

ABSTRACT

Title of Dissertation: DISPLACED DISCRETION? AN EMPIRICAL TEST OF
PROSECUTORIAL CHARGE BARGAINING BEFORE
AND AFTER THE DISTRICT OF COLUMBIA
SENTENCING GUIDELINES

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Though significant research has found that sentencing guidelines systems have reduced sentencing disparity, few studies have examined whether sentencing guidelines have shifted discretion and disparity from judges to prosecutors. Using data from the District of Columbia Superior Court, this research examines whether charge bargaining practices changed after the District of Columbia Sentencing Guidelines. This study also examines whether legal, offender, and case processing characteristics had different effects on charge bargaining outcomes before and after the Sentencing Guidelines. The analyses show that, while there were changes in the plea bargaining process after the Sentencing Guidelines, there was not significant evidence of a displacement of discretion or disparity to prosecutors. Policy implications are discussed.

DISPLACED DISCRETION? AN EMPIRICAL TEST OF PROSECUTORIAL
CHARGE BARGAINING BEFORE AND AFTER THE DISTRICT OF COLUMBIA
SENTENCING GUIDELINES

By

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2009

DEDICATION

This is dedicated to Erika and our new family.

Thank you for your patience and encouragement over these years.

This is also dedicated to my mom and dad.

You taught me it is never too late for creative and fulfilling pursuits.

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CHAPTER I. Introduction

During the late Nineteenth Century and most of the Twentieth Century, indeterminate sentencing was the most common form of sentencing in the United States. Judges imposed wide sentencing ranges with little guidance from the legislature, and correctional and parole officials subsequently determined the date of release from incarceration. Beginning in the 1970s, there was a sentencing reform movement where nearly every state and the federal system enacted laws requiring that the length of sentence be known at the time of sentencing and limiting the discretion of judges, corrections officials, and parole boards. One of the most common methods for controlling judicial discretion was through the creation of sentencing guidelines, which generally combined offense and offender characteristics in a structured format to determine the type and severity of punishment to be imposed.

The primary purpose of sentencing guidelines systems was to increase consistency and fairness in sentencing. While numerous studies have found that sentencing guidelines systems have been successful in reducing sentencing disparity, critics argue that guidelines may have simply displaced discretion and disparity from the judge at the sentencing phase to the prosecutor at the pre-conviction stage. This argument is often referred to as the “hydraulic displacement of discretion” thesis. Few studies have empirically examined whether prosecutorial practices such as charging and charge bargaining have changed as a result of sentencing guidelines reforms. This gap in the literature is due primarily to the lack of available data on prosecutorial decisions.

This study tests whether there was a displacement of discretion and disparity from the judge to the prosecutor after the implementation of the District of Columbia

Sentencing Guidelines in June 2004. Chapter Two reviews the history of sentencing guidelines reforms and the studies evaluating whether guidelines have reduced disparity. It then summarizes the background and purposes of the District of Columbia Sentencing Guidelines and discusses preliminary evaluations by the District of Columbia Sentencing Commission finding that its guidelines have been successful in achieving high judicial compliance and reducing disparity.

Chapter Two then provides an overview of the hydraulic displacement of discretion thesis and reviews the empirical tests, which have found little evidence of a change in the level of discretion or disparities in prosecutorial practices after sentencing guidelines. Next, Chapter Two summarizes prior research on prosecutorial charging and charge bargaining, not necessarily in guidelines systems, but in general. While not directly relevant to the effect of sentencing guidelines on prosecutors, this literature is important for its substantive conclusions about the determinants of prosecutorial decisions and its methodological approaches for measuring prosecutorial outcomes. This chapter then reviews the dominant theoretical perspectives used to predict and explain prosecutorial decision-making. Finally, it discusses the specific research questions that will be addressed in this study.

Chapter Three describes the data, measures, and analytic methods. This study examines two random samples of felony convictions from before and after the District of Columbia Sentencing Guidelines went into effect in 2004. Because the samples originally included only information on the conviction and sentence, it was necessary to manually collect information on prosecutorial charging and other missing information such as criminal history for each individual case. Chapter Four presents the results of the

descriptive statistics analyses, which revealed that the pre-Guidelines and post-Guidelines samples were remarkably similar in virtually all offender characteristics. Chapter Five presents the results of the multivariate analyses of charge bargaining before and after the District of Columbia Sentencing Guidelines. Finally, Chapter Six discusses the important conclusions, limitations, and policy implications of this study, and the directions for future research.

CHAPTER II: Literature Review

History of Sentencing Guidelines Reforms

In the late 1800s, indeterminate sentencing was the most common system of criminal sentencing in the United States. By 1942, every state and the federal system had indeterminate sentencing structures (Petersilia, 1999). Under this system, the legislature prescribed broad sentencing ranges without meaningful legal guidance for the trial judge (Demleitner, 2004). The judge imposed a minimum and maximum sentence, and correctional and parole officials subsequently determined the date of release from prison (Tonry, 1996). The judge had significant freedom to fashion penalties tailored to the unique circumstances of individual offenders, prison officials had substantial decision making authority over the amount of good conduct time an inmate could earn to accelerate the discharge date, and parole boards had wide latitude to determine when an offender would be released on parole supervision (Tonry, 1996; Ostrom et al., 2008). Discretion, in short, was the “cornerstone” of indeterminate sentencing (Walker, 1993).

Decisions by judges, corrections officials, and parole boards were intended to achieve utilitarian goals of punishment such as rehabilitation and incapacitation. Criminal justice officials were assumed to have special expertise to make decisions about continued incarceration and predictions about future criminal behavior (Tonry, 1999). As the United States Supreme Court explained, “reformation and rehabilitation of offenders [were] important goals of criminal jurisprudence,” and the “prevalent modern philosophy was that the punishment should fit the offender and not merely the crime.”¹ Offenders were viewed as “ill” and in need of “treatment” (Rothman, 1980). In its 1967 report, *The*

¹ *Williams v. New York*, 337 U.S. 241 (1949).

Challenge of Crime in a Free Society, the President's Commission on Law Enforcement and Administration of Justice discussed the "reform model" that existed in which the offender was a "patient" and the "treatment" was intended to fit the individual. Optimism about indeterminate sentencing and the potential for rehabilitation reached its peak in the 1960s (Ostrom, et al., 2008). Indeterminate sentencing was at that time a "distinctively American approach" (Tonry, 1999).

In the 1970s and early 1980s, however, there was a "ferment that significantly affected sentencing practice" (Blumstein, 1983: xi) and led to an unprecedented "sentencing reform movement" (Reitz, 1998: 222). Critics of indeterminate sentencing argued that sentences should be "softer, tougher, fairer, more consistent, more efficient, more economical, more transparent, or more effective at preventing crime" (Tonry, 2005: 38). With regard to sentencing severity, reformers argued that indeterminate sentencing resulted in lenient sentences and failed to control crime (Wilson, 1975). Their views were supported by research that many interpreted as finding that rehabilitative programs did not reduce recidivism (Martinson, 1974; Lipton, Martinson, Wilks, 1975; Sechrest, 1979). Others questioned the premise of the rehabilitative ideal--that crime is a product of individual pathology or illness and that rehabilitation can be achieved within a prison system. They also criticized the assumption that criminal justice officials had sufficient knowledge to impose treatment or to accurately predict recidivism to justify their sentencing power (AFSC, 1971; Monahan, 1981; Bureau of Justice Assistance, 1996: 7).

In 1972, United States District Judge Marvin Frankel wrote *Criminal Sentences: Law without Order*, which has been described as "the best indictment of traditional, indeterminate sentencing practices in the literature" (Reitz, 1993). Judge Frankel

highlighted the “gross evils and defaults” (p. vii) in the sentencing system, particularly the absence of standards, rules, or procedures to guide judicial sentences.² With such a wide range of statutory choices and a lack of legal guidance for sentencing judges, he believed that disparity among similar cases would result.³ While it is important that judges make individualized sentencing decisions, it is important that they be made according to legal rules.⁴

Complicating matters further, the disparity that may result from individual sentencing decisions was difficult to understand because judges did not provide sentencing rationales. This “wall of silence” was troubling because there was no way of knowing if a judge’s sentencing decision was based on inappropriate considerations.⁵ In

² Noting that the imposition of sentence is “probably the most critical point” (p. vii) in the criminal justice system due in part to the high rate of guilty pleas, Frankel argued that it is “tragically incongruous” that the most elaborate procedures to safeguard defendant rights are for the trial phase but we “treat as a casual anticlimax the perfunctory process” of sentencing (p. vii).

³ Judge Frankel explained:

[T]rial judges, answerable only to their varieties of consciences, may and do send people to prison for terms that may vary in any given case from none at all up to five, ten, thirty, or more years. This means that in the great majority of federal criminal cases that a defendant who comes up for sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between... The result... is a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice. And it could not be otherwise under our non-system of so-called laws prescribing penalties. The broad statutory ranges might approach a degree of ordered rationality if there were prescribed any standards for locating a particular case within any range. But neither our federal law nor that of any state I know contains meaningful criteria for this purpose (p. 7).

⁴ Judge Frankel wrote:

There is dignity and security in the assurance that each of us—plain or beautiful, rich or poor, black, white, tall, curly, whatever—is promised treatment as bland, fungible “equal” before the law. Is “individualized” sentencing consistent with that promise? Certainly not under the broad grants of subjective discretion we give to our judges... The ideal of individualized justice is by no means an unmitigated evil, but it must be an ideal of justice *according to law*. This means that we must reject individual distinctions—discrimination, that is—unless they can be justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyncratic ukases of particular officials, judges, or others (p. 11).

⁵ Judge Frankel elaborated:

Criminal sentences, as our judges commonly pronounce them, are... tyrannical. Largely unfettered by limiting standards, and thus having neither occasion nor meaningful terms for explaining, the judge usually supplies nothing in the way of a coherent and rational

short, the main “evils” assailed by Frankel were “the absence of decent legal ordering,” “the absurdly broad statutes,” “the gross inequalities,” “the unchecked discretion of judges,” “the absence of reasoned explanations,” and “the haste and the general arbitrariness” (p. 58). The problem was “too little law, not too much” (p. 58). He also criticized the rehabilitative underpinning of indeterminate sentencing, arguing that rehabilitation was “absent” in our prisons and that there was powerful evidence that the majority of prisoners “become poorer risks and lesser people” rather than improve in prison (p. 93). Parole boards, he argued, made decisions without orderly and uniform criteria and were often moved by political pressures and public opinion (p. 94). The inmate experience was “cruel and degrading,” and there was “command that he remain in custody for some uncertain period, while his keepers study him, grade him in secret, and decide if and when he may be let go” (p. 96). The “basic problem” was “the unruliness, the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory” (p. 49). Because there was evidence that rehabilitation was often ineffective or coercive, Frankel argued that the presumption should be in favor of a fixed rather than indeterminate sentence.⁶

judgment when he informs the defendant of his fate...The judge thus loosed may be one of the world’s most virtuous people. Or he may not. In either event, he is not encouraged or even invited to proceed according to law. He may be propelled toward a stern sentence by high moral values or by private quirks of a less elegant nature or by a perceived affront to his dignity in the courtroom. Whatever accounts for his judgment, he need not say, and he normally does not say. It is certain beyond question that a power this wild will spawn at least some results that are bizarre and would be promptly condemned as unlawful if the unspoken grounds of decision were known. If this certainly requires proof, every criminal lawyer knows cases in which sentencing judges have done crazy and horrible things (p. 41).

⁶ As Frankel explained:

It is not my claim that rehabilitation is always and everywhere impossible. Nor do I argue that an indeterminate sentence could never be wide and fair. The great evil in current thinking is the pair of false assumptions that (1) rehabilitation is *always* possible and (2) indeterminate sentences are *always* desirable. I urge that the shoe belongs on the other foot. Most importantly, my contention is that the presumption ought always to be in favor

Judge Frankel offered, not only criticisms of indeterminate sentencing, but proposals for change. He recommended the creation of a specialized administrative agency called a sentencing commission that would be responsible for (1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules; and (3) the enactment of rules, subject to traditional checks by the legislative and judicial branches (p. 119). Frankel also advocated appellate review of sentences, which he thought would foster a measure of consistency and fairness (p. 115). Finally, he proposed a general outline of how rules or guidelines might incorporate sentencing factors in an orderly and measurable way.⁷

Beginning in the 1970s, there was a “remarkable burst of reform” of criminal sentencing systems in the United States (Walker, 1993: 112). Nearly every state and the federal system developed mechanisms to eliminate or limit the discretion of judges, corrections officials, and parole boards (Walker, 1993: 113). Many states introduced sentencing schemes based on theories of deterrence and incapacitation such as

of a definite sentence, known and justified on the day of sentencing...There should be a burden of justifying an indeterminate sentence in any particular case—a burden to be satisfied only by concrete reasons and concrete program for the defendant in that case. The justifications, I tentatively suggest...would consist of identified needs and resources for effective rehabilitation or for incapacitation of a dangerous offender, or both (p. 98).

⁷ Frankel wrote:

Beyond codifying the numerous factors affecting the length and severity of sentences, an acceptable code of penal law should, in my judgment, prescribe guidelines for the application and assessment of these factors. While it may seem dry, technical, unromantic, and “mechanical,” I have in mind the creation of a detailed chart or calculus to be used (1) by the sentencing judge in weighing the many elements that go into the sentence; (2) by lawyers, probation officers, and others undertaking to persuade or enlighten the judge; and (3) by appellate courts in reviewing what the judge has done...The partial remedy I propose is a kind of detailed profile or checklist of factors that would include, wherever possible, some form of numerical or other objective grading...The overall result might be a score—or, possibly, an individual profile of sentencing elements—that would make it feasible to follow the sentencer’s estimates, criticize them, and compare the sentence in the given case with others (p. 112-114).

determinate or “flat time” sentencing,⁸ mandatory minimum penalties,⁹ and habitual offender laws¹⁰ (Bureau of Justice Assistance, 1996: 1; Spohn, 2002: 220). In 1976, for example, California introduced the Uniform Determinate Sentencing Law, which was the first major high-profile reconstitution of a state sentencing system. This law was supported by liberals and conservatives, prisoners’ rights advocates and police unions, and judges and corrections officials (Tonry, 2005: 38).

Other jurisdictions opted for sentencing guidelines, which brought together characteristics of the offense and the offender in a structured format that determines the type and severity of punishment the judges should impose (Ostrom, et al., 2008: i). Sentencing guidelines proponents such as von Hirsh (1976) argued that punishment schemes should be based on a non-utilitarian “just deserts” or “commensurate deserts” paradigm.¹¹ In most sentencing guidelines systems, punishments are scaled along a two-dimensional grid measuring the seriousness of the crime and the offender’s prior criminal record, and judges are required or encouraged to impose the sentence indicated by the intersection of these two factors. By restricting judicial discretion to individualize sentences and requiring that sentences be based primarily on legal characteristics of the

⁸ Determinate sentencing is defined as sentences of incarceration in which parole is abolished and an offender is given a fixed term by a judge that may be reduced by good time or earned time (Bureau of Justice Assistance, 1996: xii).

⁹ A mandatory minimum penalty is defined as: “A minimum sentence that is specified by statute and that may be applied for all convictions of a particular crime or a crime with special circumstances (e.g., robbery with a firearm or selling drugs to a minor within 1,000 feet of a school)” (Bureau of Justice Assistance, 1996: xii).

¹⁰ Habitual offender laws (such as “three-strikes-and-you’re-out”) mandated long prison sentences for repeat offenders (Spohn, 2002: 220).

¹¹ Morris (1974) recommended a “modified just deserts” approach, where upper and lower limits are set based on just deserts to prevent undeserved penalties, but judges could otherwise account for other factors to achieve utilitarian aims.

offense and prior record, sentencing guidelines seek to increase uniformity and eliminate disparity in sentencing (Savelsberg, 1992; Spohn, 2002: 222).¹²

The first stage in the sentencing guidelines movement was the development of voluntary or non-binding guidelines for sentencing judges. They were typically descriptive rather than prescriptive in that they were based on the past sentencing practices of judges and not on normative notions of what the sentence ought to be. The idea was to document the sentences that judges historically imposed for different types of offense/offender combinations (Blumstein, et al., 1983: 135; Bureau of Justice Assistance, 1996: xii; Spohn, 2002: 224). Advocates hoped that identifying historical penalties would encourage judges at the two ends of the sentencing continuum to move closer to the middle. In the late 1970s, presumptive sentencing guidelines replaced voluntary guidelines as the dominant approach (Bureau of Justice Assistance, 1996: 17; Spohn, 2002: 229). In presumptive systems, judges are expected to sentence within the range dictated by the guidelines or provide written justification for a departure. Furthermore, there is generally some form of appellate review of lower court departure decisions (Bureau of Justice Assistance, 1996: xii).

Implicit in one's preference for more presumptive or voluntary guidelines is a judgment on the degree to which judicial discretion must be constrained to best achieve consistency and fairness (Ostrom, et al., 2008: 5). Though guidelines systems are often referred to as either voluntary or presumptive, the distinctions between them are blurred in reality, and most systems are located somewhere on a continuum between the two

¹² Most sentencing guidelines systems attempt to achieve additional sentencing goals such as rehabilitation and incapacitation, for example through specific departure grounds, by providing for wide sentencing ranges, or by recommending incarceration or non-incarceration. The primary goal of the sentencing guidelines movement, however, has been to increase uniformity and reduce or disparity in sentencing.

extremes (Ostrom, et al., 2008: 25). By the early 1980s, a consensus of opinion began to emerge that the best method of controlling discretion was through sentencing guidelines, which “indicated a presumptive sentence but left the judge some limited discretion” (Walker, 1993: 122).

To be sure, sentencing reform has been a “patchwork affair” (Walker, 1993: 141). Roughly one half of the states still retain indeterminate sentencing systems, though they have introduced some determinate elements such as mandatory minimum and habitual offender statutes. At least 20 states, the District of Columbia, and the federal system use some form of sentencing guidelines (Ostrom, et al., 2008). Today, American jurisdictions continue to consider whether to adopt new sentencing reforms to increase fairness and consistency in sentencing.¹³ Though many states still retain indeterminate sentencing structures, the sentencing reform movement that began in the 1970s “arguably produced the most fundamental changes to be found in any area of criminal justice. In no other area has there been such a broad-ranging debate over the first principles and such sweeping changes in operating assumptions and practices” (Walker, 1993: 141).

Prior Research on the Impact of Sentencing Guidelines on Disparity

There is a substantial body of research examining whether sentencing guidelines have achieved their primary aim of reducing disparity. The literature includes numerous

¹³ Sentencing reforms such as sentencing guidelines are also intended to achieve other goals such as tying sentences to correctional resources and making sentencing decisions more transparent (Tonry, 2005). One factor that may affect whether more jurisdictions adopt sentencing guidelines systems is a recent line of decisions by the United States Supreme Court holding that certain presumptive sentencing guidelines systems violate a defendant’s right to a jury trial under the Sixth Amendment of the United States Constitution (See *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005)). The states and the federal system have responded to these decisions by making their sentencing guidelines voluntary or by introducing new procedural requirements to safeguard the right to a jury trial (Frase, 2005; Wool, 2005).

complex issues beginning with how to define and measure disparity. Noting that early research on sentencing confused discussions of discretion, disparity, and discrimination, Hagan and Bumiller (1983) defined discretion as “the latitude of decision provided by law to someone in imposing a sentence,” discrimination as “a pattern of sentencing regarded as unfair, disadvantaging, and prejudicial in origin,” and disparity as “a form of unequal treatment that is often of unexplained cause and is at least incongruous, if not unfair and disadvantaging, in consequence” (p. 9). More recently, disparity has been defined as “different sentencing of ‘similarly situated’ offenders and the similar sentencing of dissimilar offenders” (Bureau of Justice Assistance, 1996: 32). The meaning of “similarly situated” or “dissimilar” can vary, however, based on how one values sentencing factors or goals (Bureau of Justice Assistance, 1996: 32).¹⁴

Ostrom, et al. (2008) identified three organizing concepts of disparity: (1) consistency (like cases are treated alike); (2) proportionality (more serious offenders are punished more severely); and (3) discrimination (extra-legal factors such as age, gender and race are insignificant in who goes to prison and for how long). Spohn’s (2002) review of the sentencing literature provided the following definitions of disparity as distinguished from discrimination:

Disparity refers to a difference in treatment or outcome, but one that does not necessarily involve discrimination. As the Panel on Sentencing Research noted, “Disparity exists when ‘like cases’ with respect to case attributes—regardless of their legitimacy—are sentenced differently”

¹⁴ Frase (2005) explained:

In order to decide that two offenders are similarly situated and thus should receive similar sentences (or that they are dissimilar and should receive different sentences) we must first define the relevant sentencing factors (the offense and offender characteristics that judges should consider in determining appropriate sentences) and the weight to be given to each of these factors. The choice and weighting of sentencing factors depends, in turn, on the punishment purposes which the sentence is supposed to serve (p. 67).

(Blumstein et al., 1983, 72). Discrimination, on the other hand, is a difference that results from differential treatment based on illegitimate criteria, such as race, gender, social class, or sexual orientation. With respect to sentencing, discrimination “exists when some case attribute that is objectionable (typically on moral or legal grounds) can be shown to be associated with sentence outcomes after all other relevant variables are adequately controlled” (Blumstein et al, 1983, 72) (p. 432).

While the definition of sentencing disparity is “inescapably normative,” Alschuler (2005) argued, dispassionate social scientists can usefully study it by assessing the influence of clearly inappropriate factors such as the offender’s race, ethnicity, and gender (p. 95).¹⁵ Miethe and Moore (1985) and Souryal and Wellford (1997) followed Alshuler’s approach by examining the effect of clearly inappropriate factors. A final method measures sentencing disparity as total sentencing variation unexplained by legally mandated sentencing factors. Supporters of this approach have argued that it diminishes error arising from inadequate measures of extralegal variables and omitted variables (Stolzenberg and D’Alessio, 1994).

Regardless of how one defines sentencing disparity, it is clear that the sentencing reform movement has produced a “substantial reduction in the sum total of [judicial] discretion in criminal sentencing” (Walker, 1993: 141). Sentencing guidelines have been successful in that they have changed judges’ sentencing practices (Tonry, 1996). As to whether they have reduced disparity, however, Frase (1999) lamented that nobody can

¹⁵ Alschuler (2005) further argued that researchers should not accept the sentencing guidelines’ own standards (e.g., offense severity and prior record) as a baseline for examining disparity:

Equality requires the consistent application of a comprehensible normative principle or mix of principles to different cases. For this reason, evidence that offenders who have committed the same crime receive more uniform sentences under a guidelines system than they would have without them does not establish that the guidelines have reduced disparity. Judges in the pre-guidelines period might not have sought to treat everyone who committed the same crime alike. They might have tried to treat offenders of equal moral culpability alike or offenders of equal dangerousness alike or offenders with equal rehabilitative prospects alike. If these judges consistently applied a coherent principle or mix of principles to their cases, researchers could not fairly conclude that the guidelines had reduced disparity. They could conclude only that the guidelines had applied a new set of sentencing principles (p. 88).

answer this with certainty because the majority of the research has been in a handful of jurisdictions. The studies that do exist have generally concluded that state sentencing guidelines, particularly presumptive guidelines, have reduced (though not eliminated) disparities.¹⁶ Several studies of Minnesota’s guidelines concluded that they have increased uniformity and reduced disparity across similar cases (Minnesota Sentencing Guidelines Commission, 1984; Miethe and Moore, 1985; Moore and Miethe, 1986; Stolzenberg and D’Alessio, 1994). Stolzenberg and D’Alessio, for instance, found an 18 percent reduction in disparity for the decision to incarcerate and a 60 percent reduction in disparity for the length of sentence decision (p. 106). They did warn, however, that the proportion of sentence variation explained by offense and prior record decreased 18 months after the Guidelines were implemented, raising the possibility that Sentencing Guidelines may only have short term effects on disparity.

The Washington State Sentencing Guidelines Commission concluded that its guidelines reduced variability in sentencing among counties and among judges and led to more sentences that were gender and ethnicity neutral (Washington State Sentencing

¹⁶ The evidence on whether the Federal Sentencing Guidelines have reduced disparity is mixed and harder to interpret. Because the federal guidelines are far more rigid, complex, and severe than state systems, and because they are based on a unique system of “real offense conduct” where conduct not part of the conviction offense(s) affects sentencing, many dispositions, critics argue, have been forced “under ground,” possibly making federal data more unreliable (Tonry 1993). State sentencing guidelines systems are frequently viewed by scholars as qualitatively distinct from the Federal Sentencing Guidelines. The federal guidelines have been frequently criticized. They have been described as a “disaster” (Tonry, 1996) and a “highly detailed and mechanical set of guidelines without a clear rationale” (Ostrom, et al., 2008: 25). Unlike most state guidelines systems that were developed to reduce disparity and increase uniformity, the federal guidelines were developed and implemented after the heyday of the sentencing reform movement during the crime control era of the 1980s. Though reducing disparity is one of the stated goals of the guidelines, critics argue they were also developed as a result of a politicized process to increase sentences. Contrary to state guidelines, which generally rely on a small number of legal factors and relatively wide sentencing ranges, the federal guidelines include a long list of adjustments, offense characteristics, and other factors, and very narrow sentencing ranges. All of this makes the Federal guidelines more difficult to evaluate. Piehl and Bushway (2007) summed up the evidence: “The message with respect to the Federal guidelines is less clear. A self review by the Federal Sentencing Commission has found increased consistency, a GAO review cast doubts on these conclusions, and the academic literature is also mixed” (p. 109).

Guidelines Commission, 1992). Oregon's Criminal Justice Council found that its guidelines increased uniformity, with dispositional (whether or not to sentence someone to prison) variability for similar offenders being reduced by 45 percent (Ashford and Mosbaek, 1991). The Pennsylvania Commission on Sentencing (1984) and Kramer and Lubitz (1985) concluded that sentences were more uniform throughout Pennsylvania following the introduction of sentencing guidelines. Gorton and Boies (1999) analyzed pre- and post-sentencing guidelines felony sentences in Pennsylvania and found that racial disparity was reduced.

Thus, as Tonry (1996) wrote, "there is substantial evidence that the presumptive sentencing guidelines adopted in Minnesota, Pennsylvania, Washington, and Oregon have made sentencing more consistent and uniform. In all four states, sentencing disparity has declined in the post-reform period" (p. 42). Though extra-legal disparities based on characteristics such as race, sex, age, and employment status have not been eliminated, most studies of state sentencing guidelines conclude sentences became more uniform and less disparate and are more tightly linked to the guideline factors such as the seriousness of the offense and the offender's prior criminal record (Spohn, 2002: 299).

The early research was less encouraging for voluntary sentencing guidelines. There was evidence that they were less successful in achieving disparity reduction than their presumptive counterparts (Cohen and Tonry, 1983). As the Bureau of Justice Assistance (1996) wrote, "a review of all the major studies conducted on voluntary/advisory guidelines reveals low compliance by judges and, hence, little impact on reducing disparity" (Bureau of Justice Assistance, 1996: 11). Recent studies of voluntary guidelines systems have reached more positive results. Frase (2000) stated,

“Although much more research is needed on this point, it may be that voluntary judicial guidelines can still be effective to reduce disparity, at least if certain other factors are present” (p. 436). Hunt and Connelly (2005) argued that voluntary guidelines systems have produced results comparable to those of presumptive sentencing systems. Hartley, et al. (2006) found that judges in the Arkansas voluntary guidelines system based their decisions predominantly on legally relevant guideline variables. Pfaff (2007) concluded that, while voluntary guidelines do not reduce disparity to the same extent as presumptive schemes, they have had some success. As discussed in the next section, several preliminary evaluations by the District of Columbia Sentencing Commission have also concluded that the voluntary sentencing guidelines have been successful in achieving a high level of judicial compliance and reducing disparity.

Background of the District of Columbia Sentencing Guidelines

Prior to August 2000, the District of Columbia had an indeterminate sentencing structure, where judges and parole officials had broad discretion to fashion criminal sentences. The judge was required by law to impose a maximum term and a minimum term, which could not exceed one-third of the maximum term. The legislature set the penalty structure within very broad ranges,¹⁷ and the paroling authority had discretion to release the offender any time after service of the minimum term (less good time credits) (District of Columbia Advisory Commission on Sentencing Annual Report, 2002: 7).

In 1997, the United States Congress enacted the National Capital Revitalization and Self-Government Improvement Act of 1997 (the “Revitalization Act”), which

¹⁷ The penalty range for one count of distribution of cocaine, for example, was from probation to 30 years in prison.

abolished parole for all major felonies in the District of Columbia and mandated a shift to determinate sentencing for those felonies. The Revitalization Act also established the District of Columbia Truth in Sentencing Commission (“the TIS Commission”) and directed it to make recommendations to the Council of the District of Columbia (“the Council”) for amendments to the District of Columbia Code with respect to sentences imposed for felonies committed on or after August 5, 2000 (District of Columbia Truth in Sentencing Commission Annual Report, 1999: 1). In 1998, the TIS Commission recommended to the Council that it create an advisory body to make recommendations to enhance the fairness and effectiveness of sentencing policies. That year, the Council established the District of Columbia Advisory Commission on Sentencing (“the Advisory Commission”) (District of Columbia Advisory Commission on Sentencing Annual Report, 1999: 4).

In 2000, the Advisory Commission recommended to the Council that it abolish parole and adopt a determinate sentencing system for *all* felonies. It further recommended that the Council consider the adoption of a structured sentencing system given the expanded judicial discretion under the new determinate sentencing system.¹⁸ The Advisory Commission also noted that careful study was required before any structured sentencing system was adopted for two reasons. First, “sentencing guidelines by design limit the discretion and power of judges, and many believe that in doing so, guidelines transfer some of that discretion and power to prosecutors – giving them too much power” (District of Columbia Advisory Commission on Sentencing Annual Report,

¹⁸ The new determinate sentencing system retained a penalty structure with very broad limits, and judicial discretion was expanded by the abolition of parole. Under the new determinate system, a prison sentence consisted of a single term of imprisonment up to the maximum authorized sentence, and the offender was required to serve not less than 85% of that sentence (2002 Report: 8).

2000: 76). Second, “most believe that sentencing guidelines must be carefully drafted to allow judges some flexibility, but doing so too broadly can defeat the whole purpose of controlling discretion, and doing so too narrowly can turn the guidelines into a complicated or mechanistic process” (District of Columbia Advisory Commission on Sentencing Annual Report, 2000: 76). The Council adopted the recommendation to abolish parole for all felonies and directed the Commission to survey the structured sentencing systems around the country and to make recommendations as to the type of system, if any, that would best serve the needs of the citizens of the District of Columbia (District of Columbia Sentencing Commission Annual Report, 2006: 1).

In 2003, after three years of study, the Advisory Commission recommended the adoption of voluntary sentencing guidelines. The Advisory Commission explained:

The Commission’s primary rationale for proposing structured sentencing rests on a concern for basic fairness in sentencing. Substantial unexplained variability in sentencing exists. The judges and practitioners on the Commission all report variability in sentencing, some of which could be explained by legitimate sentencing factors relating to the crime or the background of the offender. The Commission’s analysis of sentencing data from 1996-2003 also showed variability in sentencing across all crime categories. To the extent that variability may be attributable solely to differences in judicial philosophy, it is a cause for concern. Basic fairness requires that similarly situated offenders should receive similar sentences for similar crimes (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: v).

The proposed sentencing guidelines set sentence length ranges for each combination of crime and criminal history and established standards for departing from those ranges in extraordinary cases. The goal was to “move more sentences toward the historical center, without creating a guidelines system that results in more – or less – time served for the average offender in the average case” (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: vi). Although the ranges in the

recommended guidelines were relatively broad, they narrowed discretion for the imposition of prison sentences to capture approximately the middle 50 percent of historical sentences. They also permitted a sentence to probation if at least 25 percent of offenders who fell within a given offense/criminal history combination were sentenced to probation in the past (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: vi). As the Advisory Commission explained:

[T]he Commission consciously attempted to capture the middle 50 percent of prison sentences in each category, based on the assumption that some percentage of sentences in the top and bottom 25 percent were outliers that should be brought into the middle range and some smaller percentage in each category were truly extraordinary cases that had – and would still have – valid reasons to depart from the norm. Similarly, with respect to the in/out decision, the Commission has recommended that probation be an available alternative to a prison sentence where at least 25 percent of the cases in the past received probation, and that a short split sentence, but not probation, be an available alternative to a straight prison sentence where at least 25 percent of the cases in the past received either probation or a short split sentence...The overall goal of this design is to “cabin discretion” and draw a good number of outlying sentences into the “corral” or mainstream of sentencing practice in the District of Columbia (District of Columbia Advisory Commission on Sentencing Annual Report, 2003:19).¹⁹

The Advisory Commission recommended that the sentencing guidelines be voluntary rather than presumptive for three primary reasons. First, experience in other states showed that voluntary guidelines could “achieve high compliance while avoiding undesirable litigation, which can strain resources and affect the court’s ability to manage its workload” (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: vi). Second, voluntary guidelines were viewed as “less rigid than mandatory

¹⁹ Other jurisdictions have sentencing ranges that also wide, if not wider, than in the District of Columbia. In Ohio, for instance, First-degree felons can face anywhere from three to ten years in prison, second-degree felons can face from two to eight years, third-degree felons between one to five years, fourth-degree felons between six to 18 months, and fifth-degree felons can face from six to 12 months (Wooldredge, 2009: 289).

systems and allow judges more room to structure a sentence to fit the varying circumstances of each individual case” (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: vi). Finally, voluntary guidelines “will make it easier for the Commission to adjust sentencing ranges in the future and, if necessary, account for important sentencing factors that may have been missed, and address any unanticipated consequences of such a major shift in sentencing practice” (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: vi). The Advisory Commission, also noted that, given a single courthouse in the District and substantial judicial support, it expected the Superior Court to achieve a high degree of judicial compliance:

The Commission believes that in a jurisdiction like the District of Columbia, with a single courthouse and judges in frequent contact with each other, most judges will want to operate within the mainstream of Superior Court practice, and will disdain unwarranted disparity... The Commission anticipates that Superior Court judges, understanding that the recommendations are derived from an analysis of historical sentencing practice in Superior Court, will generally tend to accept the recommendations for the typical case (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: 18).²⁰

With regard to the potential criticism that a sentencing guidelines system with such wide sentencing ranges can not reduce disparity,²¹ the Advisory Commission emphasized that the sentencing ranges exclude 25% of the highest historical prison sentences and 25% of the lowest historical prison sentences. Even if the sentences that

²⁰ Coincidentally, on the first day that the D.C. Sentencing Guidelines went into effect, the United States Supreme Court ruled that the presumptive sentencing guidelines system in Washington was unconstitutional. This ruling was widely interpreted to mean that presumptive guidelines in other jurisdictions were also unconstitutional unless certain new procedural protections were implemented. See *Blakely v. Washington*, 542 U.S 296 (2004).

