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The New Normal? Prosecutorial Charging in California After Public Safety Realignment

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JANUARY
2014

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The Stanford Criminal Justice Center (SCJC), led by faculty co-directors Joan Petersilia and Robert Weisberg and executive director Debbie Mukamal, serves as a research and policy institute on matters related to the criminal justice system. The SCJC is presently undertaking a number of research projects aimed at better understanding the implementation and effect of California's Public Safety Realignment legislation. For more information about our current and past projects, please visit our website: http://law.stanford.edu/criminal-justice-center.

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Acknowledgements

The authors wish to thank the many individuals who contributed to this research project.

Our colleagues at the Stanford Criminal Justice Center (SCJC) provided important conceptual, technical and logistical support. Joan Petersilia, Adelbert H. Sweet Professor of Law and Co-Director of the Stanford Criminal Justice Center, has been the overall leader for all our projects on Realignment. Debbie Mukamal, Executive Director of the Stanford Criminal Justice Center, provided valuable research, technical and editing support. Sarah Lawrence, Research Director for the Front-End Realignment Project at the Stanford Criminal Justice Center, contributed analytical and editing assistance. Former Research Assistant Lisa T. Quan offered important logistical, organizational and analytical help. Sara Abarbanel, Research Associate at Stanford Law School, contributed editing support.

Several individuals with knowledge of California sentencing law and Realignment provided valuable insight during the development of the survey of District Attorneys that is described below. Lisa Rodriguez, Deputy District Attorney in San Diego County, and Chris Carlson, Deputy District Attorney in Sacramento County, provided crucial legal and technical guidance in the formulation of the survey instrument. Marisa Landin, 2014 JD Candidate at Stanford Law School (SLS), led our efforts in drafting the survey instrument for this project.

In addition, an unpublished report on the impact of Realignment on District Attorneys by Marisa Landin, along with SLS students Corinne Keel and Lindsey Warp, produced through an Advanced Criminal Justice seminar co-taught by Robert Weisberg and Joan Petersilia, greatly informed our study. Andrew Van Denover, 2015 JD Candidate at Stanford Law School, served as a research assistant.

Lee Crayton, PhD, consultant to SCJC, conducted the statistical analysis of the pre- and post-Realignment disposition data.

We are grateful to the California District Attorneys Association (CDAA) and its former Chief Executive Officer, W. Scott Thorpe, for their willingness to encourage their membership to respond to the survey and allowing us to speak at their 2013 summer conference.

Many District Attorneys throughout California were generous with their time in completing this survey. We thank each of them for sharing their insights.

Any errors and omissions are solely the responsibility of the authors.

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Executive Summary

On April 4, 2011, Governor Jerry Brown signed Assembly Bill 109, the 2011 Public Safety Realignment Act ("Realignment" or "AB 109"), into law.[1] AB 109 was one response to the 2009 Three-Judge Court Order for California to significantly reduce its prison population to 110,000 people, or 137.5% of design capacity, by year-end 2013. Affirmed by the U.S. Supreme Court in 2011 in *Brown v. Plata*, the Three-Judge Court Order determined prison overcrowding to be "the primary cause of the state's unconstitutional failure to provide adequate medical and mental health care to California prisoners," concluding that population reduction was the most narrowly drawn, least intrusive remedy.[2]

Realignment shifts the responsibility of supervising, tracking and imprisoning specified non-serious, non-violent, non-sexual ("triple-nons" or "N3 felonies" or "non-non-nons") offenders previously bound for state prison to county jails and probation (see *Overview of Public Safety Realignment*, p. 21. The law states that "the purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable."[3]

The implementation of Realignment in California is the largest correctional experiment of its kind.[4] Through AB 109, the Legislature has allocated over $2 billion in the first two years of implementation to assist California's 58 counties in carrying out the legislation's provisions.[5] In addition, more than 100,000 offenders have had their sentences altered through mid-2013.[6]

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[1] For more information on AB 109 and Realignment's impact on state and local agencies, see Petersilia, Joan. "Voices from the Field: How California Stakeholders View Public Safety Realignment." *Stanford Criminal Justice Center* (2014).

[2] Three-Judge Court Order (2009) at 99. *Brown v. Plata*, 131 S. Ct. 1910 (2011). http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf.

[3] California Penal Code §17.5(a)(7).

[4] Michigan, South Carolina, and Virginia are a few of the first states to implement some form of "Realignment" similar to AB 109 provisions, with increased use of local jails and community supervision beginning in 2000, but the sheer size of California sets it apart from other states. See Subramanian, Ram and Rebecca Tublitz. "Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections." *Vera Institute of Justice* (September 2012). http://www.vera.org/sites/default/files/resources/downloads/Realigning_Justice_full_report.pdf.

[5] Brown, Brian, Legislative Analyst's Office. "The 2012–13 Budget: The 2011 Realignment of Adult Offenders—An Update." http://www.lao.ca.gov/analysis/2012/crim_justice/2011-realignment-of-adult-offenders-022212.aspx.

[6] See Quan, Lisa, Sara Abarbanel, and Debbie Mukamal. "Reallocation of Responsibility: Changes to the Correctional System in California Post-Realignment." *Stanford Criminal Justice Center* (2014) and "County Realignment Dashboard." Chief Probation Officers of California. http://www.cpoc.org/assets/Realignment/dashboard_county.swf.

Background

The key legal and policy consequences of Realignment are as follows:

- Felons convicted of N3 felonies, in theory, face the same length of sentence as they did pre-AB 109, but regardless of the length of the sentence, incarceration occurs in the county jail.
- Any AB 109 jail sentence may, on recommendation of the prosecutor and/or decision by the judge, be split between some portion of jail time and some portion of mandatory supervision. However, even on a straight (non-split) sentence, the time served might be less than a pre-AB 109 prison term because of generous good-time credits or the power of sheriffs to release some jail inmates early to alleviate overcrowding.
- Large numbers of state prisoners (those incarcerated on a current N3 offense) who would normally be released to state parole authorities are now returned to the counties for supervision under Post-Release Community Supervision (PRCS), under the control of county probation officials; released offenders who violate conditions of PRCS serve revocation penalties in the jail rather than in prison.
- The details of AB 109 funding, involving large state-to-county transfers, lie far outside the scope of this report. But it helps to note here that the funding formulas are complex and disputed, and counties generally face escalating resource pressures in light of their new responsibilities.

The advent of Realignment, of course, affected the decisionmaking of all the official actors in the criminal justice system. But the prosecutor's role is unique in one clear sense: Prosecutors have, in formal legal terms, virtually unreviewable autonomy in the choice to charge or not charge an offender (so long as any charge matches provable facts with statutory elements). Traditionally, in deciding whether to charge as high as the provable facts allow, they consider contextual aspects of the commission of the offense itself but also any relevant background aspects and criminal record of the offender.

How does this power operate in the wake of AB 109? On the one hand, AB 109 simply classified a large number of pre-existing felonies under California Penal Code §1170(h) because they were deemed "triple-nons." In that sense, prosecutors in theory might be indifferent to the change; they would continue to charge these felonies according to the same factors as they always had, and the changes in site of incarceration and possible change in de facto length of sentences would happen of their own accord. In a sense, the only mandated change in prosecutorial choice here had to do with sentence recommendation: Because judges now have the power to impose a split sentence for an AB 109 conviction—fractioning the sentence between jail time and community

supervision—when prosecutors exercise their usual function of recommending sentences, they now have to build the matter of split versus straight sentences into that responsibility. Prosecutors have also always been free to consider such resource factors as their own and other agencies' budgets and crowding in jails and prisons.

But many aspects of AB 109 were likely from the start to weigh significantly on the decisions made by prosecutors as they exercise their traditional charging and recommendation choices after October 2011. The most salient aspects were the change in site and de facto length of incarceration, as well as the secondary effects of new county responsibilities for post-release supervision of many prisoners returning home. In particular, in exercising discretion, prosecutors might be influenced by their views on the differences in the severity of experience of incarceration in jail as opposed to prison, or by their concerns about jail crowding or the extra costs that county jails and other county agencies might have to absorb under AB 109.

Any such effects might influence charging or recommendation in numerous ways. Prosecutors might think differently about how they weigh aggravating or mitigating factors about the offense or the offender in terms of what crime to charge, and what enhancements to allege. In addition, in their recommendations (and plea offers), they have to consider the relationship between the new 1170(h) sentences and the traditional, and continuing, alternative of felony probation. Because probation usually involves at least a short jail stay as a condition, it is really a pre-AB 109 form of a "split sentence." While the idea of "probation" might suggest it is a less severe outcome than a jail sentence, the statutory rules governing probation and 1170(h) sentences show that any comparison is very complex and sometimes counter-intuitive. The length of supervision might end up longer on probation, and some officials seem to be of the view that the quality and rigor of supervision are better under probation than under the incarceration part of a split sentence. Further, as between split and straight sentences, concerns over the quality of supervision might lead prosecutors to favor straight sentences, but the possibility of very early release because of good-time credits or other factors might cut the other way.

With this background in mind we set out to devise a study that might illuminate how prosecutors across California's 58 counties were implementing and possibly rethinking their discretionary powers under Realignment.

Study Design

The Stanford Criminal Justice Center had already gleaned some initial insights on these issues from interviews with numerous prosecutors that are now documented in our *Voices from the Field: How California Stakeholders View Public Safety Realignment* report.[7] These insights offered very tentative, mostly anecdotal hints about how AB 109 might be causing prosecutors to rethink their charging and recommendation decisions. In addition, we had undertaken (and earlier completed) a formal survey questionnaire study of another set of officials, Superior Court Judges, to examine how AB 109 has affected their own unique type of decision and discretion.[8] Thus, a logical next step for us in completing the Realignment picture was to apply the formal survey instrument model to prosecutors.

We set out very deliberately to establish the predicates for this study. First, we reviewed the scholarly literature on how prosecutors make their decisions, including formal logic and decision theory, organizational sociology and psychology, and administrative law policy analysis. We then looked to the empirical studies on prosecutorial decisions. That empirical work, while suggestive, is often constrained by the limits of available recorded data and tends to focus on single jurisdictions. Nevertheless, it offered us some insights on how prosecutors balance conventional offense and offender factors with institutional and extra-legal factors.

We paid special attention to the most ambitious, recent empirical study to rely on a survey instrument, completed by the Vera Institute of Justice, to examine two unnamed District Attorney offices.[9] This study used a factorial approach that tests responses to carefully varied hypothetical scenarios to elicit how these various statutory and extralegal factors affect charging decisions for certain common crime and offender fact patterns. The authors were also able to relate the factorial results with actual charge and outcome data for those statutes. We recognized that some features of the Vera study were not applicable to our situation. They deal with just two counties, with which they developed deep and long-term confidential relationships. The circumscribed scope of the data they needed made their survey-outcome correlation analysis possible. By contrast, we were seeking to analyze 58 jurisdictions, for which such deep access to internal data was not possible. Moreover, our study addressed the very different challenge of a regime change

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[7] Petersilia, Joan. "Voices from the Field: How California Stakeholders View Public Safety Realignment." *Stanford Criminal Justice Center* (2014).
[8] Weisberg, Robert and Lisa T. Quan. "Assessing Judicial Sentencing Preferences After Public Safety Realignment: A Survey of California Judges." *Stanford Criminal Justice Center* (2014).
[9] Frederick, Bruce and Don Stemen. "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making." *Vera Institute of Justice* (2012). http://www.vera.org/pubs/anatomy-discretion-analysis-prosecutorial-decision-making.

in the penal structure. But we gleaned from the Vera study a sound methodology of factorial-based survey questions that did form the basis of our study.

As we then undertook to formulate our own hypotheticals, we set out certain key research questions and hypotheses. Our questions focused on whether the new 1170(h) structure might alter prosecutorial decisionmaking in terms of tilting borderline charges towards prison-eligible crimes or recommending especially long jail sentences on the theory that jail time is less severe per se than prison time; our inquiry also focused on whether the new option of straight versus split sentence, without any formula statutory guidance on whether and how to split, and how to balance the 1170(h) sentences against felony probation, would reveal any notable patterns. In particular, whether these patterns might reflect concerns over jail crowding or the quality of county supervision might produce consistent or inconsistent responses across counties, and whether any perceived variation might correlate with salient characteristics of those counties.

In formulating hypotheses in the absence of any pre-AB 109 survey that might have established a baseline for these questions, we established a rough baseline through a separate empirical study. With data from the California Attorney General's office, we examined arrest-to-charging ratios by year and by crime category. This information enabled us to compare statewide outcomes for periods both before and after the launch of Realignment in terms of the ratio of arrests to complaints. We found very few and small differences, including insignificant differences across counties, and very few differences across crimes. Despite its limits, this study cautioned us to start with a minimalist hypothesis about the effect of AB 109 on prosecutorial discretion. We were disinclined to surmise that our study would turn up drastic changes in prosecutorial discretion, save that (a) concerns for jail crowding or county costs might marginally move choices in the direction of prison-eligible crimes, and (b) in the absence of statutory guidance or criteria for choices from the menu of straight, split and probation sentences, wide variation in responses along these dimensions would be fairly evident.

We then exhaustively analyzed the statutory elements of certain very common crimes that fall within AB 109, especially drug and property crimes, and we consulted with two well-respected California prosecutors, both involved in AB 109 training, to design our specific hypotheticals. These hypotheticals set out facts for some of these generic crimes, and used varied combinations of aggravating and mitigating factors about the offense and the offender. In some cases we allowed for possible enhancement allegations. We then asked a series of questions about what prosecutors would charge or recommend under the various scenarios. We also asked respondents to rank each scenario offense and offender background for severity on a 1-5 scale. Further, we asked several open-ended questions about the respondent's general approach to charging, including whether his or her office had structured guidelines or policies for discretionary decisions. Finally, while

we ensured anonymity for our respondents, we elicited some information about characteristics of their counties so as to enable cross-checks for county variations when we tallied the results.

Starting in June 2013, we invested great resources in soliciting responses from attorneys within the 58 county offices. While the line prosecutors in the 58 counties number in the thousands, we focused our effort on prosecutors who had significant responsibility for charging and recommendation decisions. Our first step was to make the survey available electronically by the use of Qualtrics software, which can improve the design, distribution, and ultimate analysis of such survey questionnaires. In this effort we were aided by a number of the state's elected District Attorneys. We met within venues including our participation in the California District Attorneys Association (CDAA) annual meeting in Lake Tahoe, where, with the endorsement of the Chief Executive Officer of the CDAA, we promoted the electronic survey and distributed paper copies.

Initially we had recognized that we faced a challenge very different from that in our judicial survey. Because District Attorney offices are hierarchal organizations, we surmised that office policies would vary as to whether we would get a single response per office from the head prosecutor or some designated deputy, or perhaps several within each office who had significant supervisory responsibility over charging. This challenge was in contrast with our judicial survey, where our target population was close to 2,000 judges who were co-equal in their status as respondents.

When our initial response rate was very low, we learned that supervisory decisions in the counties about speaking with one voice required us to recalibrate our target expectations. Thus, we refocused our attention on getting a fair distribution of counties, without expectations of significant numbers of responses within any one office, and we targeted follow-up solicitations on the larger counties (as defined by population). Ultimately we received responses from a total of 20 counties representing about 72% of the California population and of the 28 responses, 24 affirmed that they had substantial supervisory responsibility. While we recognized that this response rate would not permit formal statistical inferences through multiple regression analysis, we were satisfied that the data would enable useful qualitative analysis. With the help of Qualtics we then proceeded to analyze the results.

Study Results

On the whole, when asked directly about factors affecting their decisionmaking, prosecutors cited traditional factors involving the severity of the offense and the background of the offender. We find something of a paradox when we asked district

attorneys to rank factors in terms of importance: Jail space was listed as the least important, but then on a separate question many respondents acknowledged jail space concerns when queried how Realignment has influenced their policies.

