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 335, 340 (1990).

organizational settings, local court communities, and other criminal justice agencies. These theories tend to emphasize the importance of organizational needs and constraints, and the interaction among prosecutors and other critical actors or institutions.

Although most theoretical approaches speak to both of these questions and consider both the goals of individual prosecutors as well as the broader context in which they work, the mix of objectives is different for different theories.

A. "What": Theories of the Individual Prosecutor

1. Survey of the Theories

Our review of prosecutor theories starts with those accounts that emphasize the individual work of line prosecutors, often concentrating on *what* they hope to accomplish. A number of scholars adopt an economic model of prosecutorial decision making that emphasizes crime control—the efforts of a line prosecutor, both in selecting and disposing of charges, to minimize crime. In different theoretical accounts, prosecutors might choose slightly different means to this end. Perhaps they attempt to accomplish crime control through maximizing the amount of punishment (prison and other correctional resources) applied to offenders.[45] If so, then we would expect charge movement to be largely unrelated to the seriousness of the initial charges or to depth and distance in the criminal code. Or perhaps the individual prosecutor creates a set of priorities among crimes (independent of punishments that attach to those crimes under the code or in practice) and tries to maximize the convictions for the highest priority crimes.[46] Most theories, at least implicitly, assume that prosecutors prioritize more serious crimes and crimes against persons (as opposed to property or minor drug crimes), in which case one would expect more charge movement among the less serious forms of offending. Finally, the prosecutor might attempt to maximize the number of convictions, without much regard to the punishment or the priority attached to each

45. *See* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 290–91 (1983); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 98–99 (1971); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988).

46. *See* H. RICHARD UVILLER, VIRTUAL JUSTICE 180, 197 (1996); Bibas, *supra* note 2, at 2470; Daniel C. Richman, Old Chief v. United States: *Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 958 (1997).

conviction.[47] In this case, one would expect frequent charge movement, independent of crime seriousness. Charge movement should also be related to the depth of charging options in the criminal code that facilitate plea negotiation. The data we presented above most clearly resemble the latter pattern of charge movement—frequent charge movement at all levels of offense seriousness, with reductions from felony to misdemeanor being significantly related to the depth of charging options available.

Some sociological and criminological theories also point to crime-control concerns that drive decision making by court officials, including prosecutors. In selecting the cases that call for the highest priority in the crime control effort, however, these theories maintain that prosecutors will consider more than the seriousness of the available provable charges. These theories claim that criminal justice actors (both prosecutors and judges) make subjective judgments about offenders' culpability and dangerousness, judgments that affect their charging and sentencing decisions.[48] According to these accounts, the seriousness of the crime and the defendant's criminal history affect these subjective judgments, but prosecutors also form impressions of offenders' culpability and dangerousness based on non-charged conduct and other clues, including stereotypes regarding race, ethnicity, gender, or age; characteristics of the victim; or the victim's relationship to the defendant.[49] Thus, these theories would predict that charge movement will differ depending on the type and seriousness of the crime, but that legally irrelevant social status characteristics, of both defendants and victims, will also be important.

The theories of prosecution we have canvassed so far share the implicit assumption that individual prosecutors pursue public goods, such as the control of crime or fostering public safety.[50] Other

47. Bowers, *supra* note 15; Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353, 354 (2006).

48. Darrell Steffensmeier et al., *Gender and Imprisonment Decisions*, 31 CRIMINOLOGY 411, 411 (1993).

49. *See* Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 175–76 (1987); *see also* Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 SOC. PROBS. 247 (1991); Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 763, 771 (1998).

50. Similarly, an account of the individual prosecutor's work concentrates on classic purposes of the criminal law apart from crime control—that is, deterrence, incapacitation, or rehabilitation. In particular, some theories postulate that retribution or proportionality is the

theoretical accounts of prosecution, however, emphasize the individual interests of the line prosecutor. Treating the prosecutor as the classic self-interested rational actor of economic theory, these accounts suggest that prosecutors exercise their discretion to charge and resolve cases in ways that serve their personal and professional goals. For instance, the line prosecutor might negotiate guilty pleas to increase the chances that he or she will try especially interesting or difficult cases as a way to showcase or perhaps improve trial skills.[51] Or perhaps the prosecutor will push to try notorious cases that can enhance the prosecutor's reputation in the legal community.[52]

Other theories point to even more blatant forms of self-interest to account for prosecutorial choices. A number of studies, for instance, find that job performance for line prosecutors is often judged in terms of conviction rates and one's ability to manage caseloads efficiently, more than by the rate of one's success in criminal trials.[53] Indeed, in some offices a high trial rate might be seen as a sign of overzealousness or ineffective negotiating skills. Thus career advancement within the DA's office and in the local legal community may exert pressure on prosecutors to appear efficient in their jobs by maintaining a high rate of convictions and avoiding the embarrassment of losing at trial. Others point out that prosecutors can increase their leisure time by resolving more cases through guilty pleas rather than trials and by declining more prosecutions.[54]

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best organizing principle to explain the selection and disposition of charges. *See* Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 127–28 (2003). Interestingly, while it is easy to find the influence of "just deserts" theory on substantive criminal law and on punishment, it is more difficult to identify a self-conscious "just deserts" theory of prosecution.