²¹ As Wooldredge (2009) wrote, “Some states have purposely developed flexible guidelines to avoid problems associated with rigid determinate sentencing schemes. A question, however, is whether flexible schemes can achieve reductions in sentencing disparities based on extralegal characteristics while simultaneously increasing the importance of offense characteristics in shaping case outcomes” (p. 288).

will be imposed in typical cases span the entire width of the resulting middle 50% range, it argued, disparity in prison sentences should be reduced. Moreover, probation would still be an option in the proposed system in those offense/criminal history combinations where probation was historically given in 25% or more of the cases (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: 18). The Advisory Commission also noted that, while reducing disparity is an important goal, another aspect of sentencing fairness is “promoting warranted disparity, that is, treating different offenses and offenders differently” (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: 21).

The Advisory Commission further recommended that the new guidelines system be implemented initially as a pilot program to allow for a period of evaluation and public comment. Following this period, if the structured sentencing system achieved its goal, it could be implemented on a more permanent basis. In 2004, the Council adopted the Commission’s recommendations and directed it to submit a report to the Council by December 1, 2006, describing the experience under the pilot program and recommending the appropriate sentencing system (District of Columbia Sentencing Commission Annual Report, 2006: 1). The Council also renamed the Advisory Commission the District of Columbia Sentencing Commission (“the Commission”).

The Commission completed drafting of the District of Columbia Sentencing Guidelines in early 2004, and they went into effect for all felony convictions on or after June 14, 2004. The Sentencing Guidelines have separate matrices for drug offenses (“the Drug Grid”) and non-drug offenses (“the Master Grid”).²² The Drug and Master Grids

²² The Master Grid and Drug Grid are included in Appendix A and B. The most common Master Grid offenses in each severity group are also listed in Appendix C.

were designed with a recommended sentencing range for each of sixty boxes corresponding to a particular offense severity level and criminal history score. The Advisory Commission explained why it separated drug crimes from non-drug crimes:

Drug cases charged as felonies in Superior Court generally involve small quantities of drugs sold on the street. Superior Court rarely sees drug dealers who are high up in a criminal organization. Many sellers themselves use drugs, and some participate in the sale solely as an aider and abettor to the primary dealer to obtain a “tip” in the form of drugs or money they can use to purchase their own drugs. Historical sentencing patterns demonstrate that these offenders often receive a short split sentence or probation with drug treatment, even when their criminal history might suggest otherwise. Philosophically, many believe that treatment and rehabilitation are important sentencing goals for low-level drug dealers selling to support their own substance abuse. This is not to suggest that there is unanimity of views on how to sentence repeat low level drug dealers. All things considered, however, the Commission decided that placing drug felonies on a separate grid was the best way to address both the “just deserts” and “rehabilitation” issues posed by these crimes and this mixed population of offenders (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: 38).

The Advisory Commission ranked more than 150 felony offenses for the Master Grid and Drug Grid by severity of the crime. The Advisory Commission explicitly followed the principle of proportionality, which requires that more serious crimes receive more serious punishment. It ranked felony crimes in severity relative to each other, and then grouped comparable crimes to form nine severity levels for crimes other than drug offenses (Master Groups 1 through 9 with Master Group 1 being the most severe) and three severity levels for drug offenses (Drug Groups 1 through 3 with Drug Group 1 being the most severe) (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: 37). In ranking offenses, the Advisory Commission was guided by available historical data on sentences imposed, the view of the “heartland case” for each crime, the harm to crime victims and the community commonly associated with the

commission of the crime, the legislative ranking of felony offenses as reflected by the statutory penalties prescribed, and each Commissioner’s intuitive sense of the relative severity of the offense (District of Columbia Advisory Commission on Sentencing Annual Report, 2003: 37).²³

With regard to the “heartland” case for each offense, the Advisory Commission formulated its rankings based on a hypothetical “ordinary” offender who has committed the offense in an “ordinary” way, where “ordinary” refers to factual scenarios that come before courts often and would be recognized by court actors as typical rather than extreme examples of the crime being ranked (District of Columbia Advisory Commission on Sentencing Annual Report, 2002: xi).²⁴ Though the Commission members considered statutory maximum penalties as one factor, it noted that these penalties are designed to accommodate both the ordinary and the extreme cases and thus cover a very wide range.²⁵

In some boxes where the offense severity level and criminal history score intersect on the Master Grid and Drug Grid, a prison sentence is the only option

²³ The Commission warned that this ranking classification scheme did not take into account the many factors relevant at time of sentencing:

[J]udges typically base sentencing decision on the severity of the crime, but also take into account other considerations such as the rehabilitation potential of the offender, the need to restrain or incapacitate high-risk offenders, and the actual harm done to victims. These considerations include a long list of risk factors, such as a defendant’s prior record of violent conduct, and protective factors, such as the defendant’s perceived amenability to rehabilitation. Lower risk defendants who demonstrate treatable symptoms, such as drug addiction, and amenability to treatment, could be seen as good candidates for alternatives to incarceration. In other words, the offense classification would be one consideration in sentencing defendants, but not the only consideration or, in all cases, the most important consideration (District of Columbia Advisory Commission on Sentencing Annual Report, 2002: 130).

²⁴ For example, drug distribution cases sentenced in Superior Court usually involve low-level dealers, often selling to support a drug habit, rather than predatory drug kingpins (District of Columbia Advisory Commission on Sentencing Annual Report, 2002: xi).

²⁵ For example, the penalty for distribution of illegal drugs ranges from probation up to 30 years in prison (District of Columbia Advisory Commission on Sentencing Annual Report, 2002: 110).

consistent with the Guidelines recommendation. In some boxes, either a prison sentence or a short split sentence is an option.²⁶ In the remaining boxes, a prison sentence, a short split sentence, or probation are all options permitted by the Guidelines recommendation (District of Columbia Sentencing Commission Annual Report, 2006: 11). Statutory enhancements (for example, enhancements for committing a crime against a specific type of vulnerable victim or for being a repeat offender) are accommodated by raising the upper limit of the recommended guidelines range. The Guidelines contain a non-exclusive list of aggravating and mitigating factors or departures, which permit sentencing above or below the prison range in a given box or the imposition of probation or a split sentence in a prison only box. In order to rely on an aggravating or mitigating factor, the judge must state on the record the aggravating or mitigating factor(s) on which he or she relied. A judge may also opt not to follow the voluntary guidelines system, but when this occurs the judge is encouraged to explain his or her reasons to the Commission (District of Columbia Sentencing Commission Annual Report, 2006: 11).

In order to be considered “compliant” with the Guidelines, a sentence must be consistent with the applicable Guidelines recommendations in all respects. Thus, in making the in/out decision, a sentence to probation complies with the Guidelines only if (1) the sentence falls within a box for which probation is one of the recommended options and the suspended prison sentence also falls within the range or (2) the judge expressly relies on one of the mitigating factors to depart. Similarly, a prison sentence is compliant only if it is within the prison range set forth in the applicable box or the judge expressly relies on one of the mitigating or aggravating factors to depart. For a split

²⁶ A short split sentence is a sentence in which the defendant serves a sentence of six months of imprisonment or less and is then released to a period of probation.

sentence to be guideline compliant absent a mitigating factor, the length of the imposed prison term before any time is suspended must fall within the guideline range and the portion to be served must either be within the prison range or be six months or less in a box providing the option of a short split sentence (District of Columbia Sentencing Commission Annual Report, 2006: 12).

In December 2006, the Commission released its evaluation of the Sentencing Guidelines pilot program. Though its analysis was “necessarily preliminary” because it had less than two years of sentences under the Guidelines in its datafile, and “not nearly enough sentences in the more serious and complex felony cases that are likely to present the most difficult sentencing decisions for the judge,”²⁷ the Commission concluded:

[T]he preliminary evidence is compelling. In virtually every category with enough cases for analysis, we are able to measure dramatic reduction in the degree of unexplained variation in sentences, which was the primary goal of the guidelines system. At the same time the guidelines do not appear to be causing any unintended consequences, and in particular they appear to be neutral with respect to the rate of disposition by guilty plea and by trial, the use of prison and alternatives to prison, and the average length of prison sentences imposed (District of Columbia Sentencing Commission Annual Report, 2006: 2).

More specifically, the Commission concluded that 87.9% all sentences imposed were “within the box,” while the remaining 12.1% were “outside the box.”²⁸ When

²⁷ The Commission drew its data from the Superior Court Information System (CIS). The CIS system is a comprehensive database containing all felony sentences occurring during the study period before and after guidelines. The CIS system does not allow the Commission to disaggregate the data by criminal history score, because out-of-state convictions are not recorded in the CIS database. This produces a distorted picture of true criminal history. Therefore, the analysis assumes that criminal history and other factors not in the database remained relatively constant during the three-year period from 2003 through 2005 and that, therefore, any changes in sentencing disparity are attributable to the guidelines and not these other factors. The Guidelines applied to guilty pleas and verdicts entered on or after June 14, 2004, but most of these cases were not sentenced and did not begin to appear in the database until August of 2004, at the earliest (District of Columbia Sentencing Commission Annual Report, 2006: 32).

²⁸ The Master and Drug Grids were designed with a recommended sentencing range for each of sixty boxes corresponding to a particular offense severity level and criminal history score. In some boxes, a prison sentence is the only option consistent with the guideline recommendation. In some boxes, either a prison sentence or a short split sentence -- defined as a sentence in which the defendant serves a sentence of six

compliant “outside the box” sentences were included, i.e., those where the judge has articulated aggravating or mitigating reasons for departing, the overall compliance rate increases to 88.8% (District of Columbia Sentencing Commission Annual Report, 2006: 14).

As to whether the Guidelines reduced sentencing variation or disparity, the Commission’s methodology was to compare the distance between actual sentences that were imposed in a given offense severity group and the mean sentence for that group. If the average distance between the actual sentences and the group mean declined in the Guidelines period, the Commission wrote, then it could be presumed that the Guidelines reduced unexplained sentence variation (District of Columbia Sentencing Commission Annual Report, 2006: 32). Because the Guidelines were introduced in 2004, 2003 was a pre-Guidelines year, 2005 was a Guidelines year, and 2004 was a hybrid year. The data revealed that the average distance from the mean decreased between 2003 and 2005 for both Drug Grid sentences and Master Grid sentences. The average distance from the mean for Drug Grid sentences dropped from 12.3 months in 2003 to 7.3 months in 2004 and to 6.5 months in 2005, while average distance from the mean for Master Grid sentences dropped from 14.1 months in 2003 to 9.3 months in 2004 and to 8.5 months in 2005 (District of Columbia Sentencing Commission Annual Report, 2006: 35).²⁹

months or less and is then released to a period of probation -- is an option. In the remaining boxes, a prison sentence, a short split sentence or probation are all options permitted by the guideline recommendation. Sentences to one of these options are considered “within the box.” Sentences departing above or below the prison range in a given box or the imposition of probation or a split sentence in a prison only box are considered “outside the box.” (District of Columbia Sentencing Commission Annual Report, 2006: 11).

²⁹ Probation sentences were excluded from this calculation, as the distance from the average sentence could not be computed on the same metric with prison sentences. However, when probation sentences were treated as a sentence of zero months and included in the analysis, the “conclusion that guidelines appear to reduce variation [was] reinforced” (District of Columbia Sentencing Commission Annual Report, 2006: 33).

The Commission presented the same data broken down by specific offense severity groups on both grids. In five of the 12 offense severity groups, sentence variation between 2003 and 2005 decreased. In one group (Drug Group 3), there was no change. Of the remaining groups, Master Groups 1, 2, 3, 4, and 7 and Drug Group 1 had too few cases for analysis.³⁰ In the other groups, the average distance from the mean for sentences in Master Groups 5 and 9 and Drug Group 2 fell dramatically: from 9 months in 2003 to 3 months in 2005 (67%) in Master Group 9; from 83 months in 2003 to 30 months in 2005 (64%) in Master Group 5; and from 17 months in 2003 to 7 months in 2005 (59%) in Drug Group 2. The reduction in the distance from the mean in Master Groups 6 and 8 was not as dramatic but still was significant: from 11 months in 2003 to 7 months in 2005 (37%) for Master Group 8; and from 22 months to 15 months (32%) in Master Group 6 (District of Columbia Sentencing Commission Annual Report, 2006: 34). Taken together, the Commission concluded, these findings were “the strongest evidence to date that sentence variation that cannot be explained by the current offense or the offender’s prior criminal record has been reduced since the advent of guidelines, fulfilling the major stated purpose of the pilot guideline program” (District of Columbia Sentencing Commission Annual Report, 2006: 34). The Commission concluded:

In sum, because of the short time the guidelines have been in effect and the relatively small sample of guideline cases available for analysis, particularly in the more serious and complex cases, it is too soon to know for sure whether the implementation of the pilot sentencing guidelines system in June 2004 has affected the overall trends in sentencing. What can be said is that guidelines appear to have reduced disparity without altering significantly historical sentencing patterns for the in/out decision

³⁰ As a general rule of thumb, the Commission considered any group with fewer than 50 cases to be too small for reliable analysis. Under this standard, Drug Group 1 and Master Groups 1, 2, 3, 4 and 7 were too small. Drug Group 1 was omitted from the analysis because it had only two reported cases in 2003 and none in 2004 or 2005 (District of Columbia Sentencing Commission Annual Report, 2006: 34).

or for average sentence length. This preliminary result is consistent with the stated principle that the guideline sentences should reflect historical sentencing practices as closely as possible (District of Columbia Sentencing Commission Annual Report, 2006: 36).

The Commission also found evidence of reduced disparity in focus groups with judges, prosecutors, and defense attorneys. Many participants in the judicial focus group praised the Guidelines' apparent success in narrowing judicial sentencing discretion (thereby reducing inter-judge disparity), while still allowing flexibility to fashion appropriate individualized sentences (District of Columbia Sentencing Commission Annual Report, 2005: 14).³¹ In the focus groups of prosecutors and defense attorneys, lawyers on both sides praised the sentencing guidelines for reducing inter-judge disparity. They specifically noted that the sentencing guidelines have done a good job of capturing the midrange of historical sentences for most crimes, effectively eliminating the pre-Guidelines extremes between judges sentencing in similar cases (District of Columbia Sentencing Commission Annual Report, 2006: 27).

As to whether the Sentencing Guidelines impacted plea rates, the Commission anticipated that increased uniformity and predictability in sentencing under the Guidelines might bring with it a change in the process by which the parties decide to dispose of a case by guilty plea or by trial. There was some anecdotal evidence from focus groups with defense attorneys and prosecutors that guilty pleas were easier to negotiate under guidelines, at least for some crimes, because both the prosecution and the defense had a clearer picture of the likely sentencing range in typical cases, particularly for offenses with extremely wide statutory sentencing ranges. However, the Commission

³¹ Examples of the comments from judges included the following: "guidelines provide an appropriate anchor for individual sentences;" and "because they have wide ranges, the guideline recommendations are not unduly restrictive" (2005 Report: 14).

found that, “apart from any salutary effect on the negotiation of plea agreements, to date the Guidelines [did] not appear to have had any measurable impact on the percentage of cases resolved by guilty plea and by trial...the pilot Guideline program appears to be neutral with regard to this important aspect of case processing (District of Columbia Sentencing Commission Annual Report, 2006: 32).

In 2007, the Council made the Guidelines a permanent feature of sentencing in the District of Columbia Superior Court.³² In its 2008 Annual Report, which covered sentences from July 1, 2006 to December 31, 2007, the Commission found an increased rate of judicial compliance with the Guidelines (District of Columbia Sentencing Commission Annual Report, 2008: 3). The Commission concluded:

Overall, compliance has generally increased from the last report. The percentage of sentences within the box grew from 87.9% in the previous period to 89.5%...92.5% of prison sentences were within the box in the current period, compared to 89.7% in the previous period. However, the percentage of probation sentences that were within the box decreased slightly from 91% in the previous period to 89.3% in the current period, and the percentage of short split sentences within the box also decreased slightly from 98.6% to 97.1% (District of Columbia Sentencing Commission Annual Report, 2008: 13).

In its 2009 Annual Report, which covered sentences from January 1, 2008 through December 31, 2008, the Commission found that 89.8% of all sentences were “within the box,” while the remaining 10.2% were “outside the box.” The overall compliance rate increased to 90.3%. (District of Columbia Sentencing Commission Annual Report, 2009: 5). The Commission concluded:

Compliance has remained exceptionally high, although there were slight variations from what we reported in 2008. The overall percentage of sentences within the box remained relatively constant: 89.8% in the current period compared to 89.5% in the 2008 report. Among prison

³² See The District of Columbia Sentencing and Criminal Code Revision Commission Amendment Act of 2007.

sentences, the percentage within the box dropped from 92.5% to 90.3%. The percentage of probation sentences that were within the box decreased slightly from 89.3% in the 2008 report to 87.1% in the current period, and the percentage of split sentences within the box also fell from 97.1% to 94% (District of Columbia Sentencing Commission Annual Report, 2009: 12).

The Hydraulic Displacement of Discretion Argument

Findings by researchers and sentencing commissions that sentencing guidelines have reduced disparity should be interpreted with caution. The ideal research design for studying disparity reduction consists of a simple pre- and posttest comparison of two samples of offenders.³³ Although this design appears straightforward, there are several methodological problems (Bureau of Justice Assistance, 1996: 81). One challenge is to separate out the effect of the sentencing guidelines from the effects of other changes that occurred during the time period from which the cases are drawn (Spohn, 2002: 287). These changes may include the introduction of mandatory minimum statutes or other legal changes at about the same time as the implementation of sentencing guidelines (Spohn, 2002: 288).³⁴

A second challenge, which was discussed briefly above, is to decide how to define and measure disparity (Spohn, 2002: 287). Although some researchers use

³³ The first sample would be those offenders sentenced under the preguideline sentencing structure with the second sample being similarly situated offenders who were sentenced under the guidelines. Statistical comparisons between the two samples would be made on comparable offense categories and other relevant factors to ensure that both samples are statistically equivalent. Analyses would then be made to determine whether the imposition of sentences has become more standardized for the guideline cases than was the case for preguideline samples (i.e., less variance in case disposition and sentence length) (Bureau of Justice Assistance, 1996: 83).

³⁴ The Bureau of Justice Assistance (1996) further explained:

[B]ecause it is not possible to use an experimental design in which a pool of offenders is randomly assigned to either a guideline or a nonguideline system, reductions in disparity that would have occurred independently of the passage of guidelines cannot be controlled for. This is especially likely with the growing popularity of numerous legislative actions such as mandatory terms that require offenders convicted of specific crimes to be imprisoned and spend a specific amount of time incarcerated. A great deal of determinacy may already have been achieved before the guidelines were adopted (p. 83).

sophisticated statistical techniques to model sentencing in preguideline and postguideline eras, others simply compare the degree to which sentences in the pre-and post-reform eras reflect the relationship between crime seriousness and prior record expressed in the guidelines (Spohn, 2002: 287). Use of this latter approach fails to consider factors such as age or employment history that may have been legitimate determinants of sentencing in the pre-reform era but are deemed irrelevant in the post-reform era. This approach virtually guarantees that guideline sentences will appear more uniform than preguideline sentences (Bureau of Justice Assistance, 1996: 83; Spohn, 2002: 287).³⁵

Finally, critics of the conclusion that sentencing guidelines have reduced disparity argue that they may have simply displaced discretion (and possibly disparity) from the judge at the sentencing phase to the prosecutor at the charging and plea bargaining stages (Alschuler, 1978; Lagoy et al., 1979; Coffee and Tonry, 1983). This argument, McCoy (1984) wrote, is frequently referred to as the “hydraulic displacement of discretion” thesis:

An often-invoked simile likens the discretion-ridden criminal justice system to a set of hydraulic brakes. If you push down on one point, the displaced volume of fluid will exert pressure and “bulge out,” reappearing elsewhere in the mechanism. Similarly, discretion in the criminal justice system can never be extinguished; it is simply dislodged and shifted to other system parts. The metaphor illustrates the point that concentrating on one particular component of the justice system when attempting to control abuses of discretion is probably a fruitless strategy (p. 256).

As Engen and Steen (2000) put it, “Sentencing guidelines disregard a basic sociological fact of modern organizations...The intervention in sentencing decisions as one element of the criminal justice system results in possibly neutralizing reactions in

³⁵ As Tonry (1996) explained, the use of the sentencing guidelines’ offense severity and criminal history classifications as the basis of comparisons rather than comprehensive statistical models “inevitably exaggerates the extent to which disparities have been reduced” (Tonry, 1996: 40).

other parts of that system” (p. 1372). If there is a hydraulic displacement of discretion to prosecutors in sentencing guidelines systems, gains in sentencing fairness may be eroded by greater disparities at the charging and plea bargaining stages (Miethe, 1987). The displacement of discretion to prosecutors “could ultimately serve to undermine the goal of uniformity in sentences, and so disparities based on extra-legal attributes of defendants might persist even in determinate sentencing states” (Wooldredge and Griffin, 2005: 302).³⁶

In a recent critique of Judge Marvin Frankel’s arguments in favor of sentencing guidelines, United States District Judge Lynn Adelman, expressed concern about the transfer of power to prosecutors in the Federal Sentencing Guidelines context:

When Congress enacted the [Sentencing Reform Act] and the [United States Sentencing] Commission promulgated the guidelines, Frankel realized his goal of reducing judicial sentencing discretion. Unsurprisingly and, as he should have anticipated, one result was to increase the power of prosecutors over sentences. Judges could no longer serve as a bulwark against the consequences of prosecutors’ charging decisions, even when they found those consequences objectionable. Under the guidelines, prosecutors, who are advocates, largely controlled the severity of sentences through charging decisions and plea offers, and judges, who are neutrals, often had to impose sentences that they believed were unfair (Adelman and Deitrich, 2008: 254).

The displacement of discretion to prosecutors is not inevitable in sentencing guidelines systems, however. While McCoy (1984) used the hydraulic brakes metaphor to illustrate that discretion is not extinguished but is “simply dislodged or shifted to other

³⁶ A finding of hydraulic displacement of discretion to prosecutors would be important, not just because it would call into question conclusions that determinate reforms have reduced disparity, but because such a dislodging of discretion may be undesirable on other grounds. Alschuler (1978) argued that prosecutors are advocates, are often at an early stage of their careers, their decisions are made behind closed doors and are neither explained nor on the record nor subject to review. Judges, on the other hand, are generally neutral to case outcomes, are selected for high levels of professional attainment, are required to work in open court and explain their decisions on the record, and can be second-guessed by appellate courts (see Reitz, 1998). The goals of a sentencing system, therefore, are “best furthered by visible, professional, and accountable actors who have primary responsibility to further systemic goals as opposed to the interests of particular parties” (Reitz, 1998: 403).

[criminal justice] system parts” (p. 256), she included an optimistic corollary: Progress “toward a professional, responsive justice system” can be made “if discretion is carefully controlled in all system parts (and, of course, this means that each component still retains some measure of discretionary power, though it is carefully bounded)” (p. 256). Walker (1993) similarly opined that discretion is not always displaced to other criminal justice actors, and that when displacement does occur, it is relatively minor and does not necessarily subvert the intent of reforms such as sentencing guidelines (p. 150).

Forst (2002) wrote that, while judges surely have less discretionary authority under sentencing guidelines, it is not evident that prosecutors have more discretion because, unlike judges, prosecutors reported to senior level attorneys both before and after sentencing guidelines (Forst, 2002: 514). According to Miethe (1987), social control mechanisms in the form of informal charging and plea bargaining policies may limit abuses of prosecutorial discretion. Moreover, as Miethe (1987) wrote, “prosecutors may perceive the development of regulations on judicial discretion as an initial step in restructuring the entire criminal justice system,” and they may limit their use of greater discretion due to “perceptions of subsequent control over their discretionary power” by legislatures, sentencing commissions, or other bodies (p. 174). Finally, Frase (1999) wrote that the lack of effective prosecutorial regulation may be a positive feature of a carefully and rationally devised sentencing guidelines system:

I believe that most state guidelines systems are valuable reforms even if prosecutorial decisions remain substantially unregulated. I have two reasons for this belief. First, the absence of widespread complaints about prosecutorial dominance in state guidelines systems is an important sign, suggesting that closer regulation may not be needed. Specifically, I am suggesting that, in a properly balanced guidelines system—that is, one with reasonable sentence severity levels and few mandatory minimum statutes, in which courts retain substantial sentencing discretion for any

given offense (due to broad guidelines ranges, limited appellate scrutiny, and/or flexible departure powers)—it is rare that prosecutorial decisions will produce sentences which judges strongly disapprove, yet are powerless to prevent (as often seems to occur in federal courts). Second, prosecutorial charging and plea bargaining are valuable sources of flexibility and moderation in sentencing. These discretionary powers permit systems to consider individual offense and offender factors which may not fit squarely within formal statutory and guidelines rules.

Many scholars predict that systems with greater restriction of judicial discretion will have a greater hydraulic effect. As discussed earlier, curtailment of judicial discretion is most commonly achieved by making the guidelines presumptive and prescriptive. Restriction of discretion is also achieved by creating narrower ranges prescribing the sentences judges may select. Guidelines systems with less legal force (voluntary systems), wider sentencing ranges, and a descriptive approach should result in less shifting of discretion to prosecutors. Miethe (1987) wrote:

Because there is no legal mandate to ensure compliance with voluntary guidelines and because descriptive guidelines are typically based on average sentences in the past, one would expect few changes over previous practices and little impetus for the deflection of judicial discretion to prosecutors. Furthermore, even under most presumptive guidelines, judges still retain enormous discretion because the range of sentence durations is extremely wide...major changes in charging and plea bargaining decisions may not typify post-guideline practices (157).

Lagoy, et al. (1979) developed a typology suggesting that the power of the prosecutor over sentencing outcomes will be greatest in sentencing structures with tight control over judicial discretion (“share”) and severe sentences (“stake”):

[P]rosecutorial impact on sentencing will be greatest under sentencing structures typified by drastic curtailment of judicial discretion and severe sentences (e.g., high mandatory sentences). Conversely, the prosecutorial impact will be least under structures marked by wide judicial discretion and lenient sentences...Between these two extremes, prosecutorial power

will vary according to the degree to which these factors are present in the sentencing structure within which the prosecutor functions (p. 217).³⁷

In short, while numerous studies have found that sentencing guidelines reduce disparity, the majority of them have not examined whether prosecutorial charging or bargaining practices also changed as a result of determinate sentencing reforms. If prosecutorial practices do vary according to the degree of determinacy in a sentencing system, it is possible that disparity is not reduced by the sentencing scheme but rather is displaced from judges to prosecutors. The vast majority of studies finding that sentencing guidelines reduce disparity are problematic because they use only conviction data (Piehl and Bushway, 2007). This type of data can not detect whether a hydraulic displacement of discretion has occurred:

Unfortunately, information about conviction offense will not reveal the existence or extent of charge or fact bargaining. Research that does not consider what takes place prior to conviction systematically misses any change in the operation of bargaining associated with the change in sentencing system. Therefore, while studies using conviction data generally find less variation in sentencing outcomes following introduction of guidelines, the methodology cannot discern whether discretion is merely displaced to the charging stage of the process (Piehl and Bushway, 2007: 109).

The problem of unanalyzed prosecutorial discretion is widely recognized by scholars, but it does not stop them from concluding that guidelines (particularly presumptive sentencing guidelines) have reduced overall discretion and disparity (Bushway and Piehl, 2007: 465). Indeed, virtually every article that studies disparity in sentencing guidelines using guidelines data contains a disclaimer that the study can not

³⁷ Lagoy, et al. (1979) recognized that this typology is an oversimplification of the dynamics of criminal prosecution and sentencing and that many influential factors have not been included in their analysis. Nevertheless, they suggested that the typology is a useful starting point for analysis of the relationship between the prosecutorial function and determinate sentencing structures (p. 217).

account for prosecutorial disparity that may result from prosecutorial discretion (Bushway and Piehl, 2007). The next section provides an overview of the limited number of studies that specifically test the hydraulic displacement of discretion thesis.

Empirical Research on the Hydraulic Displacement of Discretion Thesis

In 1996, the Bureau of Justice Assistance wrote that “[l]ittle evidence exists to document how much of a shifting of discretion to prosecutors has occurred in sentencing guidelines systems” (p. xv). This statement is still true today. While the hydraulic effect influences contemporary research to some extent, “little research has even attempted to test its central hypothesis” (Engen and Steen, 2000: 1358). This is due largely to the scarcity of available data prior to the prosecutorial phase (Wooldredge and Griffin, 2005: 301). Prosecutors in most jurisdictions do not report information about the numbers and types of arrests received from the police and their charging decisions in the same way that police report on the number and types of arrests (Forst, 2002: 520).

The studies that do exist have found very limited evidence of displacement of discretion to the prosecutor. Miethe and Moore (1985) examined charging and plea bargaining practices before and after Minnesota implemented presumptive guidelines in 1980. They took samples of felons convicted in the fiscal year 1978 and the first 18 months after the new law was enacted in May, 1980.³⁸ With respect to whether the guidelines reduced disparity in *judicial* decision making, Miethe and Moore (1985) found that the most important predictors of the likelihood of incarceration were guideline variables (e.g., offense severity, criminal history, weapon use), whereas the direct impact

³⁸ Cases resulting in acquittals or dismissals on all felony counts and those involving misdemeanor convictions were not included in the sample.

of several socioeconomic attributes (e.g., race and employment status) was substantially reduced. They observed a similar trend for pre- and postguideline determinants of length of imprisonment (Miethe and Moore, 1985: 358).

The three prosecutorial decisions examined were whether the defendant received any charge reductions,³⁹ whether the defendant negotiated a reduced sentence,⁴⁰ and whether jail time was a condition of a stayed sentence (Miethe and Moore, 1985: 347).

Miethe and Moore found that prosecutorial practices did not change dramatically after the introduction of the sentencing guidelines and that the changes that did occur were related to changes in case attributes⁴¹ rather than offender characteristics. They concluded:

The impact of the felon's socioeconomic profile on the likelihood of charge bargaining either stayed constant or, in some cases, diminished in importance after the implementation of the law...Circumvention of the integrity of the guidelines through prosecutorial discretion in plea bargaining did not materialize nor were social biases enhanced or displaced through sentencing decisions not covered by the guidelines (p. 360).

Noting that Miethe and Moore's (1985) study was problematic because it analyzed practices in only the first year after the guidelines were implemented, Miethe (1987) used samples of felons convicted in Minnesota for the fiscal year 1978 (two years before the guidelines), the first 18 months under the guidelines (May 1, 1980 to October 1, 1981) and for an additional 12-month period (October, 1981 to September, 1982) (p. 161). Miethe (1987) examined whether there was a hydraulic effect following the guidelines in Minnesota in 1980 and, if so, whether that displacement of discretion

³⁹ A charge reduction was noted if either charges were reduced to a lesser offense or dropped as a result of a plea agreement for any of the three most serious charges.

⁴⁰ A sentence negotiation was recorded if the terms of a plea agreement for any of the three most serious charges involved a limited or capped jail sentence, a stay of imposition of the sentence, a concurrent sentence, or the prosecutor standing silent at sentencing.

⁴¹ Case attributes included the alleged severity, whether there was a personal crime, whether there were multiple alleged offenses, and whether it was an urban jurisdiction.

altered the nature and determinants of prosecutorial practices. Miethe hypothesized that, if the hydraulic effect is a logical consequence of determinate sentencing systems, overall rates of charge bargaining and sentence negotiations should be higher in post-guideline periods because prosecutors would use greater power to entice defendants into guilty pleas. Second, if the hydraulic effect undermines the goals of sentencing neutrality and uniformity through greater differentiation in the type of person who receives plea concessions, measures of the felon's social profile should more accurately predict charging and plea bargaining practices in the post-guidelines period (Miethe, 1987: 160).

Miethe first examined pre-/post-guideline differences in the average severity of initial charges, the rate of charge dismissals, the rate of charge reductions, sentence negotiations, and overall plea bargains (Miethe, 1987: 160). The major charging variable examined by Miethe was the severity of the most serious alleged charge initially filed by the prosecutor (Miethe 1987: 162).⁴² Charge bargaining was operationalized in terms of whether any of the three most serious charges were either dismissed or reduced as part of the plea agreement. An overall measure of plea bargaining composed of both charge bargaining and sentence negotiations was also included (Miethe 1987: 162). The exogenous variables included offense, case processing and offender attributes such as the severity of the most serious alleged offense, whether a dangerous weapon was used, whether the crime involved multiple offenders, the total number of incidents, and whether the case bordered the in/out dispositional line, and the offender's criminal history score, race, sex, marital status, and employment status (p. 164-165). A composite measure of the offender's demographic profile was also constructed, which compared individuals

⁴² This variable was measured on a 10-point scale ranging from 1 (e.g., possession of marijuana) to 10 (2nd degree murder). The ranking of crimes on this scale is identical to the index developed by the Minnesota Sentencing Guidelines Commission to measure the severity of the convicted offense (Miethe, 1987: 162).

whose demographic profile fit the stereotypical image of a “high risk” or “dangerous” offender (e.g., male, non-white, single and unemployed) with other profiles (p. 165).