In response to particular charging hypotheticals, the pattern of answers did not diverge in any striking way from offense and offender severity, and we see some correlation between the choice of charge and the ranking of severity for particular scenarios. Nevertheless some patterns in responses reflect a reaction to various legal and economic consequences of Realignment.

In terms of specific hypotheticals, where given a chance in a "wobbler" case to choose between a jail-eligible misdemeanor and a prison-eligible felony charge, the answers followed a traditional pattern of tilting toward the prison felony only when aggravating factors were dominant. Combined with our disposition study indicating little post-AB 109 change in arrest-to-complaint ratios, this result would cast doubt on any surmise about "charging up" under Realignment. Somewhat similarly, in an assault scenario, severity correlated with a tilt toward a prison charge, although the key factor was the presence or absence of mitigating factors rather than the presence or absence of aggravators. Also consistent was an auto theft scenario where the decisive factor in whether a juvenile strike would be alleged, thereby leading to a prison-eligible charge, was the severity of the underlying juvenile crime.

Results of other hypotheticals, while consistent with reliance on traditional charging factors, indicated that a problem after AB 109 is that prosecutors may not be fully apprised of or focused on its change in the rules, especially where the revised penal code structure has some counter-intuitive effects. For example, in one methamphetamine scenario, the choice between two sets of charges would determine whether the offender went to prison or jail. The initial results correlated greater severity of offense and offender with the prison charge. But a follow-up question noted the statutory oddity that the sentence for the prison-eligible charge would actually be shorter than that for the two jail-eligible charges, and half the respondents then said that after being so informed they would change their answer.

A further nuance in attitudes toward the prison-jail difference came from scenarios involving methamphetamine and weapons. Here it was clear that the prison-eligible charge would lead to a shorter sentence, yet it was the clear majority choice. This result may reflect a conscious view that these are especially harmful types of crime and the offender should be sent to prison to signal a greater moral stigma, independent of the sentence length. (The result is also consistent with the view that prosecutors are concerned that jail sentences are de facto far shorter than they are de jure. But this latter

inference is very speculative because it is not reflected in the results from other sets of questions.)

But perhaps the most striking finding in these results came from the questions about sentencing recommendations. For some questions the respondents had to choose between straight and split sentences and, where they chose a split, to recommend the proper fractions of jail and supervision time. For other questions, they had those choices as well as the option of felony probation. The clear dominant takeaway from these questions is huge variance along all these dimensions. In a drug trafficking scenario, the variation for both whether and how to split was great. Any effort to link chosen sentences to severity ranking for those questions is difficult, because rank ordering this complex menu of sentences in terms of severity itself is inherently difficult. Comparisons between supervision time and jail time and between 1170(h) supervision and probation are unavoidably apples-to-oranges. Nevertheless, we can say that respondents' severity rankings bore no clear relation to recommendation choices. Moreover, when the probation choice was added for a store burglary charge, that option only increased the wide variation in choices. The only thing close to consensus was that results for the question where there were no aggravators and some mitigators led to a majority choice for probation.

Finally, the results did not show any significant differences in responses across counties. "High use" and "low use" counties (referring to the rate of felony offenders sent to state prison by those counties) did not exhibit any notable differences in their scenario responses.

Conclusions

One initial observation to note is the inherent difficulty of surveying prosecutors. While answering questionnaires is time-consuming for busy officials, we learned that DAs are wary of any intrusion into decisionmaking processes and reluctant to publicly disclose anything that might cause them to be viewed in a negative light. In addition, some prosecutors fear that information might prove advantageous to defense lawyers. The principle that prosecutors are under no legal obligation to explain how they make decisions poses a challenge to empirical research. Prosecutors remain wary of research involving their deliberations even when reassured that their responses will remain anonymous and that the researchers are embarking on the project without preconceptions. Moreover, even where individual line prosecutors might be open to such surveys, their supervisors might prefer that the office speak with a single voice and so limit the volume of responses we can obtain.

Hence, research on prosecutorial preferences that examines their thinking processes (as opposed to statistical analyses of criminal justice outcomes) may often require focusing on one office or a few offices and building up long term researcher-prosecutor relationships of the sort undertaken by Vera. Simply put, breadth may have to be traded off for depth. Nevertheless, when a response rate does at least achieve a large representation of the population under review, qualitative analysis is able to yield useful insights.

As for specific substantive conclusions, the undramatic one is that most charging or recommendation preferences remain consistent with traditional severity factors and do not manifest major alterations in light of AB 109. The more dramatic general conclusion is that there is a great deal of uncertainty and variation in the responses we received. This phenomenon manifested itself particularly when prosecutors had to choose from the menu of straight, split, and probation sentencing options.

The degree of change wrought by Realignment should not be exaggerated. It changes the places where certain sentences could be served, but it still uses a combination of custodial and non-custodial sentencing. Well before 2011, judges could sentence offenders to a "jail plus tail" sentence via felony probation. The biggest legal difference now is that probation competes with the somewhat different alternative of the split sentence; other differences lie in the nuances of AB 109 funding and the relationship between funding for jails and supervision and the extra pressure counties face to operate jails and probation. Whatever the degree of effect of those differences, it remains striking that, on identical facts, recommended terms for split sentences diverged significantly, ranging from short terms of both jail and supervision, to short jail and a long tail, to long jail and a short tail.

At the same time, jail sentences, obviously available before Realignment but now extended to formerly prison-eligible sentences, were also wildly divergent on the same facts, ranging from a year or less to 20 years or more. This might be due to local population pressures (or lack thereof)—DAs worried about early release from jail—but it seems notable that professionals implementing the same statutes could recommend such different sentences.

In terms of the hypotheticals in the study, we did not find any differential patterns of charging in our results across counties (e.g., "high use" and "low use" counties). Again, we are reluctant to push any results too far, given the lack of data and the lack of reliability. Nevertheless, we did observe some interesting results when comparing a given county's results to the mean result. One county rated each offense and record as a 5—most serious—despite the significant differences in the facts for a given set of hypotheticals. At the same time, this county, on average, charged a little less seriously

than the mean. Another county tended to rate both offense and record less seriously than its peers (an average of 20% and 28%, respectively), but charged above the mean (approximately 17%). We are hesitant, again, to draw too many inferences from this behavior, given that it might have been the result of someone trying to answer the survey quickly, it might not reflect official policy, it could be the result of chance, etc., but it does point out a potential issue with the study of prosecutorial discretion (and any policies relating thereto): Reasonable prosecutors can agree on the facts' seriousness and disagree as to the right sentence these facts call for, and this disagreement may or may not manifest itself in different charging behavior.

This study, then, does not provide data either showing or disproving the hypothesis that DAs have changed their charging behavior in response to Realignment, except for some statements excerpted above. We do not see any evidence (nor do we have reliable evidence) suggesting that DAs in different counties respond differently to Realignment in a predictable way, although these results should be seen less as proving or disproving the hypothesis and more as being not responsive to it. On the other hand, since we find evidence of lack of information or clarity among many prosecutors about the new rules of AB 109, we must allow for the possibility that as prosecutors are more fully trained in this area, variations across counties might arise.

In terms of open-ended questions about the effects of Realignment, around two-thirds of respondents said, in very general terms, that charging was different after Realignment, with the most-cited example being the availability of split sentencing. At the same time, the great majority said that Realignment had not led them to adopt a policy of declining prosecution for low-level offenses because of resource constraints. On the set of questions about perceptions of the roles of other agencies, a few patterns emerged. Respondents generally gave high marks to the quality of probation and related agencies engaged in supervision and treatment, and said that their offices had good relations with those agencies. Many, however, lamented the increasing case overloads of those agencies. When asked about sufficiency of resources for police, courts, probation, public defenders and their own offices, answers varied widely in terms of whether funding was sufficient or lacking, with one exception: Respondents evinced a consensus that the defense bar was the entity least hurt by resource constraints in the wake of Realignment.

Recommendations

Given our findings and analyses, we strongly recommend the following:

(1) Some mechanism should be developed to address and mitigate AB 109's statutory ambiguities as to the relationship between felony probation and split sentences.

Currently, the legislation explains the procedural distinction between these two types of sentences but does not guide prosecutors (or judges) about the substantive goal of AB 109 in terms of how to choose between these options.

(2) In our parallel survey of judges we recommended that the California State Legislature consider amending AB 109, whether by formulaic statutory rule or some form of presumptions or guidelines, to advise judges how to choose among these sentencing options. As an alternative means to the same end, we suggested that the California Judiciary itself establish consistent approaches to the choices between traditional felony probation and 1170(h) sentences and determine how sentences should be split—under what circumstances and for which crimes, and what fractions offenders should serve in jail and under mandatory supervision—while still retaining necessary discretion. Were either of these approaches to be implemented the result would then be salutary as a mandate to prosecutors as to what criteria should guide their own choices for charging or recommendation as they face this new array of sentencing choices.

(3) In the absence of any such legislative or judicial action, we recommend that prosecutors themselves, perhaps through the California District Attorneys Association and perhaps with the help of the Attorney General in convening county prosecutors, share views and practices on these sentencing options and seek to establish at least general norms and presumptions to somewhat reduce the problem of extreme unpredictability and disparity. In addition, the prosecutors themselves, possibly with the assistance of the Attorney General, should ensure that all assistant district attorneys are fully trained in the technical details of AB 109's new sentencing rules.

(4) To improve the use of the new sentencing tools under AB 109, including split sentences, counties should ensure, and the State must supply sufficient funding for, rigorous evidence-based supervision and effective community-based treatment resources whether the offender is under felony probation or the mandatory supervision portion of a split sentence. Better supervision is of inherent value, but it also serves a purpose directly relevant to this survey: Regardless of how the statutory relationship between felony probation and 1170(h) is resolved, prosecutors are more likely to make consistent and confident recommendations about probation or supervision if they have solid faith in the likelihood that supervision, in either form, shows promise of reducing offender recidivism.

(5) While jail crowding is a complex subject outside the scope of this study, we recommend that the legislative and executive officials who control funding and space for jails pay attention to the effect of jail crowding on prosecutors. While concern about burdens that convictions place on jail and prison resources is a legitimate part of

prosecutorial discretion, severe crises in jail crowding can cause unfortunate distortions of that discretion.

(6) Future research in this area should focus on recorded data about actual charging and recommendation outcomes to help test whether the concerns raised in this study about undue disparity in stated preferences of prosecutors are manifested or mitigated over time as prosecutors adapt to the new AB 109 regime.

Introduction

Public Safety Realignment

On April 4, 2011, Governor Jerry Brown signed Assembly Bill 109, the 2011 Public Safety Realignment Act ("Realignment" or "AB 109"), into law.[10] AB 109 was one response to the 2009 Three-Judge Court Order for California to significantly reduce its prison population to 110,000 people, or 137.5% of design capacity, by year-end 2013. Affirmed by the U.S. Supreme Court in 2011 in *Brown v. Plata*, the Three-Judge Court Order determined prison overcrowding to be "the primary cause of the state's unconstitutional failure to provide adequate medical and mental health care to California prisoners," concluding that population reduction was the most narrowly drawn, least intrusive remedy.[11]

Realignment shifts the responsibility for supervising, tracking and incarcerating specified non-serious, non-violent, non-sexual ("N3 felonies" or "non-non-nons") offenders previously bound for state prison to county jails and county probation (see *Overview of Public Safety Realignment*, p. 21).[12] After October 1, 2011, adults convicted of these non-non-non's and other amended felony crimes (California Penal Code §1170(h)) cannot be sentenced to prison unless they have a prior "serious" or "violent" felony conviction (as defined by California Penal Code §1192.7(c) or 667.5(c)).[13]

Realignment also amended about 500 criminal statutes by eliminating for these offenses the possibility of a state prison sentence upon conviction. Virtually all drug and property offenses are now served in county jail. These newly amended laws are contained in the California Penal Code, the California Health and Safety Code, and the California Vehicle

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[10] For more information on AB 109 and Realignment's effect on state and local agencies, see Petersilia, Joan. "Voices from the Field: How California Stakeholders View Public Safety Realignment." *Stanford Criminal Justice Center* (2014).

[11] Three-Judge Court Order (2009) at 99. *Brown v. Plata*, 131 S. Ct. 1910 (2011), http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf.

[12] These classifications are now enumerated in California Penal Code §1170(h). They are fully discussed in Couzens, J. Richard and Tricia A. Bigelow. "Felony Sentencing After Realignment." *Felony Sentencing Reporter* 25 (2013). An excellent source of materials on the legal aspects of Realignment can be found at "Criminal Justice Realignment Resource Center." California Judicial Branch. http://www.courts.ca.gov/partners/890.htm.

[13] Offenders can be sentenced to prison even if they are currently convicted of an 1170(h) non-prison eligible crime if any of the following apply: (1) conviction of a current or prior serious or violent felony conviction listed in California Penal Code §667.5(c) or 1192.7c; (2) the defendant is required to register as a sex offender under §290; or (3) the defendant is convicted and sentenced for aggravated theft under the provisions of §186.1. See Couzens and Bigelow, ibid. at 65.

Code.[14] In addition, AB 109 added approximately 80 non-violent, non-serious, and non-sexual (and hence, not categorically state prison felonies) and designated them as still punishable by state prison.[15] California prisons are now generally reserved for convictions of robbery, rape, murder, kidnap, residential burglary, aggravated theft (loss of more than $100,000), and very serious crimes involving children.

The Public Safety Realignment law states that "the purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable."[16]

The implementation of Realignment in California is the largest correctional experiment of its kind.[17] Through AB 109, the Legislature has allocated over $2 billion in the first two years of implementation to assist California's 58 counties in carrying out the legislation's provisions.[18] In addition, more than 100,000 offenders have had their sentences altered through mid-2013.[19]

[14] There are 62 additional crimes that are not defined in the California Penal Code as serious, violent or California Penal Code §290 registerable offenses, but for which any incarceration sentence will be served in state prison. These crimes can be found at "Final Crime Exclusion List." California Department of Corrections and Rehabilitation.
http://74.205.125.191/images/users/1/Final%20Crime%20Exclusion%20List.pdf.
[15] For a complete listing of crimes that are no longer prison-eligible, see Couzens, J. Richard and Tricia A. Bigelow. "Felony Sentencing After Realignment." *Felony Sentencing Reporter* 25 (2013).
[16] California Penal Code §17.5(a)(7).
[17] Michigan, South Carolina, and Virginia are a few of the first states to implement some form of "Realignment" similar to AB 109 provisions, with increased use of local jails and community supervision beginning in 2000, but the sheer size of California sets it apart from other states. See Subramanian, Ram and Rebecca Tublitz. "Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections." *Vera Institute of Justice* (September 2012).
http://www.vera.org/sites/default/files/resources/downloads/Realigning_Justice_full_report.pdf.
[18] Brown, Brian. Legislative Analyst's Office. "The 2012–13 Budget: The 2011 Realignment of Adult Offenders—An Update." http://www.lao.ca.gov/analysis/2012/crim_justice/2011-realignment-of-adult-offenders-022212.aspx.
[19] "County Realignment Dashboard." Chief Probation Officers of California.
http://www.cpoc.org/assets/Realignment/dashboard_county.swf.

Overview of Public Safety Realignment

Enacted on October 1, 2011, the Public Safety Realignment Act transfers the management of many low-level offenders from the state to the county level. Thus, specified offenders overseen by the California Department of Corrections and Rehabilitation (CDCR) are "realigned" to local agencies.

Realignment shifts three criminal justice populations from state to county responsibility:

(1) Post-Release Community Supervision (PRCS): Inmates in state prison whose current commitment offense is non-serious, non-violent, and non-sexual ("N3") are released to county probation, not state parole. PRCS individuals are eligible for discharge in 180 days.

