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# The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power

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# THE EFFECTS OF DEPTH AND DISTANCE IN A CRIMINAL CODE ON CHARGING, SENTENCING, AND PROSECUTOR POWER

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*Today's conventional wisdom about criminal justice in the United States tells us that criminal codes do not matter much. Particularly in light of reforms that have made sentencing laws less discretionary, a prosecutor's application of criminal statutes is thought to be more important than the code provisions themselves. Despite these claims, little is known about the actual use of prosecutorial discretion under these kinds of sentencing laws. In this Article, we examine charge movement in North Carolina. The data show that charge reductions are common, occurring in roughly half of all felony cases that resulted in conviction, and that the prosecutor's decision to reduce criminal charges has a large effect on average sentence severity.*

*These effects do not apply equally, however, to all crimes. When a group of related crimes offer deeper charging options (that is, the number of charges that might apply to a given set of facts), the prosecution and defense agree more often to reduce the charges. Large distances between the sentences that attach to available charging options make it less likely that the prosecution and defense will agree on a particular charge reduction. Thus, plea bargaining is not an entirely free-market exercise that allows the parties to negotiate a customized outcome. Even in a world of charge-driven sentencing where prosecutorial discretion is a dominant feature, the substantive criminal law matters.*

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## INTRODUCTION

Today's conventional wisdom about criminal justice in the United States tells us that criminal codes do not matter much. The real impact of the criminal law appears not in the statute books, but in the choices of criminal prosecutors who apply the criminal laws. Moreover, the law says very little about how prosecutors should choose. Legal rules grant broad powers to prosecutors, including the power to decide which cases to prosecute, to recommend bail, to dismiss or revise charges after the original filing, to negotiate guilty pleas to less serious charges than might be provable in court, and to recommend sentences.[1] It is difficult to convince judges to interfere with prosecutor charging decisions.[2] Similarly, while state legislatures have been eager to enact laws regulating judicial discretion in sentencing, they have been reluctant to impose similar constraints on prosecutors.[3]

Thus, for the most part, prosecutorial discretion in charging and plea bargaining is unreviewable—leading some socio-legal scholars to argue that the prosecutor may be the single most powerful actor in

1. *See generally* NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS (2d ed. 1991) (reviewing authority and functions of criminal prosecutors).

2. *See* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 803–63 (2d ed. 2003) (reviewing limited efforts by judges to review prosecutorial charging decisions).

3. *See* MICHAEL TONRY, SENTENCING MATTERS 67–68 (1996) (comparing limits on judicial sentencing discretion to limits on prosecutorial sentencing discretion).

the criminal justice system.[4] In addition to remaining beyond the reach of conventional sources of law, these discretionary choices are easier to hide than a judge's discretion in sentencing and remain largely outside the spotlight of academic inquiry.[5]

Prosecutorial decisionmaking takes on even greater importance in the context of late twentieth century sentencing reforms. For more than a generation now, sentencing laws in the United States have become more determinate and less discretionary,[6] potentially increasing the power of the prosecutor even further. Numerous scholars have argued that nondiscretionary sentencing laws, including mandatory minimum sentences and presumptive sentencing guidelines, make the charge of conviction a more important predictor of the sentence. They increase prosecutorial discretion over sentences relative to judicial discretion.[7] Moreover, these scholars argue that nondiscretionary sentencing reforms encourage bargaining for guilty pleas and allow prosecutors to circumvent particular sentencing provisions, potentially thwarting the efforts of legal reformers to achieve greater uniformity in punishment.[8]

Despite these claims, we know little about the actual use of prosecutorial discretion under these kinds of sentencing reforms. One common working assumption is that prosecutors frequently engage in plea negotiations with the defendant and may amend initial

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4. *See generally* William F. McDonald, *The Prosecutor's Domain*, *in* THE PROSECUTOR 15 (William F. McDonald ed., 1979) (providing a framework for understanding the role of the prosecutor in the administration of justice).

5. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY, at vi (1969) ("Writers about law and government characteristically recognize the role of discretion and explore all around the perimeter of it but seldom try to penetrate it."); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952) (characterizing prosecutorial discretion as an abandonment of law).

6. Determinate sentencing laws are those that empower the sentencing judge to assign a fixed prison term to a defendant rather than deferring the choice to a parole authority. For a discussion of the relevant terminology, see Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 381–86 (2005) (discussing use of "determinate" and "discretionary" terminology).

7. *See, e.g.*, BUREAU OF JUSTICE ASSISTANCE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 126 (1996) (highlighting the concern of displacing discretion from judges to prosecutors when trying to control sentencing discretion); John C. Coffee, Jr. & Michael Tonry, *Hard Choices: Critical Trade-offs in the Implementation of Sentencing Reform Through Guidelines*, *in* REFORM AND PUNISHMENT: ESSAYS ON CRIMINAL SENTENCING 155, 159 (Michael Tonry & Franklin E. Zimring eds., 1983) (same); TONRY, *supra* note 3, at 146–59 (same); 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) (exploring interaction of sentencing law reforms and prosecutorial charging and plea bargain practices).

8. *See supra* note 7 and accompanying text.

charges as a means of compromise. This working assumption, however, does not tell us the *amount* of charge movement we are likely to find in a given system, or in particular types of cases. Nor does it tell us what effect charge reductions are likely to have on the severity of sentences.[9] Very little systematic empirical research examines how often prosecutors reduce charges or the impact that these reductions have on sentencing uniformity in jurisdictions with comprehensive sentencing guidelines.[10] Thus, research on charging decisions has greater value than ever, both in practical and theoretical terms.

We pursue three goals in this Article. First, we examine the amount of charge movement in North Carolina and estimate the impact that charge reductions have on sentencing outcomes.[11] Since 1994, North Carolina has operated a structured sentencing system (one form of sentencing guidelines) that ties the sentence imposed to the charge of conviction and the offender's criminal history. Statewide data from this system allow us to measure the prevalence of charge reductions by prosecutors and the effect of those charge reductions on the sentences that judges later impose on criminal defendants. We compare the initial felony charges that prosecutors filed with the charges at the time of conviction and then compare the sentences that defendants ultimately received with the sentences they likely would have received had they been convicted of the initial charge. The evidence shows that charge reductions are common, occurring in roughly half of all felony cases that resulted in conviction

9. The most closely-studied context involving the interplay of prosecutorial charging practices and sentencing outcomes is the operation of mandatory minimum sentencing laws. Several empirical studies and abundant anecdotal evidence indicate that prosecutors often mitigate the impact of specific mandatory sentencing laws by dismissing or reducing charges. *E.g.*, U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 53–89 (1991) (exploring mandatory minimum provisions with empirical and anecdotal evidence); Timothy Bynum, *Prosecutorial Discretion and the Implementation of a Legislative Mandate*, *in* IMPLEMENTING CRIMINAL JUSTICE POLICIES 47, 58 (Merry Morash ed., 1982); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 599 (2005); Jill Farrell, *Mandatory Minimum Firearm Penalties: A Source of Sentencing Disparity?*, 5 JUST. RES. & POL'Y 95, 96 (2003).

10. *See* BUREAU OF JUSTICE ASSISTANCE, *supra* note 7, at 98, 126 (describing "limited research" now available on plea bargaining effects of sentencing guidelines and expressing concern that "little systematic evidence" is available on shift of discretion to prosecutors).

11. Because virtually all charge movement in North Carolina moves from charges with higher sentences to charges with lower sentences, we use the terms "charge movement" and "charge reductions" interchangeably.

and that the choice to reduce criminal charges has a large effect on average sentence severity. Indeed, the impact of charging decisions on average sentences is greater than the impact of judicial decisions made at the time of sentencing.[12]

A second purpose of our research is to explore some structural features of the criminal code and related sentencing guidelines that may be important for understanding charge reductions and their impact on sentencing. While it may be true that sentencing reforms generally increase prosecutorial discretion over punishment, we argue that laws designed to limit judicial discretion in sentencing also have the effects—though not necessarily intended—of structuring prosecutorial discretion in charging and plea bargaining, and of determining the impact those decisions have on sentencing. Thus, presumptive sentencing guidelines may increase the overall power of prosecutors to control sentencing, but guidelines also constrain that power in specific areas.[13]

To understand how these legal structures can affect charging decisions and sentencing outcomes, it is necessary to develop some conceptual tools for describing this structure. We propose that it is useful to think about two dimensions of the criminal code and sentencing guidelines: depth and distance. First, the *depth* of the criminal code refers to the number of charging options available to prosecutors—charges that might apply to a given set of facts. Criminal codes often leave prosecutors several plausible choices based on a given set of facts. For example, in North Carolina, a stabbing might support charges ranging from assault "with a deadly weapon with intent to kill and inflicting serious injury,"[14] all the way down to misdemeanor "simple assault."[15] We suggest that the depth of charging options for a particular type of crime may affect the likelihood that prosecutors will reduce felony charges post-indictment.[16]

12. *See infra* Parts III–IV.

13. Presumptive guidelines are legal rules that designate a sentence or range of sentences that are presumptively correct for a given case. These guidelines allow the judge (based on special justifications) to sentence higher or lower in unusual cases, while still remaining within an absolute statutory maximum and minimum sentencing range. *See* BUREAU OF JUSTICE ASSISTANCE, *supra* note 7, at 2 (defining presumptive guidelines). Appellate courts enforce the presumption by overturning non-guideline sentences that are not adequately justified. *Id.* at 49–53 (describing the role of appellate review in presumptive guidelines).

14. N.C. GEN. STAT. § 14-32(a) (2005) (Class C felony).

15. *Id.* § 14-33(a) (Class 2 misdemeanor).

16. For further exploration of this concept, see *infra* Part II.

The second conceptual tool is the *distance* between charging options, which refers to the relative difference in the sentences that attach to the more- and less-serious charging options. In a nondiscretionary sentencing system, large distances between charging options will predictably lead to large differences in the sentences that judges actually impose. The effect of charge reductions on sentences ultimately depends on the distance between the starting and ending charges, and thus depends on the location of those crimes in the sentencing grid.

What are the effects of depth and distance in the criminal code and accompanying sentencing guidelines? The data we examine show that the proportion of charges that prosecutors reduce, along with the size of the sentence discounts that defendants receive, vary from crime to crime. We suggest that these differences between types of crimes do not depend solely on a prosecutor's individualized sense of justice. These differences also reflect the constraints that depth and distance in the criminal code place on the prosecutor.

When a group of related crimes offers deeper charging options, the prosecution and defense agree more often to reduce the charges. Large distances between the available charging options make it less likely that the prosecution and defense will agree on a particular charge reduction.[17] Perhaps more strikingly, in those areas of the code where distances between charges are greater, the effect on sentences is unmistakable. When charge reductions do occur despite the large distances between the options, those reductions explain a large component of the impact on the sentence imposed in the case.[18]

Thus, in theoretical terms, this Article updates—for a world dominated by plea bargaining and mandatory sentencing—the idea (today considered quaint) that the substantive criminal law determines the outcome of the criminal process. Plea bargaining is not an entirely Coasian exercise that allows the parties to negotiate a customized outcome without regard to the legal rules that create starting points.[19] Both depth and distance—the number of viable landing points built into a group of crimes and the spacing between those landing points—influence the actual movement of charges and the sentences that result. Even in a world where prosecutorial

17. *See infra* Part III.

18. *See infra* Part IV.

19. *Cf.* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–2 (1960) (describing a theoretical economic model of bargaining that treats legal entitlements as irrelevant to outcome of negotiation).

discretion is an acknowledged reality, the substantive criminal law matters.