Miethe (1987) found little to no evidence of significant pre-/post-guideline differences in the rate of charge reductions, the rate of charge dismissals, or the average severity of the initial charge (p. 165). He argued, however, that the rate of charge reductions and dismissals may not be the best indication of displacement of discretion and its effect on sentencing guideline goals (Miethe, 1987: 160).⁴³ Rather, Miethe (1987) wrote, the focus should be on whether greater socio-economic differentiation has occurred in plea bargaining practices over time.⁴⁴ Miethe found little evidence that extra-legal attributes became more important predictors of dispositions (severity of initial charges, charge dismissals, charge reductions, sentence negotiations, and overall plea bargains) after the guidelines were implemented. Regardless of the time period, offenders who were male, used dangerous weapons and allegedly participated in multiple behavioral incidents were initially charged with more serious offenses than their counterparts (Miethe, 1987: 168). While pre-guideline models of charge dismissals, charge reductions and sentence concessions were significantly different than their

⁴³ Miethe reasoned, first, that increases in plea bargaining rates, rather than being due to displacement per se, may be attributable to a general rise in the crime rate in post-guideline periods which may require greater use of plea-bargaining for relieving case pressure (Miethe, 1987: 160). On the other hand, even if the overall rates of plea bargaining did not increase over post-guideline periods, the “hydraulic effect” may still be operative if prosecutors are more likely to enter plea agreements for certain types of crimes, but less likely to enter them for others (p. 160).

⁴⁴ Miethe wrote:

[T]he critical question examined here is whether prosecutors are using their greater discretionary power in a manner which enhances socio-economic biases in plea bargaining and, in turn, undermines the explicit goals of the sentencing guidelines... If the hydraulic effect is a logical consequence of determinate sentencing systems..., major differences in the determinants of prosecutorial practices should be observed over pre- and post-guideline time periods. If the hydraulic effect undermines the goals of sentencing neutrality and uniformity through greater differentiation in the type of person who receives plea concessions, measures of the felon’s social profile (e.g., sex, race, unemployment status, marital status) should more accurately predict charging and plea bargaining practices in post-guideline periods (p. 160).

postguideline counterparts, these time-specific models were “primarily due to the differential importance given to case processing and offense attributes, rather than offender characteristics” (Miethe, 1987: 168). Miethe concluded:

[T]he results of this study suggest that the hydraulic displacement of discretion is not inevitable and does not necessarily dampen the success attributed to the primary reform effort...Initial charging and plea bargaining practices did change after sentencing guidelines were implemented, but greater socio-economic disparities in non-regulated prosecutorial decisions did not circumvent the goals of sentencing neutrality and uniformity (p. 175).

In 2005, Wooldredge and Griffin examined whether Ohio’s implementation of sentencing guidelines in 1996 resulted in significant changes in prosecutorial decisions related to charging severity, dropped charges, charge reductions, and overall plea bargains. They noted that Ohio’s guidelines were “considerably more flexible”⁴⁵ than Minnesota’s and, thus, “one might expect very similar findings to those of Miethe’s (1987) study” (p. 303). They also noted that at the time there was no published research on the applicability of the hydraulic displacement thesis in states with less restrictive guidelines such as Ohio (p. 303).⁴⁶

⁴⁵ Members of the Ohio Commission did not want to adopt the matrix-style grid used in other states and in the federal system. Rather, they preferred a “more flexible scheme based on presumptions, judicial discretion, and truth in sentencing.” The preference for greater flexibility reflected members’ concerns with the drawback associated with more rigid schemes such as the inability to individualize sentences (Wooldredge and Griffin, 2005: 303).

⁴⁶ Wooldredge and Griffin offered a specific illustration of how Ohio’s guidelines differed from those in Minnesota:

The new [guidelines] scheme...still permits a wider range of discretion compared to other states with more structured sentencing. For example, a Minnesota judge selects from a range of 44 to 52 months for a first-degree felon whereas an Ohio judge selects from 36 to 120 months. Although it is presumed that a first-time offender would receive no more than 36 months imprisonment in Ohio (a shorter term than the presumed 48 months in Minnesota), judges have much more latitude when determining the length of imprisonment for repeat offenders who have previously served prison time. This range of 84 months in Ohio (versus 9 months in Minnesota) allows judges more discretion in crafting a sentence to the particulars of a case. While the greater flexibility of Ohio’s scheme may reduce the impact of the new guidelines on other aspects of case processing (such as charge reductions), it permits broader discrepancies in the length of imprisonment compared to other states (p. 303).

Woolredge and Griffin (2005) drew two cross-sections of indicted suspects reflecting pre- and post-guideline populations to permit the estimation of the multivariate models for each time period (p. 304). The Ohio Sentencing Guidelines became effective on July 1, 1996. The pre-guideline sample included persons indicted between July 1, 1995 and June 30, 1996. None of these cases disposed after July 1, 1996 was subject to the new guidelines. The post-guideline sample included persons indicted between January 1 and December 31, 1997. Woolredge and Griffin selected indictments beginning six months after implementation of the guidelines to avoid cases where court participants were still learning the nuances of the new scheme. They selected over 6,000 suspects from twenty-four counties in Ohio. Woolredge and Griffin (2005) collected data from prosecutors' and probation offices. Prosecutors' files included data on general and specific case characteristics (e.g., types of offenses, felony levels indicted on, the use of weapons, types and amounts of drugs, victim injury) as well as the sex, race, and birth date of suspects. Probation files provided data on other characteristics of defendants including criminal histories, marital status, employment status, and history of substance abuse (p. 304).

The first stage of the analysis focused on whether the guidelines corresponded with significantly lower odds of being indicted on first and second-degree felonies. This stage also tested whether the guidelines coincided with significant increases in the odds of (1) all charges being dropped after indictment (among all indicted suspects), (2) guilty pleas with agreements from prosecutors (also among all indicted suspects), (3) some charges being dropped between indictment and guilty plea (among those who pled guilty via agreements with prosecutors), and (4) reductions to lesser charges (also among those

who pled guilty via agreements) (Wooldredge and Griffin, 2005: 304). These main effects of sentencing guidelines were examined by estimating period-specific models of each outcome and then comparing them (Wooldredge and Griffin, 2005: 304).

Wooldredge and Griffin's findings provided modest evidence that the guidelines corresponded with significant differences in charging and plea bargaining practices. While the shift to guidelines did not coincide with significant changes in likelihoods of indictment on a first or second-degree felony, all charges being dropped after indictment, pleading guilty with prosecutorial agreement, and some (but not all) dropped charges, they did coincide with a significant increase in rates of charge reductions among defendants who pled guilty. Thus, if a hydraulic displacement did occur, it translated into noticeable differences in one out of the five outcomes (Wooldredge and Griffin, 2005: 313).

The second stage of their analysis looked at changes in the specific effects of case and defendant characteristics on case dispositions (Wooldredge and Griffin, 2005: 301). Similar to Miethe's (1987) approach, this procedure involved testing whether the magnitude of a regression coefficient (for a certain predictor) differed significantly between the two periods (Wooldredge and Griffin, 2005: 307). They found that some changes occurred in the specific effects of various defendant characteristics on some of the outcomes examined, but that these changes did not uniformly result in harsher dispositions for defendants facing greater social and economic disadvantage. In particular, the models of charge reductions revealed "absolutely no significant differences in the effects of defendants' extra-legal characteristics," and the few significant differences in extra-legal effects that were uncovered in the other model comparisons did

“not establish a theme that defendants facing greater social and economic disadvantages were consistently treated more severely by prosecutors after the implementation of sentencing guidelines” (Wooldredge and Griffin, 2005: 314). Similar to Miethe’s findings, any increase in levels of prosecutorial discretion that might have occurred did not result in substantive extra-legal disparities in case dispositions (Wooldredge and Griffin, 2005: 301).⁴⁷ Still, Woolredge and Griffin (2005) wrote, the fact that there was any evidence at all of a hydraulic effect was substantively significant given Ohio’s guidelines structure:

Miethe (1987) observed that implementation of more flexible determinate sentencing schemes might be less likely to produce significant changes in the exercise of prosecutorial discretion because such schemes still permit a fair amount of judicial discretion...Ohio’s reform represented a more flexible scheme compared to similar guidelines implemented in other states (particularly Minnesota). Development of the scheme was also guided heavily by “average” or “going rate” sentences that, according to Miethe, should reduce likelihoods of displaced discretion because judges were not (really) changing their sentencing practices. The finding that charge bargaining actually increased under Ohio’s more flexible scheme therefore raises the possibility that even modest shifts in sentencing practices might generate noticeable differences in processing at other decision points within the system (p. 315).

⁴⁷ Wooldredge and Griffin (2005) noted an important qualification to their conclusions: [T]hese conclusions were generalizations across the twenty-four counties examined. Results indicated some very strong jurisdiction differences in disposition rates, including differences in rates of dropped charges, guilty pleas with agreements, and charge reductions. More specific county-by-county analyses would ultimately reveal the magnitude of [the guidelines’] effect on these dispositions for each specific jurisdiction in the sample. Models specified by jurisdiction would necessarily be more parsimonious than those presented due to the more restricted numbers of cases within each county, although zero-order correlations for the relationships of interest might provide a feel for these aggregate level differences....A full understanding of how to effectively reduce discretion at one point in the justice system without affecting other decision points may necessarily require an understanding of the *contextual* differences in case processing between jurisdictions (p. 314).

Piehl and Bushway (2007) suggested a different methodology for testing the hydraulic displacement thesis and applied it in an inter-jurisdictional study. While Miethe (1987) and Wooldredge and Griffin (2005) focused on changes in the rate of plea bargains (“the existence of the bargain”) after sentencing guidelines, Piehl and Bushway (2007) developed an estimate of the difference in the sentencing outcome that can be attributed to charge bargaining (“the value of the bargain”). Their method measures the difference in sentencing outcomes caused by plea bargain and emphasizes the amount in months that the sentence length is reduced. Piehl and Bushway (2007) argued that “in a world in which 90% of the convictions end as a result of a plea bargain,...the substantive value of interest is the difference between what the person would have received if he had not pled and what they received as the result of the plea bargain” (p. 107). They argued that measuring the distance (in months of prison time) moved during a charge bargain may provide a very different estimate of the discretion than is given by the rate of bargaining and that the correlates of these two outcomes may differ (Piehl and Bushway, 2007:105).

What is needed methodologically, Piehl and Bushway (2007) argued, is a way to measure the consequences of the decision to charge bargain (p. 107). In order to measure the value of the sentence length reduction as a result of the bargain, it is necessary to know what would have happened to the person if they did not plea bargain. Though this is unobservable, Piehl and Bushway noted that we have data on what other people who are convicted of these offenses receive at sentencing, and to the extent to which these defendants are similar to the person who plea bargains, we can use this information to create an estimate of the desired counterfactual (Piehl and Bushway, p. 108). Piehl and Bushway (2007) proposed that:

researchers first estimate a model for the expected sentence length at plea using all available information about the case and the criminal history, including the charge at conviction. Then, using these coefficient estimates, we advocate creation of a predicted sentence for these same individuals, where the only change is that the prediction is made with the charge at arraignment versus the charge at conviction. If there has been no charge bargain, the predicted and actual values will be the same on average. However, if there has been charge bargaining, we expect that the predicted values using the charges at arraignment will be higher than the actual values, on average. The difference for each individual will be an estimate of the value of the charge bargain in terms of the sentence avoided by pleading guilty. Or alternatively, the difference will be an estimate of the size of the discretion exercised by the prosecutor in assigning the charge (p. 108).

To build their empirical model, Piehl and Bushway began with the traditional model for explaining sentence length using only the factors usually considered to be legitimate factors involved in sentencing, namely case characteristics and criminal history (Piehl and Bushway, 2007: 111).⁴⁸ Piehl and Bushway's estimating equation involved several modifications to this approach. First, they logged sentence length to help take into account non-linearities across the sentencing range (p. 111). Second, because the truncation of non-incarcerated offenders can lead to substantial bias in the coefficient estimates in the sentence length regression, they specified a model that includes those who receive terms of incarceration as well as those who do not. They addressed truncation by modeling the sentence length as censored at zero, using a Tobit regression. They also estimated a probit model to test whether their results were driven by the Tobit approach's parametric assumptions about censored variation (p. 112).

Piehl and Bushway's equation included five crime types—person, property, drug, public order, and other—as dummy variables which they interacted with a misdemeanor

⁴⁸ They did not include the presumptive sentence as a regressor because their paper studies prosecutor decision making rather than judicial decision making. As they stated, “[t]he presumptive sentence is the outcome of prosecutor decision making, not the starting point” (Piehl and Bushway, 2007: 111).

dummy to account for the difference between felonies and misdemeanors. The categorization was based on the most serious charge at conviction (p. 112). Criminal history was represented using four variables measuring active criminal justice status at the time of current offense and numbers of past felony arrests, prison terms and jail terms (p. 112). They also included sex, race and age. Although they state these factors were not legitimate sentencing factors, they may be correlated with unobserved factors that are legitimate. Failure to control for these factors, therefore, could be particularly problematic because the jurisdictions they studied had different case mixes. The results were not sensitive to whether or not these demographic variables were included (p. 112).

Instead of comparing the proportion of charge bargains across each jurisdiction as in Miethe (1987), Piehl and Bushway estimated how much difference in sentence length could be attributed to the charge bargain. Using the estimated coefficients from the equation above, they formed a predicted sentence length (p. 112). This predicted value represented the systematic component of sentencing. They used the most serious crime type for which the person was charged at arraignment to create a second predicted value for each individual (p. 112). They then calculated the difference between each person's expected sentence at arraignment and the predicted actual sentence. The difference represented the effect of charge bargaining (p. 112).⁴⁹

They applied their approach in a comparison of two different types of guideline systems—Maryland (a voluntary guidelines jurisdiction) and Washington (a presumptive

⁴⁹ This estimate, they argued, would be unbiased as long as the relevant predictors have been included in the models. If there were omitted case factors that made the conditional sentences of those with charge bargains systematically different from those without charge bargains, then the estimate would be biased. Testing this assumption would require richer data than is generally available in either single-jurisdiction studies or cross-jurisdiction studies (p. 112).

guidelines jurisdiction).⁵⁰ They used the Bureau of Justice Statistics funded State Court Processing Statistics (SCPS) dataset, which had information on charges earlier than the conviction phase in two counties in Maryland and one county in Washington. While they conceded this dataset is not perfect,⁵¹ Piehl and Bushway argued it had enough information to allow them to at least demonstrate the utility of their approach (Piehl and Bushway, 2007: 122). They found that, although the rate of charge bargaining (in this case, the rate at which people plea down from a felony charge to a misdemeanor conviction) was higher in Maryland, its impact on sentences was greater in Washington (Piehl and Bushway, 2007: 122).

Piehl and Bushway's (2007) estimates were consistent with the hypothesis that strict guidelines lead to substantial displacement of discretion to the prosecutor (p. 107). The finding of differential charge bargaining in these two jurisdictions, Piehl and Bushway (2007) argued, should provide caution when comparing the results of studies of disparity in sentencing across jurisdiction types, as the conviction information in more structured systems such as Washington may represent systematic movement from the arraignment charge (p. 122). Piehl and Bushway (2007) concluded:

In addition to identifying the possible hydraulic displacement of discretion to prosecutors, we have also developed a way to quantify the magnitude of these shifts in practice. By measuring the average change in expected sentence due to charge bargaining, we reveal the relevance of prosecutorial practice, not merely its existence (p. 119).

⁵⁰ Though they focus only on charge bargaining and not on other forms of prosecutorial discretion such as charging decisions or bargaining over the criminal history or facts that will be considered by the judge, Piehl and Bushway (2007) argued that this only means they can not draw conclusions about the total amount of prosecutorial discretion in Maryland and Washington. These limitations, however, "will not affect a comparison of the relative amount of prosecutorial discretion in the two systems" (Piehl and Bushway, 2007: 111).

⁵¹ Piehl and Busway (2007) state that the ultimate ability of this exercise to determine causality is limited because of parsimonious descriptions of crime severity and criminal history in the SCPS data and the use of only three counties in two states (p. 121).

Prior Research on Prosecutor Decision Making

Former United States Supreme Court Justice Robert Jackson famously observed that “the prosecutor has more control over life, liberty, and reputation than any other person in America” (Jackson, 1940). In one of the best known works on the history and functions of the prosecutor, Jacoby (1980) wrote that the American prosecutor “enjoys independence and discretionary privileges unmatched in the world” (p. 3). Yet, the amount of research on the prosecutor is far less than on other actors of the criminal justice system (McDonald, 1979: 9). Worrall, et al. (2006) noted that prosecutors “have been almost completely ignored in criminal justice and criminology” and that “much more attention needs to be given to prosecutors” (p. 497). The lack of attention to the prosecutor is especially evident in research focusing on sentencing. Lagoy, et al. (1979) commented, “In contrast to the voluminous literature on the sentencing power of the legislatures, courts, and parole boards, little has been written concerning the prosecutorial role in the sentencing process” (p. 210). Finally, Ulmer, et al. (2007) stated:

It is well known that more than 90 percent of cases in most jurisdictions in the United States are guilty pleas, and a large portion of these are plea agreements negotiated with a prosecutor. This fact seems to have been forgotten by the many studies throughout the literature that frame sentencing as the study of judicial discretion. However, prosecutors have great influence... We encourage much more research on prosecutorial decisions that directly affect sentencing outcomes. Too often, studies of sentencing and sentencing discretion focus on judges and leave out prosecutors, crucial players in the courtroom work groups (p. 452).

This chapter reviews the literature on prosecutorial decision making that focuses, not on the possible hydraulic displacement of discretion in sentencing guidelines systems, but on prosecutorial practices generally. It describes the charging and plea bargaining

process in the District of Columbia and reviews prior research on the determinants of prosecutor decisions. This research is significant both for its methodological approaches, including ways to measure charging severity and charge bargaining, and its substantive conclusions.

The Charging Function

The two most important functions of prosecutors are charging and plea bargaining. The charging decision has generated the most scholarly interest and is commonly viewed as the most important prosecutorial duty (Jacoby, 1980; Walker, 1993; Spears and Spohn (1997); Spohn, et al., (2001); Davis, 2007). After the prosecutor is notified of the occurrence of a crime or the arrest of a defendant, he or she reviews the facts and evidence, evaluates the case, and decides whether to charge the defendant and what charges to file (Albonetti, 1987). Prosecutors use a variety of procedures for filing charges (Davis, 2007: 23). In the District of Columbia, prosecutions are brought by the D.C. Superior Court Division of the Office of the United States Attorney. The charging process for felony offenses in D.C. consists of: (1) the presentment of criminal charges; (2) the preliminary hearing; and (3) the grand jury indictment. In the presentment stage, the prosecutor generally initiates a formal charge with the “complaint,” a written statement of the essential facts constituting the offense charged. After presentment, the next court date is the preliminary hearing.⁵²

The purpose of the preliminary hearing is to determine whether there is probable cause to believe an offense was committed and that the defendant committed it. The probable cause standard is satisfied if it is more probable than not that the defendant

⁵² In some rare cases, the case is indicted by the grand jury before the preliminary hearing, and the preliminary hearing is not held. Also, a case dismissed at the preliminary hearing for lack of probable cause may be subsequently presented to the grand jury.

committed the crime (Davis, 2007: 26). If the court finds there is probable cause, the case is “bound over” for grand jury action. All felonies must be prosecuted by grand jury indictment unless the right to an indictment is waived by the defendant. The duty of the grand jury is to determine whether there is probable cause to believe that a defendant has committed a crime and should be brought to trial. If the grand jurors do find probable cause, they determine which charges to bring, and those charges are set forth in the indictment (Davis 2007: 25). A grand jury indictment may contain charges in addition to the ones upon which the defendant was originally arrested or presented.⁵³

The prosecutor considers numerous factors when determining whether to file criminal charges and which charges to file. Organizations such as the American Bar Association (ABA) and the National District Attorneys Association (NDAA) provide advisory guidelines and standards on factors to consider. They include: (1) the prosecutor’s reasonable doubt that the accused is in fact guilty; (2) the extent of the harm caused by the offense; (3) the disproportion of the authorized punishment in relation to the particular offense or the offender; (4) possible improper motives for a complainant; (5) prolonged nonenforcement of a statute, with community acquiescence; (6) the reluctance of the victim to testify; (7) cooperation of the accused in the apprehension or conviction of others; (8) availability and likelihood of prosecution by another

⁵³ The purpose of the grand jury is to serve as a democratic and more thorough check on the prosecutor’s decision to charge. Critics argue, however, that grand jurors rarely have difficulty concluding that there is probable cause to believe the defendant committed the offense, and that the prosecutor has full control of the grand jury process, deciding which witnesses to call and which questions to ask (Davis, 2007: 26). Jacoby (1980) explained:

A primary criticism of the grand jury system is that the jurors rely too heavily on the advice of the prosecutor and can form their opinions only on the basis of the evidence that he provides. The grand jury is often alleged to be a de facto “rubber stamp” for the wishes of the prosecutor. Critics cite the statistically low “no bill” rates in many American jurisdictions as proof, and some opponents have even called the grand jury an administrative tool of the prosecutor, which shields his exercise of discretionary power from public scrutiny (p. 103).

jurisdiction; and (9) the strength of evidence (Jacoby, 1980: 117). There are, however, no binding rules or regulations governing prosecutor charging decisions. Prosecutors suffer no penalty for failure to follow standards of organizations such as the ABA or the NDAA (Davis 2007: 30). Critics lament that very few prosecutor offices have manuals with guidelines or policies on how to make charging decisions, and offices that do have such guidelines or policies rarely enforce them (Davis, 2007: 23).

When compared to other decisions by criminal justice officials such as the decision to arrest, the pretrial release decision, the decision to enter a guilty plea, and the decision on sentence severity, there has been relatively little empirical research on the charging decision (Albonetti, 1987: 291). Numerous studies from the 1970s and 1980s found that prosecutors' charging decisions are influenced primarily by the strength of the evidence against the defendant and the seriousness of the offense (Forst, 2002: 518). These studies found that prosecutors decline to prosecute cases when police fail to produce adequate evidence (e.g., physical evidence or witnesses) or when the defendants are not viewed as serious threats to the community (Forst, 2002: 511). The studies also found that prosecutors fail to prosecute in cases based on the victim's relationship with the defendant, particularly in cases of assault and rape. Prosecutors often reject cases, for example, where the assailant is known to the victim because the victims are often uncooperative (Forst, 2002: 512). Spears and Spohn (1997) summarized the major findings of the early studies on prosecutorial charging and screening:

These studies suggest that prosecutors' assessments of convictability are based primarily on legal factors such as the seriousness of the offense (Albonetti 1987; Jacoby et al. 1982; Mather 1979; Miller 1969; M. Myers 1982; Neubauer 1974; Rauma 1984; Schmidt and Steury 1989), the strength of evidence in the case (Albonetti 1987; Feeney, Dill, and Weir 1983; Jacoby et al. 1982; Miller 1969; Nagel and Hagan 1983), and the

defendant's culpability (Albonetti 1987; Mather 1979; Miller 1969; Neubauer 1974; Schmidt and Steury 1989; Swiggert and Farrell 1976). Prior research on charging also highlights the importance of victim characteristics (Albonetti 1987; Amir 1971; Hepperle 1985; Kerstetter 1990; Miller 1969; Stanko 1988; Williams 1978). These studies suggest that prosecutors use stereotypes regarding genuine victims and appropriate behavior (Estrich 1987; Frohmann 1991; LaFree 1989) to predict how judges and juries will react to victims. Prosecutors attribute credibility to victims “who fit society's stereotypes of who is credible: older, white, male, employed victims” (Stanko 1988:172). Victims who do not fit this image or who “precipitate” (Amir 1971) the attack by their behavior are deemed less credible. As Stanko (1988:170) concludes, “[T]he character and credibility of the victim is a key factor in determining prosecutorial strategies, one at least as important as ‘objective’ evidence about the crime or characteristics of the defendant” (p. 502).

Spears and Spohn (1997) examined the effect of victim characteristics and strength of evidence on prosecutor charging decisions in sexual assault cases.⁵⁴ The dependent variable was a dichotomous measure of the decision to file charges or not. The independent variables included measures of case seriousness, strength of evidence,⁵⁵ and victim characteristics. Based on previous research, Spears and Spohn hypothesized that prosecutors would be more likely to file charges if there was an indication of strong evidence, if there were no questions about the victim’s moral character or allegations of risk-taking behavior by the victim, if the victim was an adolescent or adult rather than a child, if the victim was assaulted by a stranger, or if the victim screamed, physically resisted the suspect, or reported the sexual assault within one hour (Spears and Spohn, 1997: 512).

⁵⁴ The data used for their study consisted of a sample of all complaints of sexual offenses received by the Detroit Police Department in 1989. Spears and Spohn selected every second case, for a total of 1,046 cases. They included only cases presented to the Wayne County Prosecutor’s Office for a decision to file charges (N = 321) (Spears and Spohn, 1997: 508).

⁵⁵ The evidence factors were: whether there was a witness to the assault, an injury (other than the rape itself) to the victim, physical evidence to corroborate the victim's testimony, and whether the suspect used a gun or knife during the assault (Spears and Spohn, 1997: 509).

Spears and Spohn (1997) found that the only significant predictors of charging were victim characteristics, with prosecutors being much more likely to file charges if the victim was an adolescent or an adult rather than a child. Charging also was affected by the victim's moral character and behavior at the time of the incident (Spears and Spohn, 1997: 502). The fact that strength of evidence did not have the predicted effect, coupled with the fact that victim characteristics had significant effects, suggested to the authors that prosecutors' charging decisions in sexual assault cases were motivated by different factors than charging decisions in other types of cases. In particular, prosecutors may screen out sexual assault cases unlikely to result in a conviction because of questions about the victim's character and credibility (Spears and Spohn, 1997: 519).⁵⁶

Spohn, et al. (2001) also examined the prosecutor's decision of whether or not to charge in sexual assault cases.⁵⁷ They found that charging decisions reflect the prosecutor's assessment of the likelihood of conviction and that this assessment was based on "typifications of rape and rape victims," the victim's failure to appear for preliminary interviews, the victim's refusal to cooperate in the prosecution of the case, or the victim's admission that the charges were fabricated. The authors also found that cases involving a victim and suspect who were acquainted, related, or intimate partners were more likely than those involving a victim and suspect who were strangers to be prosecuted (Spohn, et al., 2001: 206).⁵⁸

⁵⁶ Spears and Spohn (1997) noted that one limitation was the small sample size of only 321 cases. Second, the study examined the charging decision in a single jurisdiction (Detroit, Michigan). Third, in this particular jurisdiction most of the sexual assaults involved black suspects and black victims. Finally, this study was confined to the screening decision in sexual assault cases and not other types of offenses (Spears and Spohn, 1997: 521).

⁵⁷ The authors used data on 1997 sexual battery cases cleared by arrest in Miami, Florida. They also used interviews with a sample of the attorneys who handled these cases. Spohn, et al., 2001: 206.

⁵⁸ Spohn, et al. (2001) highlighted the fact that their study focused explicitly on prosecutors' charging decisions in sexual assault cases, which prior research suggest are different than other types of cases. In

With the exception of the studies of charging in sexual assault cases, there are relatively few recent studies on prosecutor decisions compared to the 1970s and 1980s. Forst (2002) lamented that we knew less about the charging decision at the turn of the Twentieth Century than in the 1970s and 1980s due to the lack of data on prosecutor decision making (p. 525). As Forst (2002) explained, many of the studies of prior decades were based on data collected through the Prosecutor's Management Information System (PROMIS),⁵⁹ which was published by the Bureau of Justice Statistics (BJS) until it was discontinued in 1992 (p. 525).

The Plea Bargaining Function

It is useful to distinguish between three types of plea bargaining: implicit bargains (which always involve sentences); explicit bargains involving sentence bargaining; and explicit bargains involving charge bargaining.⁶⁰ An implicit bargain refers to those situations in which the defendant does not negotiate a specific agreement with the prosecutor but believes that if he or she is found guilty at trial, he or she will be punished more severely than if he or she had pled guilty. The defendant simply "throws himself on the mercy of the court by pleading guilty to the original charge under the expectation of

particular, prior studies revealed that case outcomes are affected by stereotypes about rape and rape victims, and that only "real rapes" will be taken seriously. Spohn, et al. (2001) cited Estrich's (1987) description of a "real rape" as "aggravated, jump-from-the-bushes stranger rapes" as opposed to "simple cases of unarmed rape by friends, neighbors, and acquaintances." Spohn, et al. (2001) further stated that prior studies of sexual assault case processing decisions, including the decision to charge or not, support these assertions.

⁵⁹ The PROMIS data system collected local area data from numerous jurisdictions including Manhattan, Los Angeles, Washington, D.C., Wayne County (Detroit), Marion County (Indianapolis), and Multnomah County (Portland, Ore.).

⁶⁰ There are many other types of plea bargaining. A prosecutor may, for example, provide leniency to a defendant's accomplices, withhold damaging information from the court, influence the date for a defendant's trial or sentencing, arrange for a defendant to be sent to a particular correctional institution, request that a defendant receive credit for time served while awaiting trial, agree to support a defendant's application for parole, attempt to have detainers from other jurisdictions dismissed, arrange for sentencing in a particular court or by a particular judge, provide immunity for uncharged crimes, or remain silent when the prosecutor's recommendation might otherwise be unfavorable (Alschuler, 1979).

receiving a more lenient sentence thereby” (Padgett, 1985: 756). In sentence recommendation plea bargaining, the prosecutor in exchange for a guilty plea recommends a particular disposition to the judge, who then usually imposes the sentence recommended (Padgett, 1985: 756). In charge reduction plea bargaining or charge bargaining, the prosecutor downgrades or dismisses charges in exchange for a guilty plea to the reduced charge(s) (Padgett, 1985: 756).

According to the D.C. Superior Court Rules of Criminal Procedure, a defendant may plead guilty, not guilty, or nolo contendere.⁶¹ The prosecutor and defense attorney or the defendant may engage in discussions with a view toward reaching an agreement that, upon entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the prosecutor will do the following: (1) move for dismissal of other charges; (2) make a non-binding sentencing recommendation or agree not to oppose the defendant’s request for a particular sentence or sentencing range; or (3) agree that a specific sentence or sentencing range is the appropriate disposition of the case (such an agreement would be binding on the Court once it accepts the agreement). The first type of agreement is a charge bargaining agreement. The second and third agreements are forms of sentence bargaining. The third type of agreement, also known as a Rule 11(e)(1)(c) agreement, is virtually nonexistent in the District of Columbia.

The overwhelming majority of defendants in the District of Columbia enter a plea of “not guilty” at the preliminary hearing, and the case is scheduled for trial. Between the preliminary hearing and trial, the prosecutor and the defense counsel typically engage in plea negotiations and, if the parties reach a plea agreement, the defendant waives his or her right to a trial and enters a plea of guilty to one or more charges (District of Columbia

⁶¹ See D.C. Superior Court Rules of Criminal Procedure, Rule 11.

Sentencing Commission Annual Report, 2006: 30). Plea bargaining in the District of Columbia is generally an informal process. It can occur at any point after the charging decision has been made or even before formal charges are brought (Davis, 2007: 45). In most cases, prosecutors make the plea bargaining decision early in the process. At some point after the defendant is presented with a copy of the charges, the prosecutor will let the defendant know whether there is a plea offer and whether the defendant must accept the offer by a certain date. The offer often expires by the date of the preliminary hearing. If the offer is accepted, the preliminary hearing is waived and a date is set for the plea in open court. In many cases, however, defense attorneys may negotiate a continuance of the preliminary hearing and an extension of time to accept the offer. Prosecutors are not required to offer a plea bargain in every case. He or she does not have to justify the decision to offer or decline a plea bargain to the judge, defense attorney, or anyone other than possibly the supervising prosecutor in her office (Davis, 2007: 45).

In the District of Columbia, judges do not participate in any way in plea negotiations or in the agreement. With the exception of Rule 11(e)(1)(c) pleas, which are extremely rare, there can be no agreement as to what sentence the defendant will receive for his or her plea. The plea agreement may be to one count of the charging document or to more than one count. In some cases, the defendant may plead guilty to a reduced charge included within one of the more serious charges of the indictment. For example, in an indictment for armed robbery with a gun, the prosecutor will typically charge the defendant with possession of a firearm during a crime of violence, carrying a pistol without a license, possession of an unregistered firearm and, if the gun was loaded, unlawful possession of ammunition (District of Columbia Advisory Commission on

Sentencing Annual Report, 1999: 10). Here, the defendant may be permitted to plead guilty to a variety of scenarios including unarmed robbery, or to unarmed robbery and carrying a pistol without a license. Plea agreements in the District of Columbia “come in a wide variety of configurations and may benefit both sides for many different reasons” (District of Columbia Advisory Commission on Sentencing Annual Report, 1999: 11). In the District of Columbia, “[i]n general, the prosecution bargains for the certainty of conviction, and the defendant bargains for the possibility of a reduced sentence” (District of Columbia Advisory Commission on Sentencing Annual Report, 1999: 11).