51. *See* Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 260–61 (2000).

52. *See* Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 649 (2005).

53. *See* ARTHUR ROSETT & DONALD R. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 128–32 (1976). *See generally* ABRAHAM S. BLUMBERG, CRIMINAL JUSTICE 44–50 (1967); Celesta A. Albonetti, *Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision Making in Felony Case Processings*, 24 CRIMINOLOGY 623, 626 (1986).

54. *See* Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 50–53 (1988); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988 (1992); Nuno Garoupa & Frank H. Stephen, *Law and Economics of Plea-Bargaining* (July 2006), *available at* http://ssrn.com/abstract=917922.

2. Normative Implications

What are the implications for charge movement under these various theoretical portrayals of the individual prosecutor's objectives? We suggest that the two groupings suggested above—theories that emphasize public-regarding objectives versus theories that concentrate on self-regarding objectives of the prosecutor—produce different attitudes toward charge movement.

Under the public-regarding accounts of the prosecutor's work, particularly the economic model of decision making, more negotiating options may be seen as desirable for the purpose of crime-control. Additional charging options allow the prosecutor to make incremental pricing adjustments to purchase the most convictions (or the most sentencing impact, or the most priority convictions, or the most public satisfaction) with a fixed budget. Given that prosecutors are more familiar with the details of the vast majority of cases than judges are, and assuming that the evidence presented by law enforcement is accurate, prosecutors may be in a better position than judges to determine an appropriate charge and to produce an appropriate punishment. If one is willing to grant prosecutors considerable control over the sentencing process, more negotiating power can facilitate this goal.

However, this also requires placing great faith in the ability and judgment of line prosecutors. If prosecutors' charging and plea negotiations are biased, reflecting stereotypes based on the either the victims' or the defendants' race, ethnicity, sex, or age, as some research contends, then the pursuit of one public good—crime control—may come at the expense of another—equality under the law. Furthermore, the prospect of wrongful convictions—a profound tragedy of justice that DNA testing has revealed to be more common than most previously imagined—and the evidence that prosecutor error or misconduct often is to blame, should give us pause when considering whether to increase prosecutors' leverage. Due process and justice may suffer.

For the theories that stress self-regarding behavior by prosecutors, charge movement is clearly unappealing because it would likely be used to further private goods. In this setting, it would be more desirable to keep tighter controls over the agents of the people who do not strictly serve their principals' interests. Less depth in the criminal code would lead to less charge movement, and would make it easier to monitor line prosecutors and to specify the resolutions that are acceptable for a given category of cases.

B. "Who": Theories of the Prosecutor in Context

A second set of theories views the prosecutor as an actor embedded in a complex organizational and institutional context, where individual interests, organizational imperatives, and external pressures converge to affect prosecutorial choices. These theories assert that prosecutors seek objectives other than crime control, and they point to multiple parties that influence the work of the prosecutors. For example, the prosecutor's office must perform its work in concert with judges and defense attorneys, and in light of feedback from the community, and must live within the resource limits and other boundaries created by legislative bodies, the state attorney general, and law enforcement agencies. Thus, in addition to addressing the motives and objectives of individual prosecutors, these theories of prosecution implicitly ask a second question, "*Who* decides on criminal prosecutions?"

One of the most obvious and under-explored organizational influences on the work of a prosecutor is the direction that comes from within the prosecutor's office. The chief prosecutor sets priorities for the line prosecutors and creates an environment in which the middle management of the office interpret and enforce (or fail to enforce) the chief's stated priorities.[55] The tools that operate here include formal, articulated policies, but more informal transmission of "office culture" also happens as a matter of course, and changes the choices that individual line prosecutors would make if left entirely to their own judgment.

From an organizational perspective, a number of sociological studies describe the charging and plea process as essentially an administrative process driven by efficiency concerns which, for prosecutors, means a high conviction rate and few trials.[56] In this view, the organizational imperatives of the office explain prosecutorial choices better than any emphasis on crime control or individual benefit for a prosecutor.[57] Such theories suggest that outcomes may be driven by considerations other than what might be most appropriate or deserved in a particular case.