The third purpose of our research is intensely practical. Knowing the amount of charge movement at work in different parts of a system can offer dividends for attorneys practicing criminal law. Virtually every attorney working in the criminal justice system keeps near at hand a reference work showing the elements of crimes and their refinements over the years by the courts.[20] Given the range of prosecutor choices allowed in a system that only rarely tests the charges at trial, a second standard reference should appear on the shelves (or in the computer files) of every attorney practicing criminal law: charge movement charts. Such charts would show details about the frequency and size of charge movements that happen for particular categories of crimes and defendants. The charts might break down the data by county, by year, or by other relevant distinctions. We present a first draft of charge movement charts that ought to become standard resources for anyone who wants to understand (and predict for clients) the operation of this system.[21]

This Article proceeds as follows. In Part I, we summarize theoretical arguments about the importance of charge bargaining and the influence of the prosecutor as criminal justice systems have moved toward more mandatory sentencing rules. In this part, we also review the criminological and legal scholarship that has begun to explore this promising field. In Part II, we examine some important structural features of North Carolina's structured sentencing system, including the concepts of *depth* and *distance*. Then in Part III, we look more closely at charge movement across the system as a whole and for several different types of crimes: assault, robbery, kidnapping, burglary, and cocaine delivery. Finally, in Part IV we examine the effects of charge movements within these crime types on the severity of sentences that result.

## I. CHARGE MOVEMENT AS A COMPONENT OF PROSECUTORIAL POWER

Sentencing guidelines and other forms of determinate and nondiscretionary sentencing laws can isolate the influence of many different components of the judge's sentencing decision. Under a

20. *E.g.*, ROBERT L. FARB, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME (5th ed. 2001) (description of crime elements and judicial interpretations of proof necessary to establish elements); NORTH CAROLINA CRIMINAL LAW AND MOTOR VEHICLE HANDBOOK (Gould Publications 2005–2006 ed.) (same).

21. *See infra* pp. 1956–67.

discretionary system, it was plain that factors such as an offender's prior criminal record or cooperation with the government could influence the judge's choice of sentence. Yet each of these factors mingled with other factors in a sea of discretion. With the arrival of sentencing guidelines, the separate influence of distinct sentencing factors on the judge is now easier to trace. The result has been more precise sentencing terminology and more overt thinking about the proper interaction of sentencing factors, old and new.[22]

Sentencing guidelines cast a similar light on the separate components of prosecutorial power. It was clear under discretionary sentencing laws that the prosecutor's choices could affect the sentencing outcome, but it was impossible to sort out the separate effects of different prosecutorial tools. Charge reductions, sentence recommendations, decisions about the number of counts, stipulations about facts relevant to sentencing, threatened increases in charges, possible referral to immigration authorities, and so forth, all had unspecified effects on the sentence.[23] In jurisdictions with sentencing guidelines, the separate impact of at least some of these specific prosecutorial tools became easier to isolate.

Criminologists and legal scholars have just begun to appreciate the possibilities.[24] Because a determinate sentencing environment makes visible the sentencing consequences of charging decisions, it becomes possible to filter out the impact of charge reductions from the other actions of prosecutors, defense attorneys, and judges that influence the sentence.

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22. *See* Michael M. Mihm & Nancy Gertner, *Teaching Judges How to Sentence*, 11 FED. SENT'G REP. 96, 99 (1998) (discussing the new grammar and vocabulary of sentencing that federal sentencing guidelines make possible); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1365 (2005) (discussing the ability of sentencing guidelines to enrich working vocabulary of sentencing practices).

23. *See* NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 100–08 (2003) (summarizing research on nonguideline sentencing practices); Alschuler, *supra* note 7, at 550–51 ("[F]ixed and presumptive sentencing schemes . . . are unlikely to achieve their objectives so long as they leave the prosecutor's power to formulate charges and to bargain for guilty pleas unchecked.").

24. *See, e.g.*, Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252–59 (2004) (exploring sentencing impact of centralized charging and plea bargaining guidelines issued by United States Department of Justice).

### A. *Sentencing Reforms and Prosecutorial Power*

Even before the first state adopted presumptive sentencing guidelines, scholars predicted that these attempts to regulate sentencing outcomes would merely shift control over sentencing from judges and correctional officials to prosecutors. Albert Alschuler's scathing critique of charge-based sentencing reforms makes the case:

> Although prosecutors' offices, in practice, have probably had a greater influence on sentencing than any of the other agencies (including state legislatures), the call for sentencing reform has largely ignored this extensive prosecutorial power. In my view, fixed 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.[25]

Other scholars have leveled similar criticisms, arguing that presumptive guidelines tie sentencing options to the charge of conviction, much like mandatory minimum sentencing laws do. Thus, the guidelines give prosecutors substantial control over sentences by adjusting those charges. Without some mechanism in place to guard against rampant charge bargaining, there is no guarantee that sentencing will be any more predictable, uniform, or fair under guidelines than it is under discretionary sentencing.[26]

Despite these now familiar arguments, relatively little empirical evidence exists to show what prosecutors in guideline jurisdictions actually do about charge reductions.[27] A few studies, though, have started the inquiry. Among the earliest empirical analyses of prosecutorial discretion under guidelines are two studies of charging and sentencing practices in Minnesota, a state that adopted presumptive sentencing guidelines in 1980.[28] Each study found that

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25. Alschuler, *supra* note 7, at 550–51.

26. *See* FRANKLIN ZIMRING, MAKING THE PUNISHMENT FIT THE CRIME: A CONSUMER'S GUIDE TO SENTENCING REFORM 10–15 (1977); Coffee & Tonry, *supra* note 7, at 157 (arguing that sentencing guidelines may be undermined by charge bargaining or rewards of leniency).

27. *See* BUREAU OF JUSTICE ASSISTANCE, *supra* note 7, at 98–100 (discussing the impact of sentencing guidelines on plea bargaining).

28. Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. &

charge reductions were common both before and after the sentencing guidelines took effect.[29] Surprisingly little changed after the adoption of guidelines, either in the frequency of charge reductions or in the factors that cause charge reductions.[30] Moreover, criminologist Terence Miethe found that outright dismissals of less-serious charges remained more common than charge reductions through the years.[31] Importantly, in both the pre- and post-guidelines periods, sentence bargains (negotiations over the sentence to recommend to the judge) were more common than charge bargains.[32]

One of the more intriguing findings from the Minnesota research, for our purposes, is that charge reduction in exchange for a guilty plea occurred more often in the most serious cases. Miethe reported that:

> [C]harge reductions were about three times more likely for offenders whose severity/history combination placed them

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CRIMINOLOGY 155, 161 (1987); 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). Stephen Schulhofer and Ilene Nagel provide a detailed discussion of plea bargaining under the federal sentencing guidelines based on interviews with U.S. Attorneys, trial prosecutors, probation officers, and judges, but their research does not provide quantitative data on the actual frequency of charge bargaining or its impact on sentencing. *See generally* Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989) (exploring the relationship between the federal sentencing guidelines and plea negotiation practices in the fifteen months preceding *Mistretta v. United States*).

29. *See* Miethe, *supra* note 28, at 163 (reporting the rates of charge reduction before and after the sentencing guidelines took effect); Miethe & Moore, *supra* note 28, at 348 (same).

30. *See* Miethe, *supra* note 28, at 165 (noting that "charge reductions" decreased slightly after the implementation of the sentencing guidelines); Miethe & Moore, *supra* note 28, at 348 tbl.1 (noting that the rate of charge reductions decreased from 40.8% to 39.2% after the implementation of the sentencing guidelines).

31. *See* Miethe, *supra* note 28, at 163, 168–70. For example, in 1982—two years after the adoption of guidelines—39% of cases received a charge dismissal as part of a negotiated plea, but only 8% received a reduction in the primary charge. This compares with 33% and 13%, respectively, in 1978, two years before the adoption of guidelines. *Id.* at 163. The findings appear to contradict a 1984 evaluation performed by the Minnesota Sentencing Guidelines Commission, however. Richard Frase, describing those findings, reports that "the proportion of cases involving charge bargaining increased, while the overall rate of sentence bargaining decreased" following the introduction of guidelines. *See* Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, *in* 32 CRIME AND JUSTICE: A REVIEW OF RESEARCH 131, 177 (Michael Tonry ed., 2004). It is not immediately apparent why the studies reached different conclusions.

32. *See* Miethe & Moore, *supra* note 28, at 348 (indicating that a charge bargain was obtained in 40.8% of pre-guideline cases and 39.2% of post-guideline cases, while a negotiated sentence was obtained in 53.9% of pre-guideline cases and 42% of post-guideline cases).

> below the dispositional line (e.g., felons whose presumptive disposition on conviction would have been a prison sentence). Sentence concessions, however, were far more likely for offenders above this dispositional line at each time period.[33]

Richard Frase, describing an earlier evaluation by the Minnesota Sentencing Guidelines Commission, also reports that "vertical" charge bargaining increased among these serious cases following the introduction of guidelines in Minnesota, so that "by 1981, many more of the cases eligible for presumptive prison-commit sentences (based on the 'real' offense) were being convicted of less serious charges, carrying no presumptive prison term."[34] Charge reductions were especially prevalent among first-time violent offenders and child sex offenders, for whom the legislature had attempted to increase incarceration rates.[35] In child sexual abuse cases, charge reductions increased from 50 to 80%.[36]

These studies reveal one of the ways that the guidelines not only structure sentencing decisions, but structure plea negotiations as well. Presumably, in Minnesota, parties used charge bargaining more often in cases where conviction on the original charge would result in a presumed prison sentence. In such cases, conviction on a lesser charge allowed probation or a shorter jail sentence as the only possible outcomes. Among less serious cases, a reduction in the charges would have less impact on the type of sentence that was likely to result, so negotiations more often revolved around the sentence duration.

Research by Stephen Schulhofer and Ilene Nagel on the charging practices of federal prosecutors under the federal sentencing guidelines also suggests that prosecutors frequently exercise their discretion to reduce sentences, often to avoid the imposition of mandatory minimum sentences, particularly in drug and weapon possession cases.[37] Based on interviews and a sample of case files, Nagel and Schulhofer concluded (much like Miethe and Moore) that "[c]ontrary to often-heard claims that the guideline system has

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33. Miethe, *supra* note 28, at 165.

34. Frase, *supra* note 31, at 176. Vertical charge bargains involve the reduction of the most serious charge to a less severe charge. *Id.* at 175.

35. *Id.* at 177–78.

36. *Id.* at 178. Interestingly, Frase reports that charge reductions in child sex cases decreased again following decisions in 1981 that allowed judges to depart from the guidelines in these cases. *Id.*

37. *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 501–03 (1992).

transferred to prosecutors *all* discretion previously exercised by the courts, the empirical data suggest that [guideline circumvention] occurs in only a minority of cases"[38] (which they estimated to fall between 15 and 25%).[39]

In a more recent analysis utilizing data from a larger sample of federal courts, these researchers reached essentially the same conclusion: guidelines had not transferred all discretion from judges to prosecutors, but prosecutors still circumvented the guidelines in between 25% and 35% of cases, a substantial minority.[40] These studies demonstrate that guideline circumvention occurs through a variety of mechanisms, including guideline-factor bargaining, horizontal and vertical charge bargaining, fact bargaining, and the substantial-assistance motions.[41]

Finally, in an innovative empirical analysis, Langley Miller and John Sloan estimated the effect of charge reductions on sentences and compared this with the effect of judicial discretion in the sentencing of 400 felony cases in an unnamed city in the North Central United States, which used voluntary sentencing guidelines.[42] Miller and Sloan measured the magnitude of charge reductions by taking the difference, in months, between the midpoint of the sentence range for the primary charge that the prosecutor initially filed and the midpoint of the sentencing range for the primary charge on which the defendant was actually convicted.[43] They measured *judicial* discretion as the difference in months between the actual sentence ordered and

38. *Id.* at 557.

39. *Id.* at 553.

40. *See* 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, 1285 (1997). Moreover, the researchers observed that guideline circumvention is often "more procedural than substantive." Nagel & Schulhofer, *supra* note 37, at 551. In other words, "[t]he actual sentence may not be undeserved and may not differ from the one the judge would have imposed absent the plea," yet "the sentencing decision is not being made by the judge, as the guidelines contemplated" but primarily by prosecutors. *Id.*

41. *See* Nagel & Schulhofer, *supra* note 37, at 547–51 (describing the different mechanisms used to circumvent the sentencing guidelines).