Davis (2007) provided a detailed example of the plea bargaining process with a typical burglary case in the District of Columbia:

If the defendant is arrested for breaking into a private home and stealing a number of items, he may be charged with several offenses. They may include first-degree burglary, first-degree theft, and destruction of property. If the prosecutor decides to make a plea offer, she has total discretion to decide what the offer should be. There are no laws or rules that dictate or even guide her decision. A typical plea offer in such a case might be a guilty plea to second-degree burglary (a less serious type of burglary that carries a lighter penalty than first-degree burglary) in exchange for the prosecutor’s agreement to dismiss the other charges. If the defendant was not detained after his arrest, the prosecutor also might agree not to oppose him staying in the community after his guilty plea, or even to support a sentence of probation at the sentencing hearing...A different plea offer in the same case might involve a more favorable result for the defendant than a plea to second-degree burglary. For example, the prosecutor might offer a plea to attempted burglary, which is a misdemeanor with a penalty of a year or less in jail. The prosecutor might also offer a deal less attractive to the defendant—for example, a plea to the first-degree burglary. Any of these offers might be sweetened by the prosecutor’s agreement to support the defendant’s release at the time of the plea or to support probation or a reduced penalty at the sentencing hearing (p. 46).

As with the charging decision, the prosecutor considers numerous factors when evaluating a case for plea bargaining. McDonald et al. (1979) wrote that prosecutors

focus primarily on “the big three factors”: seriousness of the offense, seriousness of the offender, and the strength of the case (p. 161). With regard to the seriousness of the offense, prosecutors rarely offer plea bargains favorable to the defendant (such as to probationary sentences) in cases of serious crimes (Davis, 2007: 49). As to the seriousness of the offender, a first offender is more likely to receive a more generous plea offer than someone with a significant prior record (Davis, 2007: 47). All other things being equal, the more serious the criminal, the stiffer the terms of the plea bargain (McDonald et al., 1979: 156). With respect to the strength of the case, attorneys believe they are able to estimate the likelihood that if a case went to trial it would result in a conviction. A prosecutor’s decision of whether to plea bargain and what terms to offer is influenced by this calculus (McDonald, 1979: 158).

Beyond the “big three factors,” there are other elements that contribute to plea bargaining decisions. Attributes of the defendant may play a role such as age, sex, race, marital status, social class, political or family connections, demeanor, history of employment, drug use, alcohol use, psychiatric problems, physical health problems, military service, and length of local residence (McDonald et al., 1979: 161). Characteristics of the victim may also affect plea bargaining including the victim’s age, sex, race, social class, demeanor, prior record of criminal deviant behavior, and relationship with the defendant (McDonald et al., 1979: 161).

The prosecutor must also take into account many practical considerations when deciding whether to plea bargain and what terms to offer. For instance, the willingness of victims and other witnesses to testify at trial and pre-trial conferences may affect the evaluation of a case (McDonald, et al., 1979: 161; Davis, 2007: 47). One of the most

significant practical considerations may be the prosecutor's caseload. Most have very heavy caseloads and must make plea offers in the majority of their cases because they simply do not have the time and resources to go to trial in all of them (Davis, 2007: 46). The prosecutor's relationship with the defense attorney and the attorney's reputation for honesty, willingness to go to trial, and competence at trial, are also contributing factors (McDonald, et al., 1979: 160; Davis, 2007: 47). Another significant factor is the defendant's willingness to cooperate with the prosecutor by providing information that will assist in the prosecution of another defendant in exchange for a dismissal or reduction of his own charges (Davis, 2007: 52).

As with the charging decision, the majority of empirical studies on the plea bargaining process were conducted during the 1970s and 1980s. While this body of research did not focus on prosecutorial decisions within sentencing guidelines systems, and while its findings are mixed, it discusses important methodological approaches for studying plea bargaining and its determinants. Bernstein, et al. (1977) empirically examined charge reductions for a sample of 1,435 criminal defendants.⁶² The authors developed two measures of the favorability of charge reduction. The first was a measure of the magnitude of the reduction relative to the absolute reduction possible.⁶³ The second

⁶² The study used a sample of defendants arraigned and convicted in a criminal (misdemeanor) court during a three-month period in a major metropolitan city in New York State. This court processed upwards of two-thirds of all criminal cases including cases prosecuted as felonies. The criminal court can only dispose of cases in which the conviction charge is a misdemeanor or violation; to convict a defendant of a felony, the case must be waived to Supreme Court. The cases in the sample represented all persons whose most severe charge at first court presentation was a second or third degree burglary or related offenses, a first, second, or third degree assault, a second or third degree grand larceny, petit larceny, or a first, second or third degree robbery. The authors selected only those defendants prosecuted for charges in one of these four crime categories (burglary, assault, larceny, robbery) to limit the variability in crime categories and assess how variation among those categories affected the dependent variables (Bernstein, et al., 1977: 372).

⁶³ This index was constructed by taking the change in severity of charge from prosecution to conviction charge as the numerator, and the change in severity of charge from prosecution charge to the lowest severity charge possible at conviction as the denominator. Severity was coded in increasing severity from 1-8 where 1 was a violation or unclassified misdemeanor, 2 was a B misdemeanor, 3 was an A

was simply the severity of the charge for which the defendant was convicted (Bernstein, et al., 1977: 365). The authors first studied defendants whose cases were disposed of at their first court appearance and found that the largest effects were for the type of crime for which the defendant was prosecuted. Defendants prosecuted for assaults were more likely to receive a more favorable charge reduction than those prosecuted for burglary, robbery, or larceny.⁶⁴ Defendants prosecuted for burglary offenses were least likely to receive a more favorable reduction. They also found that the age of defendants affected the favorability of charge reductions, with older defendants being more likely recipients of favorable reduction. The sex and race of the defendants had no significant direct effects (Bernstein, et al., 1977: 375). The authors also found that defendants for whom

misdemeanor, 4 was an E felony, 5 was a D felony, 6 was a C felony, 7 was a B felony, and 8 was an A felony. The letter codes and felony/misdemeanor/violation categories were in accordance with the specifications of the New York Penal law code. For example, if a defendant's most serious prosecution charge (the charge at his/her first court presentation) was a C felony (e.g., second degree burglary) the severity code for that charge was a 6. If that defendant's most serious charge for which he or she was convicted was an A misdemeanor (e.g., possession of burglar's tools) the severity code for that conviction charge was a 3. The difference of 3 (6 - 3) between the prosecution charge and the conviction charge was the amount of reduction, i.e., the numerator. The denominator was calculated by taking the difference between the severity code of the prosecution charge (using the same example, 6) and the severity code of the lowest charge for which the defendant could have been convicted, i.e., a violation, which carries a severity code of 1. The difference here (6 - 1) is 5. Thus, for this sample defendant, the amount of reduction relative to the amount possible would be 3/5 or .60. The index ranged from 0 for defendants whose conviction charge was identical to the charge for which they were prosecuted, to 1 for defendants whose reduction was equivalent to the total reduction possible (Bernstein, et al., 1977: 366).

⁶⁴ The authors attempted to explain this finding as follows:

Our conversations with court personnel suggest that one reason for the leniency accorded those prosecuted for assaults may be the conception that assaults are acts done in the "heat of the moment." As such, a presumption of spontaneity undercuts a presumption of premeditation. Since premeditation may be indicative of culpability, persons charged with assault and other spontaneous crimes may be more favorably treated by the courts. Additionally, we observed that the overwhelming majority of assault cases processed were alleged to have occurred between friends and relatives. Since the court under observation serves a lower class catchment area, the victims of these assaults are lower-class persons themselves. Thus, the leniency accorded to assault cases may additionally reflect the courts' adoption of a street-wise definition of assaults as routine for the lower class culture, thereby reducing the appropriateness of a more harsh societal response (Bernstein, et al., 1977: 374).

this was a first arrest did least well on the charge reduction outcome, while defendants having prior arrests but no convictions did best. This appeared to support the contention by Newman (1966) that more experienced defendants may fare better in plea negotiations due to their knowledge of the justice system (Bernstein, et al., 1977: 375).

Bernstein, et al. (1977) then examined the outcome for defendants whose cases were not disposed of at their first court presentation and found that the favorability of the charge reduction for these defendants was not affected by the type of offense or the age of the defendant (Bernstein, et al., 1977: 375). They did, however, find that minorities who pled guilty at this stage received less significant charge reductions. The authors also examined variables that reflected organizational constraints to explore how the goals of the courts may affect charge reduction decisions. They suggested that the bulk of factors having a significant impact on charge alteration can be interpreted in terms of “organizational priorities”⁶⁵ (Bernstein, et al., 1977: 382). In sum, the authors found that the favorability of the charge reduction outcome was partly explained by the statuses of the defendant and bureaucratic constraints of the court.

Curran (1983) examined whether there were differences in treatment by gender for four outcomes—negotiations, prosecution, conviction, and sentence.⁶⁶ Curran found

⁶⁵ While the authors did not have direct measures of organizational variables, they examined the effect of (a) prosecuting defendants for felony offenses, (b) prosecuting defendants for resisting arrest, and (c) a defendant's release status pending case disposition. They found that these variables had significant effects, which could be accounted for by the court's need to process as many cases as possible and to minimize the court's expenditure of time and money (Bernstein, et al., 1977: 382).

⁶⁶ The negotiation outcome was measured with a dichotomous variable indicating whether there was a charge or sentence negotiation. The prosecution outcome was measured with a dichotomous variable indicating whether a defendant was prosecuted. Curran (1983) selected a sample of 60 females and 60 males for each of five years—1965, 1966, 1971, 1975, and 1976. The total number of cases used was 543 due to missing data (Curran, 1983: 45).

that sex was not significantly related to negotiations, prosecution, or conviction.⁶⁷

Women were just as likely as men to be offered a plea, to be prosecuted once arrested, and to be convicted. At the sentencing level, however, sex did have a significant effect on the outcome, with female defendants receiving more lenient dispositions than males (Curran: 1983: 52). The findings suggested that the most important determining factors at these stages were not offender or offense related, but involved the evidentiary strength of the individual cases and organizational factors such as the criminal caseload or idiosyncrasies of individual prosecutors and judges (Curran, 1983: 54).

Bishop and Frazier (1984) studied the relationship between gender and charge reduction with a sample of 251 cases drawn from one judicial district in Florida.⁶⁸ The charge reduction outcome was measured using two indices. The first was a simple measure of the absolute amount of reduction. It was calculated by subtracting the maximum sentence possible for all conviction offenses (in years of incarceration) from the maximum sentence possible for all charges listed in the charging instrument initially

⁶⁷ Males and females were compared in terms of each outcome, controlling for relevant legal and nonlegal variables. The legally relevant variables were seriousness of the criminal act, the total number of counts, and prior criminal history. The non-legal variables were the race, age, and occupational status of the defendant.

⁶⁸ Data were collected in two stages. The first stage included all cases adjudicated during a 12-month period. The 229 cases drawn from this stage represented 90 percent of all the circuit court criminal cases processed during that year. (The remaining 10 percent consist of cases in which all charges were dismissed and those in which final adjudication had not taken place by the end of the initial data collection period). Because the number of females in the initial sample was too small for meaningful analysis, a second stage of data collection was implemented that provided an additional 80 female cases. Specifically, the one-year base sample was augmented to include all the female cases processed over the next two-year period. Since they were exploring how women fared as compared to men in charge-reduction decisions, they excluded from the sample those cases which were not resolved through guilty pleas, reducing the sample size to 291. They further refined the sample by excluding those cases where it was impossible for the defendant to negotiate a reduction in the charges. These were cases in which the defendant was initially charged with only one count of an offense. The final sample consisted of 250 cases, 178 involving males (71 percent) and 72 involving females (29 percent). The data were collected primarily from presentence reports, which included relevant charge-reduction information such as the initial charge(s) filed by the prosecutor and the final charge(s) to which each defendant pled guilty. Each presentence report also contained information regarding a variety of potential control variables (e.g., race, age, prior arrest history, pretrial release status) (Bishop and Frazier, 1984: 388).

filed by the prosecutor. The sentence maximum for each charge was obtained from the Florida penal code (Bishop and Frazier, 1984: 389).

The second measure was an index of the magnitude of the charge reduction received relative to the absolute reduction possible. The index was constructed by taking the change in the severity of charges from prosecution to conviction as the numerator, and the maximum change possible in the severity of charges as the denominator (Bishop and Frazier, 1984: 389). This index was similar to one of the measures employed by Bernstein et al. (1977) except that Bernstein et al. (1977) did not code sentences in terms of years of incarceration, utilizing instead an ordinal classification scheme in which several classes of felony and misdemeanor crimes were assigned severity scores ranging from 1 to 8. Furthermore, Bernstein et al. (1977) did not consider multiple counts, scoring only the severity of the defendant's most serious charge at initial charging and at conviction (Bishop and Frazier, 1984: 389). Bishop and Frazier (1984) controlled for numerous variables including the defendant's race, age, number of prior arrests and convictions, the amount of bond ordered at the initial appearance, the length of time that each defendant was held in detention prior to conviction. They found no evidence that there was differential treatment by gender in charge reduction.

Holmes, et al. (1987) took stock of the literature on charge bargaining at that time and concluded that "with few exceptions, our knowledge of charge reductions has been gleaned from qualitative investigations of plea bargaining or self-reports of those involved in plea negotiations" (p. 235). While this literature provided valuable insight, Holmes, et al. (1987) wrote, it was unable to establish clear relationships between the status attributes and case disposition of defendants. Holmes (1987) noted that the few

quantitative studies that existed generally suggested that defendant status variables “have less influence than generally assumed, pointing to the greater effects of legally relevant variables and the mediating effects they have in the relationships between the status attributes and charge reductions” (p. 235).

In their own study, Holmes, et al. (1987) examined legal, status, and resource determinants of charge reductions and the severity of final dispositions in cases of burglary and robbery in two jurisdictions. The data for the study were collected from prosecutors’ case files in Delaware County, Pennsylvania and Pima County, Arizona. The authors operationalized charge reduction as a trichotomous variable, comprising no reduction in level of initial indictment charge, reduction to a lesser felony, and reduction to a misdemeanor. They believed this measure improved on prior charge reduction indices of Hagan (1975) and Curran (1983) by including more information about the “actual degree of charge reduction, the most important consideration from the standpoint of the defendant” (Holmes, et al., 1987: 240).

The authors analyzed several dependent variables in sequential order. They first examined the antecedents of legal resources (i.e., type of attorney and pretrial release), which may have mitigated dispositional severity. These dependent variables were then analyzed with respect to their effects on charge reductions. Finally, all of the procedural variables were assessed in regard to their impact on the severity of the final dispositions. The independent variables included the prior felony conviction record, the number of charges filed, the type of most serious charge (robbery, residential burglary, non-residential burglary), whether the offense occurred at night, involved a weapon, or resulted in physical harm to the victim, whether there was a record of positive eyewitness

identification or a confession,⁶⁹ employment status,⁷⁰ type of attorney, and pretrial release status.⁷¹

The results of the study suggested that the effects of the status characteristics of defendants operated indirectly through their influence on access to legal resources. In Delaware County, black and unemployed defendants were less likely to be represented by private counsel, the lack of which increased the likelihood of pretrial detention and severe final disposition. There were also indirect status effects in Pima County where employed and older defendants were more likely to obtain bail, which ultimately advantaged them at final disposition. Race and ethnicity also had some unexpected effects. In Delaware County, blacks received greater charge reductions than whites, and in Pima County Mexican defendants received more favorable final dispositions (Holmes, et al., 1987: 248). Thus, while there was some evidence that social status influenced the acquisition of private counsel and pretrial release, which tended to favor defendants at final disposition, there was no support for the expectation that charge reductions would be especially receptive to status influences (Holmes, et al., 1987: 233). The findings revealed only one direct status effect and no indirect influences. Moreover, two of the three statistically significant race/ethnicity effects seemed to suggest that minorities were at an advantage (Holmes, et al., 1987: 248).

⁶⁹ According to Holmes, et al. (1987), evidential considerations were particularly relevant to charge reductions, with the usual hypothesis suggesting that prosecutors are more willing to make concession in weak cases (e.g., Rosett and Cressey, 1976; Myers and Hagan, 1979). Moreover, such factors were also thought to have potential influences in the allocation of legal resources. Judges may, for example, set higher bail in cases involving strong evidence of guilt. Finally, such factors might influence final disposition severity (Holmes, et al., 1987: 240).

⁷⁰ The employment variable may influence allocation of legal resources, charge reductions, and final dispositions because it may be seen as an indicator of future criminality (Holmes, et al., 1987: 240).

⁷¹ Research suggested that retention of a private attorney and release on bail generally contributed to more favorable dispositions. Furthermore, such variables were important not only in their own right, but because they may mediate the effects of defendant status characteristics on dispositional severity (Holmes, et al., 1987: 240).

Holmes, et al. (1987) speculated that the general lack of status effects on charge reductions may have been due to the bureaucratic nature of the judicial process, where decisions by prosecutors and defense attorneys, who are most concerned with efficiently disposing of cases, become highly routinized and relatively resistant to extralegal factors (Holmes, et al., 1987: 248). They also theorized that their findings were a result of the inability to control for biases in initial charging decisions.⁷² If prosecutors overcharged initially, they may have ultimately had to accept pleas to lesser charges from black defendants with the purpose of obtaining convictions (Holmes, et al., 1987: 249).

Noting that “the majority of research focusing on plea bargaining was conducted in the 1970s and 1980s and has been relatively neglected in the past 25 years,” Ball (2006) studied the relationship between offender characteristics and the prosecutor’s decision to reduce the number of charges (p. 246).⁷³ Ball (2006) hypothesized that race and ethnicity, sex, age, and employment status of the offender had an effect on count bargaining decisions in only the “borderline serious” cases.⁷⁴ Ball (2006) predicted that for more serious cases, plea bargaining would be used to ensure a conviction for the

⁷² Concerning the effect of race on charge reductions in Delaware County, for example, it is significant to note that during the period under study the jurisdiction was reportedly experiencing racial tension and conflict. The related antagonism between the police and the black community may have thus been accompanied by a tendency toward overcharging black offenders. While the police officers file the first charges, the authors selected the initial prosecutor charge as the base from which reductions were gauged because “they represented the formal charges to which the defendant must answer and because plea negotiations generally occur after these charges have been filed” (Holmes, et al., 1987: 240).

⁷³ Ball (2006) randomly selected a sample of 2,578 cases from a list of all offenders who were convicted of at least one felony in Chicago, Illinois 1993. Those cases where the defendant did not plead guilty were eliminated.

⁷⁴ Because sentences in Illinois in 1993 were defined in a determinate classification scheme, these groups were defined as follows: most serious included Class X offenses, borderline serious included Class 1 offenses, and least serious included Class 2, Class 3, and Class 4 offenses. These classifications were determined based on the potential maximum punishment. For the most serious classification, the defendant could likely face 30 years in prison. For the borderline serious classification, the defendant could likely face 15 years, whereas offenders in the least serious classification could only face a maximum of 7 years (Ball, 2006: 249).

prosecutor and reduce the severity of the sentence for the defense attorney. For the least serious cases, plea bargaining would be used to reduce caseloads for both parties regardless of the defendant's individual characteristics. Finally, in the borderline serious cases, there would be more disagreement between the prosecutor and the defense attorney regarding the outcome of the case and, thus, there would be more explicit bargaining and genuine concessions (Ball, 2006: 246). Plea bargaining decisions would be clearly determined by legally relevant factors in the lowest level and highest level of case seriousness. It was also hypothesized that plea bargaining decisions would not be clearly determined by legally relevant factors and rely more on prosecutorial discretion in the medium level of case seriousness. In particular, it was hypothesized that black or Hispanic, male, young, and unemployed offenders would be less likely to receive a count reduction in the borderline serious cases than white female older offenders who were employed at the time of the crime (Ball, 2006: 256).

The dependent variable in this study was the likelihood of receiving a count reduction. For instance, if a defendant was initially charged with three current offenses but was only convicted of one offense, then this defendant received a count reduction. Cases with only one original charge were eliminated from the analysis (Ball, 2006: 249). Because of low variability, the number of charges filed was recoded into a dichotomous measure—2 charges and 3 or more charges (Ball, 2006: 249). Ball (2006) did not find a statistically significant relationship between offender characteristics and the likelihood of receiving a count reduction. Thus, the hypothesis that offender characteristics affect the decision to reduce the number of charges in the borderline serious cases was not supported (Ball, 2006: 256).

In a recent review of prior empirical studies of charging and charge bargaining, Shermer and Johnson (forthcoming) concluded:

Collectively, prior research on prosecutorial decision-making in state courts provides mixed and inconsistent evidence of social disparities in punishment. In part, these sundry findings reflect the inherent diversity of the samples and jurisdictions examined. Although this research provides a number of important insights into the importance of the prosecutor in criminal courts, much of it is dated, has been constrained to small sample sizes, limited to particular offenses (e.g., burglary, robbery, or sexual assault), or conducted in specific locales, often a single city or county court. Small sample sizes result in low statistical power to detect relationships and the focus on specific crimes and locales reduce generalizability and risks localized, idiosyncratic research findings (p. 7).

Shermer and Johnson (forthcoming) examined (1) the influence of extralegal offender characteristics in the charge reduction process and (2) the influence that charge reductions exert on final sentence outcomes in federal courts (Shermer and Johnson, forthcoming: 3). Shermer and Johnson found that male offenders were about .68 times as likely as female offenders to receive a charge reduction.⁷⁵ They found no direct evidence, however, of age- or race-graded differences in the likelihood of charge reductions.⁷⁶

With regard to type of offense, Shermer and Johnson found that property crimes were more than twice as likely as violent crimes to receive charge reductions, while immigration offenses were the least likely to receive charge reductions. Moreover, on average, more serious crimes were associated with greater probability of charge reductions “in part perhaps because maximum penalties begin much higher for these crimes” (p. 20). Finally, criminal history exerted no significant influence on charge

⁷⁵ They operationalized the charge reduction dependent variable as whether the statutory maximum was reduced.

⁷⁶ More specifically, they found that young, black, and Hispanic offenders were not any less likely to have their statutory maximum penalties reduced as part of their plea negotiation. When modeling the joint impact of age, race and gender constellations, they again found few differences (Shermer and Johnson, forthcoming: 20).

reduction. The authors noted that this “unexpected result” was “consistent with at least some prior research that finds the effect of prior offending is limited to the final sentencing decision (Holmes et al., 1987)” (p. 20). Shermer and Johnson (2009) concluded: “Overall, we find evidence that federal charge reductions are significantly influenced by the gender of the offender but not by their age, race, ethnicity, or educational and family background” (p. 25).

Because the above results could not rule out the possibility that important charge reduction disparities existed for at least some categories of crime,⁷⁷ Shermer and Johnson reestimated models of charge reduction that were disaggregated by offense type. While the authors found that legal predictors such as the severity of the offense and number of filing charges exerted consistent influences across offense categories, several offender characteristics demonstrated offense-specific effects. For instance, the aggregate gender finding discussed above appeared to be driven by violent and drug offenses: For violent crimes, male offenders were about one-third as likely to receive a charge discount. For drug crimes, they were about one half as likely (p. 25). Shermer and Johnson found that other characteristics also varied by offense type. Age, for example, exerted a small positive effect only for immigration cases, and race and ethnicity emerged as strong predictors for weapons offenses, where black and Hispanic offenders were about .70 times as likely to have their initial charges reduced (p. 25).

Shermer and Johnson concluded that their results offered “relatively little support” for the contention that there are disparities associated with prosecutorial charge reductions in the federal sentencing context (p. 27). There was no evidence that younger

⁷⁷ Shermer and Jonson (2009) noted that prior research suggested “that racial inequalities in federal punishments are greatest for drug crimes (Steffensmeier & Demuth, 2000)” and theoretical arguments indicated that “charging disparities may be especially pronounced for violent and firearms offenses” (p. 25)

offenders were less likely to receive charge reductions. Moreover, the race and ethnicity of the offender exerted no direct influences on charge reductions with black and Hispanic offenders being no less likely to have their charges reduced than whites (p. 27). While males were significantly less likely than females to have their initial charges reduced, the authors warned that these effects “may also reflect important gender differences in offending and victimization patterns not adequately captured by our measure of offense severity” (p. 28).⁷⁸ Finally, Shermer and Johnson found that the influence of offender characteristics at times varied across offense type. Males were particularly unlikely to be given charge reductions for drug and violent crimes and black and Hispanic offenders were disadvantaged in charging decisions for weapons offenses (p. 28).

Turning to their second research question, Shermer and Johnson investigated the influence of charge reductions on final sentence lengths. They found “convincing support” for the expectation that charge reductions would be associated with both the presumptive sentencing recommendation in the Federal Sentencing Guidelines grid and the final sentence length: “Net of other factors, receiving a charge reduction on average reduced recommended sentences by 23% and actual sentences by 19%” (p. 29). Once the presumptive sentence was accounted for, however, they found that initial charge reductions exerted no additional influence on judicial sentencing decisions (p. 29).

Shermer and Johnson concluded:

⁷⁸ They authors explained:

Female crime tends to be less severe in its consequences (e.g., less serious victim injury) and female offenders are more likely to have unique histories of victimization as well as special family circumstances that may serve to mitigate their culpability (Chesney-Lind, 1997; Daly, 1994; Steffensmeier & Allan, 1996). Unfortunately, we lack detailed data on additional measures necessary to investigate these alternative explanations. Future research is therefore needed to better explain the underlying causes of the gender gap in prosecution, particularly for violent and drug crimes where these differences are most pronounced.

Overall, these results indicate that charge reductions significantly reduce the length of incarceration for federal offenders because they shift their relative placement within the federal sentencing guidelines, but compared to offenders within the same guidelines cells, charge reductions are not associated with differential punishment (p. 28).⁷⁹

The Link Between Charging and Plea Bargaining

Plea bargaining is best understood, not as an isolated decision but as a “*process* that includes a number of decisions” beginning immediately after arrest and that can lead to a number of different outcomes (Walker, 1993: 86). Plea bargaining is “not really a decision *point* at all. It is not a single decision that can be isolated and subjected to formal controls. Instead, it involves a series of decisions, over a period of time, by different officials” including the police and the prosecutor (Walker, 1993: 86).

One of the most important decisions affecting the plea bargaining process is the charging decision. Plea bargaining opponents object to the practice of “overcharging” (McDonald, 1979; Alschuler, 1978). Prosecutors may decline to bring charges, bring only charges that they believe they can prove, or overcharge by convincing a grand jury to indict a defendant for more and greater charges than they can prove beyond a reasonable doubt at the trial stage (Davis, 2007: 23). Overcharging can be defined as the practice of charging a defendant with the highest number and degree of charges that can possibly be

⁷⁹ The authors noted that the conclusion that charge reductions affect sentencing but are unaffected by offender race is consistent with previous work examining prosecutorial influences in punishment (Hagan, 1974) and with research examining the hydraulic displacement of discretion to prosecutors (Miethe, 1987; Wooldredge & Griffin, 2005). They also offered three important caveats. First, their study only examined reduction in charges and was therefore unable to capture potentially important differences in initial charge severity or in other prosecutorial decisions of consequence such as the imposition (or avoidance) of mandatory minimums. Second, their measure of charge reduction—whether the statutory maximum was lowered—provided a conservative estimate of prosecutorial charge bargaining that, while still important, failed to capture more subtle types of prosecutorial bargaining. Charge reductions that did not alter statutory maxima were unobserved in their analysis as were other types of plea negotiation such as fact bargaining and guidelines stipulations. Finally, the authors were unable to study the effect of some potentially important omitted variables including measures of evidentiary strength, inter-organizational relationships among the different court actors, and offender and victim characteristics such as victim injury, socioeconomic and family status, and prior histories of victimization and substance abuse (p. 29).

supported by the available evidence. It involves “tacking on” additional charges that they know they cannot prove beyond a reasonable doubt or that they can technically prove but are inconsistent with the legislative intent or otherwise inappropriate (Davis 2007: 31). It is called “overcharging,” not to suggest anything illegal but to convey the notion of “overkill” (McDonald, 1979: 39). The charges are higher than anyone expects the defendant to be convicted of or punished for given the usual local practice for similarly situated offenders. Overcharging allows the prosecutor to reduce charges without really giving anything away (McDonald, 1979: 39).

Hagan (1975) found that offenders with a higher number of charges were more likely to experience charge alterations, which “supports a hypothesis that offenders often may be systematically ‘over-charged’ in anticipation of ‘rewards’ to be distributed later in the bargaining process” (p. 544). Holmes, et al. (1987) pointed out that statistical models of charge bargaining may be misspecified by virtue of the inability to control for biases affecting initial charging decisions. In one of the jurisdictions of their study, they noted that black offenders may have been overcharged initially. If so, prosecutors may have ultimately had to accept pleas to lesser charges from black defendants and “what would appear to be an advantage at the point of charge negotiations may actually indicate efforts to establish charges more amenable to prosecution” (p.249). As discussed earlier, Ball (2006) did not find a statistically significant relationship between offender characteristics and the likelihood of receiving a charge reduction. Ball (2006) offered several warnings, however, including the fact that the study could not consider possible prosecutorial overcharging. As Ball (2006) wrote, “Without knowing the real evidence of the case, it is unclear as to whether an offender received a true plea bargain or whether

the guilty plea was a result of a markup during the initial charging phase...disparities may be masked because certain groups of offenders may have received a markup reduction as opposed to a true reduction” (p. 257).

Researchers have found that there is a relationship between the charging policy of the prosecutor’s office and charge bargaining. The charging policy affects both the rate of charge bargaining and the extent or magnitude of charge reduction. Boland and Forst (1985), for instance, analyzed data covering 14 state and local jurisdictions⁸⁰ and found that prosecutors’ offices with more selective charging policies and arrest rejection rates were more inclined to take cases to trial. In jurisdictions with a screening and charging policy based on the more stringent trial standard of “guilt beyond a reasonable doubt” rather than the minimum legal standard of “probable cause,” the prosecutors were more likely to insist that defendants plead to the top charge or go to trial (Boland and Forst, 1985: 11). In these jurisdictions, the majority of defendants pled guilty to the top charge and did not receive a charge reduction. While some jurisdictions had a criminal case processing policy “designed to weed out all but highly convictable arrests before they are filed in court, to limit plea bargaining on those that are filed, and to bring cases to trial routinely whenever the defendant does not plead as charged,” others tended to “accept arrests at a higher rate, engage more often in plea negotiation, and obtain more incarcerations (especially more short-term jail sentences) per arrest” (p. 12).⁸¹

⁸⁰ The data were obtained from the Prosecutor’s Management Information System (PROMIS).

⁸¹ Boland and Forst warned, however, that there may be other forms of concessions such as sentence bargaining, or there may be take-it-or leave it plea policies, where charge reductions are not allowed unless evidence deteriorates. They wrote, “In many jurisdictions charge reductions represent an unknown mixture of evidence weaknesses and concessions. The precise mix is difficult to establish analytically because of limitations in measuring the quality of evidence for each charge in each case” (Boland and Forst, 1985: 12).

LaFree(1985) studied the relationship between the prosecutorial charging policy and charge bargaining in three “high control jurisdictions” (HCJs) and three “low control jurisdictions (LCJs). The HCJs-- El Paso, New Orleans, and Seattle--had specific guidelines for prosecutorial decision making, specialized screening procedures, and internal review of the decisionmaking of assistant prosecutors. In El Paso, for instance, the chief prosecutor instituted stringent screening procedures and prohibited any charge bargaining once formal charges were filed. He assigned experienced trial attorneys to a screening unit and instructed them only to accept “strong, triable cases and to set charges so that they accurately reflected the facts of the case and the law” (LaFree, 1985: 294). In the three LCJs--Pima County (Tucson), Arizona; Norfolk, Virginia; and Delaware County, Pennsylvania--the lead prosecutors used minimal felony screening, allowed relatively unsupervised discretion by line prosecutors in making charging decisions, and allowed assistants to negotiate plea bargains without formal review procedures. According to LaFree (1985), the importance of these organizational differences were revealed by the data on the mean number of counts and charge seriousness for defendants at arraignment and conviction:

Defendants were charged with fewer counts and received less charge reduction in the jurisdictions that maintained stricter controls over plea bargaining (the HCJs) than in the jurisdictions with fewer restrictions on plea bargaining (the LCJs). The mean number of arraignment charges for the LCJs is over three times greater than the mean for the HCJs. In El Paso, the jurisdiction with the most stringent controls on plea bargaining, defendants were convicted of nearly as many charges as the number on which they were arraigned...Charge Reductions were greater for the LCJs than the HCJs. The difference between Arraignment and Conviction charges in Norfolk, the jurisdiction with the highest mean Charge Reduction, was 13 times greater than the difference between Arraignment and Conviction charges in El Paso, the jurisdiction with the lowest mean Charge Reduction. Overall, differences between average Arraignment and

Conviction charges were three times greater in the LCJs than the HCJs (p. 294).

The data, LaFree (1985) wrote, supported the argument of plea bargaining critics that prosecutors overcharge in order to provide leverage to obtain guilty pleas. LaFree (1985) then examined how the outcomes and determinants of guilty pleas and trials differed in the high and low control jurisdictions. He concluded that, not only did tighter controls on plea bargaining in HCJs appear to reduce the practice of overcharging, but prosecutors in these jurisdictions “also appear to have succeeded in tightening the fit between case characteristics and sentence severity” (p. 307). While the best predictors of sentence severity were similar in the two types of jurisdictions, sentence outcomes in the LCJs depended more on factors other than those included in the study. According to LaFree (1985), “Given the wide range of independent variables in the analysis and the fact that these variables were relatively successful at predicting sentencing outcomes in the HCJs, it seems likely that decision making in the LCJs was simply more idiosyncratic than in the HCJs and thus less dependent on measures of evidence and case seriousness” (p. 307).

Wright and Miller (2002) argued that prosecutors’ offices should adopt a “hard screening” policy that encompasses a “far more structured and reasoned charge selection process than is typical in most prosecutors’ offices” (p. 31). Under such a policy, the prosecutor's office would make an early and careful assessment of each case and demand that police provide sufficient information before the initial charge is filed. The prosecutor would also file only “appropriate” charges, i.e., those that the office “would generally want to result in a criminal conviction and sanction,” that “reflect reasonably accurately what actually occurred,” and that the prosecutor “can very likely prove in court” (p.32).