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55. *See, e.g.*, Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 49 (2002).

56. *See* ROSETT & CRESSEY, *supra* note 53, at 128. *See generally* David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965).

57. BLUMBERG, *supra* note 53, at 50; Jo Dixon, *The Organizational Context of Criminal Sentencing*, 100 AM. J. SOC. 1157, 1162–63 (1995); Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 AM. J. SOC. 1357, 1363 (2000).

For instance, some cases that might be won are rejected, and others may be reduced to a charge less than what could, in fact, be proven in trial, simply because the office routines allocate more resources to other types of cases.

These theories also look beyond the confines of the prosecutor's office and characterize the prosecution of crime as the product of interactions among several government institutions. Prosecution, they contend, is best described and understood by looking to the interaction between prosecutors and police departments,[58] or between prosecutors and defense attorney organizations, or between prosecutors and courts. Within the local court environment, some theories emphasize that the prosecutor forms part of a "working group" in the courthouse, a group that also includes defense attorneys, court clerks, and judges. From this perspective, the prosecutor's objective is to foster stable—and even friendly—relationships with the other members of the working group. The prosecutor, therefore, would generally not depart from the normal expectations for the charging and processing of cases, norms that the group develops to assure acceptable working conditions and a proper flow of cases in a busy system.[59]

Some social scientists have described this process, and the interaction among prosecutors and other government institutions, in terms of "inter-organizational exchange" whereby each agency accommodates the needs of the others.[60] In some specialized settings, the interaction between the prosecutors and other governmental institutions results in formal guidelines for prosecutors to follow.[61] More commonly, the other agencies hold some control over the budget that the prosecutor can spend, or the quality of the evidence in the case file, or the severity of the sentence actually imposed. Another described these relationships in terms of the degree of "coupling," or the degree to which agencies are coordinated, and the degree to which decisions at one stage influence outcomes at the next.[62] For example, in a more

58. *See, e.g.*, Felice F. Guerrieri, *Law & Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. ILL. U. L.J. 353, 353 (2001); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

59. *See* Peter F. Nardulli et al., *Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process*, 76 J. CRIM. L. & CRIMINOLOGY 1103, 1109–10 (1985).

60. *See* George F. Cole, *The Decision to Prosecute*, 4 LAW & SOC'Y REV. 331, 332 (1970).

61. *See* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

62. *See* John Hagan et al., *Ceremonial Justice: Crime and Punishment in a Loosely*

"tightly coupled" system, police and prosecutors may work closely together, resulting in the actions of police having more relevance to the final outcome. Legal structures can be seen as affecting the degree of coupling too, by tying case outcomes to earlier decisions in charging and plea bargaining.

Moving beyond the relationship between the prosecutor's office and other agencies of government, some accounts of the prosecutor's power highlight the interaction between the prosecutor and the community. In particular, recent piecemeal developments in the world of prosecution could be understood as a coherent movement toward "community prosecution." Taking its cues from the more well-established model of community policing,[63] the community prosecution office looks beyond the number or type of convictions obtained and takes a more victim- and community-centered perspective on the work.

Under the rubric of "community prosecution," the prosecutor relies on the community—through surveys, meetings, and other means—to set priorities for prosecution, even if the priorities of the neighborhood do not correspond to the most serious violations of the criminal code. The community prosecutor considers crime *prevention* to be an essential part of the job, not just crime *punishment*.[64] The reduction of crime itself becomes secondary, one means to obtain a greater end: the community's sense of safety and well-being.[65] Community prosecution also re-orients the relationships between the prosecutor and other government agencies. In a community prosecution model, the prosecutor does more than manage the criminal charges and the flow of convictions. The chief prosecutor must take a leadership role in coordinating the resources of police departments, social service agencies, and any other groups that can contribute to a healthier community, better able to ward off crime. Thus, community prosecution represents both a "what" theory of prosecution as well as a "who" theory; community perceptions of safety and public order become the ultimate objective of prosecution (clearly public goods); and the public itself becomes one of the relevant actors in

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Coupled System, 58 SOC. FORCES 506, 508–10 (1979).

63. For an overview of community policing, see Office of Community Oriented Policing Services, http://www.cops.usdoj.gov/Default.asp?Item=36 (last visited Nov. 4, 2007).

64. *See* Walter J. Dickey & Peggy A. McGarry, *The Search for Justice and Safety Through Community Engagement: Community Justice and Community Prosecution*, 42 IDAHO L. REV. 313, 317, 363 (2006).