42. J. Langley Miller & John J. Sloan, III, *A Study of Criminal Justice Discretion*, 22 J. CRIM. JUST. 107, 118 (1994) (finding substantial amounts of prosecutorial and judicial discretion operationalized as charge reduction and sentence reduction). Voluntary sentencing guidelines create suggested sentences or sentence ranges for categories of cases, but allow the sentencing judge to depart from the suggested outcomes without any greater risk of reversal on appeal. BUREAU OF JUSTICE ASSISTANCE, *supra* note 7, at 2.

43. Miller & Sloan, *supra* note 42, at 111.

the midpoint of the guideline range for the primary charge at conviction.[44]

Miller and Sloan did not report how often charges were reduced between the time of filing and conviction, but they did find that reduced charges led to presumptive sentences that were forty-six months lower on average (down from 210 months to 164 months) for offenders who were sentenced to prison.[45] Judges exercised their discretion to reduce sentences even further, by more than 100 months on average.[46] Similarly, prosecutors reduced sentences for offenders sentenced to probation by an average of forty-one months, while judges further reduced sentences by an average fifty-nine months.[47] Miller and Sloan concluded that, contrary to the prediction that prosecutors wield greater control over sentencing than judges do, "the amount of judicial discretion was significantly greater than the amount of prosecutorial discretion."[48]

### *B. Motives for Charge Movement*

The research summarized above suggests that there is some reason to worry about the effects of determinate and nondiscretionary sentencing on prosecutorial power. While initial fears that prosecutors would entirely usurp sentencing authority have not come to fruition, it is also clear that prosecutors circumvent guidelines through charge bargaining in a sizeable minority of cases. As a result, reputed gains in sentencing uniformity under presumptive guidelines may be less than some scholars have claimed.[49]

To understand this interaction between prosecutorial power and sentencing laws, we must explore several possible explanations for

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44. *Id.* at 118.
45. *Id.* at 112.
46. *Id.* at 113.
47. *Id.*
48. *Id.* at 111. Like the Minnesota studies described above, *see supra* notes 28–33 and accompanying text, Miller and Sloan also presented multivariate analyses of charge and sentencing outcomes. Miller & Sloan, *supra* note 42. Contrary to Miethe and Moore's research, however, they found that the statutory seriousness of the initial charge filed had a *negative* effect on the magnitude of charge reductions. *Id.* In other words, prosecutors were less willing to reduce or gave smaller reductions when offenders were charged with more serious crimes. It is difficult to interpret these seemingly contradictory findings, however, given that the earlier studies were conducted in a state with presumptive guidelines, while the later study was conducted in a state with voluntary guidelines. *Id.* at 129; Miethe & Moore, *supra* note 28, at 337.
49. *See* TONRY, *supra* note 3, at 40–49, 54–58 (arguing that sentencing guidelines generally have increased uniformity in sentencing and reduced unwarranted disparities associated with social status characteristics; acknowledging, however, that the research does not take into account the possible effects of charge bargaining).

why prosecutors are inclined to reduce charges. Reduced charges might simply reflect a prosecutor's judgment that the initial charges are not provable at trial, and thus revised charges grow out of necessity rather than prosecutorial choice. There is certainly some truth to this explanation based on necessity. Perhaps the police[50] or inexperienced assistant district attorneys who file the original charges place too high a value on their cases and overcharge relative to what prosecutors are likely to be able to prove in court. Prosecutors may also learn more over time about the credibility of witnesses and the strength of evidence or about new developments (such as witnesses leaving town or the victim's actions) that reduce the value of the case by making conviction on the most serious charge less likely.

Nevertheless, there are several weaknesses with the necessity theory of charge reductions. Unless prosecutors intentionally overcharge in a sizeable portion of cases, the initial filing of charges shows that, by the prosecutor's own assessment, the evidence meets the standard of legal sufficiency (probable cause) to support those charges.[51] The studies reviewed here reinforce the notion that prosecutors reduced charges for reasons other than the weakness of the evidence.[52] These studies were limited to defendants who were convicted. Thus, they found charge movement even after the weakest cases in the system had already been weeded out either through dismissals or acquittals.

Prosecutorial choice is likely to explain a larger part of the charge movement. Researchers who have examined the exercise of prosecutorial discretion under sentencing guidelines or mandatory minimum sentencing laws typically explain charge reductions based on factors other than the strength of the available evidence.[53] They argue that when prosecutors select charges to avoid sentencing laws, it is either because they conflict with local norms or because it is simply expedient to reduce or dismiss charges in exchange for guilty

50. Police typically file the original charges in North Carolina. *See* N.C. GEN STAT. § 15A-501(1) (2005).

51. *See* N.C. GEN. STAT. § 15A-611(b) (2005); AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-3.9(a) (3d ed. 1992), *available at* http://www.abanet.org/crimjust/standards/pfunc_blk.html#3.9. When the police initially file charges, they must survive an immediate test with a magistrate, who rules within hours of an arrest whether there is probable cause to support the charges that the police officer selected. § 15A-511(c)(1). Moreover, police officers work repeatedly with the same prosecutors and learn the standards that those prosecutors will apply to the evidence. These routines probably keep the charges that police officers select at the beginning of the case fairly well anchored to the realities of the courtroom.

52. *See supra* Part I.A.

53. *See supra* notes 9–10 and accompanying text.

pleas.[54] A number of studies specifically offer normative explanations for charge reductions. For example, Frase interpreted prosecutors' use of charge reductions in certain cases (first-time violent offenders and child sex cases) as resistance to new statutes that tried to change sentencing practices for those crimes in Minnesota.[55] Similarly, Nagel and Schulhofer argued that Assistant United States Attorneys frequently circumvented mandatory minimum sentences they found to be excessively harsh, instead applying charges with what they considered to be more appropriate punishments.[56]

Organizational concerns also point to a theory of charge reductions based on prosecutorial choice rather than weak evidence. The routine reliance on plea bargaining in American criminal justice (95% of felony convictions nationally are the result of guilty pleas)[57] largely reflects the reality that the state simply does not pay for jury trials for most defendants. District Attorneys must economize, selecting their highest priority cases to receive the most time and resources from their limited budgets, while the bulk of cases must be resolved without the expense of a trial.[58] Charge reductions provide a way to handle the high volume of cases, offering an incentive for defendants to give up their right to trial and a chance—even a remote chance—at acquittal.[59] Prosecutors might also want to leverage smaller cases into larger ones, asking some defendants to cooperate in investigations against other suspects. Such cooperation carries a price.

In a structured sentencing system such as the one in North Carolina, reduced charges translate into a highly predictable

54. Coffee & Tonry, *supra* note 7, at 158.

55. *See* Frase, *supra* note 31, at 174. *See generally* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001) (discussing the effect of federal sentencing guidelines on sentences for drug charges).

56. Nagel & Schulhofer, *supra* note 37, at 551.

57. *See* BUREAU OF JUSTICE STATISTICS, CRIMINAL CASE PROCESSING STATISTICS, http://www.ojp.usdoj.gov/bjs/cases.htm (last visited Aug. 30, 2006).

58. *See* ARTHUR J. ROSSETT & DONALD R. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 7 (1976) (stating that plea bargains are encouraged because of limited trial resources); Scott Baker & Claudio Mezzetti, *Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial*, 17 J.L. ECON. & ORG. 149, 149–50 (2001) (developing game theory model of plea bargaining based on assumption that plea bargaining responds to limited prosecutor resources).

59. *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129–34 (2005) (describing the effect of federal sentencing guidelines on certainty of guilty plea discount, and resulting effects on acquittal rate).

reduction in the sentence.[60] Evidence also suggests that prosecutors place a higher value on gaining convictions than on the seriousness of the conviction charges, and that they pay a professional price for acquittals.[61] For all of these reasons, charge bargaining is an attractive choice both for the prosecutor and for the defendant. Reduced charges sometimes are necessary because of weak evidence, but they also result from bargaining in many cases.

## II. THE STRUCTURE OF NORTH CAROLINA'S CRIMINAL CODE AND SENTENCING LAWS

Our research centers on sentencing and charging practices in one prominent guideline jurisdiction: North Carolina. The intersection of criminal code, charging practices, and sentences in this one state should offer lessons for determinate sentencing laws more generally. In this part of the Article, we outline the most pertinent features of the substantive criminal code (defining the elements of crimes) and the statutes that create a "structured sentencing" regime.

### *A. Structured Sentencing and Charge Bargains*

Until 1981, North Carolina operated a traditional discretionary sentencing system.[62] Criminal statutes offered a wide range of sentencing options for a judge to consider, and the judge set a maximum and minimum sentence for each offender. The Parole Commission then determined the actual time a defendant served.[63] Concern over the lack of uniformity in sentences led to the passage of the Fair Sentencing Act ("FSA"), which set "presumptive" prison terms for every crime, required judges to give special justifications for any prison sentence above or below the presumptive term, and (at least in the beginning) abolished the Parole Commission.[64] The closer

60. *See infra* Part IV.

61. *Cf.* Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 628 (2005) (explaining that federal prosecutors in districts with high private-sector salaries go to trial more often, hoping to develop and display litigation skills).

62. *See* STEVENS H. CLARKE, LAW OF SENTENCING, PROBATION, AND PAROLE IN NORTH CAROLINA 46–47 (2d ed. 1997); SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 203–05 (1985) (discussing North Carolina development from discretionary to nondiscretionary sentencing laws).

63. *See generally* Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, *in* 29 CRIME & JUSTICE: A REVIEW OF RESEARCH 39 (Michael Tonry ed., 2002) (explaining the conditions that led to the passage of the Fair Sentencing Act).

64. N.C. GEN. STAT. § 15A-1340.4 (1988) (repealed 1993).

legal controls of the FSA, however, were paper thin. In reality, judges found it easy to ignore the presumptive terms by invoking boilerplate "aggravating" or "mitigating" circumstances to support their higher or lower sentences, drawn from the same broad ranges that were available before the arrival of the FSA.[65] Soon the crowding in the prisons led the legislature to resurrect the Parole Commission, asking that body to release prisoners before they completed the terms announced by their sentencing judges.[66]

A second, more emphatic move in the direction of determinate and nondiscretionary sentences took effect late in 1994. The Structured Sentencing Act ("SSA") created a grid—familiar in "sentencing guideline" states—with a vertical axis reflecting the seriousness of the crime and the horizontal axis reflecting the extent of the offender's prior criminal record.[67] Each cell in the grid, corresponding to a particular "class" of felony or misdemeanor and a particular prior record "level," contains information about the available sentence *dispositions*: an active prison term, a "community" sanction, or an "intermediate" sanction.[68] The cell also contains information about the *durations* of the prison terms the judge could select, including a presumptive range, a higher aggravated range, and a lower mitigated range.[69]

The sentencing judge can move out of the presumptive range only after finding a legally sufficient aggravating or mitigating fact to justify a departure from the normal range.[70] Even though it has proven easy for trial judges to find sustainable reasons to support

65. CLARKE, *supra* note 62, at 69–70.

66. *See* N.C. GEN. STAT. §§ 15A-1380.2(h), 148-4.1 (2005); CLARKE, *supra* note 62, at 155–56; RONALD F. WRIGHT, MANAGING PRISON GROWTH IN NORTH CAROLINA THROUGH STRUCTURED SENTENCING, PROGRAM FOCUS 3–4 (U.S. Dep't of Justice, Nat'l Inst. of Justice 1998), *available at* http://www.ncjrs.gov/pdffiles/168944.pdf (chronicling the reasons for the failure of the Fair Sentencing Act).

67. *See* § 15A-1340.17(c) (setting out the North Carolina sentencing grid); North Carolina Sentencing & Policy Advisory Comm'n, Felony Punishment Chart (1995), http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/felonypunishmentchart.pdf. (last visited Aug. 31, 2006)

68. *See* § 15A-1340.11(1), (2), (6) (defining "active punishment," "community punishment," and "intermediate punishment," respectively).

69. For a current version of the grids, see N.C. Court Sys., Punishment Grids, http://www.nccourts.org/Courts/CRS/Councils/spac/Punishment.asp (last visited Sept. 1, 2006).