The prosecutor's office would also severely restrict all plea bargaining, particularly charge bargaining, which would be made possible by the hard screening process. Finally, such a prosecutorial screening policy would include "sufficient training, oversight, and other internal enforcement mechanisms to ensure reasonable uniformity in charging and relatively few changes to charges after they have been filed" (p. 32).

While such a policy would likely produce a small increase in the number of trials, the more substantial change would be an increase in the number of "open" pleas--defendants pleading guilty as charged without any prior negotiated agreement with the prosecutor (Wright and Miller, 2002: 33). While some form of implicit plea bargaining (i.e., sentence bargaining) may occur under such a system, Wright and Miller (2002) argued that it would be more attractive than a system where negotiated pleas predominate because of the dishonesty and inaccessibility of negotiated plea bargaining.⁸²

Wright and Miller (2002) analyzed data of the New Orleans District Attorney's Office, which has emphasized early screening of cases and has actively discouraged any changes of criminal charges as a result of negotiations after the charges are filed for the past three decades. They found that a prosecutor can indeed invest significant resources in early evaluation of cases and maintain this practice over the long run. Because there was a relatively high level of declination (refusal to prosecute after the police recommend

⁸² Plea bargaining, Wright and Miller (2002) wrote, is dishonest because the "offense of conviction does not match either the charges the state filed or the reality of the offender's behavior. A "particularly noxious form of dishonesty is overcharging by prosecutors-the filing of charges with the expectation that defendants will trade excess charges for a guilty plea. The public in general, and victims in particular, lose faith in a system where the primary goal is processing and the secondary goal is justice" (p.33). Defendants and defense attorneys also consider bargaining for pleas to be dishonest and develop the "cynical belief that they have received some undeserved favorable treatment because of a skillful defense lawyer or a sloppy or harried prosecutor" (p.33). Defense attorneys in systems driven by bargains "believe that they must convince most of their clients-even innocent defendants-to accept lesser punishments to avoid a substantial risk of much greater punishment" (p.33). Professors Wright and Miller favor sentencing bargaining over charge bargaining because sentence bargaining can be limited by legislatures in changing sentencing ranges, and conceivably could be vetoed by the judge.

charges), and a policy discouraging reductions in charges, there were lower levels of negotiated pleas, slightly higher rates of trial, and notably higher rates of open guilty pleas than in most jurisdictions (Wright and Miller, 2002: 34). Wright and Miller (2002) conclude with this recommendation:

[T]his study calls on prosecutors to appreciate the link between screening and negotiated guilty pleas, and to use screening devices with the explicit goal of lowering the number of plea bargains... The explicit connection between screening and plea bargains should be a regular part of a prosecutor's self-assessment and public explanations for charging and trial decisions. The screening/bargaining tradeoff should also become part of the public, political dialogue about the justice system, especially at election time. The interesting public question should not be the "conviction rate," but rather the "as charged conviction rate." This rate could be expressed as a simple ratio. The higher the ratio of "as charged convictions" to "convictions," the more readily a prosecutor should be praised and reelected. A ratio near one—where most convictions are "as charged," whether they result from guilty pleas or trials—is the best sign of a healthy, honest, and tough system (p. 35).

Theoretical Perspectives on Prosecutorial Decision-Making

Uncertainty Avoidance

Albonetti (1987) introduced the "uncertainty avoidance" perspective to explain the prosecutor's decision whether to charge offenders at the initial stage of felony screening. She estimated the net effects on the probability of prosecution of a set of variables including offense-related variables, the evidentiary strength of the case, and the defendant-victim relationship. Albonetti hypothesized that case information indicating increased uncertainty in obtaining a conviction at trial will decrease the probability of prosecution (Albonetti, 1987: 295). Her analysis revealed that the decision of whether to prosecute was made with a "generalized preference for avoiding uncertainty," and that uncertainty emerged from "stereotypical perceptions of cause and effect relationships

between successful case prosecution and containments thereof” (Albonetti, 1987: 311). For instance, while uncertainty about successful prosecution was significantly reduced with the introduction of certain legally relevant evidence, concerns over witness management, victim credibility, and defendant/victim relationship were extralegal sources of uncertainty that exerted a negative effect on the decision to prosecute (Albonetti, 1987: 311).

Albonetti and Hepburn (1996) joined the uncertainty avoidance perspective with “causal attribution,” “etiology of bias,” and labeling theories to argue that prosecutors make attributions from stereotypes based on ascribed characteristics of defendants to reduce uncertainty. They explored the tenets of these theories as they informed an uncertainty avoidance perspective on the prosecutors’ decisions to divert felony drug defendants from criminal prosecution and into a drug treatment program (Albonetti and Hepburn, 1996: 64). According to Albonetti and Hepburn (1996), both the etiology of bias perspective and the labeling perspective suggested that males compared to females, minority members compared to nonminority members, and older offenders compared to younger offenders were more likely to be “typed as deviant, more likely to be perceived as possessing a deviant moral character, and more likely to be assessed as having an uncertain outcome if diverted from prosecution to treatment” (p 67). Therefore, they suggested that these ascribed traits--male, minority membership, and being older--were linked to a low likelihood of rehabilitation and, thus, were expected to reduce significantly the likelihood that the prosecutor would defer a defendant from prosecution into treatment (Albonetti and Hepburn, 1996: 67). They estimated main effects and interaction effects of defendant ascribed status and achieved status on the likelihood of

diversion from prosecution to drug treatment, and their findings indicated partial support for their hypotheses.

Focal Concerns Theory

The “focal concerns theory” is “the leading theoretical perspective used to examine discretionary decision-making in sentencing” (Oneill, 2008: 8). This theory was first proposed by Steffensmeier, et al. (1998) to frame hypotheses regarding the effects of race, gender, and age on *judicial* sentencing decisions.⁸³ They posited that three “focal concerns” influence “judges and other criminal justice actors” in reaching sentencing decisions (p. 766). The three focal concerns were “the offender’s blameworthiness and the degree of harm caused the victim, protection of the community, and practical implications of sentencing decisions” (p.766).

According to Steffensmeier, et al. (1998), the first focal concern, blameworthiness, is ordinarily associated with the just deserts philosophy of punishment where the severity of the sentence increases with the culpability of the defendant and the harm caused by the offense. The second factor, protection of the community, typically focuses on incapacitation and deterrence. Steffensmeier, et al. (1998) drew on Albonetti’s (1991) argument that sentencing is an “arena of bounded rationality where court actors, particularly judges, confront the goal of protecting the public and preventing recidivism in the context of high uncertainty about offenders’ future behavior” (p. 766). Under this perspective, predictions about offender dangerousness (i.e., the risk of recidivism) are

⁸³ Steffensmeier, et al. (1998) analyzed sentencing outcomes in Pennsylvania and found that: (1) young black males were sentenced more harshly than any other group, (2) race was most influential in the sentencing of younger rather than older males, (3) the influence of age on sentencing was greater among males than females, and (4) the main effects of race, gender, and age were more modest compared to the very large differences in sentencing outcomes across certain age-race-gender combinations (p. 763). These findings, they wrote, demonstrated “the importance of considering the joint effects of race, gender, and age on sentencing, and of using interactive rather than additive models” (p. 763).

based on “attributions” predicated on factors such as “the nature of the offense (e.g., violent or property),” “the offender’s criminal history,” “the facts of the crime such as use of a weapon,” and the “characteristics of the offender such as drug dependency, education, employment, or family history” (p. 766). The third focal concern, “practical constraints and consequences,” consist of both organizational and individual facets. Organizational concerns include maintaining “working relationships among courtroom actors,” “ensuring the stable flow of cases,” and “being sensitive to local and state correctional crowding and resources” (p.767). Practical consequences at the individual level include concerns about the offender’s “ability to do time,” health condition, special needs, and the disruption of ties to children and other family members (p.767).

Because the three focal concerns and their interplay are highly complex, and because judges rarely have sufficient information about the case or the defendant, they develop a “perceptual shorthand” to make determinations such as who is dangerous and who is not. This shorthand is “linked to race, gender, and age attributions” (p.767).⁸⁴ Steffensmeier, et al., (1998) concluded that their statistical and qualitative⁸⁵ findings were

⁸⁴ Steffensmeier, et al., (1998) explained:

[O]ne might expect that judges, both as citizens and as elected officials, may share in the general stereotyping predominant in the community; and that racial (as well as age and gender) attributions will intertwine with the focal concerns...to influence judges in deciding whether to incarcerate an offender and the length of the incarceration. Our main premise is that race, age, and gender will interact to influence sentencing because of images or attributions relating these statuses to membership in social groups thought to be dangerous and crime prone (see Albonetti, 1991). The attributions may become informal norms, routines, and guides as mechanisms to reduce uncertainty in sentencing (Farrell and Holmes, 1991) (p. 768).

⁸⁵ Steffensmeier, et al., 1998 collected qualitative data on sentencing decisions including interviews with samples of judges. Their findings reinforced their focal concerns theory of sentencing. They found, for instance, that women and older offenders were defined as less dangerous and lesser risks to the community compared to younger black males. Also, the blameworthiness of women and older offenders was more often mitigated by prospects of being victimized themselves, drug or alcohol problems, or psychological disorders (p. 786). They also found that women and older offenders were seen as potentially presenting greater costs and problems for the correctional system in terms of health care and child welfare. Additionally, women and older offenders were seen as having more community ties, more likely to be

consistent with their proposed “focal concerns” framework that judges “make attributions regarding blameworthiness, dangerousness, recidivism risk, and practical organizational consequences” based mostly on legally relevant information such as offense and prior record, but also “partly on the basis of attributions based on such defendant characteristics as race, gender, or age as they relate to the focal concerns of sentencing” (p.788).

A handful of scholars have applied the focal concerns perspective to prosecutorial decision-making. Spohn and Holleran (2001), for example, used the perspective to analyze charging decisions. They noted that the focal concerns that guide prosecutors’ charging decisions are similar, but not identical to those guiding judicial sentencing decisions. While prosecutors consider the seriousness of the offense, the degree of harm to the victim, and the culpability of the suspect when filing charges, they take into account a different set of “practical constraints and consequences” than judges. Though prosecutors are also concerned about maintaining relationships with other members of the courtroom workgroup, they focus on the likelihood of conviction rather than the social costs of punishment. They must predict how the victim, the suspect, and the incident will be viewed and evaluated by the judge and jurors at later phases of the criminal justice process (Spohn and Holleran, 2001: 208). Because these predictions are uncertain, prosecutors also develop a “perceptual shorthand” that incorporates stereotypes of real crimes and credible victims. Consequently, they consider, not only the legally relevant factors, but also the “background, character, and behavior of the victim, the relationship

supporting a family, and more likely to have steady employment. Young black males, conversely, were seen as lacking such social bonds (p. 787).

between the suspect and the victim, and the willingness of the victim to cooperate as the case moves forward” (Spohn and Holleran, 2001: 208).

Ulmer, et al. (2007) proposed that the focal concerns theory be used as a “heuristic framework to integrate and organize the propositions from various other theories that are compatible in principle with focal concerns but that are perhaps incomplete explanations of punishment decision-making on their own” (p. 431). They used the focal concerns perspective to guide their examination of prosecutorial decisions to apply mandatory minimum penalties because it was “congruent with and builds on the themes of uncertainty reduction and causal attribution in Albonetti’s work and because it can integrate themes of organizational efficiency and racial threat as well (p. 431).

Ulmer, et al. (2007) reviewed Albonetti’s (1987) uncertainty avoidance/causal attribution theory and argued that “attributions of offender character based on his or her behavior, history and social statuses, and situational assessments of practical constraints or consequences” affect the interpretation of defendants in terms of the focal concerns (p. 432). They then discussed two practical constraints—organizational efficiency and conviction certainty. Courtroom actors, particularly prosecutors, value processing cases efficiently. Convictions are viewed as a measure of prosecutorial effectiveness, and guilty pleas are a method for increasing the conviction rate (p. 433). Ulmer, et al. (2007) found that prosecutors often value getting a relatively certain conviction over seeing eligible offenders receive mandatory penalties. They often trade severity for certainty of punishment, a scenario consistent with Albonetti’s (1987) uncertainty avoidance theory (p. 433).⁸⁶

⁸⁶ Numerous other scholars have also argued that certainty of conviction is more important for prosecutors than severity of sentence (Padgett, 1985: 762; Rhodes, 1979: 375).

Ulmer, et al. (2007) suggested that the focal concerns perspective was also compatible with the notion of “racial threat.” They cited a wide range of research suggesting that blacks and Hispanics “tend to be objects of crime fear and may be seen as particularly threatening” (p. 434). They reviewed research finding that “anti-black criminal stereotypes and fear of black crime were associated with support for more punitive criminal justice policies” (p. 434). They further noted that there is a sizeable literature showing that females are often seen as “less blameworthy, less dangerous, and more amenable to rehabilitation and often present practical problems for the criminal justice system (e.g., if they have children)” (p. 435). Because the preponderance of research shows that women are typically sentenced more leniently than men, they expected women to receive mandatory minimums less often than men.⁸⁷ Ulmer, et al. (2007) concluded:

Our findings suggest that the focal concerns perspective is a useful heuristic for prosecutorial decision criteria regarding sentencing outcomes, just as prior research shows it to be useful for conceptualizing judicial discretion. We argue that legally relevant factors, case processing concerns (i.e., rewarding guilty pleas), and social statuses (i.e., gender, ethnicity, and age) shape prosecutors’ perceptions of blameworthiness and community protection and thus their decisions to apply mandatories. In addition, the social contexts surrounding courts (e.g., violent crime rates, percentage Black) might shape prosecutors’ perceptions of both community protection and practical constraints (e.g., political ramifications of seeking or not seeking mandatories for certain offenders) (p. 452).

While noting that the majority of research had provided at least partial support for focal concerns theory, Hartley et al. (2007) discussed some of its major theoretical and methodological shortcomings. First, “because the focal concerns theory lacks serious

⁸⁷ They noted that Miethe (1987) found that males were charged with more severe offenses and received less favorable sentence bargains from prosecutors than women. Furthermore, Alozie and Johnston (2000) found that female drug arrestees were more likely to be diverted by prosecutors into alternative programs and that race and ethnicity interacted with gender in such decisions (Ulmer, et al. 2007: 435).

theoretical development by criminologists, there is not an explicit thesis or an established set of propositions that support this theoretical framework” (p. 62). Rather, researchers follow “a set of established concepts which only offer suggestions as to the variables which can measure particular concepts” (p. 62). Second, the concepts of the perspective are still “relatively unexplored” and “contain interrelated variables” (p. 62). Hartley, et al. (2007) cited the example of criminal history, which can be used as an indicator of both the blameworthiness and community protection concepts. If one measure such as criminal history can be used as an indicator for two concepts, then it is particularly important to know the precise relationship between the two concepts, which has not been sufficiently explained by the theory.

A third shortcoming is that the majority of research testing the focal concerns theory uses secondary data from the Pennsylvania Sentencing Commission, which limits the generalizability of results and the number of variables that can be included in analytic models. The focal concerns concepts, therefore, have not been fully operationalized in prior research. The concept of practical constraints and consequences has been an especially “untapped feature” of this theoretical perspective (p. 62). The primary variables used to measure it has been whether or not the defendant pled guilty, the court’s number of cases, and the size of the court. This lack of measurement “leaves an empirical hole” in the perspective (p. 62). In short, Hartley, et al. (2007) wrote:

The current research suggests that the focal concerns theory is not a theory at all. It has no set of testable propositions; most hypotheses that have been derived from this work have been extended over time. The primary concepts of this perspective are also underdeveloped. Different concepts can actually contain the same variables. Because of this, and the fact that focal concerns theorists do not allude to how these concepts fit together, except in a “complex interaction,” aspiring focal concerns empiricists are left to their own devices in testing extended analytic models. At this point,

the “focal concerns theory” is no such thing; it is merely a perspective. Criticism aside, the focal concerns perspective does appear to be a very logical and effective way in which to test sentencing outcomes (p.73).

Court Community Perspective

While quantitative research on prosecutorial decision-making is often grounded in perspectives such as “perceptual shorthand,” “uncertainty avoidance,” and “focal concerns,” a second type of research is ethnographic research of “court communities,” which focuses more on the dynamics of case processing rather than actual case outcomes (Woolredge and Thistlewaite, 2004: 419). Ulmer (1997) reviewed the studies carried out by Eisenstein and Jacob (1977), Nardulli et al. (1988), Eisenstein et al. (1988), and Flemming et al. (1992), who proposed the court community framework. According to Ulmer (1997), there are four notable features of the perspective, the first of which is “the metaphor of courts as communities based on local legal culture, members’ shared workplace, and interdependencies between key sponsoring agencies (prosecutor’s office, bench, defense bar)” (Ulmer, 1997: 13).

The second aspect of the court community framework highlighted by Ulmer (1997) is “an emphasis on interorganizational relations between sponsoring agencies, not only in terms of formal bases of authority but also the informal processes by which agencies and their representatives exert influence in courtroom workgroup strategies and case outcomes” (Ulmer, 1997: 13). The third element is the “detailed attention to the guilty plea and sentencing process as the core organizational activities of courts” (Ulmer, 1997: 13). The final aspect is the attention to “going rates,” which are “informal norms concerning routine charges, plea agreement terms, and sentences (Ulmer, 1997: 13).

Woolredge and Thistlewaite (2004) reviewed the court community literature and described the “going rates” aspect more specifically:

Studies of court communities describe organizational and political influences on how attorneys and judges (“courtroom workgroups”) process large-volume cases within particular jurisdictions (Eisenstein and Jacob, 1977; Nardulli et al., 1988; Sudnow, 1965). These cases must be moved quickly through the courts to moderate caseloads, and attorneys in some jurisdictions therefore informally establish “going rates” (Eisenstein and Jacob, 1977) to accompany guilty pleas (see also Flemming et al., 1992; Emerson, 1983; Nardulli et al., 1988; Ulmer, 1997). These involve charge and or sentence recommendations that are often less severe than those formally recommended by law. Defendants may therefore plead guilty rather than take their chances at trial, saving the state both time and money. Very little negotiation actually takes place in these circumstances, which also saves valuable time, because the charges and sentences accompanying guilty pleas are most often understood (referred to by Nardulli et al., 1988, as “consensus mode” guilty pleas) (Woolredge and Thistlewaite, 2004: 423).

The Effect of Sentencing Guidelines on Prosecutor Decisions

Having reviewed the major theoretical perspectives governing prosecutorial decision-making in general, this section discusses theories focusing specifically on the effect of structured sentencing reforms on prosecutorial practices. Despite the theoretical and practical importance of the hydraulic displacement thesis, “relatively little theory has been advanced that can provide specific hypotheses about the likely impact of changes to sentencing laws” (Engen and Steen, 2000: 1363). As discussed earlier, Miethe (1987) argued that, even if sentencing guidelines or similar reforms exhibit some backward transference of discretion to prosecutors, it is not necessarily true that prosecutors will use this greater discretion.

McCoy (1984) speculated that hydraulic displacement may not occur if each actor, including judges, “still retains some measure of discretionary power” (p. 256). Miethe (1987) offered several reasons why the implementation of sentencing guidelines

may not affect prosecutorial practices. First, he theorized that social control mechanisms may limit the abuses of prosecutorial discretion in charging and plea bargaining practices. For instance, there may be informal policies concerning charging and plea bargaining practices that may diminish the likelihood of major adjustments in plea bargaining practices after imposition of sentencing guidelines (Miethe, 1987: 174). Second, because prosecutors may perceive the development of sentencing guidelines as an initial step in controlling decisions, they may limit excessive use of their discretion (Miethe, 1987: 174). Third, prosecutors' use of discretion may be constrained by working relationships with others in the court community (Miethe, 1987: 157). Membership in the courtroom "workgroup" and shared norms about the appropriate penalties for particular crimes may "minimize individual interests and thwart efforts by prosecutors to exercise their greater discretionary power" (Miethe, 1987: 174).

Finally, most structured sentencing schemes retain some judicial sentencing discretion in the form of wide sentence ranges and adequate reasons for departures (Miethe, 1987: 174). With respect to this point, Frase (1999) similarly noted, in a "properly balanced guidelines system" with "reasonable sentence severity levels," in which courts retain substantial sentencing discretion due to broad guidelines ranges, limited appellate scrutiny, and/or flexible departure powers, it is "rare that prosecutorial decisions will produce sentences which judges strongly disapprove, yet are powerless to prevent" (p. 69). In such systems, there is generally an absence of widespread complaints, which is a sign that a major changes in prosecutorial practices have not occurred after the guidelines (p. 69). As discussed earlier, the voluntary nature of guidelines and the

descriptive, rather than normative approach, should also minimize the possibility of a hydraulic displacement (Miethe, 1987: 157).

Tonry and Coffee (1987) speculated about the possible effect of the Minnesota Sentencing Guidelines on prosecutorial behavior. They cautioned against the sweeping statement that sentencing guidelines increase prosecutorial power to cause guilty pleas and discussed other prosecutorial important goals:

Implicit in critiques of enhanced prosecutorial influence under guidelines is the thesis that the prosecutor will use the guidelines to maximize the pressure on each individual defendant to plead guilty. This may be an oversimplification, however. Other ends—including saving time and achieving better allocation of prosecutorial resources—are also pursued by the prosecutor and facilitated by the introduction of guidelines. Presumptive guidelines serve these goals by simplifying the negotiation process. In so doing, they enable the prosecutor to conserve his investment of resources in minor cases and thereby enable him to focus more intensively on the major cases involving more serious crimes (Tonry and Coffee, 1987: 152).

Tonry and Coffee (1987) also warned about the possibility that the aggregate pressure that the prosecutor and judge can exert on the defendant to plead guilty may actually be *reduced* by sentencing guidelines even though the prosecutor has gained increased control. They illustrate this possibility with an example from the Minnesota Sentencing Guidelines. Before those Guidelines took effect, a robbery defendant who went to trial risked a sentence as long as 25 years. Under the Guidelines, however, high statutory ceilings have far less relevance. Consequently, the effect of any charge reduction that the prosecutor can typically offer is greatly reduced. A charge reduction of one seriousness level, they write, will seldom reduce the applicable guideline range by more than a year, and often the reduction will be even less (Tonry and Coffee, 1987: 146).

Complicating matters further, Tonry and Coffee (1987) noted that the “risk aversion” level of the defendant makes it less clear whether sentencing guidelines increase the pressure to plead guilty. They point out that the concern that plea bargaining under sentencing guidelines may unduly pressure defendants to plead guilty is “implicitly based on the belief that the defendant compares the expected punishment cost of pleading guilty with that of going to trial and opts for the lesser expected cost” (p. 147). This, however, is not necessarily what the defendant does. There are at least two other possibilities. The defendant may be risk-averse and instead focus on the worst possible outcome (the maximum sentence), or he may be a “risk preferrer” and focus on the best possible outcome (the minimum sentence or acquittal). As Tonry and Coffee (1987) wrote, “There are no compelling reasons to believe that defendants are risk-neutral and simply compare the two expected outcomes” (p. 147).⁸⁸

According to Ulmer (1997), the theoretical perspectives that have been advanced to explain why a hydraulic displacement of discretion may or may not occur after the introduction of structured sentencing reforms are generally based on the court community

⁸⁸ Tonry and Coffee (1987) explained:

The prosecutor can obtain greater coercive pressure over the defendant by threatening the possibility of a severe sentence than by offering a virtually certain but more modest discount off the normal sentence for the crime. Because presumptive guidelines tend to prevent extreme sentences, they should “logically be expected to reduce the pressure on the risk-averse defendant to surrender a substantial possibility of acquittal. The trade-off has two elements: presumptive sentencing guidelines may lead a defendant who has little prospect of acquittal to plead guilty (because they make a discount off the mean sentence more certain), but by the same token they protect the risk-averse defendant with a reasonable chance of acquittal from his inability to resist prosecutorial pressure in the form of a threatened lengthy sentence for failing to plead guilty. So viewed, the charge concession arguably becomes only a small bribe that society pays the clearly convictable defendant to surrender the nuisance value that his attorney can create on his behalf, but it is inadequate to compensate the defendant who has a serious chance of acquittal. Thus, it might be argued, guidelines only expedite results; they do not reverse outcomes from the state of affairs that would exist in a world without plea bargaining. Attractive and benign as such a policy conclusion may seem, we are hesitant to endorse it without considerable qualification. Basically, our reservations stem from the ambiguity inherent in the concept of risk aversion (p. 149).

framework. As Ulmer (1997) wrote, proponents of the court community perspective such as Eisenstein et al. (1988) “hold that the influence of any type of sentencing reform will be filtered through the organizational and political contours of local court communities” (p. 14). Sentencing reforms do not operate in a vacuum, but must “take place in the real world of criminal court communities” (Eisenstein, et al. 1988: 296). Ulmer’s (1997) ethnographic and quantitative analysis of three counties in Pennsylvania suggested that the “hydraulic displacement” thesis is “not necessarily incorrect, but may be incomplete” because current framings of the issue in the literature “place a great deal of emphasis on prosecutorial discretion and the importance of charge bargaining, and give little attention to ways in which local court contexts provide opportunities, motives, and constraints” for the exercise of prosecutorial power (p. 183). In short, the role of sentencing guidelines and prosecutorial power in court community power relations will vary depending on the organizational context of each court. Ulmer (1997) explained:

[G]uidelines may benefit prosecutors’ charge bargaining leverage and thus sentencing influence, but only where local contexts provide the means, motives, and opportunities for guidelines to be used in this way... the role of guidelines in court community power relations may vary depending on the formal and informal organization of case processing, the strength of local sentencing norms or “going rates,” and the ways in which each sponsoring agency (not just prosecutors) is able to use the guidelines to their advantage (Ulmer, 1997: 32).

Ulmer (1997) stressed the importance of analyzing the relationship between the externally imposed sentencing guidelines norms and local informal norms (going rates) and how this relationship varies between court community contexts (p. 33). Ulmer (1997) hypothesized that in court communities with greater familiarity and stability—those where actors have more extensive shared pasts—there would be stronger local going rates

and thus less reliance on sentencing guidelines as a source of sentencing norms. In these court communities, informal going rates would supersede sentencing guidelines norms (Ulmer, 1997: 33). Conversely, court communities with less extensive shared pasts among workgroups and less strong going rates would exhibit greater reliance on guideline sentencing standards. In such court communities, sentencing guidelines would provide a “ready-made system of going rates, reducing uncertainty for counsel in predicting judges’ sentences, facilitating unilateral decisions, and providing explicit tools for plea negotiating agendas” (p. 34). Ulmer (1997) concluded that “the nature and character of justice and formal social control...depend as much or more on the processual orders of local courts as they do on the policies and laws of larger-scale state actors” (p. 189).

Conclusion

Many years ago, Hagan (1975) wrote that, while the literature surrounding the prosecution process was “helpful in isolating potentially important variables,” it did not “suggest a set of propositions sufficiently precise to allow a deductive model-testing approach to the research problem” (p. 537). This statement is still true today. Theory on prosecutor decision-making generally and the hydraulic displacement thesis in particular remains underdeveloped. Bushway and Reuter (2008), for example, recently reviewed the literature on prosecutor decision making and criticized the lead perspective, focal concerns theory, for not operationalizing key concepts or providing a formal model for testing (p. 410).⁸⁹ Existing theories have been most helpful, not for prediction and model testing, but simply for interpreting results of empirical research.

⁸⁹ Bushway and Reuter (2008) also argued that economic research could inform criminal justice research given that system actors are known and likely to behave rationally in the “economic sense of consistently

Not only are existing theories on prosecutor decision making in need of further development, but they can lead to inconsistent predictions about the effect of important variables on charging and plea bargaining practices. Woolredge and Thistlewaite (2004) reached this conclusion after their review of quantitative studies, which are most often grounded in theories predicting harsher treatment for persons of lower status, and ethnographic studies of court communities, which leave open the possibility that relationships between extralegal characteristics of defendants and case outcomes may operate to the advantage or disadvantage of higher status defendants (Woolredge and Thistlewaite, 2004: 423).

As discussed above, quantitative research on prosecutorial decision-making is generally based on perspectives such as “perceptual shorthand,” “uncertainty avoidance,” and “focal concerns,” which predict harsher dispositions for disadvantaged or lower status persons. Under the court community perspective, however, there are arguments that lower status defendants may receive more severe or less severe sentencing outcomes. As Woolredge and Thistlewaite (2004) explained, Sudnow (1965) argued that charge/sentence recommendations that are part of the going rates are more likely to accompany the guilty pleas of defendants who fit attorney preconceptions of stereotypical offenders involved in large-volume crime, such as persons of lower socioeconomic status arrested for assaults or burglaries. If, for example, a burglary is committed and a defense

following their objective functions.” They lamented that economic research of criminal justice generally and the prosecutor specifically has essentially disappeared. They argued that “pioneering work” by economists in the early 1970s on prosecutors could make a significant contribution to understanding prosecutorial behavior. The most notable economic research was by Landes (1971), who proposed a mathematical model of prosecutor behavior where the prosecutor “attempts to maximize the expected number of convictions weighted by the expected sentence given at trial, subject to a budget constraint on his resources. Bushway and Reuter (2008) argued that the Landes model should at the very least present “an important alternative explanation or competing theory that could serve as a useful stalking horse or straw man that criminologists could use to show the need for more complicated theories” (p. 393).

attorney can establish that this offense is just like most other burglaries occurring in more crime prone neighborhoods, then the prosecutor may be more willing to reduce the charge to petty theft. However, if offense- and offender-related characteristics do not fit preconceived stereotypes, then these charge/sentence recommendations might not be used (Woolredge and Thistlewaite, 2004: 422). When faced with atypical defendants, such as individuals of higher socioeconomic status, attorneys may “spend more time evaluating culpability, future risk, and appropriate outcomes because such evaluations are not readily dictated by any preconceptions” (Woolredge and Thistlewaite, 2004: 423). This opens the possibility that atypical defendants could experience outcomes that differ significantly from informal going rates, but whether these outcomes are more or less severe depends on the argument. As Woolredge and Thistlewaite (2004) explained:

Case outcomes for atypical defendants could be more severe if judges maintain higher expectations of these individuals and are less likely to tolerate excuses for their behaviors...Atypical defendants could also experience more severe outcomes if refusal to negotiate leads to criminal investigations uncovering more evidence of culpability, providing the state with greater leverage in subsequent negotiations. Reluctance to initially accept a plea could also lead to harsher treatment even if these defendants subsequently plead guilty. Eisenstein and Jacob (1977) found that, in Chicago, prosecutors offered less attractive plea bargains as trial dates approached. By contrast, criminal investigations involving atypical defendants could lead to less severe outcomes if details about a defendant’s background are revealed that either reinforce preconceptions that the offense might have been an aberration in the life of an otherwise law-abiding citizen, or if uncovered details raise questions about guilt (p. 423).

Woolredge and Thistlewaite (2004) analyzed disparities in case processing for nearly 3,000 males arrested for misdemeanor assaults on intimates in Hamilton County (Cincinnati), Ohio. The stages of case processing pertinent to their analysis included the charging decision (filed charges versus no filed charges), full prosecution (no

subsequently dropped charges), conviction, and sentencing. Their general hypothesis for the main effects of race and socioeconomic status at each stage examined was that disposition severity among males arrested for intimate assault will vary based (separately) on the individual's race and socioeconomic status, as well as the socioeconomic status of his neighborhood (p. 428). Woolredge and Thistlewaite (2004) hypothesized significant differences in case dispositions rather than testing directional relationships because their review of the literature left open the possibility of alternative hypotheses for extralegal disparities in case dispositions for intimate assault (p. 427).

Woolredge and Thistlewaite's (2004) findings revealed greater advantages for African Americans relative to whites in decisions related to charging, full prosecution and the length of incarceration. On the other hand, the significant results for both defendant socioeconomic status and neighborhood socioeconomic status were split in terms of the directions of their relationships. Lower socioeconomic status at the individual level coincided with lower odds of filed charges, yet higher odds of a jail sentence. Similarly, lower socioeconomic status at the neighborhood level corresponded with lower odds of filed charges and full prosecution, yet higher odds of conviction and a jail sentence. The relationships "consistently reflect either a less severe disposition for more disadvantaged defendants (formal charges and full prosecution), or a more severe disposition for more disadvantaged defendants (jail sentences)" (p.443). The theme that emerged was that that earlier case processing decisions generally favored defendants with lower socioeconomic status but later decisions generally favored defendants with higher socioeconomic status. Importantly, the "most interesting aspect of these trends [was] that the first set of findings is consistent with predictions extrapolated from ethnographic

studies of court communities, and the second with those based on frameworks more common to quantitative studies of case outcomes” (Woolredge and Thistlewaite, 2004: 443).

The authors speculated that this may have resulted from the fact that studies of court communities focus more heavily on decision making by attorneys, and studies of case outcomes focus more heavily on sentencing (decisions by judges). The benefits to lower socioeconomic defendants in earlier decision points could have been a consequence of the much larger volume of these individuals being arrested by police. They could have also reflected a prosecutorial “release valve” for these types of defendants that compensates for the proactive arrest policy (Woolredge and Thistlewaite, 2004: 443).⁹⁰

In sum, Woolredge and Thistlewaite’s (2004) findings indicated that earlier case processing decision points (i.e., charging) resulted in more favorable dispositions for suspects of intimate assault who faced greater social and economic disadvantage, which was consistent with predictions extrapolated from the literature on large volume crime and court communities. Conversely, later decision points (conviction and sentence) generally favored those with higher socioeconomic status, which is consistent with predictions grounded in frameworks more common to quantitative research on

⁹⁰ Moreover, decisions to file charges and to not subsequently dismiss them may also have been influenced by risk factors not measured in the study, so the pool of fully prosecuted defendants may have consisted of a pool of higher risk offenders. It may only have been in the context of processing these higher risk defendants that lower socioeconomic status became a disadvantage to defendants, “based on the stereotypes of higher risk offenders that might include their class status and whether they reside in more crime-prone neighborhoods” (Woolredge and Thistlewaite, 2004: 443). The authors concluded that, while stereotyping may actually benefit defendants who fit the more typical profiles of routine offenders, it is possible that such benefits only existed early on in the process due to caseload demands. Once the pool of defendants was filtered, both attorneys and judges may have seen the more stereotypical defendants as higher risks (Woolredge and Thistlewaite, 2004: 443).

sentencing.⁹¹ In short, the results indicated that “both perspectives have merit for understanding extralegal disparities in processing cases of intimate assault, and together they offer an explanation for findings that might otherwise seem contradictory across stages of case processing” (p. 445).