65. In another interesting variation on this theme, the individual prosecutor might aim to maximize the amount of acceptance among defendants through an emphasis on procedural justice. *See* Michael O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 329–32 (2007).

prosecution choices.[66]

What do these "who" theories of prosecution tell us about charge movement? Perhaps the answer to this question depends on choosing sides. If the important effects of legal rules are their power to shift control over prosecution choices from one actor to another, then one might favor those legal rules that empower the most desirable actor in a given setting. From this vantage point, a critical question is how depth and distance in a criminal code affect the relative power of the sentencing judge and prosecuting attorney. Generally speaking, easier charge movement empowers the lowest levels of the prosecutor's office as opposed to the chief prosecutor and management. As between the prosecutor's office and other government agencies, deeper criminal codes and greater charge movement empower the prosecutor.

But there is another consideration that runs through all of these power struggles among institutions and individuals. Whatever institutions affect the outcomes of prosecutorial choices, it is crucial for democratic legitimacy that the public be able to identify the responsible parties. Transparency in the application of criminal law is a key virtue.[67] Only when the public knows who is responsible for prosecutor outcomes can voters change leadership to revise policies or spending priorities. Charge movement, however, is likely to interfere with the community's ability to follow the work of their agents.[68] It sends conflicting signals about the estimated worth of the case and makes it more difficult to compare one case to another.

Overall, then, we believe that "who" theories of prosecutors—those that emphasize the organizational, community, and institutional forces affecting prosecutors' choices—will lead more often to a negative evaluation of charge movement and a preference for less depth in criminal codes. Among the "what" theories of prosecution—those that emphasize the individual prosecutors' objectives—the responses to charge movement are less certain. These theories suggest that charge

66. *See, e.g.*, Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 87 (2007); Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1128–29 (2005).

67. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 917 (2006); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 902–03; Frank J. Remington, *The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices*, *in* DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY 73, 78–79 (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

68. *Cf.* Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410 (2003).

movement is a powerful tool that could be used well or abused. The desirability of a deep criminal code will depend on what one concludes to be the leading objective of prosecution and about how prosecutors will pursue that objective. When the objective appears to be a public good, deeper criminal codes and greater capacity for charge movement will seem to be a reasonable way to enhance the prosecutor's work. When prosecutorial decisions lead to inequality in the application of the law, however, justice and the perceived legitimacy of the criminal courts may be compromised.

C. Theoretical Implications

Our current and previous findings taken together throw some light on public safety and just deserts models of prosecution. Seriousness of the crime does not determine the rate at which felony charges are reduced in the way that we would expect under those theories. Charge reductions, including reductions from felony to misdemeanor, are frequent among all groups of offenses and at all levels of seriousness, and tend to be more frequent among higher level crimes. Even this counter-intuitive relationship between offense seriousness and charge reductions, however, is weak. Rather, we find that the availability of lower felony charging options increases the rate of charge reductions overall. It appears to us that having more options available probably facilitates plea negotiations, making it more likely that the parties will reach a mutually satisfactory agreement. This interpretation suggests that efficiency in case resolution looms large among the factors driving the process.

Likewise, our analysis in Part II finds that the reduction of felony charges to misdemeanors is also driven by the availability of felony options, and not by the seriousness of the originating charge. This reveals another way that the criminal code structures charge movement: the greater the depth of felony options, the less likely prosecutors are to reduce the primary charge to a misdemeanor. This suggests that prosecutors generally prefer not to reduce felonies to misdemeanors; if they have felony options, they generally choose them. However, it is also interesting to consider that when few felony options are available we do not see a higher percentage of cases resulting in convictions of the original charge. Rather, we see an increase in misdemeanor convictions. Thus, while prosecutors may prefer felony convictions, they also seem to prefer to gain a misdemeanor conviction than to invest the substantial resources that would be required to try the case on the most serious charge, and risk losing.

IV. CONCLUSION

We hope the rubric of "charge movement" allows us to see something meaningful about the work of prosecutors on both the empirical and theoretical levels. On the empirical level, this project to describe more precisely the exact location and amount of charge movement—not resting content with the general observation that charge bargaining is commonplace—can reveal the effects of criminal code structure. Our analysis in this Essay, for instance, points out one particular feature of the felony-misdemeanor dividing line. The parties treat misdemeanor outcomes as a last resort, and deeper felony options predictably lead to fewer misdemeanor outcomes.

On the theoretical level, our findings about charge movement offer some insights on the explanatory power of different theories of the prosecutor's work. Stronger theoretical accounts, in turn, clarify our normative choices about the legal tools we make available to prosecutors. Any coherent explanation and evaluation of a legal tool such as charge movement will reveal a great deal about the users of that tool.