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

aggravated or mitigated range sentences[71] (appellate review of this question is practically non-existent), trial judges still sentence offenders in the presumptive range most of the time.[72] Some of the cells in the grid designate only one "disposition" available to the judge. For instance, all of the dispositions 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 (sometimes called "border boxes")[73] give the judge a choice between two different dispositions (and in one cell on the grid, a choice among all three dispositions).

Because the seriousness of the charge is one of the two leading inputs into the sentencing calculation under this system, the decision by a prosecutor to change the charges can have an obvious and measurable effect on the sentence.[74] But the effect of charge reductions does not remain constant throughout the system.

Two features of the North Carolina laws should make charge bargains especially attractive in cases that begin with relatively serious charges. First, under the North Carolina sentencing laws, prosecutors can initially select charges that place the defendant into a grid box that demands an active prison term. In such cases, the prosecutor's decision to reduce charges to another box that allows an intermediate or community punishment effectively controls the disposition because the North Carolina statutes disallow "dispositional departures" by the judge.[75]

Second, the North Carolina grid allows for unusually broad ranges when only an active sentence is at stake. In theory, sentencing laws that place looser restrictions on the options of the judge should make charge bargains less valuable. Conversely, any "sentence bargain" (an agreement about the sentence that the parties will

71. *See* Ronald F. Wright, *The Future of Responsive Sentencing in North Carolina*, 11 FED. SENT'G REP. 215, 216 (1999) (noting the ease with which judges can identify aggravating and mitigating factors).

72. *See* N.C. SENTENCING & POLICY ADVISORY COMM'N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS, FISCAL YEAR 2003/04 16 (2005), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/200304statisticalreport.pdf (reporting that 70% of all active sentences fell within the presumptive range).

73. *See* WRIGHT, *supra* note 66, at 6 (describing the border boxes).

74. *Cf.* Kay A. Knapp, *Allocation of Discretion and Accountability within Sentencing Structures*, 64 U. COLO. L. REV. 679, 694 (1993) ("When offenses are variously and narrowly defined . . . more sentencing discretion rests with the prosecutor.").

75. *See* N.C. GEN. STAT. § 15A-1340.17(c)(1) (describing the "authorized" punishments under sentencing guidelines).

recommend) will grow more attractive to the parties. Because North Carolina offers sentencing judges relatively broad sentencing ranges when compared to other guideline systems, charge bargains will mean less when the disposition options remain the same regardless of any reduction in charges. Conversely, they mean more when the revised charge makes a non-prison sentence possible. In sum, charge bargains should matter more when a disposition is at stake than when a sentence duration is the key question.

### *B. The Concepts of Depth and Distance*

Prosecutors and defense attorneys negotiate about guilty pleas for particular crimes, not just generic classes of felonies. The criminal code restricts the options available to the negotiators: a proposed reduction in charges is only plausible if the code offers some alternative, at a lesser class, that could fit the facts at hand. A case first charged as kidnapping (a class C felony) ordinarily cannot be reduced to possession of cocaine (a class I felony), even though the sentencing outcome might be acceptable to both prosecution and defense.[76] After the parties negotiate an agreement, the prosecutor still must convince the judge that there is a factual basis to support a conviction for the agreed-upon charge.[77]

The plausible lower charges within a code include any "lesser included offenses": crimes that require the prosecution to prove some subset of the elements of the most serious form of the crime, or a lesser form of mens rea for one or more of the elements.[78] For instance, under the North Carolina code, common law robbery is a lesser-included offense for robbery with a deadly weapon.[79] Simple assault is a lesser-included offense for assault with a deadly weapon inflicting serious injury.[80]

A code might also give the parties additional options, crimes that have been labeled "situationally-included lesser offenses" because they arise out of a single factual transaction even though the elements of the first crime charged are not a subset of the elements of the second crime.[81] For example, some serious assaults might be reduced

76. In the data that forms the basis for our research, none of the cases originally charged as kidnapping were later reduced to cocaine possession.

77. *See* § 15A-1022(c) ("The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea.").

78. *See* BLACK'S LAW DICTIONARY 1111 (8th ed. 2004).

79. *See* §§ 14-87, 14-87.1 (defining various forms of robbery).

80. *See* §§ 14-32(b), 14-33(a).

81. *See* David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 256–59 (1965).

to a lesser form of robbery, even though the more serious crime requires no proof that the defendant took property.[82] Taken together, the lesser-included offenses and situationally-included offenses form "crime groups" that constitute the realistic charging options for typical fact patterns in criminal cases.[83]

Groups of crimes that are viable charging options for a given set of crime facts have two features that are pertinent for our purposes: depth and distance. First, a group of crimes could show great *depth* if it offers a large number of charges at different levels of sentencing.[84] 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. Second, two crimes might show great *distance* if the sentences that flow from those crimes are spaced far apart: perhaps a crime group starts with a class C felony at the top of the scale of seriousness (with a presumptive range of 58–73 months for Prior Record Level I), while the second crime appears 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.

It is useful to think of depth as a characteristic of the original charge at the time of filing (typically the highest available charge for that case): some charges have a large number of potential destinations for a reduced charge, while other charges offer fewer options at lower levels.[85] By contrast, think of distance as a characteristic of each potential destination for a reduced charge. Some final destinations require greater movement from the original charges than other destinations: if a case starts at felony class D, then a reduction to a new charge at class I involves greater distance than a reduction to some other option at class F.

This combination of distance and depth that the criminal code makes available for a group of crimes is one important feature that

82. *See* §§ 14-32(a), 14-87.1 (defining felonious assault with a deadly weapon and common law robbery). Table 2, *infra*, presents evidence that such charge reductions occasionally do happen.

83. The coding documents for the North Carolina sentencing data place crimes together in these functional groups.

84. *Cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–20 (2002) (using "depth" to describe the number of charges available to reach the same conduct under criminal codes and "breadth" to describe amount of conduct reached by criminal code).

85. For an example of a group of crimes with relatively deep options, see the discussion of assault crimes *infra* at Table 2.

affects a prosecutor's power within a guideline system. Like the width of the ranges available in a given cell on the sentencing grid or the opportunities for judicial departures from the prescribed sentences, distance and depth affect how much leverage prosecutors hold in gaining guilty pleas and also determine how big an impact charge reductions have on sentence severity.

There are reasons to believe that a group of crimes offering more depth will produce a greater proportion of charge reductions than a group of charges with less depth. The deeper options available to the negotiating parties will give them more potential ways to find common ground, a sentencing discount that reflects their shared view about the value of the defendant's waiver of trial rights.[86] Put in economic terms, deep options allow the prosecutor to offer a market-clearing price for a guilty plea more often.

The charging effects of long distances between bargaining options are harder to anticipate. Greater distance between viable charging options will increase the sentencing impact of a charge reduction and will thus give the prosecutor a greater impact on the bottom line in the case.[87] The prosecutor, however, might hesitate to pay this higher price unless the defendant can offer something unusually valuable in return. This suggests, at first blush, that the greater the distance between the original charge and a particular destination crime, the less likely that a prosecutor would offer such a reduction.

Alternatively, in some cases the prosecutor might find reasons to ignore the greater distance and offer the reduction anyway. Some lesser charges might require a factual element that is not often present, particularly if the lower option does not qualify as a true

86. *Cf.* Alschuler, *supra* note 7, at 567 ("Charge bargaining is not as capable of making fine adjustments but must proceed by leaps from one charge to another. In one case, an agreement to substitute the next available lesser offense for the offense that has been charged may result in a conviction for only a slightly less serious felony. In another case, 'going down to count two' may result in a misdemeanor conviction. In still another case there may be no lesser offense that seems at all related to the defendant's conduct."); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2486–91 (2004) (discussing bargaining effects of "cliffs" and "craggy slopes" created by sentencing laws).

87. *See* Rodney Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 AM. J. SOC. 1357, 1366 (2000) (discussing the impact of prosecutorial discretion on drug sentences when mandatory minimum sentences are available).

lesser-included offense.[88] In such a situation, the prosecutor might find it necessary to reduce the charge to some destination that lies a greater distance from the original charge.

The *dispositions* available to the sentencing judge could also lead defendants to negotiate with special urgency for larger distances in charge movement. As the felony sentencing grid shows, certain cells in the sentencing grid open up new disposition options for the judge: blocks below class D allow for some non-prison punishments.[89] Thus, defendants might be willing to give up especially valuable defenses or cooperation in other investigations in exchange for a chance to move down to class E or lower and argue to the judge for an intermediate or community punishment. For instance, a defendant initially charged with armed robbery at class D would certainly face a prison term, while a defendant charged with common law robbery at class G might receive an intermediate punishment.[90]

For initial charges that begin at class E or lower (particularly for defendants with no extensive criminal history), the value of a move to some lesser level of felony might be negligible—an intermediate sanction will carry roughly the same sting whether it is imposed for a class E or a class I felony. Thus, for charges that start in a region of the grid that already allows non-prison punishments, defendants might hold out for charge movements into misdemeanor territory.

For this reason, a charge reduction that allows the prosecutor to move a case out of the portion of the sentencing grid requiring an active prison sentence and into a discretionary cell in the grid can be thought of as having greater distance than a reduction that does not change the basic options available for sentencing. Due to the structure of North Carolina's guidelines, charge reductions have a greater impact on disposition type among more serious than less serious cases, and charge reductions have a greater impact on sentence duration than on disposition type.

## III. CHARGE MOVEMENT IN NORTH CAROLINA

In this Part, we estimate the overall amount of charge movement that occurs in one typical guidelines state: North Carolina. Further, we detail how the movement of charges looks different for various related groups of crimes and suggest how the depth and distance of

88. For instance, more serious assault charges might be reduced to a Class F felony, assault on a handicapped person, but only if the victim meets the statutory definition. *See* N.C. GEN. STAT. § 14-32.1(a) (2005).

89. *See* North Carolina Sentencing & Policy Advisory Comm'n, *supra* note 67.

90. *See infra* Part III.A.

the North Carolina Criminal Code explains some of the variation among different groups of crimes.

The statistics maintained as a routine matter in North Carolina make it possible to track charge movement. Because no parole authority is available to shorten the sentences imposed under the SSA, the legislature needs some assurance that the sentencing decisions of trial judges will collectively match the available correctional resources.[91] The North Carolina Sentencing and Policy Advisory Commission monitors sentencing practices in the state and recommends adjustments in the sentencing rules when necessary to prevent an imbalance.[92] To carry out this duty, the commission must collect and analyze case data from the court system.

The commission's data for Fiscal Year 1999–2000, which form the basis for our study, show all cases that were initially charged as felonies and ended in a conviction.[93] The data also show the most serious felony or misdemeanor charge that formed the basis for conviction (that is, the "final charge") and the sentence ultimately imposed in the case. Table 1 gives an overview of charge movement in North Carolina, indicating the percentage of the cases that remained within the same class of felony between the time of initial charge and the time of conviction, along with the percentage of each class that moved to a different offense class before conviction.[94] For instance, 51.5% of the 11,614 cases originally charged as a class I felony resulted in convictions for a class I felony, while 47.6% of those cases resulted in a misdemeanor conviction.

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91. *See* N.C. SENTENCING & POLICY ADVISORY COMM'M, A CITIZEN'S GUIDE TO STRUCTURED SENTENCING 2 (2005), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/citizenguide2005.pdf.

92. *See* N.C. GEN. STAT. § 120-36.7(d) (requiring that all bills coming before the general assembly that would increase incarceration be accompanied by a financial report prepared in consultation with the North Carolina Sentencing and Policy Advisory Commission).

93. The major limitation of data like these is that they only track convictions, so many of the biggest decisions by prosecutors go unobserved: decisions to decline prosecution, to divert a defendant into non-criminal treatment programs, or to dismiss charges outright, are arguably more important because they determine who is eligible for punishment. Thus, from the perspective of prosecutorial discretion, we are missing many details that might be important to explain prosecutorial choices. However, looking at this data by comparison to the existing studies of sentencing practices, these data are strong. Sentencing studies virtually never have measures of the underlying offense or initial charges. They rely solely on the conviction offense to control "offense seriousness" and most are subject to the criticism that they fail to take into consideration earlier decisions, such as charging.