Summary and Research Questions

The 1970s marked the beginning of a sentencing reform movement where many states sought to limit judicial discretion and reduce sentencing disparity through sentencing guidelines. The District of Columbia implemented sentencing guidelines in June 2004 with the goal of moving more sentences toward the center of the historical sentencing range. There have been numerous studies finding that sentencing guidelines systems in other states have been largely successful in reducing extra-legal sentencing disparity, and the D.C. Sentencing Commission evaluations have found that the D.C. Sentencing Guidelines have reduced variation that can not be explained by the current offense or the offender’s criminal record.

The majority of research, however, has not examined whether sentencing guidelines have displaced discretion and disparity from the judge at the sentencing phase

⁹¹ As alluded to above, Holmes, et al. (1987) reviewed prior empirical research, which generally did not find any effect of extralegal variables on prosecutor charge bargaining decisions. They speculated that this was due to the “bureaucratic nature” of the judicial process, which “creates relative uniformity at this stage of decision making” (p. 248). They explained:

It has often been argued that the primary concern of both prosecutors and defense attorneys is the expedient disposal of cases (e.g., Blumberg, 1967). The result is the routinization of dispositions, a procedure dictated by concerns about controlling court dockets and maintaining an orderly flow of cases through the system. Prejudicial responses to social status may thus become insignificant in light of the bureaucratic imperative to dispose of cases efficiently (Hagan and Bumiller, 1983). Moreover, although the acquisition of legal resources was strongly affected by social status, these resources did not influence charge reductions. This is an especially important finding given the effects of legal resources on final disposition observed here in previous research. The lack of resource effects on charge reductions reinforces the possibility that such decisions were highly routinized and, therefore, relatively impervious to extralegal influences (p. 248).

to the prosecutor at the pre-conviction stage. There are a limited number of studies testing whether such a displacement has occurred. Miethe and Moore (1985) examined charging and plea bargaining practices (including the rate of charge reductions) before and after presumptive sentencing guidelines were implemented in Minnesota. They found that prosecutorial practices did not change dramatically after the sentencing guidelines and that the changes that did occur were related to changes in case attributes rather than offender characteristics. Miethe (1987) also examined the Minnesota guidelines and found little to no evidence of significant pre-/post-guideline differences in the rate of charge reductions, the rate of charge dismissals, or the average severity of the initial charge. Furthermore, he found little evidence that extra-legal attributes became more important predictors of dispositions after the guidelines were implemented. Any differences in pre- and post-guidelines models were due to the differential importance given to case processing and offense attributes rather than offender characteristics.

Wooldredge and Griffin (2005) examined whether Ohio's voluntary sentencing guidelines resulted in significant changes in prosecutorial charging and bargaining decisions. As discussed above, the first stage of the analysis focused on whether the guidelines corresponded with significantly lower odds of being charged with a felony where incarceration was presumed. This stage also tested whether the guidelines coincided with significant increases in the odds of (1) all charges being dropped after indictment (among all indicted suspects), (2) guilty pleas with agreements from prosecutors (also among all indicted suspects), (3) some charges being dropped between indictment and guilty plea (among those who pled guilty via agreements with prosecutors), and (4) reductions to lesser charges (also among those who pled guilty via

agreements). They did not find that the implementation of guidelines coincided with significant changes in any of the outcomes, except that they did correspond with a significant increase in rates of charge reductions among defendants who pled guilty.

The second stage of their analysis looked at changes in the specific effects of case and defendant characteristics on case dispositions. They found that some changes occurred in the specific effects of various defendant characteristics on some of the outcomes examined, but that these changes did not uniformly result in harsher dispositions for defendants facing greater social and economic disadvantage. Thus, any increase in levels of prosecutorial discretion that might have occurred did not result in extra-legal disparities in case dispositions.

In sum, only three studies have specifically examined whether there has been a displacement of discretion to prosecutors after the introduction of sentencing guidelines.⁹² The two studies in Minnesota, a presumptive guidelines state, found limited evidence of a hydraulic effect, and any displacement that did occur was not related to a defendant's extra-legal characteristics. The study in Ohio, a voluntary guidelines jurisdiction, found that the shift to guidelines coincided with an increase in rates of charge reductions among defendants who pled guilty, but that these changes did not result in harsher dispositions for offenders with greater socioeconomic disadvantage. The authors in the Ohio study emphasized, however, that even their limited finding of a hydraulic effect was significant due to that state's voluntary guidelines structure.

⁹² As described above, there have been numerous studies, particularly during the 1970s and 1980s, examining the nature and determinants of charging and charge bargaining. There are also several theoretical perspectives on prosecutor decision-making. An understanding of this literature is critical for this study on prosecutorial behavior, as it addresses issues such as whether to use non-directional hypotheses, model specification, and the operationalization of key concepts. It is not directly relevant, however, to developing the research questions in this study.

This study empirically tests whether there was a displacement of discretion and disparity from the judge to the prosecutor after the implementation the District of Columbia Sentencing Guidelines. It focuses on prosecutor charge bargaining decisions.⁹³

Specifically, this study addresses the following research questions:

Among those who plead guilty, is the rate of prosecutor charge bargaining different before and after the D.C. Sentencing Guidelines?

Among those who plead guilty, are the determinants of whether defendants receive a charge bargain different before and after the D.C. Sentencing Guidelines?

Among those who plead guilty, is the magnitude of prosecutor charge bargaining different before and after the D.C. Sentencing Guidelines?

Among those who plead guilty, are the determinants of the magnitude of prosecutor charge bargaining different before and after the D.C. Sentencing Guidelines?

Piehl and Bushway (2007) proposed a different approach for testing the hydraulic displacement thesis. While the studies in Minnesota and Ohio focused on changes in the rate of plea bargains (“the existence of the bargain”) after sentencing guidelines, Piehl and Bushway (2007) developed an estimate of the difference in the sentencing outcome that can be attributed to prosecutorial charge bargaining (“the value of the bargain”). Their method measures the difference in sentencing outcomes caused by plea bargain and emphasizes the amount in months that the sentence length is reduced. They suggested this method because it may yield different substantive findings than when using the methodology from Minnesota and Ohio studies. This study will be test the hydraulic displacement of discretion thesis with Piehl and Bushway’s (2007) methodology. It will

⁹³ As discussed further below, this study also attempted to examine whether there were any changes in the nature and determinants of the mode of conviction and charging severity after the Sentencing Guidelines.

compare the average change in expected sentence due to charge bargaining in the pre and post-Guidelines periods. The research question to be addressed is:

Among those who plead guilty, do prosecutor charge bargaining decisions affect the sentence to a different degree before and after the D.C. Sentencing Guidelines?

The vast majority of studies of the effect of sentencing guidelines on disparity reduction have ignored the hydraulic displacement thesis largely because of the lack of necessary data. This is a “troubling reality: rules to control discretion may shift the discretion so that it is invisible to the researcher” (Piehl and Bushway, 2007: 121). While the District of Columbia Sentencing Commission has recognized the possibility of a displacement of discretion to prosecutors,⁹⁴ it has not specifically examined this issue. It has not had the necessary data—at least not in a prepared datafile—to analyze whether the nature and determinants of prosecutorial decisions changed after the guidelines were introduced. The District of Columbia Superior Court has granted access to data that will allow an examination of whether sentencing discretion and disparity has been displaced from judicial decisions to prosecutorial decisions.

⁹⁴ The Commission wrote that “sentencing guidelines by design limit the discretion and power of judges, and many believe that in doing so, guidelines transfer some of that discretion and power to prosecutors – giving them too much power” (Advisory Commission on Sentencing Annual Report, 2000: 76). When considering whether to recommend abolishing parole for some versus all felonies, the Commission determined a unitary system where parole was abolished for all felonies was preferable because “the retention of some parole-eligible offenses would also create the potential for a transfer of power to prosecutors.” It reasoned that “prosecutors hold the power to select the charge at the indictment and have leverage in the plea bargaining process. In a bifurcated or trifurcated system, many occasions would arise in which the prosecutor could select between one charge that carries parole and another that does not” (Advisory Commission on Sentencing Annual Report, 2000: 14).

CHAPTER III: Data and Methods

Data and Sample Selection

This study is based on a random sample of single count felony sentences (n=881) from the District of Columbia Superior Court. The sample was selected from 4403 cases sentenced in 2003 and 2005.⁹⁵ This data were taken from the District of Columbia Superior Court Information System (CIS), which contains conviction and sentencing related information.⁹⁶ The CIS is more appropriate than the Sentencing Commission's datafile for purposes of this study because it contains information from the periods prior to and after the implementation of the Sentencing Guidelines.⁹⁷ The Commission's datafile, on the other hand, only contains information from the period after the Guidelines.⁹⁸

The research design is a pre- and post-test comparison of two samples of cases. The CIS does not allow a clear delineation between pre- and post-Guidelines cases because it does not include the date of conviction.⁹⁹ Given that the Guidelines became effective in June 2004, and given that it generally takes approximately eight weeks from conviction to sentencing, it was not possible to determine which cases in 2004 were post-Guidelines cases. All cases sentenced in 2004 were therefore excluded, and only cases sentenced in 2003 (the pre-Guidelines sample) and 2005 (the post-Guidelines sample) were used. A twenty percent sample was selected, forty percent of which were Drug Grid

⁹⁵ The majority of convictions in the Superior Court are for only one count. In 2003 and 2005, only 13.6% of felony sentences were for multiple convictions. In 2003, there were 2213 single count cases. In 2005, there were 2190 single count cases.

⁹⁶ Access to this data was granted through a Memorandum of Understanding with the Superior Court.

⁹⁷ After 2005, the CIS was replaced by another data system.

⁹⁸ The CIS dataset also contains more demographic, legal, and case-processing variables than the Commission's dataset, which primarily contains variables related to compliance with the Sentencing Guidelines.

⁹⁹ As stated above, the Sentencing Guidelines apply to convictions on or after June 14, 2004.

cases and sixty percent of which were Master Grid cases. Disproportionate stratified sampling was done to ensure that there were sufficient non-drug cases, which have far more offense types than drug cases. For 2003, 443 cases were selected, 177 of which were drug cases and 266 of which were non-drug cases.¹⁰⁰ For 2005, 438 cases were selected, 175 of which were drug cases and 263 of which were non-drug cases.¹⁰¹

The second source of data for this study was the Superior Court’s “CourtView” system, which tracks individual cases from the prosecutor charging phase to the sentencing phase. The CourtView system allows authorized users to examine individual cases by defendant name/identification number or by case docket number. The Memorandum of Understanding with the Superior Court grants access to all relevant variables in CourtView with the exception of the names of the defendants and the names of the sentencing judges.¹⁰² While the CIS dataset contains useful conviction and sentencing related information, access to CourtView was essential for this study due to its focus on prosecutorial decisions. As Ulmer (1997) wrote, “[a]n ideal statistical analysis of case processing and sentencing outcomes would include data on original charges (i.e., charges at arrest or arraignment stages) as well as conviction charges” (p. 44). For this study, the author manually supplemented the random sample of 881 sentenced cases with charging, charge bargaining, case processing, and criminal history variables from CourtView.

¹⁰⁰ In 2003, 1066 (48.2%) of the cases in the population were drug cases, while 1147 (51.8%) were non-drug cases.

¹⁰¹ In 2005, 1083 (49.5%) of the cases in the population were drug cases, while 1107 (50.5%) were non-drug cases.

¹⁰² The CIS dataset includes numeric codes for the judges and defendants to ensure anonymity.

Measures

Independent Variables

Table 4.1 provides descriptive statistics for the measures in this study. The independent variables can be categorized as (1) demographic variables; (2) criminal history variables; (3) case processing variables; and (4) charging variables. The demographic variables --- age, gender, and race of the offender – are included as independent variables in all multivariate analyses. The defendant’s age at sentencing (AGE) was created by taking the difference between the year of sentencing (2003 or 2005) and the defendant year of birth. The defendant’s gender is measured by a dichotomous variable (MALE) and coded as 1 for males and 0 for females. The defendant’s racial category is captured by a dummy variable (AA) and coded as 1 for African Americans and 0 for non-African Americans.

With regard to criminal history variables, the following information was manually collected from CourtView for each case in the sample: (1) the number of prior felony arrests in the District of Columbia (PRIORF); and (2) the number of prior misdemeanor arrests in the District of Columbia (PRIORM).¹⁰³ The following additional criminal history variables were then created: (1) the number of prior D.C. felony and misdemeanor arrests (PRIORA); (2) a dichotomous variable for whether there were any prior D.C. felony arrests (ANYFELS); and (3) a dichotomous variable for whether there were any prior D.C. felony or misdemeanor arrests (ANYPRIORS). The criminal history variables originally collected (PRIOF and PRIORM) were included in all multivariate analyses.¹⁰⁴

¹⁰³ Information on traffic related matters was not collected.

¹⁰⁴ While the other three criminal history variables provide helpful information for the descriptive analyses, they were not included in the multivariate analyses because they were less precise than the included measures.

Though there was no information available for prior criminal record from jurisdictions other than the District of Columbia, there is no reason to believe that the inability to measure prior out-of-state convictions changed after the Guidelines. Therefore, a relative comparison between the pre- and post-Guidelines samples should not be affected. Nevertheless, to test the accuracy of the criminal history variables collected from CourtView, a comparison was made to a subset of cases where the D.C. Sentencing Guidelines criminal history scores, which are based on both D.C. and out-of-state convictions, were available. The Sentencing Commission provided Sentencing Guidelines criminal history scores for 316 of the 438 cases sentenced in 2005 (the post-Guidelines sample).¹⁰⁵ A correlation analysis was then performed between the Sentencing Guidelines score of adult convictions and this study's measure of prior D.C. arrests collected from Courtview. The highest correlation level (.371) was between the Sentencing Guidelines score of adult offenses and the measure of prior D.C. felony and misdemeanor arrests (PRIORA).

While this comparison to the Sentencing Guidelines criminal history measures may provide some insight as to the most accurate criminal history variables among the measures collected for this study, it is important to note that the Sentencing Guidelines scores frequently do not reflect the true criminal history of the offender. This is due to a variety of complex rules for "scoring" prior convictions according to the Sentencing Guidelines. For instance, while this study counts the number of prior misdemeanor and felony convictions at equal value regardless of their severity, the Sentencing Guidelines rules score prior convictions at different levels (e.g., ½ point, 1 point, 2 points, or 3

¹⁰⁵ The Commission was unable to provide criminal history scores for every case because in the early stages after the Guidelines went into effect, information for some sentenced cases did not reach the Commission.

points) depending on their severity.¹⁰⁶ The Guidelines also include intricate rules for when convictions are too old to be counted and, thus, “lapsed.” There are also rules for when lapsed offenses can be “revived” and scored. In such cases, they are scored at a lesser value than non-lapsed convictions, though they are sometimes scored at full value depending on the seriousness of the offense. Finally, there are extremely complex rules on how to score out-of-state convictions, which by and large result in under representing the true out-of-state criminal history in the presentence investigation report and, thus, in the Sentencing Commission’s dataset.¹⁰⁷ Thus, while the comparison to Sentencing Guidelines criminal history scores provides some useful information, one should not assume that the scores in the Sentencing Commission’s datafile are an accurate measure of prior record.

While prior convictions or sentences to imprisonment are frequently used as measures of prior record to explain sentences imposed by judges, prior arrests may be the best measure of criminal history when examining prosecutorial decisions. Welch, et al. (1984) assessed the utility of 11 commonly used measures of prior record when examining the sentencing outcome.¹⁰⁸ They found that these measures were not interrelated highly and thus were not interchangeable, that the measures affected sentence severity differently, and that the relationships between these measures and sentence

¹⁰⁶ For example, more serious felonies such as aggravated assault are generally scored at three points while less serious offenses such as theft are scored as one point.

¹⁰⁷ In brief, these rules instruct the presentence report writer to under-represent the out-of-state convictions based on a comparison of the statutory elements of the offense from the foreign jurisdiction. The sentencing court is then permitted to increase the out-of-state criminal history score based on factual arguments by the prosecutor. The prosecutor, however, only raises these arguments in a small fraction of cases when such an argument would increase the criminal history category (e.g., A, B, C, D, or E) on the sentencing guidelines table. Even in the rare event that such arguments are made, and the criminal history score is increased to reflect the true prior record, that increase in the criminal history score frequently was not reported back to the Sentencing Commission in the early years after the Guidelines became effective.

¹⁰⁸ The authors acknowledged that their study was limited because it examined only 2400 cases in one city. They wrote: “While this is an adequate number for an overall analysis, it does not allow for a fine breakdown by different types of crimes and defendants” (p. 224-225).

severity varied for black and white defendants. The strongest predictor of the sentence was whether a defendant had ever received a prison sentence of more than 1 year and whether a defendant had ever received a prison sentence of any length.¹⁰⁹

In his review of the sentencing literature, Mitchell (2005) noted that several authors have been highly critical of the adequacy of measures intended to capture variation in defendant prior record. While some scholars criticize measures of prior record as being crude because they are simple dichotomies distinguishing defendants with some record from those without one, others have found that a variety of criminal record scores (including both dichotomous and interval-level measures) were equally effective at predicting sentencing outcome (Mitchell, 2005: 450).

Wooldredge and Griffin (2005) explored numerous possible measures for inclusion in their study of prosecutorial charging and charge bargaining decisions before and after sentencing guidelines in Ohio. They concluded that two measures prevailed in strength across the outcomes and were included in the full models. The first measure was the number of prior prison terms served by a defendant, and the second involved whether a defendant had ever been institutionalized as a juvenile.¹¹⁰ Worrall, et al. (2006)

¹⁰⁹ The measures include in the study were: (1) whether or not the defendant had ever been arrested; (2) whether or not the defendant had ever been arrested on a felony charge; (3) whether or not the defendant had ever been convicted; (4) whether or not the defendant had ever been convicted on a felony charge; (5) the number of times the defendant had been convicted on a felony charge; (6) whether or not the defendant had ever been sentenced to a prison term; (7) the number of times the defendant had been sentenced to a prison term; (8) whether or not the defendant had ever been sentenced to a prison term of one year or more; (9) the number of times the defendant had been sentenced to a prison term of one year or more; (10) a four-point summary scale of prior record in which the defendant received one point for any prior arrest, any prior conviction and any prior term of incarceration; and (11) a four-point (0-3) summary scale of prior felony record in which the defendant received one point for any prior arrest on a felony charge, any prior conviction on a felony charge, and any prior term of incarceration for one year or more (p. 218-219).

¹¹⁰ The measures explored were: (1) number of prior felony arrests, (2) prior misdemeanor arrests, (3) total prior arrests, (4) prior felony convictions, (5) prior misdemeanor convictions, (6) total prior convictions, (7) prior prison terms less than 2 years, (8) prior prison terms greater than or equal to 2 years, (9) prior jail terms less than or equal to 30 days, (10) prior jail terms greater than 30 days, (11) total prior jail terms, (12) total prior prison and jail terms, or (13) prior community supervisions.

explored the factors that affected prosecutors' charging decisions in domestic violence cases. They defined prior criminal history as whether there was a prior domestic violence conviction (Worrall, et al., 2006: 473). According to Weisburd and Britt (2007), while a minority of scholars contend that arrests are a less valid measure of offending because they come before the court determines guilt or innocence, criminologists "have generally assumed that arrest is the most valid measure of frequency of offending" from official data sources because arrests are much closer in occurrence to the actual criminal behavior and are not filtered by the negotiations at later stages of the legal process (p. 24).

Indeed, there is evidence that prior arrests may be a preferable measure of criminal history than prior convictions or prior imprisonment in the context of prosecutor decision making. Hagan (1975) and Curran (1983) used the number of prior arrests rather than other possible indicators of criminal history in their studies of prosecutorial charge bargaining. Kingsnorth, et al. (2002) modeled the prosecutor's decision at the intake phase to "retrack" a domestic violence case as a probation violation in lieu of a criminal charge (p.560).¹¹¹ The prior record variable was measured, not by prior convictions or incarcerations, but by prior arrest record, which was "preferred over prior conviction because interviews with prosecutors indicate[d] that at this less formal stage of processing, arrest record [was] an important concern" (p. 560).

Spohn, et al. (1987) reached a similar conclusion when they modeled the prosecutor's charging decision and included four items in the prior record score: whether

¹¹¹ The authors utilized a sample of 1427 domestic violence cases supplemented by interviews with prosecutors to analyze the phenomenon that arrests not resulting in convictions may nonetheless receive substantial punishment through reliance on alternative, less formal, means of imposing sanctions. They concluded that the majority of cases disposed by such means originated as new criminal charges, which were then rejected or dismissed in favor of resolution through use of the prosecutor's power to initiate probation violation hearings, which almost always resulted in jail or prison sentences.

or not the defendant had been arrested in the last five years, the number of previous arrests, the number of arrests for crimes against persons, and whether or not the defendant ever used an alias (p. 181). They noted that, though the prior arrest record may be an imperfect indicator of the seriousness of a defendant's prior record because of research finding that prior convictions and incarcerations were better predictors of the *judicial* sentencing decision, "this may not be true for predicting rejection or dismissal of charges" by the prosecutor (p. 181).

The case processing variables in this study are the identification number of the sentencing judge (JUDGE), (2) the type of attorney (ATTY); and (3) whether the offender was charged by grand jury indictment (INDICT).¹¹² The judge identifier variable may be important if prosecutors and defense attorneys consider the reputation of the judge for sentencing leniency or severity before determining whether and how to plea bargain. In cases before the D.C. Superior Court, the parties know the identity of the trial judge at the time of presentment of charges and thus prior to plea negotiation. For this study, the identification number of the sentencing judge was used to create a three-category variable (LIGHT, MODERATE, SEVERE) representing the estimated sentencing severity level of the judges. It was created by regressing the sentence length variable on the judge identification dummy variables and other variables representing crime severity and characteristics of the offenders.¹¹³ The judge sentencing severity variables were included in all multivariate analyses except for the models predicting

¹¹² The first variable was in the CIS dataset, while the second two variables were manually collected from CourtView.

¹¹³ A tobit regression was conducted with sentence length as the dependent variable. Sentences to probation were counted as zero months of imprisonment. The independent variables included were the Drug Group or Master Group of the conviction offense, the number of prior D.C. misdemeanor arrests, the number of prior D.C. felony arrests, the defendant's age, gender, and race, and the type of attorney.

sentence length because the sentence length was used to create the judge sentencing severity variables. When the judge sentencing severity variables were included, the moderate sentencing category was omitted as it had the largest number of cases.

The type of attorney variable measures whether the defendant had a publicly funded private attorney appointed by the Court under the Criminal Justice Act (CJA),¹¹⁴ an attorney from the District of Columbia Public Defender Service (PDS), or a privately retained attorney. The variable was coded as 1 for CJA, 2 for PDS, and 3 for privately retained.¹¹⁵ The public defender organization (PDS) approach as opposed to the appointed counsel (CJA) approach is most often justified by four key considerations (Jacoby, 1980: 90). First, it is more economical in large jurisdictions. Second, the permanent staff of the public defender has more experience and competence in criminal matters than assigned counsel. Third, public defenders can enter the case processing at an earlier stage. Early investigation by defense counsel is considered “one of the most important responsibilities of the defense attorney” (Davis 2007: 58). Finally, public defenders have built in support services (Jacoby, 1980: 90).

Though the assigned counsel system has some advantages such as the fact that the court can specifically select more experienced attorneys when necessary, a serious problem is the lack of control over the quality of defense representation (Jacoby, 1980: 93). In D.C. Superior Court cases, private attorneys retained by clients with financial resources and PDS attorneys generally have more time and resources to conduct a

¹¹⁴ The United States Congress enacted the Criminal Justice Act (18 U.S.C. 3006A), which provides for the appointment of defense attorneys to represent indigent defendants at no cost.

¹¹⁵ Two dummy variables (PDS and RETAINED) were then created so that the attorney type variable could be included as an independent variable (the reference category is CJA).

thorough and early investigation and negotiation than CJA attorneys, who are often overburdened and underpaid.

The variable measuring whether a grand jury indictment is filed (INDICT) was coded as 1 for when an indictment was filed and 0 for when an indictment was not filed. The government's interest in saving time and avoiding a trial can result in reaching favorable bargains before indictment. Many D.C. Superior Court judges grant greater sentencing concessions for pleas entered before indictment (District of Columbia Public Defender Service, 2005). Still, indictments are filed in virtually all cases due largely to the fact that prosecutors are not required to disclose information about the case prior to indictment, which hinders the defense attorney's ability to conduct an investigation and negotiate an early plea (Davis, 2007: 28).

Several charging variables were manually collected from CourtView as well. The number of felony charges initially filed by the prosecutor (NUMFELCH) and the number of misdemeanor charges initially filed by the prosecutor (NUMMISCH) were used as independent variables as measures of charging severity in all multivariate analyses. The most important data collected for this study were the specific names of the original charges initially filed by the prosecutor (OCHARGE1, OCHARGE2, OCHARGE 3, etc.). This information was then used to create several new charging and charge bargaining variables. For instance, variables were created for the Sentencing Guidelines offense severity group accompanying each of the original prosecutor charges (PGROUP1, PGROUP2, PGROUP3, etc.). A new variable was then created for the most severe offense severity group initially charged by the prosecutor.¹¹⁶ Because this variable

¹¹⁶ This variable is similar to the "alleged severity" variable used by Miethe and Moore (1985) and Miethe (1987), which was measured on the ten-point Minnesota Sentencing Guidelines scale of conviction

included the Sentencing Guidelines severity groups for both drug and non-drug offenses (Drug Grid 1 through Drug Grid 3; and Master Grid 1 through Master Grid 9), the drug and non drug groups were separated into two new variables named SEV_CHG_D (most severe charge group for drug offenses) and SEV_CHG_M (most severe charge group for non-drug offenses). The scales of these two variables were also reversed so that, unlike under the Sentencing Guidelines, higher numbers corresponded with more severe sentencing ranges.¹¹⁷ These variables were included in the multivariate models predicting the rate and extent of charge bargaining. Several variables were also created for the type of drug involved (cocaine, heroine, PCP) in drug cases or for whether a drug free zone violation was violated.¹¹⁸ These variables were included in the multivariate analyses for Drug Grid offenses.

Dependent Variables

To examine whether and to what extent charge bargaining occurred, several variables were included as dependent variables. First, a dichotomous variable for whether there was a charge reduction/dismissal was created.¹¹⁹ This variable (GRPREDCED) was measured by whether there was a reduction in Sentencing Guidelines severity group

severity. The District of Columbia Sentencing Guidelines offense severity groups are used to gauge both charging severity and charge bargaining because they provide a more precise measure of sentencing consequences than statutory maximum penalties. Moreover, though the Sentencing Guidelines were not in existence during 2003 (the pre-Guidelines sample), they were developed based on average sentences in the past and should thus provide a measure of pre-Guidelines as well as post-Guidelines sentencing practice.

¹¹⁷ These variables are coded as “one” (least serious) through “three” (most serious) for drug offenses and “one” (least serious) through “nine” (most serious) for non-drug offenses. For Drug Grid offenses, these variables are included as independent variables as dummy variables where group “two” (Drug Group 2) is the omitted category. For Master Grid offenses, this variable is treated as an interval level measure.

¹¹⁸ Distribution of marijuana is a felony *unless* the defendant has not been previously convicted of distributing or possessing with intent to distribute any controlled substances and the amount of marijuana is ½ pound or less, in which case it is a misdemeanor. See D.C. Official Code § 48- 904.01(a)(2)(B). In the sample of felony convictions used for this study, all drug distribution cases are for cocaine, heroine, or PCP. The drug free zone cases are for committing the offense in protected areas such as near schools.

¹¹⁹ Because this study uses sentenced cases for only single count convictions rather than multiple count convictions, consecutive sentences are not possible and, thus, a charge reduction is the functional equivalent of a charge dismissal.

from the most severe initial prosecutor charge to the final charge of conviction. A variable for the number of felony counts dismissed/reduced (FELCTSDISM) was created by taking the difference between the number of felony charges initially filed by the prosecutor (NUMFELCH) and the number of felony convictions (which will always be only one). Finally, to measure, not just the existence of, but the magnitude of the charge reduction, a variable (GRPSRED) was created for the number of Sentencing Guidelines offense severity groups reduced from the most severe prosecutor original charge to the conviction charge.¹²⁰ In order to examine the effect of charge bargaining on sentence length, as suggested by Piehl and Bushway (2007), this study uses the variable (SENTENCE) from the CIS dataset, which is a continuous variable measuring months of imprisonment with sentences to probation treated as zero months of imprisonment.

Analytic Methods

This study examines whether the implementation of the D.C. Sentencing Guidelines resulted in significant changes in prosecutorial charge bargaining decisions.¹²¹ Master Grid cases and Drug Grid cases will be analyzed separately. The first stage of the analysis will be to examine the descriptive statistics of the pre and post-Guidelines samples. Tests of statistical significance will be used to compare the two samples on relevant factors to ensure they are statistically equivalent. Next, this study will examine whether the Guidelines corresponded with significant differences in charge bargaining as measured by whether a charge was reduced, the number of charges dropped, and the

¹²⁰ Wooldredge and Griffin (2005) considered numerous dependent variable measures such as the raw number of count reductions and the magnitude of charge reductions, but they found that the results for those outcomes were virtually identical to the findings for their dichotomous outcomes (whether there was a charge reduction), so the dichotomous outcomes were presented in order to avoid criticisms related to the highly skewed distributions of the ratio scales (p. 304).

¹²¹ This study also attempted to examine whether the Guidelines coincided with changes in the nature and determinants of the mode of conviction (plea vs. trial) and charging severity (as measured by the number and severity of charges filed). The results of these analyses are discussed below.

number of Sentencing Guidelines severity groups reduced between the original prosecutor charge and the charge of conviction. Only cases where conviction was by plea agreement will be included in the analyses of charge bargaining outcomes. The outcomes will also be examined separately on pools of cases including and excluding convictions for escape or Bail Reform Act violations.¹²²

The main effects of the Sentencing Guidelines on the outcomes will be examined by estimating period-specific models of each outcome and then comparing them. Because applying ordinary least squares regression to these outcomes would violate important assumptions (Long, 1997), logistic regression will be used for dichotomous outcomes while negative binomial regression will be used for count outcomes.¹²³ This study will then examine changes in the specific effects of case and defendant characteristics on the outcomes. This procedure will involve testing whether the magnitude of a regression coefficient (for a certain predictor) differed significantly between the pre and post-Guidelines periods. An equality of coefficients test for independent samples will be used (Paternoster, et al., 1998).¹²⁴ Finally, this study will examine how much difference in the sentence length can be attributed to the charge bargain. This question will be tested with the methodology recommended by Piehl and Bushway (2007), who estimated tobit regression models to measure the difference in sentencing outcomes caused by the charge bargain. While Piehl and Bushway (2007) measured the charge of conviction and the

¹²² Escape offenses virtually always stem, not from escaping from a secure facility such as a jail, but from leaving a halfway house without permission or failing to return to a halfway house when required. Violations of the Bail Reform Act involve a violation of the conditions of pre-trial release. For both types of convictions, prosecutors generally charge the defendants with only one count and, therefore, there is no possibility of charge bargaining.

¹²³ The requirements of Poisson regression (equidispersion and independence of observations) were not satisfied for the count outcomes.

¹²⁴ The equation suggested by Paternoster, et al. (1988) was: $Z = (b_1 - b_2) / \sqrt{SEb_1^2 + SEb_2^2}$.

most severe indictment charge by the type of crime and whether the offense was a misdemeanor or felony, this study includes the conviction charge and initial prosecutor charge through a set of dummy variables measuring the Sentencing Guidelines severity group associated with each charge.

All statistical significance tests for this study will be non-directional with the standard five percent significance level. As discussed above, the empirical and theoretical research on prosecutorial decisions in sentencing guidelines systems is not sufficiently advanced for one-tailed significance tests. Because it is not possible to categorically exclude the possibility of negative or positive findings, a more conservative approach to statistical significance is appropriate.

CHAPTER IV. Descriptive Analyses

This study uses a random sample of 881 felony convictions.¹²⁵ The descriptive statistics for the variables are displayed in Table 4.1. They are first broken down by pools of Master Grid offenses versus Drug Grid offenses, and then by time period examined (pre-Guidelines versus post-Guidelines). With regard to the first demographic variable, gender, 88.72% of Master Grid cases involved males before the Guidelines, while 84.41% of Master Grid cases involved males after the Guidelines.¹²⁶ Before the Guidelines, 86.44% of Drug Grid cases involved males, while 90.86% of Drug Grid cases involved males after the Guidelines.¹²⁷ As to the defendant's racial category, 93.98% of Master Grid cases before the Guidelines involved African American defendants, while 93.52% of Master Grid cases involved African American defendants after the Guidelines.¹²⁸ Before the Guidelines, 98.31% of Drug Grid cases involved African American defendants, while 96.53% of Drug Grid cases involved African American defendants after the Guidelines.¹²⁹ While data are not available about the racial composition of non-African Americans, there is widespread agreement among local criminal justice practitioners that the majority of non-African Americans are of Hispanic origin. Before the Guidelines, the mean age at sentencing for Master Grid cases was

¹²⁵ While the case is the unit of analysis in this study, 12 defendants appeared twice in the dataset. Seven defendants appeared two times in the pre-Guidelines sample, two defendants appeared twice in the post-Guidelines sample, and three defendants appeared in both the pre- and post-Guidelines samples.