(2) 1170(h) Offenders: Defendants newly convicted of N3 offenses now serve their sentence locally in jail.[20] Three sentencing options exist for this population:

a) Full sentence in county jail (can be served in alternative custody programs);

b) A "split sentence": Combination of a term in county jail and mandatory supervision (MS), which cannot exceed the total term chosen by the sentencing judge. Upon release to MS, a defendant is supervised by probation under the same terms, conditions, and procedures of traditional probation; and

c) Traditional probation, which can include up to one year maximum in county jail. A defendant who violates the terms and conditions of probation could be given a full term of imprisonment or a split sentence.

(3) Parolees: State parole agents will only supervise individuals released from prison whose current offense is serious or violent and certain others (i.e. those assessed to be mentally disordered or high risk sex offenders).

Other key elements of AB 109 include:

- Redefining Felonies: Felonies are redefined to include certain crimes punishable in jail for 16 months, 2 years, or 3 years. Almost 500 criminal statutes were amended to require that any adult convicted of CA Penal Code §1170(h) felony crimes cannot be sentenced to prison unless they have a past serious or violent felony conviction.
- Parole and Probation Revocations Heard and Served Locally: PRCS and parole revocations are served in local jails for a maximum revocation sentence of 180 days. As of July 1, 2013, local trial courts hear PRCS and parole revocation hearings.
- Changes to Custody Credits: Jail inmates earn four days of credit for every two days served. Time spent on home detention (i.e., electronic monitoring) is credited as time spent in jail custody.
- Alternative Custody: Electronic monitoring can be used for inmates held in county jail in lieu of bail. Eligible inmates must first be held in custody for 60 days post-arraignment, or 30 days for those charged with misdemeanor offenses.
- Community-Based Punishment: Counties are authorized to use a range of community-based punishment and intermediate sanctions other than jail incarceration alone or traditional probation supervision.

[20] Offenders can be sentenced to prison even if they are currently convicted of an 1170(h) non-prison eligible crime if any of the following apply: (1) conviction of a current or prior serious or violent felony conviction listed in California Penal Code §667.5(c) or 1192.7c; (2) when the defendant is required to register as a sex offender under California Penal Code §290; or (3) when the defendant is convicted and sentenced for aggravated theft under the provisions of §186.1. The Legislature also left over 70 specific crimes where the sentence must be served in state prison. Couzens, J. Richard and Tricia A. Bigelow. "Felony Sentencing After Realignment." *Felony Sentencing Reporter* 25 (2013).

Background

Prosecutorial Discretion

To understand Realignment's effect, we need to analyze how those responsible for implementing Realignment are doing so in their day-to-day decisionmaking. But the mode of implementation obviously differs according to the unique role each official plays in our legal system. Hence, an understanding of the prosecutorial role in general is key to understanding how such discretion operates in California criminal law and specifically under the new statutory regime of Realignment.

We start, then, with a few basic principles. District attorneys are arguably the most powerful figures in criminal justice, with virtually unreviewable discretion in charging (including whether or not to charge at all). Prosecutors subject to popular election (as is the case for all California head district attorneys) may be politically accountable for their decisions whether to charge or not charge particular crimes, but the American constitutional system does not provide any legal mechanism whereby a prosecutor can be forced to bring a case if she would prefer not to.[21] "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[22]

Prosecutors consider many factors in deciding whether to file charges in a given case. They ask two primary questions: *Can* I prove the case? And, *should* I prove the case?[23] The first question goes to issues of proof and sufficiency of evidence, while the latter frequently turns on factors such as offense severity and criminal history.[24] Moreover, because the overwhelming majority of criminal convictions result from guilty pleas, the prosecutor's willingness to strike a plea deal often gives her de facto power to control the actual sentence in a case. Indeed, as American sentencing laws in recent decades have

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[21] Vorenberg, James. "Narrowing the Discretion of Criminal Justice Officials." *Duke Law Journal* 4 (1976): 651-697.; Moore, Shelby A. Dickerson. "Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion - Knowing There Will Be Consequences for Crossing the Line." *Louisiana Law Review* 60 (2000): 371-404, 379. Exploring arguments for and against such unbridled discretion. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (1973). (separation-of-powers principle precludes judiciary from compelling prosecutors to bring cases; aggrieved crime victims have no right to bring suit for injunction to compel filing of charges).

[22] *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

[23] Frederick, Bruce and Don Stemen. "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making." *Vera Institute of Justice* (2012). http://www.vera.org/pubs/anatomy-discretion-analysis-prosecutorial-decision-making. at 59.

[24] Ibid. at 177.

shifted from lodging considerable sentencing discretion with judges to more rigid and formulaic systems, that de facto power has increased greatly, i.e., through her choice of charge the prosecutor has effectively taken much sentencing power away from the judge.[25]

One scholar has emphasized the breadth of crime definition as a major source of prosecutorial power: "By choosing to create a large number of crimes, and by defining those crimes with the breadth proposed by the Model Penal Code, legislatures make it impossible to enforce all criminal statutes, and, at the same time, make it possible for a single act to be charged under many overlapping provisions."[26] Thus, the district attorney has discretion to choose not only *what* crimes, but also *how many* crimes, to charge. Prosecutors differ in how they approach the decision of how many charges to file. Some only file charges they believe the defendant should plead guilty to, others only file charges they believe the defendant would plead guilty to, and a third group files all the charges available regardless of expected pleas.[27] Whether a prosecutor prefers to "negotiate up" or "negotiate down" in plea negotiations also affects the number of charges filed at the outset.[28]

A feature of California criminal law that extends beyond AB 109 helps illustrate this prosecutorial power. As in most states, the huge number and interlocking and overlapping complexity of California criminal statutes—not just in the Penal Code but in Health and Safety, Vehicle, Government, and other codes—place vast power of implementation in county District Attorneys.[29] For example, there is the category called "wobblers"—crimes that can be classified as either felonies or misdemeanors under the law. California Penal Code §17(b) provides prosecutors with the discretion to reduce wobblers (which by default are classified as felonies) from felonies to misdemeanors.[30] In making the decision between charging a felony or a misdemeanor, prosecutors mainly consider such factors as severity of crime, eligibility for probation and prior criminal record.[31]

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[25] For a comprehensive discussion of this latter phenomenon, see Stith, Kate. "The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion." *Yale Law Journal* 117 (2008).
[26] Misner, Robert L. "Recasting Prosecutorial Discretion." *The Journal of Criminal Law and Criminology* 86, no. 3 (1996): 717-777. at 745.
[27] Frederick, Bruce and Don Stemen. "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making." *Vera Institute of Justice* (2012). http://www.vera.org/pubs/anatomy-discretion-analysis-prosecutorial-decision-making. at 177.
[28] Ibid. at 178.
[29] For a comprehensive review of this statutory mélange, see Little Hoover Commission "Solving California's Corrections Crisis: Time is Running Out." Sacramento, CA (2007). www.lhc.ca.gov. at 33-35; 67-71.
[30] California Penal Code §17(b) (2011).
[31] Berwick, Megan, Rachel Lindenberg, and Julia Van Roo. "Wobblers & Criminal Justice in California: A Study into Prosecutorial Discretion." *Public Policy Practicum, Stanford University,* (March 2010). http://ips.stanford.edu/sites/default/files/shared/DA%20Discretion%20Final%20Report.pdf. at xi. The

Further, California prosecutors have the opportunity to use their discretion by alleging any applicable sentence enhancements, such as strike offenses in the "Three Strikes" context, which will increase sanctions in the event of conviction.[32] Prosecutors can also lessen charges to avoid imposition of a mandatory sentencing enhancement when they see fit. They also have "wide latitude to dismiss or 'strike' a prior offense in the interest of justice."[33] In fact, according to one study, 92% of District Attorney offices in California[34] have used their discretion to drop a strike in a three-strike case, citing the trivial nature of the offense and/or remoteness of the criminal history as factors relevant to the decision.[35]

Finally, because prosecutors have so much power over conviction and sentencing rates, absent some independent constraint, their decisions also control prison population.[36] And California exemplifies this phenomenon. As shown by David Ball (2012), counties, through the actions of their prosecutors, have traditionally had the de facto power to externalize or off-load the cost of incarceration on the state prison system, and often do so for reasons more attributable to charging preferences than to purely objective violent crime rates.[37] Indeed, one way to conceive of Realignment is as an effort to rebalance this externality. That is, depending on funding formulas, for AB 109, counties are being forced to internalize the costs of their prosecutorial (and local law enforcement) decisions far more than before.

CDAA's Uniform Crime Charging Standards that provide guidance for DAs charging wobbler offenses state that appropriate case-related factors a DA may consider include: prior record, severity of crime, probability of continued criminal conduct, eligibility for probation, relative difficulties in successful prosecution as a felony, cooperation of accused and the age of the accused. Berwick, Lindenberg, and Van Roo's article on wobblers that relied on both published data and intensive interviews with officials concludes that information about criminal record and concurrent (multiple) charges helps predict whether an offender will be charged with a misdemeanor or a felony. Interestingly, violent crime and the scarcity of resources do not uniformly (and linearly) influence DA charging policies. This study however, was conducted before Realignment, when prosecutorial incentives may have been different. In particular, before AB 109 prosecutors had less reason to be concerned with county jail resources.

[32] Little Hoover Commission "Solving California's Corrections Crisis: Time is Running Out." Sacramento, CA (2007). www.lhc.ca.gov. at 67-71.

[33] Freedman, Malaina and Craig Menchin. "Realignment's Impact on the Public Defender and District Attorney: A Tale of 5 Counties." *Stanford Criminal Justice Center* (2012): 47. http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Freedman_Menchin.pdf.

[34] Walsh, Jennifer Edwards. "In Furtherance of Justice: The Effect of Discretion on the Implementation of California's Three Strikes Law." Claremont Graduate University (unpublished manuscript) (1999). The study included a survey of District Attorney offices in 25 of the 58 California counties (accounting for over 75% of the state's total share of three-strike convictions).

[35] Ibid.

[36] Pfaff, John F. "The Micro and Macro Causes of Prison Growth." *Georgia State University Law Review* 28, no. 4 (2011). http://scholarworks.gsu.edu/gsulr/vol28/iss4/9.

[37] Ball, W. David. "Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates - And Why It Should." *Georgia State University Law Review* 28 (2012): 987-1084.

Existing Research on Prosecutorial Discretion

In this endeavor to study prosecutorial discretion post-Realignment, we benefit from recent important work done by respected scholars. We provide below a brief summary of the background scholarship on prosecutorial discretion. That scholarship, while fairly ample, is also limited in its relevance to this current study.

One component within the realm of conventional legal scholarship examines prosecutorial discretion as part of administrative law, as simply a species of the general category of official agency discretion, observing that prosecutors enjoy far broader and less reviewable discretion than other executive branch officials.[38] Then there is a body of theoretical writing on prosecutorial discretion, focusing on such abstract concepts as "bounded rationality," i.e., how prosecutors can make decisions on limited information, and engage in "uncertainty management."[39] Much of this writing draws fairly intuitive conclusions about how prosecutors rely to the maximum extent possible on such factors as attributes of the offender and the offense, looking to blameworthiness and dangerousness, while also accounting for resource constraints. Some studies use psychological principles to describe how prosecutors develop sub-generalizations or working stereotypes about offenders to guide their own decisions.[40]

Another body of work that has a more empirical and sociological basis looks to the "courtroom community" context, in which established relationships among prosecutors, judges, defense lawyers, police officers and courtroom personnel lead to institutional norms that guide prosecutorial choices.[41] Research by organization theory scholars looks to how institutional hierarchies and structures guide and constrain discretion by individual actors.[42] Then there is the economists' approach, whereby prosecutors are essentially market actors and the interactive positions of judges, prosecutors, and others

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[38] Davis, Kenneth Culp. *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: LSU Press (1969). at 188-189, 207-208 ("more than nine-tenths of local prosecutors' decisions are supervised or reviewed by no one").

[39] Albonetti, Celesta A. "An Integration of Theories to Explain Judicial Discretion." *Social Problems* 38 (1991): 247-266.; Ulmer, Jeffrey, Megan Kurlycheck, and John Kramer. "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences." *Journal of Research in Crime and Delinquency* 44, no. 4 (2007): 427-458.

[40] Albonetti, Celesta. "Prosecutorial Discretion: The Effects of Uncertainty." *Law and Society Review* 21 (1987): 291-313.

[41] Ulmer, Jeffrey, Megan Kurlycheck, and John Kramer. "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences." *Journal of Research in Crime and Delinquency* 44, no. 4 (2007): 427-458.; Johnson, Brian D. "Racial and Ethnic Disparities in Sentencing Departures Across Modes of Conviction." *Criminology* 41 (2003): 449-490.; Eisenstein, James, Roy Flemming, and Peter Nardulli. *Contours of Justice: Communities and Their Courts* (National Criminal Justice Reference Service Document No. NCJ 107140). Boston: Little Brown & Co. (1988).

[42] Stanko, Elizabeth Anne. "The Impact of Victim Assessment on Prosecutors' Screening Decisions: The Case of the New York County District Attorney's Office." *Law and Society Review* 16 (1981-1982): 225-240.

lead to "going rates" of charge and sentence for types of crimes that ensure the overall efficiency of the system.[43]

Turning to empirical scholarship, numerous studies exist using recorded offense and offender data and often recorded interpretative data from law enforcement or prosecutorial officials.[44] While these studies confirm how the conventional legal factors affect decisions in most situations, a few find data suggesting reliance on extra-legal factors. Some find statistical evidence of illegitimate factors such as race or ethnicity as significant causal explanations. A large body of this work focuses on the risk of racial discrimination,[45] much of that in the heavily researched area of the death penalty.[46] Others find evidence that social or moral characteristics of the victim, or the nature of the victim-offender relationship, heavily influence the charging decision.[47] Finally, there have been a few studies looking directly to political factors, such as whether imminent elections for county prosecutors might affect their charging practices.[48]

While this theoretical and empirical scholarship has been extensive and has offered great insights into prosecutorial discretion, it exhibits many limitations. As noted by Vera Institute of Justice scholars Bruce Frederick and Don Stemen,[49] these studies have tended to focus on single jurisdictions and single decision points (e.g., whether or not to charge)[50] and thus lack great generalizability. Moreover, while many are successful in

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[43] Ulmer, Jeffrey, Megan Kurlycheck, and John Kramer. "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences." *Journal of Research in Crime and Delinquency* 44, no. 4 (2007): 427-458.; Eisenstein, James, Roy Flemming, and Peter Nardulli. *Contours of Justice: Communities and Their Courts* (National Criminal Justice Reference Service Document No. NCJ 107140). Boston: Little Brown & Co. (1988).; Eisenstein, James and Herbert Jacob. *Felony Justice: An Organizational Analysis of Criminal Courts*. Boston: Little Brown & Co. (1977).

[44] E,g., Schmidt, Janell and Ellen Hochstedler Steury. "Prosecutorial Discretion in Filing Charges in Domestic Violence Cases." *Criminology* 27 (1989): 487-509. For a remarkable example of reliance on interpretive data, see Miller, Marc L. and Ronald F. Wright. "The Black Box." *Iowa Law Review* 94 (2008).

[45] Free, Marvin D., Jr. "Race and Presentencing Decisions in the United States: A Summary and Critique of the Research." *Criminal Justice Review* 27, no. 2 (2002): 203-232.

[46] The most iconic of these studies, finding strong evidence of racial discrimination on the basis of the race of the victim, is Baldus, David C., Charles Pulaski, and George Woodworth. "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience." *Journal of Criminal Law and Criminology* 74 (1983): 661-753. An updating of its findings is Baldus, David C., Catherine M. Grosso, and George G. Woodworth. "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)." *Nebraska Law Review* 81 (2002): 486-756.