94. This table is drawn from the 2002 Sentencing Practices Study of the North Carolina Sentencing Policy and Advisory Commission, and is based on the same FY 1999–2000 data that we analyze for the discussion of particular crime groups.

Table 1. Most Serious Charged and Convicted Offense Class

| Convicted Offense Class | Charged Offense Class | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | B1 | B2 | C | D | E | F | G | H | I |
| B1 | | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| B2 | 4.6 | | 1.0 | 0.9 | 0.5 | 0.1 | 0.1 | 0 | 0 |
| C | 14.9 | 0 | | 0.2 | 0.2 | 0 | 0.1 | 0 | 0 |
| D | 4.3 | 15.7 | 4.6 | | 0.2 | 0 | 0 | 0 | 0 |
| E | 5.2 | 5.6 | 19.6 | 7.5 | | 0.5 | 0.1 | 0 | 0 |
| F | 40.2 | 31.5 | 8.8 | 3.4 | 7.7 | | 0.2 | 0.1 | 0 |
| G | 0.6 | 0 | 3.5 | 30.9 | 1.9 | 6.8 | | 0.5 | 0 |
| H | 0.5 | 0 | 8.4 | 12.3 | 3.9 | 2.9 | 23.6 | | 0.9 |
| I | 2.9 | 0 | 4.0 | 1.5 | 1.2 | 3.9 | 3.3 | 9.0 | |
| Misdemeanor | 9.3 | 7.9 | 17.0 | 12.8 | 49.0 | 21.1 | 10.5 | 39.6 | 47.6 |
| Total Cases | 656 | 89 | 1,636 | 1,858 | 1,452 | 1,741 | 3,442 | 19,173 | 11,614 |

Source: North Carolina Sentencing Commission felony convictions data set for FY 2000

It is interesting to see confirmation in Table 1 that prosecutors generally shift charges downward. It is unusual for the crime of conviction to be more serious than the initial charge. Nevertheless, upward movement is possible and could happen if new evidence develops to justify the higher charge. The charges also might move up if the prosecutor carries out a negotiation threat to file higher charges after the parties fail to reach a plea agreement.[95] It is impossible to tell from Table 1 how often prosecutors mention the prospect of raising charges, a negotiating tactic that might lead some defendants to plead guilty to the existing charge.

The data show that the frequency of charge reductions is much higher among more serious crimes than among less serious crimes. Rates of charge reduction are very high (ranging from 60% to 82% of all cases) among offense classes B1 to D, for which a prison sentence is essentially mandatory. Charge reductions are also common (65%) at class E, where a sizeable minority of offenders also fall into the Active portion of the sentencing grid. Below that, charge reductions are still very common, but much less so than for the cases falling in the upper portion of the offense distribution. This appears to correspond with the findings from Minnesota, described above, that charge reductions were more common among cases that would have a presumptive prison sentence if convicted as originally charged.

95. Based on informal conversations with prosecutors and defense attorneys, it is our impression that potential habitual felon charges (a class C felony) are mentioned regularly during plea negotiations.

### A. *Charge Movements Within Crime Groups*

It is possible to see the potential impact of code structure by examining separately the charge movement that occurs within different groups of related crimes from the North Carolina Criminal Code. The examples we explore here include violent crimes that offer deep options (assault), violent crimes that offer fewer options and more distance between options (robbery and kidnapping), and non-violent crimes with deep options (burglary and cocaine distribution and possession). Rather than attempting here to create a precise measure for comparing the depth of differing groups of crimes, we instead illustrate the potential influence of these code features by reviewing a few clear-cut examples of greater and lesser depth.

We begin with a relatively deep group: assault crimes. The same basic cluster of facts could support charges of assault with a deadly weapon with intent to kill inflicting serious injury (a class C felony with a presumptive range of 58–73 months),[96] assault with a deadly weapon with intent to kill (class E, 20–25 months),[97] assault with a deadly weapon inflicting serious injury (also class E),[98] assault inflicting serious injury (class F, 13–16 months),[99] habitual misdemeanor assault (class H, 5–6 months),[100] assault on a female[101] or assault by pointing a gun[102] (both misdemeanor class A1, 1–60 days), and simple assault (misdemeanor class 2, 1–30 days).[103] The only offense levels below class C that lack a form of assault based on common fact scenarios are felony classes D and G, and misdemeanor

96. *See* N.C. GEN. STAT. § 14-32(a); North Carolina Sentencing & Policy Advisory Comm'n, *supra* note 67 (showing presumptive sentencing ranges). The range of months mentioned in the text assumes a minimal criminal history; more serious criminal records would generate higher sentence ranges. *See* North Carolina Sentencing and Policy Advisory Comm'n, *supra* note 67. Other less frequently charged assaults at Class C include malicious castration, § 14-28, and malicious maiming, § 14-30.

97. *See* § 14-32(b).

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

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

100. *See* § 14-33.2. Other options at Class H include assault by strangulation. § 14-32.4(b).

101. § 14-33(c)(2).

102. *See* § 14-34.

103. *See* § 14-33(a).

classes 1 and 3.[104] The movement among these related charges appears in Table 2.[105]

Table 2. Offense Class of Conviction by Class of Most Serious Charged Offense: Assault

| Conviction Offense Class | Most Common Offense | Charged Offense: Class C (N = 675) AWDW IKSI | Class E (N = 928) AWDW IK or SI | Class F (N = 146) ASSAULT SI | Total (N = 1,749) |
|---|---|---|---|---|---|
| ***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%)** |

104. The assaults available at these levels are specialized, requiring proof of facts that do not occur often. For instance, assault on a sports official is a Class 1 misdemeanor, § 14-33(b)(9), and assault by a caretaker on a disabled or elder adult causing serious injury is a Class G felony, § 14-32.3(b). The legislature amended the assault statutes in 1995 specifically to add depth to the available options and to reduce the distance between offense levels for domestic violence assaults. WRIGHT, *supra* note 66, at 8–11.

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.

Given the depth of options available to prosecutors and defense counsel during negotiations over assault charges, we would expect a smaller percentage of assault crimes to remain at their initial level of charging than other crimes starting at the same offense class. That appears to be the case. For assault cases originally charged at class C, only 12% remained at that level by the time of conviction. As Table 1 indicated, 33% of class C charges overall ended in class C convictions. For assault crimes starting at class E, only 25% stayed at that level (compared to 35% of class E felonies more generally). Among the class F assault crimes, 30% resulted in a conviction at class F (compared to 65% of the class F felonies more generally that ended in a class F conviction).

As for the distance between the original charges and the reduced charges, the most factually related lower charges (that is, the lesser-included offenses) are the most common destination for the cases that begin at the top of the scale. For class C assaults, the class D options (voluntary manslaughter and robbery) require additional facts not often present in a case originally charged as an assault. For many class C assaults, there is no factually plausible option at class D. The class E options therefore became the final charges most often, with 39% of the charges ending there.

For the assault charges starting at class E and class F, it appears that the nearest options were not the most common. The parties skipped past class H and ended most often with misdemeanor class A1 assaults; close to half of all cases took this route. The movement across this extra distance might reflect the specialized proof necessary for the class H version of assault (habitual misdemeanor assault) or possibly the fact that defendants who face non-prison punishments gain little from charge movement among the various lower levels of felonies, where judges commonly impose non-prison sentences at each of these levels. For these defendants, a discount from a non-prison felony sentence to a non-prison misdemeanor sentence might often be the necessary price for a guilty plea.

In sum, the assault crimes seem to show both depth and distance at work. The depth of charging options produces a higher than ordinary level of charge movement. At the higher levels of the grid, charges move across shorter distances more often than they move across greater distances. At lower levels, however, the reductions cover greater distances, perhaps because misdemeanor charges become relevant in the negotiations when the original charge is a lower-level felony.

A different pattern of charge movement appears with robbery, a group of crimes that offers only slightly fewer charging options for negotiators but places longer distances between some of the outcomes. The North Carolina code provides versions of robbery offenses at class D (robbery with a deadly weapon),[106] class G (common law robbery),[107] class H (larceny from a person),[108] misdemeanor class 1 (larceny),[109] and several other misdemeanors.[110] Given the relatively few felony options and the distance between those options, we should expect a larger proportion of robbery charges to remain at the original level of charging than other crimes charged at that level. Again, that is what Table 3 shows.

Table 3. Offense Class of Conviction by Class of Most Serious Charged Offense: Robbery

| | | **Charged Offense** | | |
|---|---|---|---|---|
| **Conviction Offense Class** | **Most Common Offenses** | Class D (N = 1,302) Robbery w/DW + Attempt | Class G (N = 716) Common Law Robbery | Total (N = 2,018) |
| ***Felony*** | | | | |
| D | Robbery w/DW + Attempt | 492 (38%) | 1 (<1%) | 493 (24%) |
| E | Conspiracy, AWDW IK or SI | 99 (8%) | 0 | 99 (5%) |
| G | Common Law Robbery | 463 (36%) | 325 (45%) | 788 (39%) |
| H | Attempted Robbery, Larceny from Person | 89 (7%) | 168 (24%) | 257 (13%) |
| | ***Total Felony*** | **1,220 (94%)** | **508 (71%)** | **1,728 (85%)** |
| ***Misdemeanor*** | | | | |
| A1 | Assault w/DW, Assault on female | 22 (2%) | 21 (3%) | 43 (2%) |
| 1, 2, or 3 | Larceny, Simple Assault, B&E | 60 (4%) | 186 (26%) | 246 (12%) |
| | ***Total Misdemeanor*** | **82 (6%)** | **207 (29%)** | **289 (14%)** |

106. N.C. GEN. STAT. § 14-87. The presumptive range is 51–64 months. *Id.* § 15A-1340.17.

107. § 14-87.1. The presumptive range is 10–13 months. § 15A-1340.17.

108. § 14-72(b)(1); § 14-70. The presumptive range is 5–6 months. § 15A-1340.17.

109. § 14-72(a) (goods not more than $1000); § 14-73.1.

110. § 14-73.1.

The charges seem to move differently for the most serious robberies than for the others. For armed robbery (and attempted armed robbery, which the code treats as an equivalent crime),[111] 38% of the cases charged at class D remained at that level, higher than the 31% of the overall cases that remained at class D after beginning at that level, as indicated in Table 1. Perhaps the gap between class D (with a presumptive range of 51–64 months) and class G (10–13 months) was too large for the prosecutor to make the offer very often. The jump between class D and class G also opens up the non-prison punishments, a price that prosecutors might find too steep in many cases.

On the other hand, when the charges started lower down the scale, at class G, only 45% of the cases remained at that level, compared to the 62% of the cases remaining at class G overall. It appears that the charging options for class H felonies or for various misdemeanor crimes in the group created deep enough options for the less serious robberies and enticed the parties away from the original charges more frequently than the norm. Even slight concerns about the quality of the evidence, or relatively light caseload pressures in the office, could convince a prosecutor to offer the defendant a discount this small.

Our examples so far have involved a group of violent crimes with deep options up and down the scale of seriousness (assault) and a group of violent crimes with greater distance between options at the top of the scale and somewhat deeper options at the bottom (robbery). We now turn to a group of violent crimes with shallow options, but only modest distance between those options: kidnapping.

111. *See* § 14-87(a) ("Any person or persons who . . . unlawfully *takes* or *attempts* to take . . . .").

Table 4. Offense Class of Conviction by Class of Most Serious Charged Offense: Kidnapping

| Conviction Offense Class | Most Common Offenses | Charged Offense: Class C (N = 163) Kidnap 1 | Charged Offense: Class E (N = 101) Kidnap 2 | Total (N = 264) |
|---|---|---|---|---|
| ***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%)** |

The most serious option, class C (58–73 months presumptive term),[112] stayed at this charging level at roughly the same rate as other crimes: 30% for kidnapping, compared to 33% for class C generally. The limited options further down the scale, at class E (20–25 months)[113] and class F (13–16 months),[114] involve relatively large distances, both in terms of the durations and the dispositions available at that offense level. The viable felony options for charges starting at class E are even fewer, and the kidnapping cases move a bit less often than other class E cases (59% of kidnapping cases move off class E, compared to 65% of class E cases more generally).