¹²⁶ The results of a chi-square test did not indicate a statistically significant relationship between gender and whether the Sentencing Guidelines were in effect (chi-square with one degree of freedom = 2.115, $p = 0.146$).

¹²⁷ The results of a chi-square test did not indicate a statistically significant relationship between gender and whether the Sentencing Guidelines were in effect (chi-square with one degree of freedom = 1.704, $p = 0.192$).

¹²⁸ The results of a chi-square test did not indicate a statistically significant relationship between race and whether the Sentencing Guidelines were in effect (chi-square with one degree of freedom = 0.047, $p = 0.829$).

¹²⁹ The results of a chi-square test did not indicate a statistically significant relationship between race and whether the Sentencing Guidelines were in effect (chi-square with one degree of freedom = 1.098, $p = 0.295$).

32.09(10.03), while the mean age for Master Grid cases after the Guidelines was 32.48 (10.78).¹³⁰ Before the Guidelines, the mean age at sentencing for Drug Grid cases was 34.54(10.81), while the mean age for Drug Grid cases after the Guidelines was 35.39 (10.80).¹³¹ The mean age of the offenders in this sample is relatively high in large part because the sample consists only of cases for felony convictions. Moreover, according to interviews with local practitioners, offenders charged and convicted with felony offenses in D.C. Superior Court frequently have an extensive criminal record, while offenders with less or no criminal history are often charged and convicted of misdemeanor offenses.

With regard to criminal history variables, the mean number of prior D.C. felony arrests for Master Grid cases before the Guidelines was 3.07 (3.69), while the mean number of prior D.C. felony arrests for Master Grid cases after the Guidelines was 2.71 (3.50).¹³² For Drug Grid cases, the mean number of prior D.C. felony arrests before the Guidelines was 2.53 (2.62), while the mean number of prior D.C. felony arrests for Drug Grid cases after the Guidelines was 2.85 (2.95).¹³³ The mean number of prior D.C. misdemeanor arrests for Master Grid cases before the Guidelines was 3.51 (5.10), while the mean number of prior D.C. misdemeanor arrests for Master Grid cases after the Guidelines was 3.20 (4.21).¹³⁴ The mean number of prior D.C. misdemeanor arrests for

¹³⁰ An independent-samples t-test was conducted, and no significant difference was found in scores for before and after the Guidelines ($t(519)=-.429$, $p=.668$).

¹³¹ An independent-samples t-test was conducted, and no statistically significant difference was found in scores for before and after the Guidelines ($t(349)=-.736$, $p=.462$).

¹³² An independent-samples t-test was conducted, and no significant difference was found in scores for before and after the Guidelines ($t(509)=1.146$, $p=.253$).

¹³³ An independent-samples t-test was conducted, and no statistically significant difference was found in scores for before and after the Guidelines ($t(348)=-1.062$, $p=.289$).

¹³⁴ An independent-samples t-test was conducted, and no significant difference was found in scores for before and after the Guidelines ($t(509)=.738$, $p=.461$).

Drug Grid cases before the Guidelines was 3.02 (3.99), while the mean number of prior D.C. misdemeanor arrests for Drug Grid cases after the Guidelines was 2.86 (3.08).¹³⁵

The mean number of prior D.C. misdemeanor and felony arrests for Master Grid cases before the Guidelines was 6.58 (7.71), while the mean number of prior D.C. misdemeanor and felony arrests for Master Grid cases after the Guidelines was 5.91 (6.10).¹³⁶ The mean number of prior D.C. misdemeanor and felony arrests for Drug Grid cases before the Guidelines was 5.55 (5.62), while the mean number of prior D.C. misdemeanor and felony arrests for Drug Grid cases after the Guidelines was 5.71 (5.05).¹³⁷

Before the Guidelines, 70.99% of Master Grid cases involved defendants with prior D.C. felony arrests, while 68.80% of Master Grid cases involved defendants with prior D.C. felony arrests after the Guidelines.¹³⁸ Before the Guidelines, 73.86% of Drug Grid cases involved defendants with prior D.C. felony arrests, while 77.01% of Drug Grid cases involved defendants with prior D.C. felony arrests after the Guidelines.¹³⁹ Before the Guidelines, 81.30% of Master Grid cases involved defendants with prior D.C. felony or misdemeanor arrests, while 80.88% of Master Grid cases involved defendants

¹³⁵ An independent-samples t-test was conducted, and no significant difference was found in scores for before and after the Guidelines ($t(348)=-.422$, $p=.674$).

¹³⁶ An independent-samples t-test was conducted, and no significant difference was found in scores for before and after the Guidelines ($t(509)=1.054$, $p=.292$).

¹³⁷ An independent-samples t-test was conducted, and no statistically significant difference was found in scores for before and after the Guidelines ($t(348)=-.273$, $p=.785$).

¹³⁸ The results of a chi-square test did not indicate a statistically significant relationship between whether there were prior D.C. felony arrests and whether the Sentencing Guidelines were in effect (chi-square with one degree of freedom = 0.292, $p = 0.589$).

¹³⁹ The results of a chi-square test did not indicate a statistically significant relationship between whether there were prior D.C. felony arrests and whether the Sentencing Guidelines were in effect (chi-square with one degree of freedom = 0.468, $p = 0.494$).

with prior D.C. felony or misdemeanor arrests after the Guidelines.¹⁴⁰ Before the Guidelines, 84.66% of Drug Grid cases involved defendants with prior D.C. felony or misdemeanor arrests, while 88.51% of Drug Grid cases involved defendants with prior D.C. felony or misdemeanor arrests after the Guidelines.¹⁴¹

Turning to the case processing variables, prior to the Sentencing Guidelines, 82.95% of Master Grid cases involved defendants with court-appointed attorneys under the Criminal Justice Act (CJA), 12.40% had Public Defender Service (PDS) attorneys, and 4.65% had privately retained attorneys. After the Guidelines, 69.44% of Master Grid cases involved defendants with CJA attorneys, 23.02% had PDS attorneys, and 7.54% had privately retained attorneys. The results of a chi-square indicated there was a statistically significant difference in attorney type among time periods (chi-square with two degrees of freedom = 12.933, $p = 0.002$) among Master Grid cases.¹⁴² Among Drug Grid cases, 86.63% of cases prior to the Guidelines involved defendants with court-appointed attorneys under the Criminal Justice Act (CJA), 6.98% had Public Defender Service (PDS) attorneys, and 6.40% had privately retained attorneys. After the Guidelines, 89.66% of Drug Grid cases involved defendants with CJA attorneys, 6.32% had PDS attorneys, and 4.02% had privately retained attorneys.¹⁴³ According to interviews with local criminal justice practitioners, the majority of defendants are

¹⁴⁰ The results of a chi-square test did not indicate a statistically significant relationship between whether there were prior D.C. felony or misdemeanor arrests and whether the Sentencing Guidelines were in effect (chi-square with one degree of freedom = 0.015, $p = 0.903$).

¹⁴¹ The results of a chi-square test did not indicate a statistically significant relationship between whether there were prior D.C. felony or misdemeanor arrests and whether the Sentencing Guidelines were in effect (chi-square with one degree of freedom = 1.112, $p = 0.291$).

¹⁴² It is unclear why there was a difference in attorney type between the two time periods. Conversations with defense attorneys revealed that PDS attorneys generally handle a higher proportion of more serious offenses. However, the distribution of crime types did not change before and after the Guidelines.

¹⁴³ The results of a chi-square test did not indicate a statistically significant difference in attorney type among time periods (chi-square with two degrees of freedom = 1.0815, $p = 0.582$).

represented by CJA attorneys, particularly in more routine cases, while PDS attorneys frequently handle more serious cases.

Before the Guidelines, 94.66% of Master Grid cases were charged by grand jury indictment, while 87.64% of Master Grid cases were charged by indictment after the Guidelines. The results of a chi-square test indicated there was a statistically significant difference (chi-square with one degree of freedom = 7.955, $p = 0.005$). This difference may indicate that prosecutors and defense attorneys were able to negotiate plea agreements quicker and easier after the Sentencing Guidelines. Among Drug Grid cases, before the Guidelines, 91.53% of cases were charged by grand jury indictment, while 90.29% of cases were charged by indictment after the Guidelines.¹⁴⁴ This absence of a statistically significant difference is not surprising because, based on conversations with criminal justice practitioners, Drug Grid offenders are on a “fast track” where indictments have always been filed sooner after arrest than in Master Grid cases. This is due largely to the fact that Drug Grid cases are often very similar to each other and addressed in a routine manner by prosecutors and defense attorneys.

As discussed above, several variables were also created for the type of drug involved (cocaine, heroine, PCP) in drug cases or for whether there was a drug free zone violation. A set of dummy variables was also created for the type of non-drug offense. The offense types were: weapons, sexual offenses, theft/fraud/forgery, extortion/threats, assault, inchoate offenses, escape/violation of bail conditions, homicide, cruelty to children, kidnapping, carjacking, robbery, burglary, destruction of property/arson, unlawful use of an automobile, and obstruction of justice. A specific description of these

¹⁴⁴ The results of a chi-square test did not indicate a statistically significant difference (chi-square with one degree of freedom = .164, $p = 0.686$).

offense types is attached at Appendix D. A statistically significant difference was not found for drug type or offense type between the pre and post-Guidelines periods.

Turning to the outcome variables, this study attempted to analyze whether conviction was by plea or trial. For Master Grid cases, 96.24 percent of convictions were by plea agreement before the Guidelines, while 92.78 percent of the Master Grid cases after the Guidelines were for convictions by plea agreement.¹⁴⁵ Among Drug Grid cases, 93.79 percent of the cases were for convictions by plea agreement before the Guidelines, and 96.57 percent of the cases were for convictions by plea agreement after the Guidelines.¹⁴⁶

With regard to the charging severity variables, the mean number of prosecutor original felony charges for Master Grid offenses before the Guidelines was 2.03 (1.67), while the mean number of prosecutor original felony charges for Master Grid offenses after the Guidelines was 2.54 (3.82). An independent-samples t-test was conducted, and a statistically significant difference between the two time periods was found ($t(620.49) = -1.97, p = .0496$). As to Drug Grid offenses, the mean number of prosecutor original felony charges before the Guidelines was 2.38 (1.00), while the mean number of prosecutor original felony charges for Drug Grid offenses after the Guidelines was 2.24 (.81).¹⁴⁷ The mean number of prosecutor original misdemeanor charges for Master Grid offenses before the Guidelines was .45 (.98), and the mean number of prosecutor original

¹⁴⁵ The results of a chi-square test did not indicate a statistically significant difference between the pre and post-Guidelines periods (chi-square with one degree of freedom= 3.064, $p = 0.08$).

¹⁴⁶ The results of a chi-square test did not indicate a statistically significant difference between the pre and post-Guidelines periods (chi-square with one degree of freedom= 1.486, $p = 0.223$).

¹⁴⁷ An independent-samples t-test was conducted, and a statistically significant difference was not found ($t(350) = 1.486, p = .138$).

misdemeanor charges after the Guidelines was .59 (1.17).¹⁴⁸ The mean number of prosecutor original misdemeanor charges for Drug Grid offenses before the Guidelines was .25 (.56), while the mean number of prosecutor original misdemeanor charges for Drug Grid offenses after the Guidelines was .31 (.69).¹⁴⁹

The mean of the most serious severity group charged by the prosecutor¹⁵⁰ for Master Grid offenses before the Guidelines was 2.79 (2.04), while the mean of the most serious group charged by the prosecutor for Master Grid offenses after the Guidelines was 3.02 (2.31).¹⁵¹ A frequency distribution of the most serious group charged by the prosecutor for Master Grid offenses also revealed no statistically significant differences. With regard to Drug Grid offenses, virtually all observations for most serious charge group fell into group two.¹⁵²

The first charge bargaining variable is whether there was a reduction in Sentencing Guidelines severity group from the most severe initial prosecutor charge to the final charge of conviction. Before the Guidelines, the group was reduced from prosecutor to conviction in 28.95 percent of Master Grid cases. After the Guidelines, the group was reduced from prosecutor to conviction in 31.56 percent of the Master Grid

¹⁴⁸ An independent-samples t-test was conducted, and no significant difference was found in scores for before and after the Guidelines ($t(518)=-1.54$, $p=.124$).

¹⁴⁹ An independent-samples t-test was conducted, and no significant difference was found in scores for before and after the Guidelines ($t(350)=-8.99$, $p=.370$).

¹⁵⁰ As discussed above, unlike under the D.C. Sentencing Guidelines, this variable measures charging severity so that lower numbers indicate a less severe charging category and higher numbers indicate a more severe charging category.

¹⁵¹ A Mann-Whitney two-sample rank-sum test was done and did not reveal a significant difference between groups ($z=-.787$; p value of .431).

¹⁵² Prior to the Guidelines, 175 of 177 observations fell in group two. After the Guidelines, 170 of 175 observations fell into group two. Given that there were only three categories, and that most observations fell in one category, a chi-square test was also performed. It did not indicate a statistically significant difference between the pre and post-Guidelines periods (chi-square with two degrees of freedom = 1.728, $p = 0.422$).

cases.¹⁵³ For Drug Grid offenses, the group was reduced from prosecutor to conviction in 53.00 percent before the Guidelines. After the Guidelines, the group was reduced from prosecutor to conviction in 68.00 percent of the Drug Grid cases. The results of a chi-square test indicated a statistically significant relationship between whether there was a reduction in Sentencing Guidelines severity group for Drug Grid offenses and whether the Sentencing Guidelines were in effect (chi-square with one degree of freedom = 8.168, $p = .004$). Based on conversations with criminal justice practitioners in the District of Columbia, this statistically significant difference may be the result of the fact that the statute for attempts to commit a drug offense was placed in the least severe Sentencing Guidelines Group (Drug Group 3).

The mean number of felony charges dismissed/reduced before the Guidelines for Master Grid cases was 1.03 (1.67), while the mean number of felony charges dismissed/reduced after the Guidelines for Master Grid cases was 1.54 (3.83). An independent-samples t-test was conducted, and a statistically significant difference was found in scores for before and after the Guidelines ($t(518)=-1.97$, $p=.0496$). Thus, while the number of felony charges for Master Grid offenses increased after the Guidelines, the number of felony charges dismissed increased as well. The mean number of felony charges dismissed/reduced before the Guidelines for Drug Grid cases was 1.38 (1.00), and the mean number of felony charges dismissed/reduced after the Guidelines for Drug Grid cases was 1.24 (.81).¹⁵⁴ Finally, the mean number of Sentencing Guidelines groups reduced from prosecutor original charge to conviction charge for Master Grid cases

¹⁵³ The results of a chi-square test did not indicate a statistically significant relationship between whether there was a reduction in Sentencing Guidelines severity group and whether the Sentencing Guidelines were in effect (chi-square with one degree of freedom = .428, $p = .513$).

¹⁵⁴ An independent-samples t-test was conducted, and no significant difference was found in scores for before and after the Guidelines ($t(350)=1.486$, $p=.138$).

before the Guidelines was .58 (1.08), while the mean number of groups reduced for Master Grid offenses after the Guidelines was .74 (1.34).¹⁵⁵

The final outcome variable is the sentence length, which measures sentences to probation as zero months of imprisonment. The mean final sentence for Master Grid cases before the Guidelines was 26.91 (45.56), while the mean final sentence after the Guidelines was 23.16 (40.42).¹⁵⁶ With regard to Drug Grid cases, the mean final sentence before the Guidelines was 15.98 (19.94), while the mean final sentence after the Guidelines was 12.09 (12.09). An independent-samples t-test was conducted, and a statistically significant difference was found ($t(343)=2.199, p=.029$).

In sum, the descriptive statistics did not reveal any statistically significant differences in the demographic profile or prior criminal record of the offenders in the pre-Guidelines and post-Guidelines samples. The statistical tests did reveal a difference in the type of attorney between the two samples among Master Grid offenses, with CJA attorneys being far less common and PDS attorneys being far more common after the Sentencing Guidelines. Additionally, among Master Grid cases, the rate of indictment by grand jury was lower in the post-Guidelines period, which may suggest that plea bargains were negotiated more quickly after the Guidelines.

With regard to the outcome variables, there was no statistically significant difference among time periods in the rate of conviction by plea agreement. There was a potentially important difference in charging severity with the mean number of prosecutor original felony charges for Master Grid offenses increasing after the Guidelines. This

¹⁵⁵ An independent-samples t-test was conducted, and no significant difference was found in scores for before and after the Guidelines ($t(519)=-1.509, p=.132$).

¹⁵⁶ An independent-samples t-test was conducted, and no significant difference was found in scores for before and after the Guidelines ($t(514)=-.993, p=.321$).

may indicate that there was prosecutorial overcharging once the Guidelines went into effect. As to the charge bargaining measures, the significance tests revealed that for Master Grid cases the mean number of felony charges dismissed/reduced increased after the Guidelines. Thus, while the charging level for Master Grid offenses was more severe after the Guidelines, there was some evidence that the extent of charge bargaining for Master Grid increased as well. For Drug Grid offenses, while the level of charging severity did not increase, the rate of charge bargaining (as measured by how often the severity group was reduced from the prosecutor original charge to the conviction charge) increased after the Guidelines. The significance tests also revealed that the final sentence was lower for Drug Grid offenses after the Guidelines.

Table 4.1: Nominal scale percentages and metric scale means (with standard deviations) for pre-Guidelines and post-Guidelines samples (N=881)

Measures	Missing	Master Grid		Drug Grid	
		Pre-	Post-	Pre-	Post-
Demographic Variables					
Age at sentencing	9	32.09 (10.03)	32.48 (10.78)	34.54 (10.81)	35.39 (10.80)
Male (0,1)	0	88.72	84.41	86.44	90.86
African American (0,1)	18	93.98	93.52	98.31	96.53
Criminal History Variables					
Prior DC arrests (felony and misdemeanor)	20	6.58 (7.71)	5.91 (6.10)	5.55 (5.62)	5.71 (5.05)
Prior DC felony arrests	20	3.07 (3.69)	2.71 (3.50)	2.53 (2.62)	2.85 (2.95)
Prior DC misdemeanor arrests	20	3.51 (5.10)	3.20 (4.21)	3.02 (3.99)	2.86 (3.08)
Whether prior DC felony arrests (0,1)	19	70.99	68.80	73.86	77.01
Whether prior DC felony or misdemeanor arrests (0,1)	18	81.30	80.88	84.66	88.51
Case Processing Variables					
Indicted (0,1)	8	94.66*	87.64*	91.53	90.29
Attorney type	25				
CJA (1)		82.95*	69.44*	86.63	89.66
PDS (2)		12.40*	23.02*	6.98	6.32
Retained (3)		4.65*	7.54*	6.40	4.02

* p < .05

Measures	Missing	Master Grid		Drug Grid	
		Pre-	Post-	Pre-	Post-
Type of Drug Offense	0				
Cocaine (0,1)		---	---	70.06	69.71
Heroin(0,1)		---	---	23.16	25.71
PCP(0,1)		---	---	2.26	1.14
DFZ(0,1)		---	---	4.00	3.43
Type of Master Grid Offense	0				
Arson		0	.38	---	---
Assault		15.04	14.45	---	---
Burglary		2.26	4.56	---	---
Carjacking		.38	.38	---	---
Cruelty to Children		.38	0	---	---
Destruction Property/Unlawful Entry		0	.76	---	---
Escape, Bail Reform Act		34.96	31.56	---	---
Extortion		0	0	---	---
Homicide		3.01	4.94	---	---
Inchoate		6.40	6.84	---	---
Kidnapping		.75	.38	---	---
Obstruction		0	0	---	---
Robbery		5.26	3.42	---	---
Sex offense		2.63	2.67	---	---
Theft, Fraud, Forgery		1.13	1.52	---	---
Unlawful Use of Automobile		13.53	10.65		
Weapon		13.16	16.35	---	---
Outcomes					
Conviction by plea agreement (0,1)	0	96.24	92.78	93.79	96.57
Number of prosecutor original felony charges	9	2.03 (1.67)*	2.54 (3.82)*	2.38 (1.00)	2.24 (.81)
Number of prosecutor original misdemeanor charges	9	.45 (.98)	.59 (1.17)	.25 (.56)	.31 (.69)
Most severe group charged by prosecutor for Master Grid offenses	8	2.79 (2.04)	3.02 (2.31)	---	---

Measures	Missing	Master Grid		Drug Grid	
		Pre-	Post-	Pre-	Post-
Most severe group charged by prosecutor for Master and Drug Grid offenses	8				
One (Master 9; Drug 3)		34.73	33.20	0	.57
Two (Master 8; Drug 2)		29.00	28.19	98.87	97.14
Three (Master 7; Drug 1)		4.20	3.47	1.13	2.29
Four (Master 6)		10.69	10.81	---	---
Five (Master 5)		10.31	10.04	---	---
Six (Master 4)		2.29	2.32	---	---
Seven (Master 3)		5.73	5.41	---	---
Eight (Master 2)		1.91	2.32	---	---
Nine (Master 1)		1.15	4.25	---	---
Group reduced from prosecutor to conviction (0,1)	0	28.95	31.56	53.00*	68.00*
Number of felony counts dismissed	9	1.03 (1.67)*	1.54 (3.83)*	1.38 (1.00)	1.24 (.81)
Number of groups reduced from most serious prosecutor charge to conviction charge	8	.58 (1.08)	.74 (1.34)	---	---
Final Sentence	20	26.91 (45.56)	23.16 (40.42)	15.98* (19.94)	12.09* (12.09)

CHAPTER V. Results of Multivariate Analysis

While this study attempted to analyze several other prosecutorial outcomes such as mode of conviction¹⁵⁷ and charging severity,¹⁵⁸ the focus was on charge bargaining practices before and after the District of Columbia Sentencing Guidelines. The multivariate models displayed in Tables 5.1 through 5.8 provide information regarding possible main effects of the Sentencing Guidelines on prosecutorial charge bargaining outcomes. They also provide information on possible interaction effects, or how the Sentencing Guidelines conditioned the effects of certain factors on prosecutorial decisions. With regard to the main effects, comparisons of the constants in the pre-Guidelines and post-Guidelines models in Tables 5.1 through 5.8 did not reveal any statistically significant effects of the Sentencing Guidelines on prosecutorial outcomes. The interaction effects were examined by testing the differences in slope coefficients for the independent variables across the pre and post-Guidelines samples. The general conclusion was that, while there were some differences in slope coefficients for certain outcomes, there were far fewer significant interaction effects relative to nonsignificant effects.

¹⁵⁷ Logistic regression analyses predicting the mode of conviction were performed for Master Grid and Drug Grid cases. Among Master Grid cases, the analyses, which included variables measuring charging severity, prior criminal history, demographic characteristics, and case processing attributes, did not reveal any main or interaction effects of the Sentencing Guidelines. It should be noted that the explained variability of the models were low (.12 in the Pre-Guidelines model and .13 in the post-Guidelines model). Among Drug Grid cases, many of most important variables were excluded from the analyses in the post-Guidelines model due to perfect prediction of the outcome, which led to a large reduction in the number of observations and affected the ability to draw strong conclusions without reducing the number of predictor variables in the models.

¹⁵⁸ Negative binomial regression analyses predicting the number of felony and misdemeanor charges filed by the prosecutor were performed for Master and Drug Grid cases. Because the majority of the available independent variables occurred later in time than the charging decision, however, only five variables (measuring prior criminal history and demographic characteristics) were included in these models, and there were very low levels of explained variability (from .01 to .11).

Tables 5.1 through 5.3 present the results of logistic regression models predicting whether the Sentencing Guidelines severity group was reduced from the prosecutor filing stage to the conviction stage. The models predicting this outcome for Master Grid cases include variables measuring the most severe Sentencing Guidelines severity group charged by the prosecutor, the number of prosecutor charges filed, the number of prior D.C. arrests, offender demographic characteristics, case processing factors such as type of attorney and whether an indictment was filed, and the sentencing severity category of the judge. The difference of coefficients tests for models predicting whether the severity group was reduced for Master Grid cases did not reveal any statistically significant interaction effects (Tables 5.1-5.2).

The models predicting whether the severity group was reduced for Drug Grid cases included the same variables as those for Master Grid cases in addition to variables measuring the type of drug offense. The models for Drug Grid cases did reveal a statistically significant difference ($p < .05$) in the effect of the number of misdemeanor charges initially filed by the prosecutor. Prior to the Guidelines, there was a nonsignificant negative relationship ($-.69$) between the number of misdemeanor charges filed and whether the severity group was reduced. After the Guidelines, there was a nonsignificant positive relationship ($.72$) between the number of misdemeanor charges filed and whether the severity group was reduced (Table 5.3). This interaction effect may suggest that after the Sentencing Guidelines the number of misdemeanor charges filed was used as a tool by prosecutors to expedite the charge bargaining process for Drug Grid cases.

The second type of charge bargaining outcome examined was the number of felony charges that were dismissed or reduced by the prosecutor. The negative binomial regression models predicting this outcome (Tables 5.4 through 5.6) include the same variables as the charge bargaining models discussed above in Tables 5.1 through 5.3. While the majority of the difference of coefficients tests continued to have nonsignificant results, there were several notable interaction effects. For Master Grid cases, there were three statistically significant interaction effects (Table 5.4). First, there was a statistically significant difference ($p < .01$) in the effect of the most severe Sentencing Guidelines group charged on the number of felony charges dismissed or reduced. Prior to the Guidelines, there was a statistically significant ($p < .01$) positive relationship (.11) between these two factors. After the Guidelines, there was a statistically significant ($p < .001$) stronger positive relationship (.24) between these two factors. This finding suggests that prosecutors may have filed more serious charges in Master Grid cases after the Guidelines in order to increase the number of charges dismissed and expedite the charge bargaining process.

Second, there was statistically significant difference ($p < .01$) in the effect of Being African American. Before the Guidelines, there was a nonsignificant negative relationship (-.40) between being African American and the number of charges dismissed or reduced. After the Guidelines, there was a nonsignificant positive relationship (.39) between being African American and the number of charges dismissed or reduced (Table 5.4). Thus, before the Guidelines, being African American led to less charges dismissed, while after the Guidelines, being African American led to more charges being dismissed. While this may suggest that prosecutors treated African Americans more leniently after

the Guidelines to expedite processing of these more typical offenders, this finding should be interpreted with caution because, as discussed below, there may be unmeasured variables correlated with being African American that account for this type of treatment.

Third, the effect of the judge sentencing severity level on the number of felony charges dismissed changed after the Guidelines ($p < .05$). Prior to the Guidelines, there was a nonsignificant positive effect (.18) between having a judge in the least severe sentencing category (as opposed to the moderate category) and the number of charges dismissed or reduced. After the Guidelines, there was a statistically significant ($p < .05$) negative relationship (-.58) (Table 5.4). This may be because prior to the Guidelines, defense attorneys and prosecutors estimated how a judge might sentence based largely on reputation. When judges with reputations for imposing light sentences were assigned to cases, prosecutors may have had less bargaining leverage because they could not argue that a severe sentence would be imposed at trial. After the Guidelines, however, prosecutors could have enjoyed increased leverage to induce guilty pleas quickly because of their greater ability to predict the punishment based on the Sentencing Guidelines ranges.

For the models predicting the number of felony charges dismissed or reduced for Master Grid cases except for those for escape or Bail Reform Act violations (Table 5.5), a statistically significant difference ($p < .01$) was still found in the effect of the most severe Sentencing Guidelines severity group charged. Before the Guidelines, the most severe group charged had a nonsignificant negative effect (-.02) on the number of felony charges dismissed, while it had a statistically significant ($p < .001$) positive effect (.13) after the Guidelines (Table 5.5). Second, there was still a difference ($p < .05$) in the effect of being

African American, which had a nonsignificant negative effect (-.31) on the number of charges dismissed before the Guidelines and a nonsignificant positive effect (.33) after the Guidelines (Table 5.5).

Finally, a new difference emerged for the effect of the number of prosecutor original felony charges ($p < .001$). There was a statistically significant ($p < .001$) positive effect (.30) before the Guidelines and a statistically significant ($p < .001$) smaller positive effect (.10) after the Guidelines (Table 5.5). While the number of felony charges filed led to more felony charges being dismissed in both Guidelines periods, the stronger positive effect before the Guidelines was surprising and inconsistent with the findings above suggesting that increased charging severity led to increased charge bargaining after the Guidelines were in effect.

With regard to models predicting the number of charges dismissed or reduced for Drug Grid offenses, there were two statistically significant differences among pre and post-Guidelines periods (Table 5.6). First, there was a difference ($p < .01$) in the effect of being charged with the most severe charge group (compared to Drug Group 2). Before the Guidelines, there was a nonsignificant negative effect (-.76). After the Guidelines, there was nonsignificant weaker negative effect (-.28). This finding is consistent with the argument that Sentencing Guidelines may assist prosecutors in facilitating charge bargaining through charging decisions. Second, there was a difference ($p < .05$) in the effect of being African American. There was a nonsignificant negative relationship (-.20) between being African American and the number of charges dismissed before the Guidelines, and a nonsignificant positive relationship (.02) after the Guidelines (Table 5.6). Again, while this finding is consistent with the argument that more typical

defendants may actually be treated less severely by prosecutors in order to expedite their processing and focus more on less routine cases, and Sentencing Guidelines may facilitate such treatment, this finding, as discussed below, should be interpreted with caution due to possible unmeasured variables.

Contrary to the findings of models predicting the number of charges dismissed or reduced by prosecutors, there were no statistically significant interaction effects found in the negative binomial regression models predicting the number of severity groups reduced for Master Grid cases (Tables 5.7 and 5.8). The next set of tables contain the results of the tobit regression approach recommended by Piehl and Bushway (2007) to measure the effect of the charge bargain on the ultimate sentence. Table 5.13 presents the final results, which are the predicted sentence lengths based on the offense of conviction and then on the most severe prosecutor charge. For Master Grid offenses, there was very little change between the pre and post-Guidelines periods in the predicted sentences as a result of the charge bargain. Prior to the Guidelines, Master Grid offenders received a 1.21 percent reduction in their sentence as a result of the charge bargain. After the Guidelines, offenders received a 2.28 percent reduction in sentence as a result of the charge bargain. For Drug Grid cases, offenders received a 1.25 reduction in sentence before the Guidelines as a result of the charge bargain. After the Guidelines, Drug Grid offenders received a .08 percent reduction in sentence. Thus, these findings do not suggest a dramatic difference in reduction in sentence due to charge bargaining after the Guidelines.

In sum, the most important finding from the multivariate analyses was that there were far more null effects than statistically significant effects, which supports the

argument that there was not a significant displacement of discretion and disparity to the prosecutor. While there were several statistically significant interaction effects, they seemed to suggest, not a transfer of disparity to the prosecutor, but a change in the plea bargaining process. There were several findings indicating that prosecutors increased their charging severity level after the Guidelines to increase the efficiency of the charge bargaining process. For instance, there was one statistically significant difference in the models predicting whether the Sentencing Guidelines group was reduced from the original prosecutor charge to the final conviction charge. Specifically, for Drug Grid cases, there was a difference in the effect of the number of misdemeanor charges initially filed by the prosecutor. Prior to the Guidelines, there was a negative relationship between the number of misdemeanor charges filed and whether the severity group was reduced. After the Guidelines, there was a positive relationship between these two factors, which may suggest that prosecutors increased their number of charges after the Guidelines to induce guilty pleas more quickly (Table 5.3).

The results of the models predicting the number of felony charges dismissed or reduced for the most part also demonstrated more severe charging was associated with more charge bargaining after the Guidelines. For Master Grid cases, regardless of whether escape/BRA cases were included, the effect of the most severe group charged on the number of charges dismissed was stronger after the Guidelines. Indeed, there was a negative effect before the Guidelines and a positive effect after the Guidelines (Table 5.4-5.5). For Drug Grid cases, there was a difference in the effect of being charged with the most severe charge group with a strong negative effect before the Guidelines and a weaker negative effect after the Guidelines (Table 5.6). These findings, in combination

with the descriptive statistics showing more severe charging and more charge bargaining after the Guidelines (Table 4.1), seem to suggest that prosecutors relied on charging severity as a mechanism to facilitate plea agreements. There was one finding, however, that contradicted this conclusion. In the model predicting the number of charges dismissed for Master Grid cases (excluding escape/BRA cases), there was a difference in the effect of the number of prosecutor original felony charges with a stronger positive effect before the Guidelines than after the Guidelines (Table 5.5). Still, the majority of the findings suggested a stronger effect of charging severity on charge bargaining after the Sentencing Guidelines went into effect.

There were also notable findings with regard to the effect of the offender's race on the number of charges dismissed or reduced. For Master Grid cases, regardless of whether escape/BRA cases were included, there was a negative relationship between being African American and the number of charges dismissed before the Guidelines and a positive relationship after the Guidelines (Table 5.4-5.5). This may suggest that prosecutors used the Sentencing Guidelines as a tool to accelerate case processing for the most typical or routine offenders so that they could, as Wooldredge and Thistlewaite (2004) wrote, "spend more time evaluating culpability, future risk, and appropriate outcomes" (p. 423) for less typical defendants. This finding should be interpreted cautiously, however, because the race variable may be standing in for uncontrolled or unmeasured variables that make cases with African American defendants more typical.

Despite findings suggesting a greater effect of charging variables on charge bargaining after the Sentencing Guidelines went into effect, there was no evidence that these changes affected the ultimate sentencing outcomes. In other words, while there was

some evidence that the determinants and rate of charge bargaining (“the existence of the bargain”) changed after the Guidelines, there was no evidence that the effect of the charge bargain on the sentence (“the value of the bargain”) changed. The tobit regression approaches proposed by Piehl and Bushway (2007) did not suggest a dramatic difference in reduction in sentence due to charge bargaining after the Guidelines.