[47] Spears, Jeffrey W. and Cassia C. Spohn. "The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases." *Justice Quarterly* 15 (1997): 501-524.

[48] E.g., McCannon, Bryan. "Prosecutor Elections, Mistakes, and Appeals." *Journal of Empirical Legal Studies* 10 (2013): 606-714.

[49] Frederick, Bruce and Don Stemen. "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making." *Vera Institute of Justice* (2012). http://www.vera.org/pubs/anatomy-discretion-analysis-prosecutorial-decision-making. at 10-11.

[50] On the other hand, an emerging phase of empirical scholarship has turned to analyzing separate stages of "case-processing" (i.e., filing of police reports, initial charging, bail requests, plea offers, etc.) to tease out which stages of the exercise of discretion play key roles in the causal effect of relevant factors. See e.g.,

extrapolating which factors tend to influence charging decisions, by virtue of their reliance on recorded empirical data, they are limited in their ability to tackle subtler questions about the processes of thinking by which prosecutors weigh these factors.[51]

The single most extensive recent study of prosecutorial discretion, by Frederick and Stemen, represents the boldest recent step towards overcoming these limitations, and thus merits some brief separate discussion.

The Vera Study of Prosecutorial Discretion

The Vera Institute's recent study, "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making,"[52] is concerned with a question quite different from ours: It focuses on issues of racial disparity in criminal justice outcomes along stages of adjudication. Its potential relevance to our study lies more in the scope and methods of its study, along with its general insights about prosecutorial discretion. As for scope and method, the authors of the study sought to overcome the limitations of earlier studies by using a suite of empirical methods. First, its data came from two counties from two different states and distinct social settings, though the counties were both medium-sized and of similar density and, roughly of similar demographic diversity. Thus, Vera was able to claim some general and comparative value for their insights. Second, while it was able to rely, as had earlier studies, on public data about criminal justice outcomes and to perform formal regression studies on these outcomes, they took advantage of remarkable cooperation from officials of these two prosecution offices to obtain unusually nuanced interpretive and organizational data. With promises of anonymity, it was able to develop detailed knowledge about the organizational structure/bureaucratic processes of these two counties; it was also able to conduct detailed interviews with large numbers of

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Starr, Sonja B. "Estimating Gender Disparities in Federal Criminal Cases." *University of Michigan Law and Economics Research Paper, No. 12-018* (2012). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144002.; Sutton, John. "Structural Bias in the Sentencing of Felony Defendants." *7th Annual Conference on Empirical Legal Studies* (December 2011). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2095594. For a review of this new scholarship, see Weisberg, Robert. "Empirical Criminal Law Scholarship and the Shift to Institutions." *Stanford Law Review* 65 (2013): 1371-1401.

[51] Some studies do achieve some insights into decisionmaking, even without formal rigor, through interviews with officials, see e.g., Berwick, Megan, Rachel Lindenberg, and Julia Van Roo. "Wobblers & Criminal Justice in California: A Study into Prosecutorial Discretion." *Public Policy Practicum, Stanford University,* (March 2010). http://ips.stanford.edu/sites/default/files/shared/DA%20Discretion%20Final%20Report.pdf. or recorded subjective data by officials, e.g,Miller, Marc L. and Ronald F. Wright. "The Black Box." *Iowa Law Review* 94 (2008).

[52] Frederick, Bruce and Don Stemen. "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making." *Vera Institute of Justice* (2012). http://www.vera.org/pubs/anatomy-discretion-analysis-prosecutorial-decision-making.

individual prosecutors to elicit their understanding of their own decision-making practices and to elicit their responses to the researchers' initial statistical findings about factors affecting the outcomes and to refine the statistical and analysis through feedback from these interviewees. Finally, the study's authors were able to conduct, and get a very high response rate for, a detailed survey questionnaire that used a factorial analysis (see below) as to how they exercised their discretion.

The Vera study concluded that while discretion is unbounded in theory, it is, in fact, governed by "rules, resources, and relationships." It broke down the idea of prosecutorial discretion into screening and charging, concluding that evidentiary concerns, for example, dominate the decision to prosecute or not. Its analysis revealed that a variety of contextual constraints frequently influenced prosecutors' decisions about whether a case can and should be prosecuted.

First, the study's authors learned that internal rules or policies within the prosecutor's office sometimes determined whether a case is accepted for prosecution or how to craft an appropriate plea. The Vera study found that district attorneys established very few office-wide policies governing case outcomes, but that prosecution units within offices do establish policies and norms that limited the exercise of discretion.[53] Thus, the broad discretion prosecuting attorneys have in making decisions that determine criminal case outcomes raises concerns about the potential for unwarranted disparity across prosecutors and settings.[54] The study concludes that "while responses to surveys suggested prosecutors attached high importance to consistency, statistical analyses of case outcomes found considerable variation across prosecutors that could not be accounted for by the case characteristics that were available for analysis."[55]

Second, the lack of resources of the prosecutor's office and the local court system sometimes led prosecutors to reject, dismiss or amend charges in order to work within available resource limits. While the study's analysis showed that decisions to charge were influenced by offense seriousness and criminal history, these aspects can have various effects on prosecutors' decisions. Third, relationships with law enforcement officers, judges and defense attorneys altered how a case would be handled. These constraints—rules, resources and relationships—could trump evaluations of strength of the evidence,

[53] The notion of a prosecution "office" is complex because even within a single jurisdiction there are often regional branch units with some degree of autonomy.
[54] Because our target respondents were heads of offices or others with supervisory responsibility, we could not feasibly account for intra-office disparities among line prosecutors who might diverge from office polices.
[55] Frederick, Bruce and Don Stemen. "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making." *Vera Institute of Justice* (2012). http://www.vera.org/pubs/anatomy-discretion-analysis-prosecutorial-decision-making. at 4.

seriousness of the offense and defendant criminal history, forcing prosecutors to make decisions that they might not consider ideal.

Designing Our Study

The general body of scholarship on prosecutorial discretion, and the Vera study in particular, usefully informed our decisions about the ambition and design of our own study. But our reliance on this background scholarship was limited by the distinct goal and context of our own study, as well as certain logistical constraints unique to our study.

The theoretical scholarship, of course, gave us a general understanding of how prosecutors decide whether to charge. Generally working without formal legislative limitation and usually working without any very specific internal administrative protocols, prosecutors naturally develop common-sense rational criteria that focus largely on severity of crime in regard to statutory choices, along with criminal record and other offender features that rationally influence their choices. The empirical data, of course, pointed us to the types of factors that might influence charges when statutes are sufficiently vague, complex or overlapping, that multiple statutory options are available for a particular offense and offender, as they frequently are. On the other hand, most of the empirical studies focus on charging decisions under stable statutory regimes, whereas we were focused on the effect of a very dramatic legislative change as it influenced prosecutorial decisions. Moreover, our goal was to generate a study fairly soon after the implementation of AB 109, and at a time when detailed outcome and stage-processing data were not available, especially because so much of the data must come from cash-strapped counties engaged in quick adjustments to the new regime. Thus, a formal statistical analysis of the effect of the regime change was not yet feasible at the level of statutory detail we were concerned with. Under these constraints, we sought to focus on prosecutors' intellectual understanding of the significance of the change and its effect on the incentives and disincentives bearing on their charging.

Two methods were available in theory, both well-modeled by the Vera study. One was detailed interviews with officials to elicit their self-understandings. We faced a broader challenge in dealing with 58 counties than Vera's two counties; this challenge prevented us from achieving access to large numbers of officials within particular counties or detailed understanding of the organizational structure of particular counties, as Vera was able to accomplish. Fortunately, we were able to partially mitigate these constraints by relying on a parallel Stanford Criminal Justice Center study written by Joan Petersilia,

Voices from the Field,[56] that included very candid interviews with a reasonable sample size of prosecutors around the state, focused on their sense of how they and other prosecutors were responding to AB 109.

Second, and most critically, we recognized that a factorial-focused survey questionnaire was the best way to gain the insights we sought. While we benefited greatly from the Vera model on this score, it was not feasible for us to fully replicate its actual methods or adapt them to our purposes. For one thing, as outlined below, we could not obtain the diversity, volume of access, and guaranteed response rate that Vera enjoyed. For another, we were concerned with a legislative regime change; because the Vera study did not address such a change, it was thus an imperfect model.

Thus, we set out to do a questionnaire, factorial-focused survey with as many county prosecutors around California as we could. We would ask questions that examined post-AB 109 statutory changes, and we would draw whatever insights we could as to how these responses might reflect adaptations to AB 109. In this effort, we generated research questions and hypotheses and then survey hypotheticals based on these questions and hypotheses. In doing so, as fully explained in the following section of this report, we relied on the *Voices* interviews and advice gleaned from group meetings with several head District Attorneys interested in promoting this survey, enhanced by detailed consultations with two prosecutors who offered us exceptional expert guidance. Finally, in the absence of a before-and-after comparison, we conducted statistical analysis of outcome data compiled by the California Attorney General. This analysis looked to outcome ratios in stages of criminal adjudication pre-and post-AB 109, sorted by county and crime category. While far too broad in its classifications to test prosecutorial decisions at the level of detail we sought, this study enabled us to establish a baseline hypothesis about the effects of AB 109 on charging.

Drawing on these sources, we posited several research questions:

- Has Realignment generally changed charging behavior across counties?
- Has Realignment generally changed new felon admissions across counties?
- Has Realignment changed these behaviors differently across counties, e.g. are high-use counties reacting differently than low-use counties?[57]
- Do DAs generally "charge up" after Realignment? That informal term can mean that in cases where prosecutors previously would have charged/recommended in

[56] Petersilia, Joan. "Voices from the Field: How California Stakeholders View Public Safety Realignment." *Stanford Criminal Justice Center* (2014).
[57] These terms refer to the "use of state prison" i.e., rates by which counties send convicted felons to state prison.

such a way that the offender would go to county jail, post-AB 109, at least in borderline cases, they are tilting upward toward prison-eligible felonies.
- Do only certain DAs charge up after Realignment, and, if so, does the pattern of variation correlate with variations among counties in rates of sending felony convicts to state prisons?
- Does jail capacity affect charging and recommended sentencing? Does any increase in jail crowding result in more probation or more prison?
- Does the availability of treatment (and/or effectiveness of probation) affect counties' willingness to recommend non-custodial sentences/charge crimes for which custody is not an option?

We next proceeded from these questions to consider what research hypotheses might guide the study.

Any study of prosecutorial discretion necessarily rests on assumptions or hypotheses about prosecutorial incentives and motivations, as well as some understanding of the decision-making processes within prosecutorial organizations. An ambitious and ideal study would consider a number of possibilities:

- Prosecutors might seek to maximize the total number of convictions, independent of their success percentage or their success percentage (such that they would be wary of charging too prolifically).
- They might seek to maximize total amount of punishment, and hence would focus more on the most serious crimes, or on preventing future crime, such that they will concentrate on charging the most likely recidivists, regardless of the severity of the current crime.
- Any prosecutor's office will of course worry about efficient use of resources, but in addition, depending on its relationship with and mutual financial dependence on other agencies, it might also seek to minimize county costs for incarceration or other expenses.
- Further, in considering these possible incentives, we would want to distinguish between individual prosecutors and organizational leaders and their individual career incentives. Also, we should consider the leaders' incentive to maximize overall agency goals, such as more funding and better staff to workload ratios.

However, given the very specific goal of this study—to assess how AB 109 might have affected prosecutorial approaches to charging and recommendations—we needed to operate with carefully limited assumptions. A survey instrument of the kind we were planning could not feasibly explore all the factors—such as organizational structure, political economy, inter-agency relations, and so on, that could aid in considering the

width and breadth of these hypotheses. Moreover, no pre-AB 109 survey existed to use as a baseline nor was it feasible to do a fully systematic before-and-after survey now.

Thus, we set out with what might be called a minimalist hypothesis, if not a "null hypothesis." That is, our starting assumption was that the only sure effect of AB 109 was that prosecutors would charge AB 109 felonies in compliance with the AB 109 mandate. Further, in their recommendations, prosecutors would interpret the choice between straight and split sentences as well as their construction of legislative purpose would allow. Beyond that, the minimalist hypothesis would go as follows: AB 109 will not alter prosecutorial discretion, on the basic sub-assumptions that prosecutors (a) charge and recommend in accordance with the provable facts of the case in terms of both the nature of the offense and the background of the offender; (b) as a matter of both ethical responsibility and rational risk-aversion, only charge/recommend when the facts are strongly on their side; (c) pay considerable attention to the offender's record in deciding whether he or she might be amenable to supervision rather than requiring long-term incarceration; (d) are generally indifferent to costs of punishment because they believe the sorting of offenders between supervision and incarceration, and between jail and prison, should be a function of deserved sentence.

Next we hypothesized that any wider effects of AB 109 on prosecutorial choices would come from one of many factors.

- The change in site of incarceration from prison to jail for 1170(h) felonies might, at the margin, cause prosecutors to tilt toward prison-eligible charges or enhancements, if prosecutors shared overall county concerns about costs and resources.
- The same effect might occur if prosecutors took into account the greater generosity of good-time credits for jail under AB 109.[58]
- The degree of uniformity/nonuniformity across the state in terms of charging in general would at least be replicated in the new discretionary choices of recommendation for split vs. straight (and fractions of split) sentences, and indeed, the nonuniformity might be greater because under a new law, there would not be the equilibrium of settled norms of discretionary decisions.
- Also, county-by county variations in charging might increase under AB 109 because of possible exacerbation of differences in county resource concerns.

[58] The good-time credit scheme under AB 109 is fairly generous, offering two days of credit for every day served, and counting home detention (i.e., electronic monitoring) as time spent in jail custody. Prosecutors anxious to ensure a reasonable amount of incarceration might account for this generosity by tilting more toward prison-eligible charges or enhancements. They might also push for longer than usual jail sentences to make up for the credits.

- Finally prosecutors' choices among probation and split/straight sentence recommendations would vary according to their faith in the ability of probation agencies to conduct reliable supervision.

In developing these hypotheses for our survey instrument, we undertook two predicate lines of inquiry—one statistical and one qualitative.

While, as noted, there was no research on which to base a direct before-after comparison of prosecutorial preferences relevant to AB 109 charging, data available from the California Attorney General (AG) enabled us to assay at least one test of the effect of AB 109. The AG's disposition data involves arrest-to-charging ratios by year and by crime category. We looked to the data for 2009-2012. For all 58 counties, we downloaded three files: one that contained the number of dispositions resulting in a complaint sought, a second that contained the number of dispositions resulting in a release, and a third that contained the number of dispositions that resulted in the offender being turned over to another agency. We then merged these 174 files and calculated total disposition rates.[59]

We learned that the vast majority of dispositions fell into the "complaint sought" category, with very few observed differences pre- and post-Realignment in the rates of complaints sought. We also observed very few differences overall, very few differences across counties, and very few differences across crimes. The full details of the analysis appear in Appendix C. They do reveal observable differences along some dimensions, but the differences never rise to the level of statistical significance. Thus, granted the limits of this analysis, we can say that these data are consistent with our starting minimalist hypothesis about the effect of AB 109 on prosecutorial discretion.

At the same time, these data carry inherent limitations,[60] and the binary outcome test they involve is very different from the detailed charging and recommendation choices we wished to explore. Thus, while *consistent with* the minimalist hypothesis, this analysis hardly *proves* that hypothesis. To pursue our surmises about what changes might have occurred, we also relied on insights gleaned from extensive and detailed qualitative interviews with local criminal justice officials (e.g., probation officers, judges, police

[59] The total number of dispositions was found by combining complaint sought, released and released to other agency.