Given that destinations for reduced charges in kidnapping cases are not especially deep and involve relatively long distances, the code offers the prosecutor little incentive to move the charges down. The cases flow down the chart at roughly the expected rate, and the code does not mute or amplify the effects of evidentiary problems, caseload pressures, or other forces that normally lead to charge bargains.

112. § 14-39(b) (first degree).
113. § 14-39(b) (second degree).
114. § 14-43.3 (felonious restraint).

Finally, we survey two non-violent offenses: burglary and drug offenses.

Table 5. Offense Class of Conviction by Class of Most Serious Charged Offense: Burglary, Breaking or Entering a Building

| | | Charged Offense | | | |
|---|---|---|---|---|---|
| **Conviction Offense Class** | **Most Common Offense** | Class D (N = 440) Burglary 1 | Class G (N = 224) Burglary 2 | Class H (N = 4,649) Break/Enter | Total (N =5,313) |
| ***Felony*** | | | | | |
| D | Burglary 1 | 47 (11%) | 0 | 0 | 47 (1%) |
| E | Att. Burglary 1 | 21 (5%) | 0 | 0 | 21 (<1%) |
| G | Burglary 2 | 90 (20%) | 78 (35%) | 3 (<1%) | 171 (3%) |
| H | Break/Enter, Larceny, PSP | 129 (29%) | 82 (37%) | 2,905 (62%) | 3,116 (59%) |
| I | Break/Enter Veh., misc. | 7 (2%) | 4 (2%) | 79 (2%) | 90 (2%) |
| | ***Total Felony*** | **305 (69%)** | **164 (73%)** | **2,993 (64%)** | **3,462 (65%)** |
| ***Misdemeanor*** | | | | | |
| A1 | AWDW, Assault-SI, Assault on Female | 19 (4%) | 3 (1%) | 26 (<1%) | 48 (1%) |
| 1, 2, or 3 | Break/Enter (m), Larceny | 116 (26%) | 57 (25%) | 1,630 (35%) | 1,803 (34%) |
| | ***Total Misdemeanor*** | **135 (31%)** | **60 (27%)** | **1,656 (36%)** | **1,851 (35%)** |

For burglary, few cases start as high as class D,[115] and those cases tend to move down more frequently than class D charges generally do. The class G burglaries[116] move far more often than is typical for a class G crime (62.1% of the class G crimes remain at that level, while only 35% of the burglaries at class G remain at the same level).

The real action for felony burglary charges, with 4,649 cases, starts at class H.[117] These breaking or entering charges stayed at that level somewhat more often than the norm (62% here versus 50.8% for class H generally). The only lesser charges not requiring proof of a specialized fact (such as breaking or entering a vehicle, a class I

115. § 14-51 (first degree).
116. § 14-51 (second degree).
117. § 14-54(a) (breaking or entering building with intent to commit felony or larceny therein).

felony)[118] are misdemeanors.[119] It may be that the cases charged initially at class H were especially easy to prove, making the prosecutors unwilling to cross the costly distance between felony and misdemeanor charges.

Our final example involves another group of non-violent offenses with deep charging options: cocaine crimes.

Table 6. Offense Class of Conviction by Class of Most Serious Charged Offense: Selling or Trafficking Cocaine

| | | Charged Offense | | | |
|---|---|---|---|---|---|
| | | Class D-G (N = 401 ) | Class G (N = 1,272) | Class H (N = 3,362) | Total (N = 5,037) |
| **Conviction Offense Class** | **Most Common Offenses** | Trafficking Cocaine | Sell/ Conspire to Sell | PWI, Delivery | |
| ***Felony Trafficking*** | | | | | |
| D | Trafficking 400g + | 13 (3%) | 0 | 0 | 16 (1%) |
| F | Trafficking 200g but less than 400g | 28 (7%) | 0 | 1 (<1%) | 33 (1%) |
| G | Trafficking 28g but less than 200g; Attempt or Conspire | 240 (60%) | 10 (1%) | 0 | 283 (6%) |
| | ***Total Trafficking*** | **294 (73%)** | **11 (1%)** | **1 (<1%)** | **336 (7%)** |
| ***Non-Trafficking*** | | | | | |
| G | Sell or Conspire to Sell | 3 (1%) | 851 (68%) | 81 (2%) | 935 (19%) |
| H | PWISD, Deliver | 49 (12%) | 298 (23%) | 1,789 (53%) | 2,135 (42%) |
| I | Possession | 25 (6%) | 80 (6%) | 1,102 (33%) | 1,207 (24%) |
| | ***Total Non-Trafficking*** | **107 (27%)** | **1,232 (97%)** | **2,979 (89%)** | **4,278 (85%)** |
| ***Misdemeanor*** | | | | | |
| 1 | Possess Paraphernalia | 0 | 31 (2%) | 360 (11%) | 391 (8%) |
| 2 | Assault, weapon | 0 | 0 | 7 (<1%) | 7 (<1%) |
| 3 | Possess Marijuana | 0 | 0 | 11 (<1%) | 11 (<1%) |
| | ***Total Misdemeanor*** | **0 (0%)** | **31 (2%)** | **383 (11%)** | **414 (8%)** |

118. § 14-56.
119. § 14-54(b).

Two features of Table 6 merit our attention. First, notice how few of the cases that begin as trafficking charges are reduced to non-trafficking felonies or misdemeanors. This might reflect an office policy among many district attorneys in the state to disfavor any reductions in trafficking charges, or it may simply show that the elements of drug trafficking are especially easy to prove at trial. Unfortunately, our data do not include the quantity of drugs involved, which is the critical factor in differentiating trafficking from non-trafficking offenses. Whatever the reason, this is one area where the availability of deep options in the code has little impact.

As for the cases that are initially charged at class G and class H, movement happens only slightly less often than the norm for these felony classes (68% stability for sale of cocaine compared to 62.1% for class G generally, and 53% for cocaine possession with intent to sell or distribute compared to 50.8% for class H generally). The available lower charges (primarily class I possession or misdemeanor possession of drug paraphernalia) might not leave enough options to induce any extra charge reductions.

Overall, the kidnapping, burglary, and cocaine crime groups show a few variations on how depth and distance can discourage charge bargaining. The kidnapping group illustrates what happens when the code presents few bargaining options to the parties: fewer charge bargains are the natural result. The burglary group points out the importance of the felony-misdemeanor line: although the code offers reasonably deep options, the move from a felony to a misdemeanor increases the relevant distance, and that greater distance reduces the number of deals. Finally, the cocaine group indicates that depth and distance standing alone do not explain all charge movement. Even when the code offers relatively deep options with varying distances available, charge bargaining might not flourish, perhaps because the defendants in these easy-to-prove cases have little value to offer in exchange for a reduced charge.

### *B. Alternative Explanations for Charge Reductions*

Our quick survey of crime groups under the North Carolina code emphasizes one possible influence—code structure—on the movement of charges. A number of different factors, however, surely contribute to the charge movement that we observe in particular crime groups. Prosecutors might decide to reduce charges based on the seriousness of the original charge, the criminal history of the defendant, the strength of the evidence, the credibility of the victim,

prosecutor office policies, and countless other factors.[120] The handful of multivariate and qualitative studies that other researchers have completed confirm the practical relevance of these types of reasons.[121]

The cross-tabulations in this Part do not untangle these other possible influences on charge movement from the effects of criminal code structure. Yet the interactions among these factors are worth exploring. Further research will be necessary to examine the overlap between features of a criminal code, such as depth and distance, and other features, such as offense seriousness, crimes against persons, and crimes that fall into the "active prison term" zone of the sentencing grid.

A closer study of the criminal code's effects on charge movement should also account for some possible limits on the power of depth and distance. The charge movements for crime groups in our study suggest that lesser-included offenses count for more than situationally-included offenses. The true lesser-included offenses predictably give the prosecutor a case that fits the evidence at hand—the evidence that originally supported the higher charge. A situationally-included offense (for instance, the use of robbery for a case originally charged as a kidnapping) may require the existence of extra facts that are only available in a few cases.[122]

Our survey also suggests, in a preliminary way, that the sentence *dispositions* available to the judge might either mute or amplify the power of deep options or long distances between charging options. For instance, both the assault crimes and the robbery crimes indicated that the distance between charge options mattered most for charges at higher offense levels, where active prison terms were the only option. When moving down from a higher active prison term to a lower active prison term, the distance between the different felony

120. *See, e.g.*, FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 7–8 (1969) (creating a typology of reasons why prosecutors decline or reduce charges); NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 42.3 (2d ed. 1991) (listing acceptable reasons for reducing charges). *See generally* Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980) (discussing reasons for declinations in one federal district).

121. *See, e.g.*, Miethe, *supra* note 28, at 163–64 (discussing variables expected to influence whether the felon receives a particular type of plea bargaining concession); Miller & Sloan, *supra* note 42, at 115–16 (empirically examining the influence of multiple factors as indicators of charging and sentence reduction).

122. *See supra* Table 4.

levels took the central role in the plea negotiations.[123] On the other hand, when a reduced charge makes possible a non-prison punishment where none was available before, this new disposition option becomes more important in the negotiations than the precise number of felony levels between the charges or the precise difference in the range of months available under the original charge and the potential new charge.

Similarly, the line between felonies and misdemeanors might amplify some of the influence of depth and distance in the criminal code. Felony convictions carry longer-term consequences than misdemeanors, putting aside any reductions in the sentence for the case at hand. The parties would naturally place less negotiating weight on the number of felony options or the distance between them if a misdemeanor charge is also on the negotiating table.

Thus, as a general rule, we might expect to see charges with deep options producing more charge movement than a typical charge. And generally speaking, those charge movements might end most often at points that are less distant from the original charge. But the dividing line between active prison terms and non-prison punishments, and the dividing line between felonies and misdemeanors, both seem to complicate the picture.

## IV. THE SENTENCING IMPACT OF CHARGE MOVEMENT

Reductions of charges matter, first and foremost, because they affect the bottom line of the sentence. In a jurisdiction that relies on determinate sentencing laws, like North Carolina, it becomes possible to quantify the amount of sentencing effects that can be traced to a given reduction in charges.

Roughly speaking, the difference between the sentence prescribed by the *initial* charge and the sentence prescribed by the *final* charge of conviction shows the sentencing impact of prosecutors' charge reductions.[124] The gap between the *presumptive* sentences for the conviction charges and the sentences *actually* imposed shows the impact of other factors, beyond the selection or reduction of charges. Those other factors might reflect the remaining judicial discretion to choose among sentencing options or they might show the influence of

123. *See supra* Tables 2, 3 (showing that assault charges move more often across shorter distances and that the distance between robbery charges prevented charge movements from happening frequently).

124. It might also show the combined influence of the prosecutor and the defendant, as reflected in plea negotiations.

prosecutors' sentencing recommendations or factual stipulations (such as the value of property destroyed or stolen).

Table 7 summarizes the impact of charge reductions on the average presumptive sentence duration and the average sentence duration ordered for each category of charges. Similar to Miller and Sloan,[125] we compare the mean presumptive sentence duration at the initial charging with the mean *presumptive* duration at the sentencing stage and the mean sentence duration *ordered* for these cases. We also compute the average *reduction* in the presumptive sentence between the time of original charging and the time of conviction. As Table 7 shows, the impact of charge reductions on the average presumptive sentence is substantial and is greatest for the more serious crimes, both in absolute and relative terms. However, we see meaningful differences in the magnitude of reductions among different types of crimes, even those originally charged at the same offense class.

For example, for offenders originally charged with assault with a deadly weapon with intent to kill inflicting serious injury (AWDW IKSI), a class C offense, the average presumptive sentence duration dropped from 89 months for the original charge to 30 months at conviction. The mean sentence duration actually imposed by judges was about the same as the mean of the presumptive sentence spelled out in the sentencing grid (29.7 months ordered by judges versus 29.6 presumptive). Thus, the average charge reduction in AWDW IKSI cases is about 60 months. By comparison, for offenders originally charged with first-degree kidnapping, also a class C offense, the average presumptive sentence duration shrank from 94 months to 58 months—a substantial, but considerably smaller, reduction of 36 months.