Table 5.1: Logistic regression models predicting whether the severity group was reduced from prosecutor filing stage to conviction stage for Master Grid cases

	Pre-guidelines		Post-guidelines		Z-test
	b ₁	(se ₁)	b ₂	(se ₂)	b ₁ - b ₂
Constant	-1.98	1.61	-1.60	1.75	
Most severe severity group charged for non-drug offenses	1.29***	.18	1.46***	.21	
Number of prosecutor original misdemeanor charges	.41	.22	.01	.22	
Number of prosecutor original felony charges	-.18	.16	-.15*	.06	
Prior DC felony arrests	-.00	.07	-.24	.14	
Prior DC misdemeanor arrests	.02	.05	.05	.10	
Age	.01	.03	-.01	.03	
Male	-.84	.71	-.75	.84	
African American	-.93	.90	.94	1.16	
Indicted	-.78	.78	-1.94**	.73	
Whether PDS attorney	-.45	.68	.18	.63	
Whether retained attorney	-1.48	1.09	-.61	1.09	
Least severe sentencing judge category	.22	.61	-.10	.70	
Most severe sentencing judge category	.72	.52	-.13	.74	
N	246		216		
Pseudo R ²	.51		.60		

* p < .05

** p < .01

*** p < .001

Table 5.2: Logistic regression models predicting whether the severity group was reduced from prosecutor filing stage to conviction stage for Master Grid cases (excluding escape cases)

	Pre-guidelines		Post-guidelines		Z-test
	b ₁	(se ₁)	b ₂	(se ₂)	b ₁ - b ₂
Constant	-.99	1.71	-1.25	1.89	
Most severe severity group charged for non-drug offenses	1.07***	.18	1.39***	.24	
Number of prosecutor original misdemeanor charges	.28	.21	-.11	.21	
Number of prosecutor original felony charges	-.14	.14	-.15*	.06	
Prior DC felony arrests	-.02	.07	-.30*	.15	
Prior DC misdemeanor arrests	.05	.07	.08	.11	
Age	.02	.03	.00	.03	
Male	-1.30	.85	-1.16	1.01	
African American	-.86	.88	.78	1.22	
Indicted	.80	.81	-1.92*	.75	
Whether PDS attorney	-.37	.67	.03	.65	
Whether retained attorney	-1.20	1.00	-.68	1.10	
Least severe sentencing judge category	.10	.61	.13	.73	
Most severe sentencing judge category	.61	.52	-.01	.74	
N	158		144		
Pseudo R ²	.38		.53		

* p < .05

** p < .01

*** p < .001

Table 5.3: Logistic regression models predicting whether the severity group was reduced from prosecutor filing stage to conviction stage for Drug Grid cases

	Pre-guidelines		Post-guidelines		Z-test
	b ₁	(se ₁)	b ₂	(se ₂)	
Constant	-4.32*	2.01	-1.83	2.71	
Most severe charge group drugs three	-6.52**	1.93	---	---	
Number of prosecutor original misdemeanor charges	-.69	.37	.72	.55	-1.41*
Number of prosecutor original felony charges	1.57***	.33	2.38**	.49	
Prior DC felony arrests	-.11	.09	-.00	.09	
Prior DC misdemeanor arrests	.02	.05	-.03	.08	
Age	.03	.02	-.02	.03	
Male	1.06	.57	.40	.76	
African American	-.46	1.51	-1.64	2.15	
Indicted	.35	.68	.35	.75	
Whether PDS attorney	-.84	.80	-2.05*	.86	
Whether retained attorney	-1.01	1.25	-2.34*	1.05	
Least severe sentencing judge category	-.44	.65	-.65	.58	
Most severe sentencing judge category	1.24*	.50	1.10	1.55	
Whether drug conviction involved heroin	-1.34*	.54	.76	.64	
Whether drug conviction involved pcg	-.84	1.68	-1.56	1.68	
N	160		157		
Pseudo R ²	.28		.34		

* p < .05

** p < .01

*** p < .001

Table 5.4: Negative binomial regression models predicting the number of felony charges dismissed from prosecutor charging phase to conviction for Master Grid cases

	Pre-guidelines		Post-guidelines		Z-test b ₁ - b ₂
	b ₁	(se ₁)	b ₂	(se ₂)	
Constant	-.58	.60	-.93	.56	
Number of prosecutor original misdemeanor charges	.05	.07	.03	.06	
Number of prosecutor original felony charges	.35***	.06	.12***	.02	
Most severe severity group charged for non-drug offenses	.11**	.04	.24***	.04	-.13**
Prior DC felony charges	.01	.03	-.03	.03	
Prior DC misdemeanor charges	-.02	.02	.00	.03	
Age	-.00	.01	-.00	.01	
Male	-.16	.24	.00	.22	
African American	-.40	.27	.39	.35	-.80*
Indicted	-.20	.33	-.22	.22	
Whether PDS attorney	-.08	.22	.11	.18	
Whether retained attorney	.23	.30	-.10	.33	
Least severe sentencing judge category	.18	.22	-.58*	.24	.76*
Most severe sentencing judge category	-.11	.18	-.02	.20	
N	246		216		
Pseudo R ²	.31		.28		

* p < .05

** p < .01

*** p < .001

Table 5.5: Negative binomial regression models predicting the number of felony charges dismissed from prosecutor charging phase to conviction for Master Grid cases (excluding escape cases)

	Pre-guidelines		Post-guidelines		Z-test
	b ₁	(se ₁)	b ₂	(se ₂)	b ₁ - b ₂
Constant	.11	.55	-.29	.47	
Number of prosecutor original misdemeanor charges	-.01	.05	-.02	.05	
Number of prosecutor original felony charges	.30***	.03	.10***	.01	.20***
Most severe severity group charged for non-drug offenses	-.02	.04	.13***	.03	-.15**
Prior DC felony charges	.01	.02	.00	.04	
Prior DC misdemeanor charges	-.01	.03	-.02	.03	
Age	.00	.01	.01	.01	
Male	-.40	.24	-.34	.20	
African American	-.31	.26	.33	.29	-.64*
Indicted	-.08	.32	-.02	.18	
Whether PDS attorney	.14	.19	-.06	.16	
Whether retained attorney	.25	.27	-.17	.29	
Least severe sentencing judge category	.01	.21	-.41	.21	
Most severe sentencing judge category	-.10	.17	-.07	.17	
N	158		144		
Pseudo R ²	.30		.27		

* p < .05

** p < .01

*** p < .001

Table 5.6: Negative binomial regression models predicting the number of felony charges dismissed from prosecutor charging phase to conviction for Drug Grid cases

	Pre-guidelines		Post-guidelines		Z-test b ₁ - b ₂
	b ₁	(se ₁)	b ₂	(se ₂)	
Constant	-1.08	.64	-1.41*	.61	
Number of prosecutor original misdemeanor charges	-.03	.11	.03	.15	
Number of prosecutor original felony charges	.62***	.07	.70***	.09	
Most severe charge group drugs one	---	---	.06	1.09	
Most severe charge group - drugs three	-.76	.39	-.28	.53	-.48**
Prior DC felony charges	.00	.03	-.01	.03	
Prior DC misdemeanor charges	.00	.02	-.01	.03	
Age	.00	.01	-.00	.01	
Male	-.02	.24	-.04	.29	
African American	-.20	.52	.02	.43	-.22*
Indicted	-.09	.23	-.03	.26	
Whether PDS attorney	.05	.27	-.07	.31	
Whether retained attorney	-.31	.34	-.07	.37	
Least severe sentencing judge category	-.07	.22	-.03	.18	
Most severe sentencing judge category	-.02	.15	.08	.26	
Whether drug conviction involved heroin	-.08	.18	.06	.18	
Whether drug conviction involved pcg	.13	.52	.09	.75	
Whether drug conviction involved drug free zone	.12	.51	.14	.60	
N	163		165		
Pseudo R ²	.22		.18		

* p < .05

** p < .01

*** p < .001

Table 5.7: Negative binomial regression models predicting the number of severity groups reduced from prosecutor charging phase to conviction for Master Grid cases

	Pre-guidelines		Post-guidelines		Z-test
	b ₁	(se ₁)	b ₂	(se ₂)	
Constant	-2.22**	.79	-2.12**	.71	
Number of prosecutor original misdemeanor charges	.18	.11	.05	.07	
Number of prosecutor original felony charges	-.01	.06	-.03	.02	
Most severe severity group charged for non-drug offenses	.57***	.07	.52***	.06	
Prior DC felony charges	-.09	.05	-.05	.05	
Prior DC misdemeanor charges	.03	.03	-.00	.04	
Age	.02	.01	.01	.01	
Male	.07	.35	.58	.31	
African American	-.46	.39	.21	.43	
Indicted	-.20	.47	-.65**	.24	
Whether PDS attorney	-.20	.29	-.34	.23	
Whether retained attorney	-.21	.38	-.13	.36	
Least severe sentencing judge category	-.02	.37	-.34	.29	
Most severe sentencing judge category	.06	.25	-.21	.24	
N	246		216		
Pseudo R ²	.28		.30		

* p < .05

** p < .01

*** p < .001

Table 5.8: Negative binomial regression models predicting the number of severity groups reduced from prosecutor charging phase to conviction for Master Grid cases (excluding escape cases)

	Pre-guidelines		Post-guidelines		Z-test
	b ₁	(se ₁)	b ₂	(se ₂)	b ₁ - b ₂
Constant	-1.59*	.66	-1.77**	.67	
Number of prosecutor original misdemeanor charges	.10	.09	-.00	.07	
Number of prosecutor original felony charges	-.01	.05	-.02	.01	
Most severe severity group charged for non drug offenses	.44***	.06	.43***	.05	
Prior DC felony charges	-.09*	.04	-.04	.05	
Prior DC misdemeanor charges	.06	.03	-.01	.04	
Age	.01	.01	.01	.01	
Male	-.10	.31	.44	.29	
African American	-.38	.33	.32	.41	
Indicted	-.11	.43	-.57**	.21	
Whether PDS attorney	-.09	.25	-.37	.21	
Whether retained attorney	-.06	.32	-.12	.33	
Least severe sentencing judge category	-.22	.34	-.39	.27	
Most severe sentencing judge category	.06	.21	-.20	.21	
N	158		144		
Pseudo R ²	.21		.24		

* p < .05

** p < .01

*** p < .001

Table 5.9: Tobit Regressions of Ln(sentence length) based on Conviction Charge for Master Grid Offenses

	Pre-guidelines		Post-guidelines	
	b ₁	(se ₁)	b ₂	(se ₂)
Constant	3.15***	.55	2.26***	.44
Prior DC felony charges	.03	.02	.03	.02
Prior DC misdemeanor charges	.00	.02	.02	.02
Age	-.00	.01	.00	.01
Male	.24	.23	.26	.22
African American	.02	.29	-.28	.27
Indicted	-.64	.36	-.09	.22
Whether PDS attorney	.02	.21	.03	.19
Whether retained attorney	-.83*	.38	-.40	.32
Whether convicted group "one"	-.21	.17	-.35	.18
Whether convicted group "three"	-.73	.49	.66	.35
Whether convicted group "four"	.49*	.22	.91***	.23
Whether convicted group "five"	1.61***	.36	1.54***	.36
Whether convicted group "six"	1.45*	.57	2.24***	.50
Whether convicted group "seven"	2.53***	.44	2.60***	.36
Whether convicted group "eight"	3.10**	.95	3.37***	.91
N	185		173	

* p < .05

** p < .01

*** p < .001

Table 5.10: Tobit Regressions of Ln(sentence length) based on Most Severe Prosecutor Charge for Master Grid Offenses

	Pre-guidelines		Post-guidelines	
	b ₁	(se ₁)	b ₂	(se ₂)
Constant	3.08***	.59	1.45**	.48
Prior DC felony charges	.06*	.02	.05*	.02
Prior DC misdemeanor charges	.00	.02	.02	.02
Age	-.01	.01	.00	.01
Male	.22	.25	.18	.23
African American	.19	.31	-.37	.28
Indicted	-.84*	.39	.51*	.24
Whether PDS attorney	.07	.23	.14	.20
Whether retained attorney	-.89	.41	-.37	.33
Whether charged group "two"	.24	.02	.29	.20
Whether charged group "three"	-.56.43	.43	1.20**	.39
Whether charged group "four"	.34	.25	1.10***	.29
Whether charged group "five"	.88**	.28	.97**	.28
Whether charged group "six"	1.66**	.61	1.33*	.56
Whether charged group "seven"	1.42***	.32	1.74***	.32
Whether charged group "eight"	1.77**	.53	2.16***	.55
Whether charged group "nine"	3.01***	.72	2.86***	.36
N	185		173	

* p < .05

** p < .01

*** p < .001

Table 5.11: Tobit Regressions of Ln(sentence length) based on Conviction Charge for Drug Grid Offenses

	Pre-guidelines		Post-guidelines	
	b ₁	(se ₁)	b ₂	(se ₂)
Constant	3.28***	.86	1.20	.64
Prior DC felony charges	.07	.04	.06*	.03
Prior DC misdemeanor charges	.00	.02	.01	.03
Age	.00	.01	.01	.01
Male	.24	.32	.72**	.26
African American	-.93	.60	-.10	.43
Indicted	-.49	.35	.09	.30
Whether PDS attorney	-.13	.36	-.02	.31
Whether retained attorney	-.01	.45	-.67	.42
Whether convicted drug one	1.82	1.01	--	--
Whether convicted drug two	.42*	.20	.51**	.17
N	117		118	

* p < .05

** p < .01

*** p < .001

Table 5.12: Tobit Regressions of Ln(sentence length) based on Most Severe Prosecutor Charge for Drug Grid Offenses

	Pre-guidelines		Post-guidelines	
	b ₁	(se ₁)	b ₂	(se ₂)
Constant	3.64***	.86	1.25	.66
Prior DC felony charges	.08	.04	.07*	.03
Prior DC misdemeanor charges	.01	.02	.01	.03
Age	-.00	.01	.01	.01
Male	.05	.31	.68*	.26
African American	-.86	.61	-.05	.44
Indicted	-.57	.36	.13	.31
Whether PDS attorney	-.13	.37	.11	.31
Whether retained attorney	.20	.44	-.43	.43
Whether charged group "one"	--	--	-.98	.84
Whether charged group "three"	1.41	.73	-.26	.43
N	117		118	

* p < .05

** p < .01

*** p < .001

Table 5.13: The role of charge bargaining on sentence length

	Master Grid	Drug Grid
<i>Predictions based on coefficient estimates pre-Guidelines</i>		
Predicted sentence using conviction charge	17.19	12.64
Predicted sentence using prosecutor charge	17.40	12.80
Change as a result of charge bargain	-.21 (-1.21%)	-.16 (-1.25%)
<i>Predictions based on coefficient estimates from post-Guidelines</i>		
Predicted sentence using conviction charge	13.31	11.94
Predicted sentence using prosecutor charge	13.62	11.95
Change as a result of charge bargain	-.31 (-2.28%)	-.01 (-.08%)

CHAPTER VI. Discussion and Conclusion

Summary and Discussion of Key Findings

This study contained three stages of analysis. The first stage examined whether the District of Columbia Sentencing Guidelines had any main effects on prosecutorial charge bargaining outcomes. The analyses revealed that there were no statistically significant main effects. The second phase examined whether there were any interaction effects of the Sentencing Guidelines on charge bargaining. There were very few statistically significant differences over time in the effect of legal and extra-legal factors on the prosecutorial outcomes. The final stage examined whether the effect of charge bargaining on the ultimate sentence changed after the Sentencing Guidelines, and the analyses revealed very little change. The most important conclusion of this study, therefore, is that there were far more null findings than significant findings. These results are consistent with the results of Miethe (1987) and Wooldredge and Griffin (2005), which found very limited evidence of a hydraulic displacement of discretion to prosecutors.

While the majority of the findings did not reveal significant differences in the nature, determinants, and effect of prosecutorial decisions after the implementation of the Sentencing Guidelines, there was some evidence of a change in charging and charge bargaining practices that may have affected the plea bargaining process. Though the multivariate analyses did not reveal any main effects of the Sentencing Guidelines on prosecutorial outcomes, the descriptive statistics suggested that prosecutors increased the level of charging severity and charge bargaining after the Sentencing Guidelines went into effect. The most consistent findings of the multivariate analyses related to the effect

of charging variables on charge bargaining outcomes. As discussed earlier, one of the most important decisions affecting the plea bargaining process is the charging decision (McDonald, 1979; Alschuler, 1978). Hagan (1975) found that offenders with a higher number of charges were more likely to experience charge alterations, which “supports a hypothesis that offenders often may be systematically ‘over-charged’ in anticipation of ‘rewards’ to be distributed later in the bargaining process” (p. 544).

The analyses in this study found that, with one exception, there was a stronger positive relationship between the level of charging severity and the level of charge bargaining after the Sentencing Guidelines went into effect. Before implementing the Sentencing Guidelines, the D.C. Advisory Commission on Sentencing speculated that, “in general, the prosecution bargains for the certainty of conviction, and the defendant bargains for the possibility of a reduced sentence” (1999 Report: 11). Tonry and Coffee (1987) wrote that it is an oversimplification to say that sentencing guidelines increase prosecutorial power only to cause guilty pleas, but that other ends such as saving time and achieving better allocation of prosecutorial resources are also pursued by the prosecutor and facilitated by the introduction of sentencing guidelines. Sentencing guidelines, they believed, can simplify the negotiation process and enable the prosecutor to conserve resources for more major cases involving serious crimes (p. 152).

After the introduction of the D.C. Sentencing Guidelines, prosecutors seemed to change their charging and charge bargaining practices to make the plea negotiation process easier. According to interviews with criminal justice practitioners in the District of Columbia, prosecutors after the Guidelines relied heavily on the Sentencing Guidelines ranges when offering plea bargains. Indeed, the standard plea agreements in the post-

Guidelines era have generally required that the parties not argue for departure above or below the Guidelines range. There is anecdotal evidence that guilty pleas became easier to negotiate under the Guidelines because both the prosecution and the defense had a clearer picture of the likely sentencing range in typical cases, particularly for offenses with extremely wide statutory sentencing ranges. The finding that the rate of charging by indictment decreased after the Guidelines (Table 4.1) also supports the argument that prosecutors sought to reach plea agreements more efficiently after the Guidelines. As discussed above, the government's interest in saving time and avoiding a trial can result in reaching bargains without filing indictment (District of Columbia Public Defender Service, 2005).

There was also an interesting finding regarding the effect of the offender's race on prosecutorial outcomes. The analyses revealed a negative relationship between being African American and the number of charges dismissed before the Guidelines and a positive relationship after the Guidelines. The finding of more favorable treatment after the Sentencing Guidelines is consistent with prior research finding a lack of status effects on charge reductions that may be due to the "bureaucratic nature of the judicial process," where decisions by prosecutors and defense attorneys, who are concerned with efficiently disposing of cases, become "highly routinized and relatively resistant to extralegal factors" (Holmes, et al., 1987: 248). Thus, after the Sentencing Guidelines went into effect, it appears that prosecutors may have used them as a tool to expedite typical cases in a routinized manner in order to save resources. Again, it is important to note that the race variable may be standing in for other unmeasured or uncontrolled factors that make cases involving African Americans more typical.

Limitations and Future Research

Though this study fills a gap in the literature because it is one of the few studies examining the hydraulic displacement of discretion thesis, and it is the first study to apply Piehl and Bushway's (2007) methodology to assess, not just the rate, but the value of the charge bargain, it does have limitations. One major shortcoming is that it only examines a period of one year after the Sentencing Guidelines went into effect. Data limitations prevent the examination of cases after 2005, which means this study will not be able to account for a possible lag effect of the Guidelines as court actors become more familiar with the nuances of the new system (Wooldredge and Griffin, 2005: 308). An additional limitation is the small sample sizes, which may affect the ability to detect statistically significant relationships. Future studies should include large samples if data are available to increase the level statistical power.¹⁵⁹

This study is also limited in that it can only be generalizable to other urban jurisdictions with similar caseloads and offender demographic characteristics. Furthermore, because this study uses a sample of convicted felons, it can not consider cases where defendants are convicted only of misdemeanors. Moreover, this study examines only prosecutorial decisions associated with charge bargaining. Due to lack of data, it does not consider other forms of prosecutorial discretion such as sentence bargaining, fact bargaining, or bargaining over whether to recommend release from pretrial detention.

¹⁵⁹ Statistical power provides an estimate of how often one would fail to find a statistically significant effect when one exists. Statistical power is defined as "1-type II error," or one minus the probability of accepting the null hypothesis when it is false (Weisburd, et al., 1993).

This study is also limited because the CIS dataset and CourtView have a limited number of variables. They do not include factors such as the offender's pretrial status, employment status, income, marital status, degree of harm inflicted, education, drug/alcohol dependence, and whether a weapon was used in the crime. However, while model misspecification may result in biased estimates of the outcome and biased estimates of the effects of specific independent variables, there is no reason to believe that measurement error is different in the pre and post-Guidelines periods and, therefore, a relative comparison between the two samples is still possible.

Another limitation is that, because the data are limited to cases resulting in conviction, this study was unable to examine prosecutorial discretion regarding other decisions such as the decision of whether to charge and which charges to file. This study focuses on charge bargaining, which is one component in the sequence of decision making by criminal justice actors. It revealed the importance of charging on charge bargaining, and future research should examine the effect of sentencing guidelines on charging outcomes. Interviews with local criminal justice practitioners revealed that prosecutors often increase the number and severity of charges between the arrest stage and the charging phase. Future research should analyze police arrest charges to determine whether prosecutor charging decisions changed after the Sentencing Guidelines. As discussed above, plea bargaining is best understood, not as an isolated decision but as a "*process* that includes a number of decisions" beginning immediately after arrest and that can lead to a number of different outcomes (Walker, 1993: 86). Plea bargaining is "not really a decision *point* at all. It is not a single decision that can be isolated and subjected

to formal controls. Instead, it involves a series of decisions, over a period of time, by different officials” including the police and the prosecutor (Walker, 1993: 86).

Conclusion

The majority of the findings of this study did not reveal significant differences in the nature and determinants of prosecutorial decisions after the implementation of the District of Columbia Sentencing Guidelines. Moreover, this study found that the effect of the charge bargain on the ultimate sentence did not change significantly after the Guidelines. Thus, the Sentencing Guidelines did not appear to result in a significant displacement of discretion and disparity to the prosecutor stage. This finding should be encouraging to policy makers who did not intend for the Sentencing Guidelines to affect prosecutorial practices.

There were some changes in the charge bargaining process, however, that may be of interest to policy makers. Several findings of this study revealed, for instance, that charging practices changed after the Guidelines to facilitate charge bargaining. According to interviews with criminal justice practitioners in the District of Columbia, the Guidelines have made the plea negotiation process easier for both the prosecutor and the defense attorney by increasing the predictability of the sentencing exposure for each charge. While this is considered a virtue by many, some defense attorneys criticize the Sentencing Guidelines for eliminating the judge’s ability to take into account extraordinary circumstances. Prosecutors generally require in plea agreements that defense attorneys not argue for downward departure, and judges virtually never depart from the Guidelines. The impression of some defense attorneys and defendants is that

prosecutors control the sentencing process under the Sentencing Guidelines. Policy makers may therefore wish to periodically review the Guidelines to determine whether the Guidelines ranges and departure rules strike the right balance between uniformity and judicial flexibility. The most important finding of this study, however, is that the Guidelines did not appear to result in a substantial displacement of discretion to prosecutors that would undermine the goal of reducing sentencing disparity.

APPENDIX A

MASTER GRID

		Criminal History Score				
Ranking Group	Most Common Offenses	0 to ½ A	¾ to 1¾ B	2 to 3¾ C	4 to 5¾ D	6 + E
Group 1	1st degree murder w/armed 1st degree murder	360 - 720	360 - 720	360 - 720	360 - 720	360 +
Group 2	2nd degree murder w/armed 2nd degree murder 1st degree sex abuse 1st degree sex abuse w/armed	144 - 288	156 - 300	168 - 312	180 - 324	192 +
Group 3	Voluntary manslaughter w/armed 1st degree child sex abuse Carjacking while armed Assault with intent to kill w/armed Armed burglary I	90 - 180	102 - 192	114 - 204	126 - 216	138 +
Group 4	Aggravated assault w/armed Voluntary manslaughter	48 - 120	60 - 132	72 - 144	84 - 156	96 +
Group 5	Possession of firearm /CV Armed robbery Burglary I Obstruction of justice Assault with intent to kill	36 - 84	48 - 96	60 - 108	72 - 120	84 +
Group 6	ADW Robbery Aggravated assault 2nd degree child sex abuse Assault with intent to rob	18 - 60	24 - 66	30 - 72	36 - 78	42 +
Group 7	Burglary II 3rd degree sex abuse Negligent homicide Assault w/I to commit mayhem Attempt 2nd degree sex abuse	12 - 36	18 - 42	24 - 48	30 - 54	36 +
Group 8	CPWOL UUV Attempt robbery Attempt burglary 1st degree theft	6 - 24	10 - 28	14 - 32	18 - 36	22 +
Group 9	Escape/prison breach BRA Receiving stolen property Uttering Forgery RSP	1 - 12	3 - 16	5 - 20	7 - 24	9 +
*Criminal History Points for prior convictions in these groups.						
White/unshaded boxes – prison only.						
Dark shaded boxes – prison or short split permissible.						
Light shaded boxes – prisons, short split, or probation permissible.						

APPENDIX B

DRUG GRID

		Criminal History Score				
	Ranking Group Most common offenses	0 to ½ A	¾ to 1¾ B	2 to 3¾ C	4 to 5¾ D	6 + E
	Group 1 Distribution w/a PWID w/a	30-72	36-78	41-84	48-90	54+
	Group 2 Distribution PWID	12-30	16-36	20-42	24-48	28+
	Group 3 Attempt Distribution Attempt PWID	6-18	10-24	14-30	18-36	22+
*Criminal History Points for prior convictions in these groups.						
White/unshaded boxes – prison only.						
Dark shaded boxes – prison or short split permissible.						
Light shaded boxes–prisons, short split, or probation permissible.						

APPENDIX C

RANKING CHART (Most Common offenses by Groups)

1	Murder 1° w/a Murder 1	Murder of a law enforcement officer 1°
2	Murder 2° w/a Murder 2°	Child sexual abuse 1° w/a Sexual abuse 1°w/a Sexual abuse 1°
3	AWIK w/a Burglary 1° w/a Carjacking w/a	Child sexual abuse 1° Kidnapping w/a Voluntary manslaughter w/a
4	Aggravated assault w/a	Voluntary manslaughter
5	Armed robbery AWI commit any offense w/a AWI commit robbery w/a AWIK Burglary 1° Carjacking Involuntary Manslaughter w/a Involuntary Manslaughter Kidnapping Malicious disfigurement w/a Mayhem w/a Obstruction of justice	PFCOV Child sexual abuse 2° w/a Sexual abuse 2° w/a Sexual abuse 2° AWI commit 1° child sexual abuse w/a AWI commit 2° child sexual abuse w/a AWI commit 1° sexual abuse w/a AWI commit 2° sexual abuse w/a Child sexual abuse, attempt 1° w/a Child sexual abuse, attempt 2° w/a Sexual abuse, attempt 1° w/a Sexual abuse, attempt 2° w/a
6	Aggravated assault Arson APO w/ dangerous weapon ADW AWI commit robbery Attempt robbery w/a Burglary 2° w/a Cruelty to children 1° Malicious disfigurement	Mayhem Robbery AWI commit 1° child sexual abuse AWI commit 2° child sexual abuse AWI commit 1° sexual abuse AWI commit 2° sexual abuse Child sexual abuse, attempt 1° Child sexual abuse 2° Sexual abuse, attempt 1°
7	AWI commit mayhem Burglary 2° Incest Negligent homicide	Sexual abuse, attempt 2° Sexual abuse of a patient 1° Sexual abuse of a ward 1° Sexual abuse 3°
8	APO AWI commit any offense Aggravated assault, attempt Bribery Burglary, attempt CPWL/CDW Cruelty to children 2° DP (f) Extortion Introducing contraband into penal institution Kidnapping, attempt Perjury Procuring	Robbery, attempt Theft 1° Threats Trafficking in stolen property UUV Child sexual abuse, attempt 2° Enticing a child Sexual abuse of a patient, attempt 1° Sexual abuse of a ward, attempt 1° Sexual abuse, attempt 3° Sexual abuse 4° Sexual abuse of a patient 2° Sexual abuse of a ward 2°
9	Bad check Bail reform act (BRA) Blackmail Crack house, maintaining Credit card fraud Embezzlement Escape Escape, attempt False personation of a police officer Forgery Fraud 1° Fraud 2°	Impersonating a public official Obtaining narcotics by fraud Pandering PPW -- second + offense RSP UE (vending machine) Uttering Enticing a child, attempt Sexual abuse, attempt 4° Sexual abuse of a patient, attempt 2° Sexual abuse of a ward, attempt 2°

APPENDIX D

1 Weapons

Possession of prohibited weapon
Unlawful possession of pistol
Carrying a pistol w/o license
Attempt carrying pistol w/o license
Poss firearm during dang. crime/violence
Unregistered firearm
Unlawful possession of ammunition

2 Sexual Offenses

Sexual solicitation
Solicitation for lewd purposes
Sexual solicitation 3rd
Sex abuse
Attempt 2nd degree child sex abuse
Sodomy on minor
1st degree sex abuse
2nd degree sex abuse
3rd degree sex abuse
4th degree sex abuse
1st degree child sex abuse
2nd degree child sex abuse
Enticing a child
2nd degree sex abuse/ward
2nd degree sex abuse/patient
Attempt 1st degree sex abuse
Sexual performance using minor
1st degree sex abuse w/armed
Attempt 1st degree child sex abuse
Induce female into prostitution
Rape w/armed
Incest
Indecent act - Miller Act
Carnal knowledge
Pandering
Rape
Sodomy

3 Theft/Fraud/Forgery

Taking property w/o right
1st degree theft
1st Degree Fraud
2nd Degree Fraud
Uttering
Forgery
Embezzlement
Receiving stolen goods
Theft DC property
Theft from mails
False pretenses

Larceny after trust

4 Extortion/Threats

Extortion
Threats bodily harm
Threats menacing man
Blackmail

5 Assault

Assault domestic
Armed assault with intent
Mayhem while armed
Assault w/i to kill
Assault on correctional officer
Assault with intent
Assault w/i to rape w/armed
Assault w/i to rob w/ armed
Assault w/i to kill w/armed
Assault w/i to commit sodomy while armed
Attempt aggravated assault
Assault w/i to rob
Assault w/i to commit 1st degree sex abuse
Assault w/i any offense
Assault w/i to commit mayhem
APO
APO dang weapon
ADW
Stalking
Aggravated assault
Aggravated assault w/armed
Mayhem

6 Inchoate

Attempt burglary
Accessory before fact
Conspiracy
Attempt robbery
Attempt kidnapping
Accessory after fact
Attempt armed robbery

7 Escape/BRA/Contempt/Prison Breach

Bail Reform Act violation
Contempt (violation of conditions of release)
Attempt prison breach
Escape/prison breach

8 Drugs

Attempt PWID marijuana
Attempt PWID heroin

Attempt PWID cocaine
Attempt PWID PCP
Attempt PWID dilaudid
Attempt dist heroin
Attempt dist cocaine
Attempt dist preludin
Attempt dist marijuana
Attempt dist PCP
Attempt dist dilaudid
Violating drug free zone
Attempt dist in drug free zone
Dist heroin
Dist cocaine
Dist preludin
Dist other
Dist PCP
Dist dilaudid
PWID heroin
PWID cocaine
PWID preludin
PWID other
PWID dilaudid
PWID PCP
PWID meth
PWID w/armed
Dangerous Drug Act

9 Homicide

Involuntary manslaughter
Murder I
Murder I while armed
2nd degree murder w/armed
Involuntary manslaughter
Manslaughter while armed
Manslaughter
2nd degree murder

10 Cruelty to Children

2nd degree cruelty to children
1st Degree cruelty to children

11 Kidnapping

Kidnapping
Armed kidnapping

12 Carjacking

Carjacking
Carjacking w/armed

13 Robbery

Armed robbery
Robbery of senior citizen
Armed robbery of senior citizen

Robbery

14 Burglary

Armed burglary I
Armed burglary II
Burglary II
Buglary I

15 DP/Arson

Arson
Dest property over \$200

16 Obstruction

Bribery of witness
Obstruction of justice
Perjury

17 Misdemeanors/Other

Adultery
Affray
Simple assault
Attemp petit larceny
Attempt UUA
Attempted crime not listed
Bad check
CDW
Cruelty to animals
Sale possession narcotics
Exempt narcotics
UNA records
Obtain narcotics by fraud
Dangerous drugs
DDA inventories
Destruction of property
Disorderly house
Embezzlement
Indecent publication
Petit larceny
Larceny - shoplifting
Negligent homicide
Permanent game table setup
Possession of number slips
PPW others
Unlawful entry
Attempt procuring
Possession implement crime
Buying stolen property
Indecent exposure
Disorderly and disrupt
Marijuana possession
Illegal dumping
Heroin possession

Cocaine possession
Preludin possession
Attempt false pretense
possession heroin
possession cocaine
possession preludin
possession other
possession marijuana
dist marijuana
PWID marijuana
possession dilaudid
possession PCP
possession drug parphenalia
2nd Degree Theft
Shoplifting
Commercial piracy
Fraudulent registration
False statements
Possession of drug parphenalia w/in to use
2nd Degree attempt theft
Attempt to take property w/o right
Attempt possession heroin
Attempt possession cocaine
Attempt possession marijuana
Attempt possession PCP
Attempt possession dilaudid
Picket 100 feet of health care facility
Maintaining a crack house
Destroying property/domestic
Violation of civil protection
Violation of civil protection
PDP with intent to sell
Unlawful possession of heroin
Unlawful possession of cocaine
Unlawful possession of preludin
Procuring
Violation of work release
Unlawful entry - vending machine

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