[60] This disposition study is subject to a few limitations. First, by treating arrest and filing of complaint as independent acts, it assumes that police departments are not influenced in their arrest decisions by any communication with prosecutors or by their perception of what prosecutors desire to charge. Second, it assumes that police have not altered their arrest priorities in reaction to the passage of AB 109. Further, the binary choice captured by the data cannot account for organizational factors within police and prosecutorial agencies that might influence how these decisions are made.

chiefs, etc.), including district attorneys around the state.[61] Prosecutors' interviews regarding Realignment and their day-to-day operations in several district attorneys' offices in various parts of California in *Voices from the Field* greatly informed our study design.

In discussions with district attorneys' offices, researchers learned that some prosecutors believed that Realignment has affected prosecutors' charging decisions because of prosecutors' awareness that their counties now have to internalize the costs of incarcerating a significant increase of offenders serving their time locally. By this reckoning, some prosecutors might be more likely to opt for charging prison-eligible offenses over 1170(h) offenses when the evidence permits them to do so. Yet other prosecutors we interviewed adamantly rejected the notion that prosecutorial discretion in charging has in any way been altered post-Realignment, although some in this group acknowledged that prosecutors may have altered their sentencing recommendations after the enactment of Realignment. Other interviewees suggested that some prosecutors' attitudes toward probation are shifting. One prosecutor noted that his office views probation for low-level offenders more favorably now that local jails are becoming even more overcrowded than they were prior to the passage of Realignment.[62]

A few prosecutors commented that prosecutorial recommendations regarding split versus straight sentences involve significant discretion, an issue that we sought to capture in our study. Some stated that they do not recommend split sentences for offenders receiving shorter sentences because a short split sentence (such as two to four years) rarely allows the offender enough time on mandatory supervision to complete any rehabilitative programming. They lamented that negotiations between prosecutors and defense counsel on these choices among jail and supervision time rarely revolve around the availability of evidence-based practices to the offender.[63]

Some interviewees commented that changes in available sanctions under Realignment seem to have the perverse effect of making rehabilitative programs less appealing to defendants. In the adversarial system, each side ostensibly tries to maximize benefit to its "client." To a district attorney, that usually means requiring of the offender more time in custody or under supervision, i.e. maximizing control, while a public defender's goals are naturally reversed. If a case is going to settle in a guilty plea, the defense attorney has an obligation to negotiate for a lesser sanction for the client when possible. But AB 109 challenges the normal presumption that a defendant above all wants to minimize

[61] These interviews and relevant findings across all criminal justice officials were incorporated into one large report. Petersilia, Joan. "Voices from the Field: How California Stakeholders View Public Safety Realignment." *Stanford Criminal Justice Center* (2014).
[62] See ibid. at 145-146.
[63] See ibid. at 129-131.

incarceration time. Under Realignment, a defendant may prefer a straight sentence over a split sentence or jail time over a rehabilitative program. Even if a split sentence offers less time behind bars, attorney and client may see any post-release "tail" as a negative outcome that ultimately may threaten more time behind bars, while also of course carrying the interference with liberty that comes with supervision. Before Realignment, the offer of probation or programming in lieu of a prison term was obviously less punitive. Today, double time credits, unsupervised release from straight jail terms, and crowding that sometimes leads to early release combine to make the choices less clear. Under these circumstances, a drug treatment program could be far more burdensome than a short stay in jail.[64]

Assistant District Attorney Karen Meredith of Alameda County underscored this odd outcome. As she explained, in the past defendants accused of "lesser" felonies were eager to serve their time locally or on probation to avoid prison. Now, with no threat of prison and the promise of double time credits in jail (see *Overview of Public Safety Realignment*), some realigned felons may opt for straight time, even if it means they serve a longer term of incarceration. Deputy District Attorney Jennifer Contini of Orange County pointed out the irony of this role reversal, saying "you can only [rehabilitate] if you have some kind of [] program … but it's hard to get our public defenders to do it, they are against split sentencing, which is ironic." She says she teases the public defenders that they are "drinking the juice that this is a good [way to rehabilitate] … and then I'm trying to give it to [them] and [they] won't take it." On the other hand, Ron Coffee of Riverside County reported that, rather than take advantage of jail crowding by opting for straight time, the local defense bar welcomes split sentences. Riverside County District Attorney Zellerbach has also been a major advocate for split (or blended) sentences.[65]

Deputy District Attorney Contini suggested a further, and remarkable, irony about AB 109. She and her colleagues realized that post-Realignment they could potentially achieve more control over a defendant, and thereby protect the public and collect restitution more effectively, by charging certain crimes as misdemeanors rather than felonies. Charging a crime as a misdemeanor can lead to a sum of five years of incarceration and supervision under the rules of so-called summary probation.[66] This longer probation term extends the period of correctional control and enables restitution collection and monitoring the offender. Contini noted that while felony charges have

[64] See ibid. at 127.
[65] See ibid. at 127.
[66] See California Penal Code §1203(a).

always been thought of as more severe, after the enactment of Realignment the punishment for misdemeanors could actually be harsher.[67]

Prosecutors from Sacramento, Santa Barbara and Riverside Counties commented that they are increasingly relying on traditional probation per California Penal Code §1170(h)(4). Santa Barbara County DA Joyce Dudley explained that Realignment has made felony probation sentences more attractive to prosecutors because the three to five year probation period is often longer than supervision of split sentences. A Deputy DA in Sacramento County echoed this reasoning, noting that since Realignment the number of felony probationers has increased. Interviewees from Riverside County indicated that since Realignment their office has become more conscious of limited jail space and thus has relied more heavily on traditional probation for misdemeanors.[68]

Our interviews also revealed that prosecution offices that are more receptive to rehabilitation may use split sentences to encourage offenders to participate in programming and avail themselves of services. Prosecutors in Alameda, Orange, Riverside, Santa Barbara, Santa Clara and Solano Counties made clear they discern one goal of AB 109 as being to enhance rehabilitation, and they rely on split sentences to fulfill this goal, often noting that this approach reflects on their strong relationships with and confidence in such other stakeholders such as probation and drug treatment agencies.

Some counties acknowledge that concern about jail crowding has prompted them to use or expect to use split sentencing.[69] Others with jail crowding problems denied any such effect. By contrast, it was interviewees from counties without jail crowding who declared most strongly that their charging practices have not changed appreciably under Realignment.[70] Interviewees from other counties offered more mixed pictures on this question.[71]

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[67] See Petersilia, Joan. "Voices from the Field: How California Stakeholders View Public Safety Realignment." *Stanford Criminal Justice Center* (2014). at 129.
[68] See ibid. at 131.
[69] Prosecutors from Orange, Riverside and Santa Barbara Counties indicated they favor split sentencing as a mechanism to alleviate the influx of local offenders on the jails instead of altered charging practices.
[70] When asked whether the availability of jail beds allowed his office to maintain the status quo in charging decisions, Assistant District Attorney David Howe from Santa Clara County rejected the idea that crowding should ever affect charges. He stressed that his office seeks to contribute to uniformity of charging practices across counties and to avoid varying "standards of ethical and professional…discharging of duties." Solano County prosecutors echoed a similar attitude toward altering charging practices post-Realignment. Solano County's District Attorney, Donald du Bain, said his office has never charged a third strike just because it could and in a similar manner will not alter charges beyond what it can prove. Assistant District Attorney Karen Meredith from Alameda County acknowledged that jail overcrowding might drive charging decisions but, because her county does not have that problem, decisions in her office

Study Design

With these possible hypotheses in mind, we proceeded to devise the specific hypotheticals to present to our respondents, with detailed references to charging and recommendation options under key sections of the California Penal Code. Our goal was to offer hypothetical choices that would elicit possible tendencies in charging and recommendation implicated by our cautious surmises about possible effects of AB 109, as outlined above. Thus, our next step was a very technical analysis of post-AB 109 charging and recommendation options to determine which ones would best test our hypotheses. In doing so we consulted with Lisa Rodriguez of San Diego County and Chris Carlson of Sacramento County, key prosecutors in charge of Realignment training in their offices, to enhance the legal accuracy and realistic plausibility of the hypotheticals.

Post-Realignment Prosecutorial Charging Options

Given the changes in sentencing options and as outlined in our research questions, we considered the very specific ways that Realignment may have changed charging and sentencing recommendations.

Figure 1 below maps out the structure of new charging options under AB 109—and a complex map it is. But the key to it is this: If the facts support a felony charge, the prosecutor must first decide whether the crime is a wobbler and, if so, decide whether to charge it as a misdemeanor or felony; in any case where she charges a felony, she must determine whether it is a county-jail eligible, or N3 felony. If it is, the prosecutor must decide whether to recommend probation or an 1170(h) "county jail prison" sentence." If the latter, the prosecutor must decide whether to recommend a split or a straight sentence, and, if she recommends a split, what fraction should be allocated to jail time and what part to mandatory supervision. Of course it is the judge who ultimately issues the sentence, but the prosecutor's choice of charge will set a maximum on what the judge can hand down as a sentence; her recommendations are likely to be very persuasive

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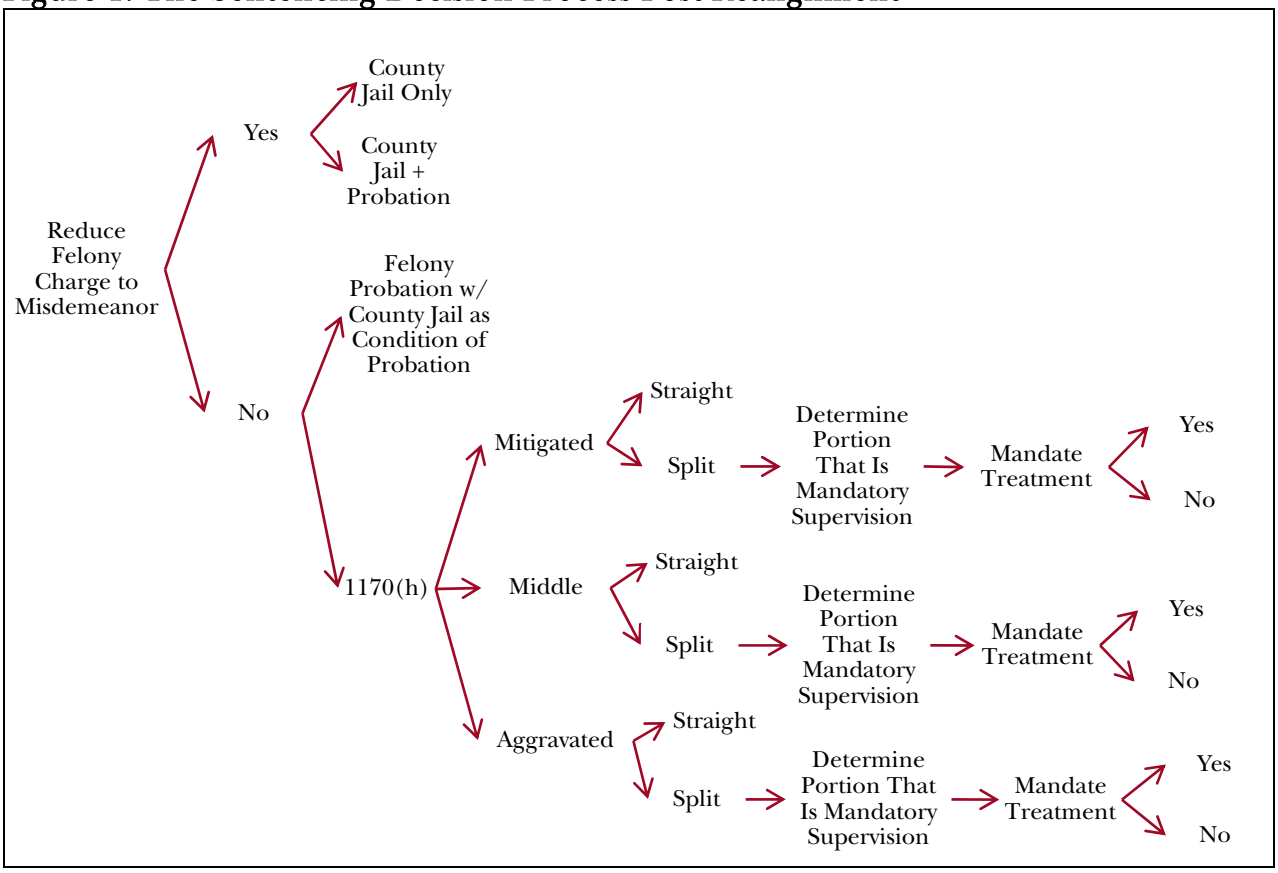
are not so affected. See Petersilia, Joan. "Voices from the Field: How California Stakeholders View Public Safety Realignment." *Stanford Criminal Justice Center* (2014). at 125.

[71] Kern, Orange, Riverside and Santa Barbara Counties all face jail overcrowding; yet, according to our interviewees, none have altered their charging practices as a result of Realignment. As discussed above, interviewees from Orange and Riverside Counties explained they are applying heightened scrutiny to realigned cases to discover circumstances that make offenders prison eligible, and thus have modified their charging procedures to some degree, but indicated they are not "charging around" Realignment. Interestingly, despite jail overcrowding, District Attorney Dudley from Santa Barbara indicated her office applies no extra layer of scrutiny. This deviation from Orange and Riverside Counties could be explained by the difference in absolute jail population, with Santa Barbara County being a significantly smaller county. See ibid. at 125.

to the judge; and since most convictions result from guilty pleas and most judges approve negotiated pleas, the prosecutor has great power over the form of the sentence as well.[72]

[72]Indeed, given the complexity of the law, two prosecutors in California released a fifty-page manual explaining Realignment and its amendments, which has been widely distributed throughout California. Storton, Kathryn B. and Lisa R. Rodriguez, California District Attorneys Association. "Prosecutors' Analysis of the 2011 Criminal Justice Realignment."(2011).
http://www.cpoc.org/assets/Realignment/cdaarealignguide.pdf.

Figure 1: The Sentencing Decision Process Post-Realignment[73]



To translate this map into more specific options under AB 109 that we sought to examine, we offer here the key categories of AB 109 prosecutorial discretion, how they prompted us to design our survey questions and what factors might influence prosecutors' decisions in these categories.

Charging Decisions

(1) Wobblers: A wobbler is a criminal statute that can either be charged as a felony or misdemeanor. The Stanford study of wobblers concludes that information about criminal record and concurrent charges helps predict whether an offender will be charged with a misdemeanor or a felony.[74] Interestingly, violent crime and the scarcity of resources do not uniformly (and linearly) influence prosecutorial charging policies. The Stanford study on wobblers was conducted when incentives

[73] Weisberg, Robert and Lisa T. Quan. "Assessing Judicial Sentencing Preferences After Public Safety Realignment: A Survey of California Judges." *Stanford Criminal Justice Center* (2014).
[74] Berwick, Megan, Rachel Lindenberg, and Julia Van Roo. "Wobblers and Criminal Justice in California: A Study into Prosecutorial Discretion." *Public Policy Practicum, Stanford University,* (March 2010). http://ips.stanford.edu/sites/default/files/shared/DA%20Discretion%20Final%20Report.pdf.

were different regarding wobblers; thus, we determined it would still be useful to see how prosecutors were treating wobblers post-Realignment, in light of their awareness of Realignment's effect on their offices and other agencies in their counties. For this study, we wanted to see how prosecutors would charge a wobbler crime if the felony version of it was a prison-eligible crime under AB 109, i.e. if a misdemeanor would send the defendant to jail, while a felony would send the defendant to prison. Prosecutorial choice here may somewhat reflect a preference for state prison sentence over a jail sentence, independently of other factors.