125. Miller & Sloan, *supra* note 42, at 112–13.

Table 7. Average Presumptive and Actual Sentences by Most Serious Charged Offense

| Offense Class | Offense Charged | Presumptive Duration at Charging | Presumptive Duration at Sentencing | Mean Duration Ordered | Mean Charge Reduction | % Charge Reduction | Mean Sentence Reduction | % Sentence Reduction |
|---|---|---|---|---|---|---|---|---|
| C | AWDW IKSI | 89.4 | 29.6 | 29.7 | 59.8 | 67% | -0.1 | 0% |
| C | Kidnapping 1 | 94 | 57.9 | 60 | 36.1 | 38% | -2.1 | -2% |
| D | Robbery w/DW | 75.6 | 39.7 | 37.8 | 35.9 | 47% | 1.9 | 3% |
| D | Burglary 1 | 77.4 | 16.6 | 17 | 60.8 | 79% | -0.4 | -1% |
| E | AWDW IK or SI | 27.1 | 11 | 12 | 16.1 | 59% | -1 | -4% |
| E | Kidnapping 2 | 27.4 | 15.9 | 17.2 | 11.5 | 42% | -1.3 | -5% |
| F | Assault SI | 17.2 | 8.7 | 9.7 | 8.5 | 49% | -1 | -6% |
| G | Burglary 2 | 13.6 | 8.2 | 8.7 | 5.4 | 40% | -0.5 | -4% |
| G | Com Law Robbery | 14.3 | 9.7 | 10.1 | 4.6 | 32% | -0.4 | -3% |
| G | Sell Cocaine | 14.2 | 12 | 12 | 2.2 | 15% | 0 | 0% |
| H | Break/Enter | 7.5 | 5.6 | 6.2 | 1.9 | 25% | -0.6 | -8% |
| H | PWI, Delivery | 7.4 | 6.4 | 6.8 | 1 | 14% | -0.4 | -5% |

Mean Charge Reduction=Presumptive Duration at Charging - Presumptive Duration at Sentencing

Mean Sentence Reduction= Presumptive Duration at Sentencing - Duration Ordered

A similar discrepancy in the magnitude of charge reductions appears when we compare cases charged with first-degree burglary with cases charged with robbery with a deadly weapon, both class D offenses. The presumptive sentence among the burglary cases was reduced by 60.8 months (from 77.4 to 17.6 months), while the robbery cases dropped by about 36 months (75.6 months to 39.7 months). Again, the average sentence duration ordered was very close to the average of the presumptive duration specified in the sentencing grid (38 months for robbery cases and 17 months for burglary cases), indicating that these charge reductions are the driving force behind the resulting sentences.

Disparities appear in the impact of charge reductions among some less serious crimes as well. For example, three of the crimes we examine originated as class G offenses: burglary 2, common law robbery, and selling cocaine. Offenders charged at burglary 2 and common law robbery had sentences reduced by an average of 5.4 months and 4.6 months, respectively, whereas offenders charged with selling cocaine received an average reduction of only 2.2 months. Importantly, we see the same pattern of greater and lesser charge reductions if we focus on the relative magnitude of charge reductions (that is, reductions measured as a percentage of the presumptive grid

sentence for the original charge) rather than the absolute number of months.

These data reveal that charge reductions truly do change the bottom line at sentencing. In fact, Table 7 suggests that charge reductions prior to sentencing have a much greater impact on sentence duration than does the choice among sentencing options under the grid. Actual sentences follow the presumptive guideline range for the conviction offense (and criminal history) very closely. For most of the crimes we examined, judges' average sentences were slightly above the midpoint of the presumptive range, but even the largest difference observed is only two months on average.

The patterns observed here are also consistent with our predictions about the effects of the criminal code. The crimes that receive the largest sentence reductions, AWDW IKSI and burglary 1, have relatively deep charging options. Recall that relatively few of these cases (12% and 11%, respectively) ended in a conviction for the original charge filed. Perhaps more importantly, 29% of AWDW IKSI and 31% of burglary 1 cases were reduced to misdemeanors, receiving sentences that average less than three months.

Among the class G offenses, the impact of charge reductions on sentences is greater for burglary 2 and common law robbery than for selling cocaine. We suggest that this is, in part, due to the fact that for burglary 2 and common law robbery the distance between the original charge and the typical conviction charge is greater than the distance between selling cocaine and the lesser-included offenses of possession with intent or simple possession of cocaine. Twenty-seven percent of burglary 2 charges and 29% of common law robbery charges were reduced to misdemeanors (breaking or entering and larceny, respectively) carrying sentences that averaged less than two months. By contrast, the least serious of the lesser-included cocaine offenses is possession, a class I felony for which sentences averaged more than six months.[126]

Thus far, our analysis of charge reductions and their impact on sentencing has focused on changes in the presumptive sentence *duration*. Although sentence duration is certainly an important indicator of sentence severity, other dimensions of sentence severity are also relevant. The sentencing *disposition*—that is, the decision to sentence offenders to an active prison term versus intermediate or

126. Appendices A through D provide additional detail regarding the magnitude of charge reductions and their impact on sentences ordered for various combinations of original charges and conviction charges.

community-based sanctions—also captures an important measure of sentencing effects.

As with the presumptive sentence duration, charge reductions can affect the type of disposition options available to the judge at sentencing. This is especially true for crimes that begin at class D or higher and for offenders with considerable criminal history points, in which cases an active prison sentence may be mandatory.[127] In these cases, a charge reduction can mean the difference between a certain prison sentence and the possibility of not going to prison.[128]

It is unclear, however, whether charge reductions will affect sentence dispositions as profoundly as they affect sentence durations. Under the structured sentencing grid, North Carolina judges retain the power to decide the disposition type in the majority of cases.[129] That is, even if a charge reduction moves a case out of the "Active" portion of the punishment chart, in most cases judges will still have the option to order either an active prison sentence or an intermediate punishment. Perhaps more importantly, because felony defendants are concentrated at the lower levels of the punishment grid, the vast majority of defendants would not face a mandatory prison sentence even if they were convicted of the original charge. The effect of charge reductions on the disposition is not obvious when the charge both starts and ends in a portion of the grid that allows (but does not compel) the judge to select a non-prison punishment.

To examine the impact of charge reductions on the sentence disposition, we computed three measures for each offense type charged: the percentage of cases that would have required the judge to impose an active prison sentence if convicted of the *original* charge, the percentage with required prison sentences based on the final *conviction* charge, and the percentage actually *receiving* active prison sentences. From these summary measures we also computed the change in the percentage having a required prison sentence (% Reduced). These data are presented in Table 8.

127. *See* North Carolina Sentencing & Policy Advisory Comm'n, *supra* note 67.

128. Approximately 5,000 North Carolina offenders would have received active prison sentences in the year we examined if they had been convicted of the most serious crime originally charged. About half of these were convicted of less serious crimes that did not require an active sentence.

129. *See* N.C. SENTENCING & POLICY ADVISORY COMM'N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS, FISCAL YEAR 2004/05 2 (2006), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/2004-05statisticalreport.pdf (showing percentage of felons within each grid box).

As with our analysis of the presumptive duration, it is clear that charge reductions have a substantial effect on the type of disposition required under the guidelines, especially for the more serious cases. Among the defendants originally charged at class C (AWDW IKSI, kidnapping 1) and class D (robbery with deadly weapon, burglary 1), 100% would result in a prison sentence if convicted of the original charge. Most of these, however, were convicted of less serious crimes for which a prison sentence was no longer required (though in most cases it was still an option). Again, we see that the class C assault cases and class D burglary 1 cases received the largest "breaks," with 73% and 87%, respectively, moving out of the "Active" portion of the punishment chart. Even for defendants charged with kidnapping 1, who were the least likely to receive a disposition reduction, 40% moved to charges where judges had the discretion to choose a non-prison sentence. Substantial reductions in the percentage facing mandatory prison occur less often as we move down the seriousness scale, because only a few of these offenders (those with considerable prior record points) start out with a required prison sentence.

Table 8. Percent Active Sentence Required at Charging and Conviction by Most Serious Charged Offense

| Offense Class | Offense Charged | Required Active at Charging | Required Active at Sentencing | Active Sentence Ordered | % Reduced |
|---|---|---|---|---|---|
| C | AWDW IKSI | 100.0% | 27.4% | 48.6% | 72.6% |
| C | Kidnapping 1 | 100.0% | 59.5% | 71.8% | 40.5% |
| D | Robbery w/DW | 100.0% | 42.8% | 66.4% | 57.2% |
| D | Burglary 1 | 100.0% | 13.0% | 42.5% | 87.0% |
| E | AWDW IK or SI | 25.1% | 7.2% | 27.0% | 17.9% |
| E | Kidnapping 2 | 29.7% | 13.9% | 32.7% | 15.8% |
| F | Assault SI | 8.2% | 6.2% | 28.1% | 2.1% |
| G | Burglary 2 | 4.9% | 3.1% | 29.9% | 1.8% |
| G | Com Law Robbery | 5.7% | 4.3% | 39.5% | 1.4% |
| G | Sell Cocaine | 3.4% | 3.1% | 34.7% | 0.3% |
| H | Break/Enter | 1.2% | 1.2% | 28.4% | -0.1% |
| H | PWI, Delivery | 0.7% | 0.7% | 21.5% | 0.0% |

The effect that these reductions have on the rate of active prison sentences is less extreme, however, than the effect of reductions on sentence duration. Again, even when an active sentence is not mandatory it is usually an option, and one that the judge uses regularly. For each category of crimes we studied, the percentage of those convicted receiving active prison sentences is much greater than

the percentage for whom it would be required by the guidelines. For example, the guidelines required an active prison sentence for 27% of offenders originally charged with AWDW IKSI, but 49% actually received active sentences. More striking still, the percentage receiving active prison sentences ranged from 22% to 40% even among charging categories that required prison sentences for very few offenders.[130] This reveals that while charge reductions have a considerable impact on sentence *durations* under structured sentencing, their effect on *disposition* decisions is muted.

The impact of charge movement on sentence dispositions reveals one of the ways that the structure of the sentencing guidelines can either enhance or limit de facto sentencing power of prosecutors. Some early guideline systems, such as those originally adopted in Minnesota and Washington state, included a clear "disposition line": cases on one side of the line would be sentenced to prison, while cases on the other side of the line would not.[131] With that type of structure, charge reductions determine more often whether judges can sentence offenders to prison or not. In the present study, this does not appear to be the case. By allowing judges the discretion to choose a prison sentence in all but the least serious cases, the border boxes in the North Carolina sentencing grid mitigate prosecutorial control over punishment.[132]

To summarize, charge reductions have a substantial effect on both the disposition and on the duration of sentences. The impact on sentence durations appears to be larger, however, than the impact on imprisonment decisions. We believe that this is a function of the structure of North Carolina's sentencing laws, which, for the majority

130. For felonies in Classes F, G, and H, the availability of non-prison dispositions depends on the offender's prior record level.

131. *See* SHANE-DUBOW ET AL., *supra* note 62, at 164–66. Note, however, that the Minnesota and Washington systems allow the judge to "depart" from the disposition indicated in the guidelines, while the North Carolina system prevents any dispositional departures, even while granting the judge more discretion over the in/out decision in some grid boxes.

132. We should not assume, however, that sentencing dispositions reflect judicial discretion rather than prosecutorial discretion, even when the North Carolina sentencing grid leaves the choice open. It is likely that the type of disposition ordered often reflects a prosecutor's recommendation that is part of the plea agreement. Although our data do not allow us to test this, prosecutors may insist upon an "active" sentence recommendation more often if they have already agreed to reduce the charge from one where an active sentence would have been required. Thus, the actual sentence dispositions we have observed likely reflect a combination of judicial and prosecutorial influences.

of cases, allow discretion in deciding the type of punishment to impose.