(2) "Realigners": We use the term "realigner" to refer to a criminal act that can either be charged pursuant to a statute with a prison-eligible offense or to a statute with an 1170(h) offense. Again, whether a respondent chooses to charge a prison eligible offense or an 1170(h) offense may reveal a preference for state prison time over jail time. Because Realignment's aim is to divert lower-level offenders who committed N3 felonies to county jail and probation, we wanted to see whether there was a difference pre- and post-Realignment in how prosecutors charged drug offenses. One type of charge (California Health and Safety Code §11370.1) would send the defendant to prison and the other (California Health and Safety Code §11370.1 and Penal Code §12022(a)) would send the defendant to jail. In addition, California Health and Safety Code §11370.1 and Penal Code §12022(a) can potentially overlap. While the former is a prison eligible offense, the latter is not a prison eligible offense. Thus, this information could reveal whether counties are "charging around Realignment."

(3) "Realigners" and Enhancements and Multiple Realigner Charges: Another area of interest relating to "realigners" is that California Penal Code §654 forbids multiple charges for the same incident, but also requires prosecutors to pursue the charge resulting in the greatest length of sentence—not where it is served. Thus, structuring a question where there would be a shorter prison term than a jail term helped us test how the prison/jail factor by itself operates. Would prosecutors opt for a charge that resulted in a shorter prison sentence, despite §654's requirements? For our study, we used the existing code regarding drug possession for sale with weight enhancements, and firearm possession to construct a situation where the prison-eligible charge would result in a shorter term than the county jail-eligible charge. To ensure that prosecutors recognized that prison-eligible charge was a shorter sentence, we added a follow-up question asking whether prosecutors would change their mind if the prison-eligible resulted in a shorter sentence length.

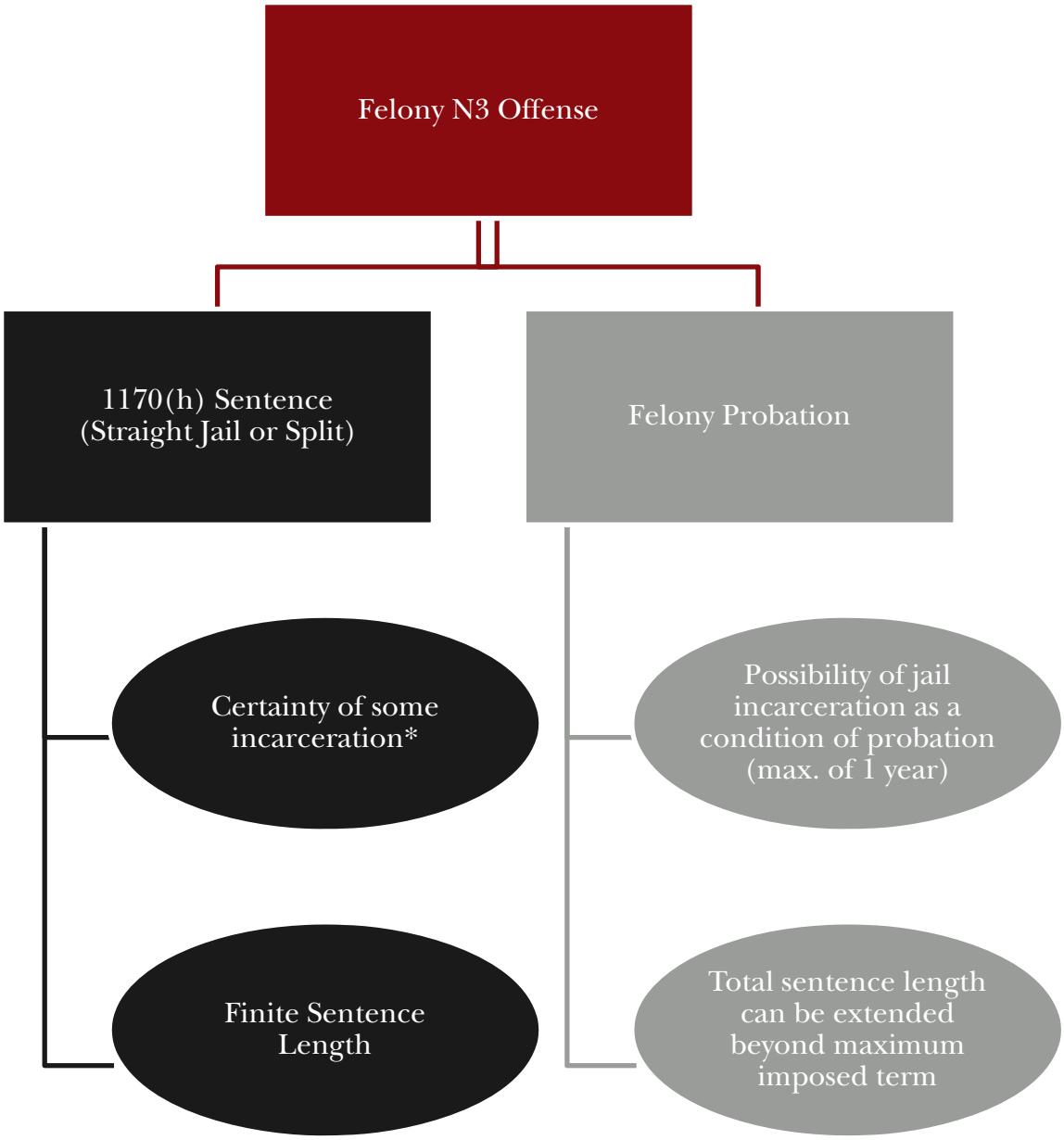
(4) Strikes: We also considered other dimensions of the "priors" effect on charging decisions. Are they less willing to strike prior strikes? Regardless of whether a judge strikes a prior strike or not, a defendant with a prior strike will still go to prison. Thus, we included questions involving the prosecutor discovering that the defendant had a prior juvenile strike and seeking to determine whether the prosecutor would allege that strike; alleging the strike would send the defendant to prison while dismissing the strike would lead to a jail sentence.

Sentencing Recommendations

(5) Probation vs. Straight Sentences vs. Split Sentences: If an offender serves any incarceration time under Realignment, he will become prison eligible on the next offense. This rule could, potentially, give prosecutors who want to maximize prison time an incentive to offer only plea deals with some time served, rather than straight probation. We thus considered the changes (if any) in the mix of straight probation sentences given (controlling for crime, etc.). However, for low-level crimes with a triad of 16 months, two years or three years, some prosecutors will usually offer probation (typically five years will be given for a crime with this triad scheme) instead of a jail sentence. Before Realignment, some district attorneys' offices would recommend jail time over probation, but post-Realignment, due to jail overcrowding, half time credits and early releases, prosecutors may rather have a defendant serve five years on probation than do 16 months or two to three years in jail.[75] A defendant granted probation would do eight months in jail and then would be on probation for the remaining time. If a defendant violated probation, the judge could order the original sentence (16 months, two or three years). For this area of interest, we realized it would be desirable to pose follow-up questions asking prosecutors who choose an 1170(h) sentence to indicate how much time they would have the defendant serve in jail (and on mandatory supervision, if they chose a split sentence). For a map of the probation versus jail choices, see Figures 2 and 3 below.

[75]The SCJC survey study of judicial preferences post AB 109 provides a full discussion of the factors and interests at stake in the choice between traditional felony probation and 1170(h) sentences. See Weisberg, Robert and Lisa T. Quan. "Assessing Judicial Sentencing Preferences After Public Safety Realignment: A Survey of California Judges." *Stanford Criminal Justice Center* (2014). at 58.

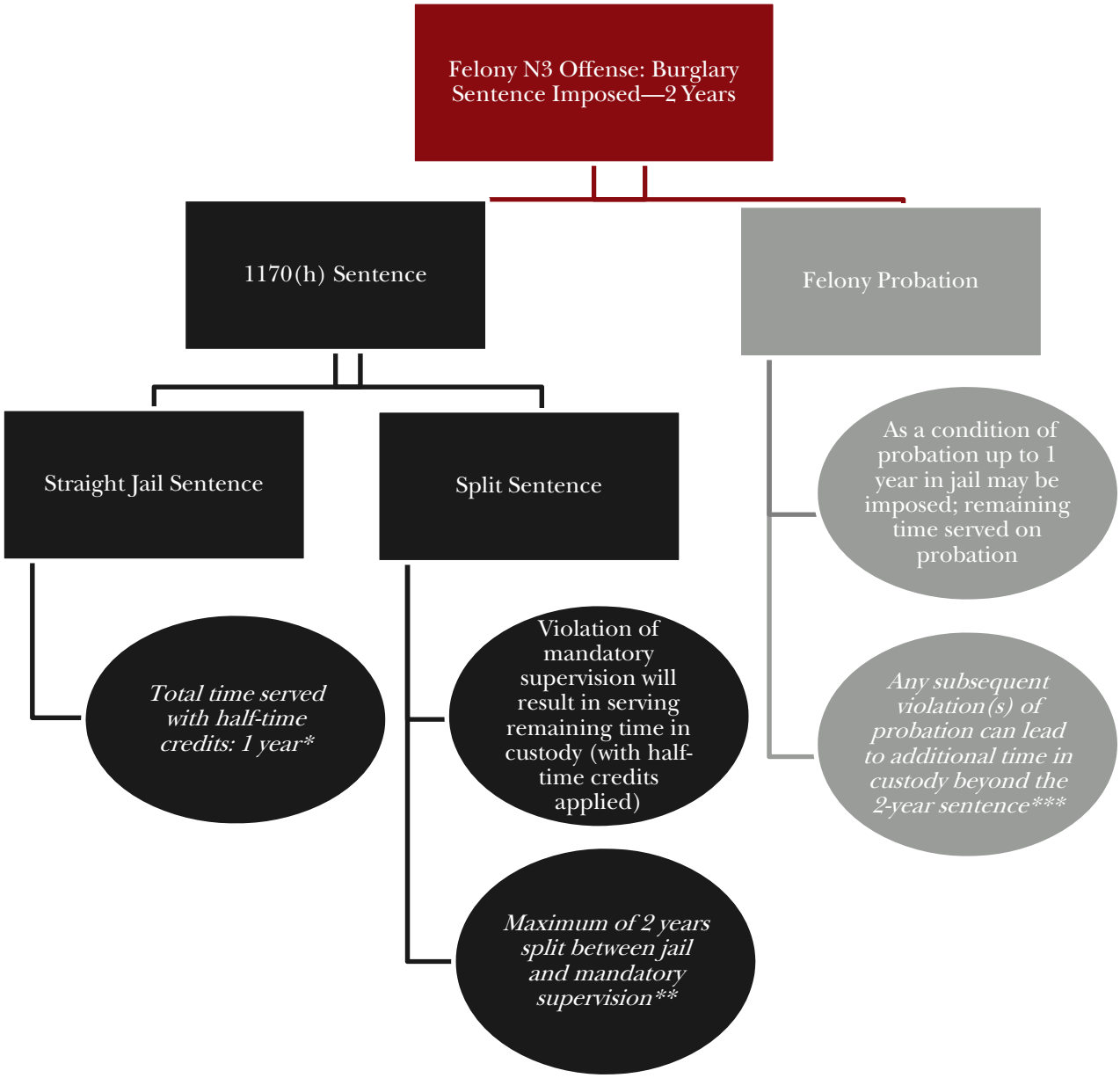
Figure 2: Differences between 1170(h) and Traditional Felony Probation Sentences[76]



* Length of incarceration may vary due to county jail capacity constraints.

[76] Ibid.Reproduced with permission.

Figure 3: An Example of Differences between 1170(h) and Traditional Felony Probation Sentences[77]

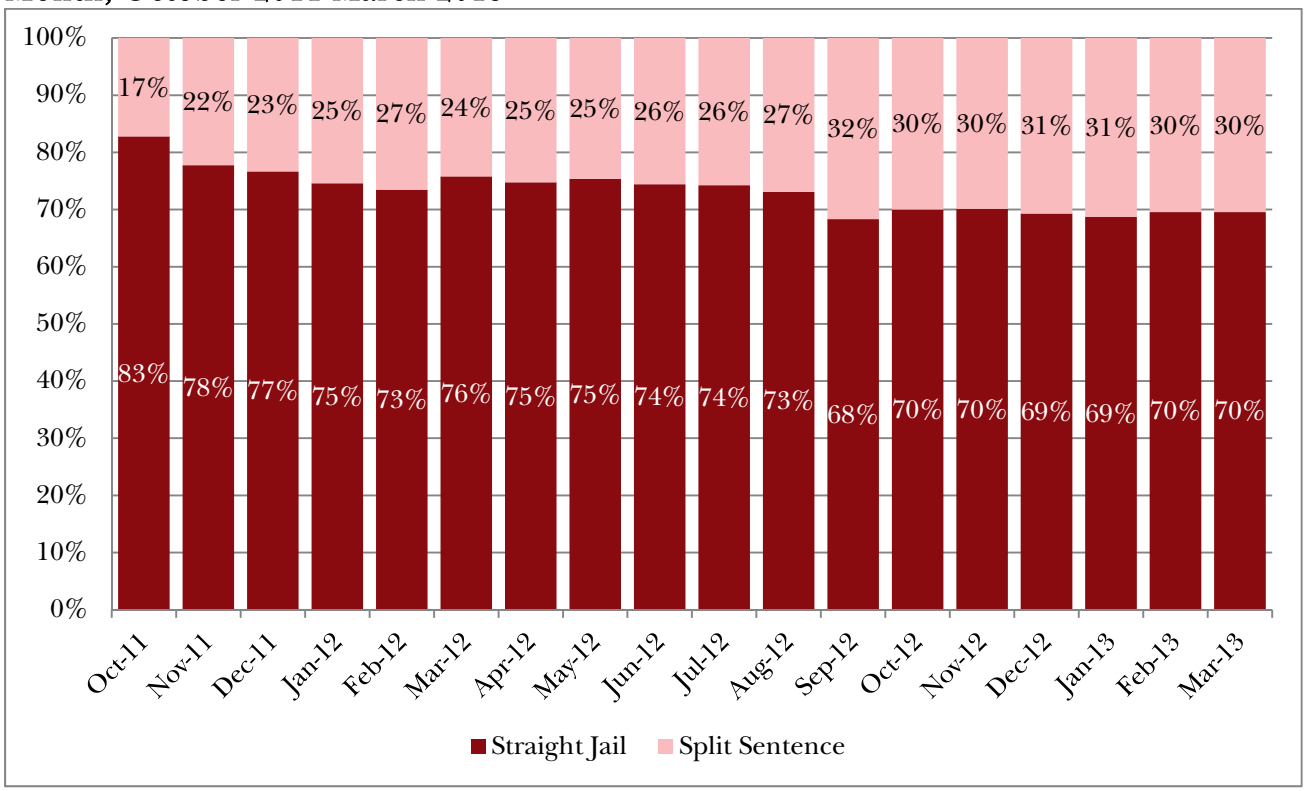


* Length of incarceration may vary due to county jail capacity constraints.
** Time served between jail and probation is determined at the discretion of the sentencing judge.
*** Probation violations result in restarting the sentence imposed.

[77] Ibid. Reproduced with permission.

(6) Straight vs. Split Sentences: Current probation data shows that between a straight versus a split sentence, most offenders are given straight jail sentences. However, as shown in Figure 4, the percentage of split sentences is increasing over time. As of March 2013, roughly 30% of 1170(h) sentences were split sentences, up from 17% in October 2011. To capture any prosecutorial preferences for straight over split sentences (or vice versa), we identified offenses where the defendant would be punished for a significantly longer period of time compared to the offenses that offer probation (as above). We sought insights as to whether this factor makes any difference in regard to sentencing recommendations because, as noted below, some prosecutors have indicated that they hesitate to recommend split sentences for defendants who receive short sentences either because they think they deserve more incarceration time, or because they think programming cannot be effective in such a short period of time. Answers to these questions could illustrate why a survey participant chose a split or straight sentence and/or the rationale behind his/her recommendation in regard to how the sentence should be split.

Figure 4: Percent of 1170(h) Population Given Jail Only and Split Sentences by Month, October 2011-March 2013[78]



[78] Ibid. Reproduced with permission.

Factorial Method

As noted above, we turned to the established methodology known as Factorial Survey Experimental Design. Developed by American sociologist Peter Rossi about 30 years ago, the factorial survey design is used to study the social and individual determinants of human judgments. It may be used to study a range of different judgments, including positive beliefs (beliefs about how something is), normative judgments (judgments about how something ought to be) and individuals' intentions to act. It may be used to study judgments and attitudes in the general population, or in a selected group, such as a profession. The factorial survey design has been widely used to study decision making and judgment formation on a variety of issues, including professional judgment, crime seriousness, ideal substance abuse use treatment recommendations, and justice of punishment, among others.[79] This approach has been used more frequently in the social sciences due to the variety of possible applications and the appealing possibilities to test social and economic theories. Recently, criminologists have increasingly recognized the full potential of this approach in the study of crime and deviance and normative attitudes of field workers in the criminal justice system.

In this research design, respondents are asked to make judgments about true-to-life, hypothetical cases, or "vignettes." All vignettes have the same basic structure, or base scenario, but in each vignette, certain factors are systematically varied in order to measure their effect as potential determinants on the outcome, or judgment of interest. The factorial survey can be developed in three steps: (1) identifying and using the factors or variables; (2) writing a coherent vignette; and (3) randomly generating the vignettes. Researchers first identify factors hypothesized to influence the respondents' judgments and decide on specific values of measurement that will be used to represent each factor. Each factor is an independent variable. For example, researchers can choose to identify

[79] Frederick, Bruce and Don Stemen. "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making." *Vera Institute of Justice* (2012). http://www.vera.org/pubs/anatomy-discretion-analysis-prosecutorial-decision-making.; Jasso, Guillermina. "Factorial Survey Methods for Studying Beliefs and Judgments." *Sociological Methods and Research* 34 (2006): 334-423.; Rossi, Peter H. and Andy B. Anderson, "The Factorial Survey Approach. An Introduction," in *Measuring Social Judgments: The Factorial Survey Approach*, ed. Peter H. Rossi and Steven L. Nock (Beverkly Hills: SAGE, 1982). at 15–67; Sauer, Carsten et al. "The Application of Factorial Surveys in General Population Samples: The Effects of Respondent Age and Education on Response Times and Response Consistency." *Survey Research Methods* 5 (2011): 89-102.; Taylor, Brian J. "Factorial Surveys: Using Vignettes to Study Professional Judgement." *British Journal of Social Work* 36, no. 7 (October 2006): 1887-1207. First published online October 31, 2005; Wallander, Lisa. "Measuring social workers' judgements: Why and how to use the factorial survey approach in the study of professional judgements." *Journal of Social Work* 12, no. 4 (2012): 364-384.; Wallander, Lisa. "25 years of factorial surveys in sociology: A review." *Social Science Research* 38, no. 3 (2012): 505-520.; Wallander, Lisa and Jan Blomqvist. "Modeling ideal treatment recommendations: A factorial survey of Swedish social workers' ideal recommendations of inpatient or outpatient treatment for problem substance uses." *Journal of Social Service Research* 35, no. 1 (2009): 47-64.

three factors that might affect the respondents' judgment, and have two values of measurement for each factor (i.e. whether or not the factor is mentioned in the vignette). Thus, this example is considered a 2X2X2 or 2^3 factorial design, and a total of eight unique vignettes could be constructed (2X2X2 = 8), which represent all possible combinations of factors that will be studied. Then, this vignette population can be randomly or systematically presented to respondents. The manner in which the presentation of vignettes can be (a) sampled from the total vignette population to create a unique set of vignettes for each respondent, or (b) a smaller, fixed number of vignettes selected so multiple responses can be obtained for each case.

The randomized factors within the vignettes, combined with the randomization of the selection of vignettes for each respondent, give the factorial survey a unique capability to investigate the effect of multiple factors in complex decisions, allowing researchers to simulate real-world conditions. In addition, by requiring that researchers specify exactly (a) the factor(s) being measured; (b) the outcome of interest; and (c) the control group (i.e. what would happen in the absence of such factors or treatment), this method allows researchers to precisely measure the effects of the variations in a rigorous manner, effects that might be difficult to discern through real-world observations.

This factorial survey method is traditionally designed to produce the best coverage of dimensions of interests when the number of potential survey respondents is relatively large. Thus, the number of hypothetical cases and factors measured will primarily be determined by the number of respondents expected to participate in the survey. In addition, the size of each treatment group is largely a function of (a) the size of the effect researchers want to be able to detect between the treatment and control group, and (b) the standard deviation of the sample.

The Survey Instrument

Drawing on our legal research and consultation with prosecutors from across the state, we arrived at the final survey instrument. The instrument consisted of seven sets of hypotheticals, with variations presented based on the areas of interest discussed in the previous section. Each hypothetical gave a "base scenario" which had a description of the offense and a description of the offender's criminal record. Respondents had to choose from a menu of limited charging options, which would then indicate where the offender would serve their punishment, in prison or jail.

To analyze what factors influenced the charges prosecutors ultimately chose for each hypothetical, we varied each of the seven sets of hypotheticals three times to include another variable of measurement: additional information that might influence their

charge. We sorted this information into three categories, aggravating factors, mitigating factors, and some combination of both, relying on the California Court Rules defining factors of aggravation and mitigation, shown in Table 1.

As stated above, the survey required prosecutors to choose their ultimate charge based on the seriousness of the offense and the seriousness of the criminal record, which we hypothesized to be largely determined on the presence or absence of aggravating and/or mitigating factors. Consequently, we asked respondents to rate each hypothetical on the basis of offense severity (using a 1 through 5 scale, with 1 being least serious) and criminal record severity (using a 1 through 5 scale, with 1 being least serious). Within each trio of hypotheticals, we presented respondents with the same set of sentencing options. These options were not rated in order of severity; rather, prosecutors simply had choices from either two or three options (e.g. "charge as a misdemeanor; charge as a felony").

Thus, this factorial survey is a $3^{x}7$ design (three choices on factor category and seven different topics of interest), yielding 21 unique hypotheticals (3X1X7 = 21), as shown in Table 2. For the full survey instrument given to prosecutors, see Appendix A.

Table 1: List of Aggravation and Mitigation Factors to Determine Seriousness

Seriousness of Record	Aggravation (Cal. Court Rule 4.421)	(1) increasing seriousness of criminal activity
		(2) served a prior prison term
		(3) was on probation or parole when crime committed
		(4) prior performance on probation/parole unsatisfactory
	Mitigation (Cal. Court Rule 4.423)	(1) no prior or insignificant prior record
		(2) suffers from mental or physical condition reducing culpability
		(3) voluntarily acknowledged wrongdoing before arrest or at early stage of criminal process
		(4) prior performance on probation satisfactory
Seriousness of Offense	Aggravation (Cal. Court Rule 4.421)	(1) great bodily harm
		(2) high degree of cruelty
		(3) armed or used a weapon
		(4) victim particularly vulnerable
		(5) induced other to participate in crime
		(6) planning, sophistication
		(7) taking of great monetary value
		(8) large quantity of contraband
		(9) took advantage of position of trust or confidence
	Mitigation (Cal. Court Rule 4.423)	(1) passive participant or minor role
		(2) victim was initiator, provoker or willing participant
		(3) unusual circumstance
		(4) was induced to participate
		(5) motivated by desire to provide necessities to family or self
		(6) defendant suffered from continual abuse by victim who was spouse, intimate cohabitant

Table 2: Hypotheticals in the Final Survey Instrument

Hypothetical/ Survey Question	Topic of Interest	Aggravating (A), Aggravating+Mitigating (AM) or Mitigating (M) Factors?	Charge Options (Included Here as Reference)
2	Wobbler	A	Assault as (1) misdemeanor; or (2) felony
3	Wobbler	AM	
4	Wobbler	M	
5	Realigner	A	(1) Drug possession for sale + felony while armed; or (2) Drug possession while armed
6	Realigner	AM	
7	Realigner	M	
8	Realigner	A	(1) Drug possession for sale + weight enhancement + firearm; or (2) Drug possession for sale + weight enhancement + prior felony conviction with firearm; or (3) Drug possession for sale + weight enhancement + firearm + prior felony conviction with firearm
9	Realigner	AM	
10	Realigner	M	
11	Realigner	A	(1) felony battery; or (2) felony assault; or (3) both (1) and (2)
12	Realigner	AM	
13	Realigner	M	
14	Strike	A	Auto theft and (1) allege juvenile strike; or (2) do not allege juvenile strike
15	Strike	AM	
16	Strike	M	
17	Sentence Type	A	Burglary as (1) Straight sentence; or (2) split sentence; or (3) probation
18	Sentence Type	AM	
19	Sentence Type	M	
20	Sentence Type	A	Cocaine transport across counties + weight enhancement as (1) Straight sentence; or (2) Split sentence
21	Sentence Type	AM	
22	Sentence Type	M	

We also asked respondents open-ended questions about how charging decisions were structured (e.g. whether there was an official policy governing charge decisions), what factors went into their decisions about charging and whether (and how) charging had changed post-Realignment. These questions were designed to help us determine how decisions are made internally and how, if at all, they are made in concert with other players locally (and statewide). In addition, we asked respondents questions about certain characteristics of their counties (e.g. probation caseload, jail capacity, community-based providers and treatment services, etc.). These non-hypothetical questions totaled eleven in the survey. Lastly, we included five voluntary demographic questions.

Study Limitations

In the months before our survey was officially launched we contacted all 58 county district attorneys' offices to gauge the level of participation, since the number of hypotheticals used in a factorial survey is largely dependent on the number of potential respondents.[80] We did not hear back from many district attorneys' offices, and those that did speak with us generally indicated that they were (a) facing reduced resources in small counties and could not guarantee the time to participate; and/or (b) wary of a study on prosecutorial discretion relating to Realignment and thus requested that a sample survey be sent for review. In addition, in April 2013 we met personally with several Northern California head District Attorneys, convened at the office of the Solano County District Attorney. At that meeting, prosecutors were more receptive to our study but a few still echoed concerns about our design.

Given our expectations for a lower response rate, we modified our factorial survey, using a version of a less common method of quota sampling instead of the usual random sampling.[81] Quota sampling is generally used when a random sampling is precluded because researchers have a small number of hypotheticals and so must give all respondents all the hypotheticals in the survey. Basically, instead of randomly presenting a smaller subset of hypothetical cases to our respondents (e.g. in a random sample factorial survey, each respondent would receive a unique set of hypotheticals drawn from the 21 total hypotheticals, which would require a large number of respondents), all respondents were given all 21 hypotheticals.

Accordingly, with quota sampling, there is a likelihood that the set of hypotheticals would include constants or variables that are linear combinations of other variables in the same

[80] These contacts preceded our discussion with a group of district attorneys at a regional conference in April 2013.
[81] Dülmer, Hermann. "Experimental Plans in Factorial Surveys: Random or Quota Design?". *Sociological Methods & Research* 35 (2007): 382. http://smr.sagepub.com/content/35/3/382.

set (e.g. one hypothetical would include information about an offender's knowledge of the victim is followed immediately by a hypothetical with a similar offender who did not know the victim, all other things being equal). However, to address this concern, and to reduce the risk of tainting the study with undue prompting and bias that may result from the order of questions, we randomized the order of all hypotheticals, as well as all non-hypothetical questions, such that each respondent would receive a unique sequence of questions

Distribution of Survey Instrument

In order to maximize the ease in which the survey is taken and the number of prosecutors participating in our survey, we used online survey design software that is easily accessible via an Internet link. In addition, we formally announced our research and distributed our survey through personalized letters to district attorneys and other prosecutors in California's 58 counties and via follow-up calls, with the assistance of the California District Attorneys Association (CDAA).

Qualtrics Software

Qualtrics is an online survey design tool that allows researchers to easily create, distribute and manage surveys all in one user-friendly platform. Some benefits of using Qualtrics for this research include: providing researchers with a sophisticated design, allowing for extensive customization of survey questions to meet research needs, and offering multiple options for survey distribution, such as generating a survey link in circumstances where distribution via e-mail is not available (as in this case). An important feature of Qualtrics that is essential to the factorial survey design is its ability to randomly and systematically assign questions to participants to prevent undue prompting and bias.

Distribution

Our contacts within the California District Attorneys Association, particularly former president W. Scott Thorpe, assisted us in announcing our research and encouraging prosecutors around the state to participate in our survey. The survey was officially launched on June 17, 2013. On June 18th and 19th we traveled to Lake Tahoe to present our research project at the annual CDAA summer conference. We distributed paper surveys and also answered questions about any concerns prosecutors may have had about our research. Several counties expressed positive views about our research but were nevertheless hesitant to participate. On June 21st, shortly after the launch, Mr. Thorpe emailed our survey to district attorneys. However, by the end of the month, only six

district attorneys had completed the survey, so we also sent personal letters to district attorneys in order to further encourage them to participate in our research. By the end of July, we had only received 11 responses. With the assistance of other district attorneys who had endorsed our research to their colleagues, we contacted district attorneys' offices in large counties. A few days later, the response rate grew to 17 responses. In early August, we regrouped and developed a list of counties to target based on the size of their county and conducted follow-up phone calls with these individuals. We determined that with the high degree of hesitancy on the parts of district attorneys, we needed to treat each respondent who participated to be presumptively representative of his or her county in their responses to our survey. By mid-September, we received 28 responses. Nine of these responses were from three counties. Two responses did not indicate what county they were from; we excluded these from our analysis to avoid the possibility of duplication. In the case of multiple responses from a single county, we only included the answer from a person with supervisory responsibility in charging. Where multiple responses claimed that responsibility, we averaged answers to the nearest whole number. We received responses from a total of 20 counties representing approximately 72% of the California population (per 2011 Census data).

As we expected, the number of responses proved to be insufficient to justify much more than a qualitative analysis of the data. Thus, we recognized that our data would not provide any conclusive (or statistically significant) results about which factors are correlated with which results. Nevertheless, we are confident that the qualitative responses are instructive. The 20 counties who responded to the survey represent a large percentage of the California population. Moreover, because 24 of the 28 respondents reported having "substantial responsibility for supervising charging decisions made by others" in their offices, we can infer that these responses are, in some ways, representative of charging policies (and management) within each county.

Study Results

In this section we present the survey results in light of our research questions and hypotheses. In addition, because we were able to meet with several district attorneys on two separate occasions before and after our survey launched, we also connect any relevant insights gained from these meetings to our survey results below.

Response Rate

In some ways, our experience with the administration of the survey instrument is itself the first meaningful result. Several prosecutors' offices that had previously shared insights with our researchers expressly declined to respond to the survey.

One reason given for the low response was that prosecutors did not want to be seen as binding themselves to a particular sentence recommendation for a given set of facts concerning the offense and the offender's background. The concern was that a defendant might use these survey results to claim that he or she was entitled to a particular plea offer. It should be noted that in half of respondents' counties (10 of 20) there is already a formal internal policy governing charging decisions. It would be understandable if prosecutors did not want to reveal these policies, which could be confidential within their offices, or risk offering answers that might be at odds with their office policies. There are, of course, inherent concerns with self-reporting, a few of which pose evident problems in the results we received. But it also may be the case that, despite the guarantee of anonymity, some respondents may have felt uncomfortable about appearing too harsh or too lenient; that is, there is undoubtedly an expressive and/or political component to prosecutorial decisions, and prosecutors might be averse to risking any such expression outside of their actual decisions.