We predicted not only that charge reductions would affect sentencing, as others have alleged, but also that the structure of the criminal code would be important in determining how great an impact there is. More precisely, we hypothesized that the effect of charge reductions on sentences would reflect two dimensions of the code, which vary by offense type: the depth of charging options and the distance between them. Our findings generally support this theory.

We observed that even among crimes charged initially at the same offense class, some result in greater sentence reductions than others.[133] When the criminal code provides more options for reducing charges, especially to lesser-included offenses, and when the distance between those lesser offenses and the original charge is great, we see relatively larger average reductions in the presumptive sentence. We see examples of this both among more serious crimes and less serious crimes.

The potential for misdemeanor charges has an especially powerful effect on some crimes. Given the large break in average sentences between low level felonies and misdemeanors, the availability of a charging option at the misdemeanor level resulted in larger reductions for some categories of crimes (e.g., assaults, robberies) than for others (e.g., drug crimes).

## CONCLUSION

In a jurisdiction like North Carolina that depends on determinate sentencing laws, close attention to charge movement reaps big rewards. A number of scholars have argued that efforts to regulate judicial discretion, either through determinate sentencing systems, mandatory minimums, or presumptive sentencing guidelines may concentrate power over sentencing outcomes in the hands of prosecuting attorneys. Little systematic empirical evidence exists, however, about what prosecutors actually do with this theoretically increased power. This Article attempts to shed some light on how often prosecutors reduce charges and the effect that charge reductions have on the severity of punishment in one state with comprehensive sentencing guidelines.

133. Although our analysis does not provide a rigorous test of our prediction (i.e., we have not controlled for other factors that might also be relevant, such as prosecutors' priorities), the pattern of charge and sentence reductions is generally consistent with our expectations.

The analyses here reveal three major findings. First, in North Carolina, prosecutors exercise their discretion to reduce the severity of the primary charges filed, and they do so frequently. Although we have not explored other types of charge reductions in this analyses (e.g., decisions to reduce the number of counts or facts that could affect the sentence), the data suggest that charge bargaining over the offense seriousness is one of the central ways that cases are resolved.

Second, these charge reductions have substantial effects on the severity of sentences imposed. The effects are largest on the duration of active prison sentences, but they are also consistent and visible in the sentence dispositions.

Third, we find that the frequency with which cases move from the original charge to a lesser offense, and the average sentence reduction that results, vary by crime type. This crime-specific lens reveals that sentence reductions are partly a function of the structure of the criminal code and the sentencing grid in North Carolina. It appears that the same sentencing guidelines and crime definitions that grant prosecutors greater power, relative to other sentencing actors, also constrain prosecutor's choices in important ways. The guidelines give, and the guidelines take away.

Our descriptive account of the connection between charge reductions and sentences could form the basis for more well elaborated theories of the prosecutor's work. By detailing the contribution of charge movement to the sentences that defendants serve, our project moves beyond a blanket description of "prosecutorial discretion." We hope that our tour around the North Carolina criminal code inspires much further attention to charge movement, particularly in jurisdictions with sentencing guidelines and other forms of determinate sentencing. There is much to learn about the typical reductions of charges in different settings, lessons holding real value both for criminal practitioners and academic observers.

We close with some practical implications of our research. Imagine the impact on criminal practice everywhere if both prosecutors and criminal defense attorneys routinely knew and used the sort of charge movement information set out in this Article. For a given defendant, the attorneys could open an online database and search for similar cases to determine a typical range of charge movements.[134] As for which cases are similar enough to the case at

134. *Cf.* Marc L. Miller, *Sentencing Reform Through Sentencing Information Systems*, *in* THE FUTURE OF IMPRISONMENT 121, 123 (Michael Tonry ed., 2004) (creating a similar proposal for a sentencing information system).

hand, each attorney could select variables that seem relevant, drawn from a standardized list (such as the original charge, the county, a range of dates, the criminal history, and other variables that experience might suggest). With these competing versions of the relevant comparison groups, the attorneys would enter plea negotiations with the real power to argue about meaningful uniformity in sentencing. The power of transparency in charge movements could transform criminal justice in ways that are hard to predict, but fascinating to ponder.

Finally, lawmakers in North Carolina as well as other states may find valuable lessons in these data as they consider creating or revising the laws of sentencing. First, the data suggest that sentencing laws are only sometimes applied in the way that legislators might have anticipated or intended. When legislators or sentencing commissions create or modify sentencing guidelines, they should keep in mind that the limitations they place on judicial discretion have important implications for the balance of power among prosecutors and judges, and that the real impact of any guidelines will depend on how those guidelines are used in negotiating guilty pleas. Second, lawmakers would do well to recognize that "mandatory" prisons sentences, whether designated for specific crimes or for whole classes of crimes, as in North Carolina, are seldom mandatory in practice. Our findings show that the crimes for which the guidelines mandate active prison sentences are the ones that are most likely to result in substantial charge reductions. Finally, these findings should give pause to anyone who assumes that North Carolina's structured sentencing has achieved uniform and equitable sentencing practices. Although our data do not allow us to test whether sentences are more or less uniform now than they were prior to the enactment of guidelines, the evidence clearly shows that offenders who are charged with similar crimes—especially the *most serious* crimes—often receive *very* different punishments.

## APPENDICES

### Appendix A. Sentence Characteristics by Charged Offense and Conviction Offense: Assault

| Conviction Offense Class | Most Common Offenses | Sentence Ordered | Charged Offense: Class C (N = 675) AWDW IKSI | Class E (N = 928) AWDW IK or SI | Class F (N = 146) ASSAULT SI |
|---|---|---|---|---|---|
| ***Felony*** | | | | | |
| C | AWDW IKSI | Min. Months | 89.63 | 116.00 | |
| | | % Active | 91.3% | 100.0% | 0.0% |
| E | AWDW IK or SI | Min. Months | 27.69 | 27.26 | 27.00 |
| | | % Active | 50.9% | 35.9% | 50.0% |
| F | Assault SI | Min. Months | 18.44 | 17.98 | 18.35 |
| | | % Active | 30.3% | 26.2% | 32.6% |
| | ***Total Felony*** | **Min. Months** | **40.60** | **25.96** | **18.70** |
| | | **% Active** | **57.2%** | **35.4%** | **36.2%** |
| ***Misdemeanor*** | | | | | |
| A1 | Assault SI, AWDW | Min. Months | 2.85 | 2.84 | 4.02 |
| | | % Active | 25.5% | 21.5% | 24.6% |
| 1 | Simple Assault | Min. Months | 2.15 | 2.13 | 1.81 |
| | | % Active | 27.3% | 19.1% | 20.0% |
| 2 | Simple Assault | Min. Months | 1.55 | 1.24 | 1.11 |
| | | % Active | 53.8% | 25.0% | 0.0% |
| | ***Total Misdemeanor*** | **Min. Months** | **2.69** | **2.64** | **3.54** |
| | | **% Active** | **27.6%** | **21.6%** | **22.7%** |

Appendix B. Sentence Characteristics by Charged Offense and Conviction Offense: Kidnapping

| Conviction Offense Class | Most Common Offenses | Sentence Ordered | Charged Offense: Class C (N = 163) Kidnap 1 | Charged Offense: Class E (N = 101 ) Kidnap 2 |
|---|---|---|---|---|
| ***Felony*** | | | | |
| C | Kidnap 1 or 2, AWDS IKSI | Min. Months | 102.49 | |
| | | % Active | 98.0% | |
| D | Robbery w/DW | Min. Months | 75.50 | |
| | | % Active | 100.0% | |
| E | Kidnap 2 | Min. Months | 32.29 | 27.90 |
| | | % Active | 75.0% | 46.0% |
| F | Felonious Restraint | Min. Months | 17.50 | 18.87 |
| | | % Active | 33.0% | 26.0% |
| H | Break and Enter | Min. Months | 8.83 | 15.25 |
| | | % Active | 17.0% | 50.0% |
| | ***Total Felony*** | **Min. Months** | **68.17** | **23.97** |
| | | **% Active** | **78.7%** | **39.1%** |
| ***Misdemeanor*** | | | | |
| A1 | AWDW, Assault of Female | Min. Months | 2.48 | 2.85 |
| | | % Active | 23.0% | 14.0% |
| 1 | False Imprisonment | Min. Months | 1.83 | 2.52 |
| | | % Active | 33.0% | 30.0% |
| | ***Total Misdemeanor*** | **Min. Months** | **2.25** | **2.74** |
| | | **% Active** | **27.3%** | **18.8%** |

Appendix C. Sentence Characteristics by Charged Offense and Conviction Offense: Robbery

| Conviction Offense Class | Most Common Offense | Sentence Ordered | Charged Offense: Class D (N = 1,302) Robbery or Att Robbery w/ DW | Class G (N = 716) Common Law Robbery | Class H (N = 47) Att. Common Law Robbery |
|---|---|---|---|---|---|
| ***Felony*** | | | | | |
| D | Robbery or Att Robbery w/ DW | Min. Months | 69.92 | 94.00 | |
| | | % Active | 97.2% | 100.0% | |
| E | Consp. Robbery AWDW-SI, Kidnapping 2 | Min. Months | 26.36 | 46.00 | |
| | | % Active | 45.5% | 100.0% | |
| G | Common Law Robbery | Min. Months | 14.66 | 14.84 | |
| | | % Active | 51.2% | 44.6% | |
| H | Att. Common Law Robbery, Larceny From Person | Min. Months | 8.42 | 8.63 | 7.79 |
| | | % Active | 33.7% | 36.9% | 21.4% |
| | ***Total Felony*** | **Min. Months** | **40.14** | **13.34** | **7.59** |
| | | **% Active** | **68.3%** | **42.0%** | **25.0%** |
| ***Misdemeanor*** | | | | | |
| 1 | Larceny | Min. Months | 2.01 | 1.98 | 1.84 |
| | | % Active | 38.5% | 34.9% | 0.0% |
| | ***Total Misdemeanor*** | **Min. Months** | **1.96** | **2.10** | **1.94** |
| | | **% Active** | **39.0%** | **33.3%** | **6.7%** |

Appendix D. Sentence Characteristics by Charged Offense and Conviction Offense: Cocaine

| Conviction Offense Class | Most Common Offense | Sentence Ordered | Charged Offense: Class D-G (N = 401) Trafficking Cocaine | Charged Offense: Class G (N = 1,272) Sell or Conspire to Sell | Charged Offense: Class H (N = 3,362) PWI, Delivery |
|---|---|---|---|---|---|
| ***Felony Trafficking*** | | | | | |
| D | Trafficking 400g + | Min. Months | 87.77 | | |
| | | % Active | 69.0% | | |
| F | Trafficking 200g < 400g | Min. Months | 56.43 | | |
| | | % Active | 89.0% | | |
| G | Trafficking 28g < 200g; Att. or Conspire | Min. Months | 32.45 | 32.90 | |
| | | % Active | 81.0% | 80.0% | |
| | ***Total Trafficking*** | **Min. Months** | **36.90** | **32.90** | |
| | | **% Active** | **80.6%** | **80.0%** | |
| ***Non-Trafficking*** | | | | | |
| G | Sell or Conspire to Sell | Min. Months | 19.61 | 14.05 | 14.07 |
| | | % Active | 52.8% | 37.0% | 17.3% |
| H | PWISD, Deliver | Min. Months | 9.39 | 8.28 | 8.03 |
| | | % Active | 39.0% | 34.6% | 29.9% |
| I | Possession | Min. Months | 13.41 | 6.38 | 5.75 |
| | | % Active | 36.4% | 16.3% | 9.3% |
| | ***Total Non-Trafficking*** | **Min. Months** | **19.63** | **12.22** | **7.76** |
| | | **% Active** | **45.8%** | **35.1%** | **22.0%** |
| ***Misdemeanor*** | | | | | |
| 1 | Poss. Paraphernalia | Min. Months | | 2.31 | 2.05 |
| | | % Active | | 19.4% | 17.5% |
| | ***Total Misdemeanor*** | **Min. Months** | | **2.31** | **2.02** |
| | | **% Active** | | **19.4%** | **17.8%** |