A second factor that might explain the low response was disagreement with the structure of the hypotheticals, often based on the belief that they did not account for pragmatic realities. One example involves drug crimes. Under Realignment, drug crimes are now (absent strikes, etc.) largely ineligible for state prison sentences. Thus, in order to test responses to the change in code, we altered the quantity of drugs up to a threshold where there would be a meaningful decision between a prison-eligible sentence and one served locally. One respondent told us that she understood the different legal effect of changes in quantity, but, in practice, in the case of the higher quantities we were asking about, she would refer the cases for *federal* prosecution. That is, there would be no charge from her office—instead, it would become a federal matter. Another criticism we got from one office was that we did not allow for a "no charge" response to some of the questions. The

District Attorney from one county said that she would not charge anything in one scenario, and did not continue with the survey.

These criticisms, in some ways, reflect the inherent limitations of any survey design, given that a survey must limit facts and variables to be of practical use. But in addition, despite all the feedback we sought and obtained from DAs, we have to accept the inevitability of some continuing disagreement regarding the kinds of questions we should be asking, and what options are on the table for a given set of facts about the offense and the offender.

Thus, we one key insight arising from our survey: That in attempting surveys of prosecutors, researchers should recognize that high response rates are very difficult to achieve. In this vein, as noted earlier,[82] the very rich survey results from the Vera study are an exception that proves the rule, because of the very unusual arrangements that were made by the researchers and the two target offices.

What are the most salient factors influencing charging?

The key aim of the survey was to get more clarity on what kinds of factors DAs use in making their charging decisions. We put special emphasis on the factors that go into recommending split sentences, since the split sentence is the key option not available before Realignment. We asked respondents to rank listed factors on a scale of one to five, one being the most important: availability/effectiveness of programming, jail capacity/overcrowding, lack of prior record, severity of crime, and desire to have a defendant on searchable supervision after release.

Because the limitations of the data received preclude formal quantitative analysis on the results, we will focus on qualitative descriptions of the responses. In that regard, two general summary points are:

- Offense severity generally ranked as the most important (on a scale of 1 to 5, with 1 being the most important, 10 of 20 counties listed it as most important, with a mean ranking of 1.8), and jail space generally ranked as the least important (9 of 20 counties listed it as the least important, with a mean ranking of 4.0).
- The other factors were generally clumped together in between (again, we are not engaging in rank analysis given the limited number of data points).

[82] Frederick, Bruce and Don Stemen. "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making." *Vera Institute of Justice* (2012). http://www.vera.org/pubs/anatomy-discretion-analysis-prosecutorial-decision-making.

Have charging decisions changed after Realignment?

We also asked explicit questions about whether charging practices have changed after Realignment. Approximately two-thirds of respondents (13 out of 20) said yes. Interestingly enough, in comments about how charges have changed post-Realignment, several respondents did mention jail capacity (and its effects on time served) as influencing their decisions. We excerpt a few unedited responses below, matching the comments with their rank of jail capacity's importance in sentencing decisions (1 to 5; with 5 being least important) along with an estimate of how crowded their local jails are (1 being ample room, 5 being beyond capacity; one third of the respondents said the jails in their county were beyond full capacity).

> "More likely to give felony probation now than straight or split sentence due to early release from county jail." (jail space importance rank 4; jail capacity score 5)
>
> "The county jail is approaching or at capacity due to Realignment impacts. When a plea can be taken to a felony that acts as a key to state prison (whether that person is shipped initially or not), that is how we structure things post-Realignment." (jail space importance rank 4; jail capacity score 2)
>
> "Our local jail impacted at this time, meaning there is little if any available jail space. Pre-Realignment, I would not have offered a split sentence; instead, I would have sent these defendants to prison for lengthy sentences." (jail space importance rank 1; jail capacity score 5)
>
> "The length of time a person would serve in county jail, which would previously have been served in state prison, influences our sentencing recommendations and offers. We have insufficient space in county jail for long-term sentences and this has caused our offers to be reduced. Furthermore, obviously, there was no previous opportunity to offer split sentences. Finally, prison eligible offenses are imperative when a person should be sentenced to state prison and those offenses (like 29800) are the keys." (jail space importance rank 2; jail capacity score 3)
>
> "The local "jail/prison" is so overcrowded that felony inmates serve MAYBE 30% of their time. Misdemeanor inmates will more often than not serve ZERO time regardless of their sentence. A "15-year" local prison sentence would never be served; the inmate will be released in very short order. Therefore, while the weight enhancement on the drug cases might previously have been stricken in order to dispose of a case relatively quickly for a term in prison, that may not happen so much anymore. As far as split sentences, while we favor a period of

> mandatory supervision, we think that a long "tail" (period of mandatory supervision) is counter-productive and hampers the ability to charge the conviction as a "prison prior" when the def re-offends." (jail space importance rank 4; jail capacity score 5)
>
> "Because I know a straight sentence is unlikely to be fully served due to overcrowding, we will consider mandatory supervision split sentences." (jail space importance rank 4; jail capacity score 5—"duplicate" answer not included in mode/mean analysis)
>
> "Prior to Realignment, a state prison commitment provided certainty regarding actual time spent in custody. Post Realignment, a "state prison" sentence served locally varies from jurisdiction to jurisdiction and does not provide certainty of actual time of confinement which is left to the discretion of each county's sheriff. If I believe Defendant (based on current case facts and criminal history) should receive actual incarceration, then a non-1170(h) eligible offense will more likely guarantee such a result." (jail space importance rank 4; jail capacity score 3—"duplicate" answer not included in mode/mean analysis)

Most striking and most puzzling in these comments is the discrepancy between the ranked importance of jail capacity and the comments. We note first that these comments include "duplicate" answers from counties (e.g. counties with more than one response); they are included to shed some light on the reasoning, but the numerical answers about jail capacity and/or rank were not included in mode/mean calculations. Among non-duplicate answers, only four respondents indicated that jail capacity was the first or second most important factor, and of the above respondents, many ranked jail space as second-least important, despite their commentary. This outcome might mean that the variables DAs think are salient are not, in fact, driving the decisions. Or, it might be that those they subjectively believe are salient in their decision-making are not so salient. Regardless, the answers to these questions are in tension with one another and deserve further study.

Analysis of Results for Specific Hypotheticals

All the data regarding the tallied results of the responses to the hypotheticals are reported in Appendix B. For ease of reading, we review the results below in narrative form, highlighting key data numbers.

How do mitigating and aggravating factors affect charging decisions after Realignment?

In each of the seven trios of questions, we presented three sets of questions. The first set contained merely "aggravating" factors—that is, we manipulated facts so that the offender engaged in the most serious conduct (e.g. stitches and bruising from an assault, rather than bruising) and had the most serious record (e.g. being on probation for a violent crime at the time of the offense, rather than having a drug-related prior).[83] The second set contained factors that were more ambiguous (e.g. more serious offenses farther in the past, for example), details of which will be given in the discussion that follows. The third set contained merely mitigating factors (lower, less-serious offenses and record). Given this design, we would expect that recommended charges/sentencing outcomes would tend to decrease first as mitigating factors were introduced, and then as aggravating factors were removed. Out of the seven sets of trios, we excluded two concerning split sentencing, because of the problems with coding severity for split sentencing versus straight jail time discussed above. Four trios showed decreasing severity in the manner we would expect (2,3,4; 8,9,22; 10,11,12; and 13,14,15). One trio surprisingly showed an increase in sentencing severity with the addition of mitigating factors, followed by a decrease when aggravating factors were removed. We will discuss the split sentencing trios separately.

Despite our discussion of the importance of extrinsic factors above (e.g. jail capacity, availability/effectiveness of programming), it was beyond the realistic scope of this survey to build into the hypotheticals a manipulation of jail capacity, etc., to test whether the resulting charges would be different. These hypotheticals, then, merely analyze results based on changes to offense and record severity.

Trios including questions 2,3,4; 8,9,22; 10,11,12; and 13,14,15 showed declining sentence severity, as we would expect.

[83] The CDAA's Uniform Crime Charging Standards which provide guidance for DAs charging wobbler offenses state that appropriate case-related factors a DA may consider include: prior record, severity of crime, probability of continued criminal conduct, eligibility for probation, relative difficulties in successful prosecution as a felony, cooperation of accused, and the age of the accused.

Are district attorneys "charging around" Realignment?

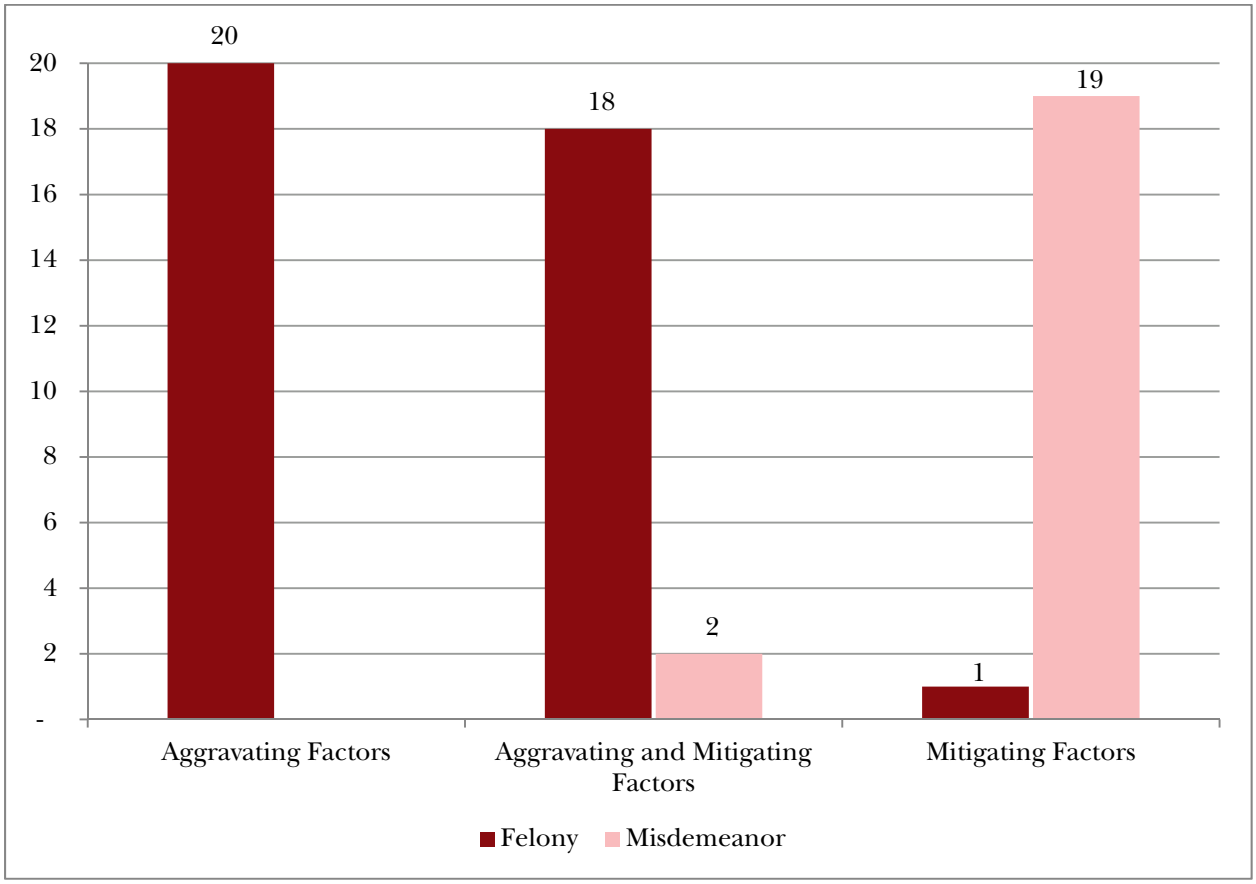
We devised questions to test the hypothesis that DAs are charging around Realignment by opting more often for charges eligible for state prison rather than those to be served locally. We did so by providing sentencing choices that provided a choice between state time and local time (whether custodial, non-custodial, or a combination of the two). We note that perhaps most striking result here is that there still remains some uncertainty or lack of information on the part of DAs as to which statutes and/or factors result in state prison time, most notably in the case of juvenile strikes.

Assault (Wobbler): Questions 2, 3, and 4

For these questions, we tested a jail/prison distinction by giving prosecutors two charging options: to charge the offense as a misdemeanor (and hence incarceration only in local jail) or a felony (state prison). Thus, we chose a crime for which the felony version would be not jail eligible - assault. Given that the statutory choices here are those that pre-exist AB 109, this set of questions serves two purposes: First, it sets a rough baseline of prosecutorial decision-making that may be tested against the other hypotheticals. Second, if the results proved at all counter-intuitive in comparison to what one might expect of charging in this context—i.e. any surprising incidence of felony-charging would possibly suggest an indirect AB 109 effect, i.e. that prosecutors were so concerned about jail crowding that they tilted towards off-loading these offenders on state prisons.

In the "aggravating" version of the hypothetical (question 2), the defendant went to confront his mother-in-law with a friend, punched her in the face (resulting in stitches and bruising), and was apprehended with a knife. His record in this hypothetical was that he was on probation for misdemeanor elder abuse and had priors for misdemeanor assault, child abuse, and spousal abuse. More than half of respondents (11 of 20) rated the offense as midway between not serious and serious (or 3 on a scale of 1 to 5, with 1 being not serious; the mean score was 3.5) and half rated the record as midway between not serious and serious (10 of 20 respondents, with a mean of 3.3). All respondents chose to charge the assault on the mother-in-law as a felony, rather than a misdemeanor, as shown in Figure 5.

Figure 5: Wobbler Hypotheticals (Assault), Charging Options
Number charged as felony v. misdemeanor (N=20)



In the second version of the hypothetical with aggravating and mitigating factors (question 3), the defendant discovered that his ex-wife had vandalized his car, walked to her house, and lay in wait for her, and when she returned, punched her multiple times in the face resulting in "extensive bruising." His record included a misdemeanor conviction for assault against a parking control officer one year ago and a misdemeanor domestic violence crime two years ago. For this answer, the most common rating of offense seriousness was a 4 (eight respondents out of 20), although the mean score decreased to 3.3. The record seriousness was most often rated a 3 (nine respondents out of 20), with the mean score dropping to 2.8. The charge dropped, but only slightly, with all but two respondents still recommending that the offense be charged as a felony (see Figure 5).

In the final, "mitigation only," form of the question (question 4), the defendant did not lie in wait or attack a family member; instead, he went to his neighbor's house to demand he turn down his loud music and tried to punch him in the face (but missed). The defendant's record in this hypothetical consisted only a conviction for possession of narcotics paraphernalia. Half of respondents (10 of 20) rated the offense as not serious

(with a mean of 1.7) and 18 of 20 respondents rated the record as not serious (mean of 1.3). All but one respondent chose to charge the assault as a misdemeanor, rather than a felony, as shown in Figure 5.

There was near unanimity on this set of hypotheticals. In the presence of aggravating factors (questions 2 and 3), nearly all respondents charged the crime as a felony; without the aggravating factors, nearly all charged the crime as a misdemeanor. Thus, we can draw two tentative conclusions. First, the pattern of charging seems intuitively rational and not at all surprising; second, while for pre-AB 109 charging for wobblers we can only rely on the general no-change pattern observed in our disposition study, we find no reason to think that wobbler-charging has changed in response to jail-crowding concerns.

Methamphetamine Possession (Realigner with Enhancements): Questions 8, 9, and 22

In this trio, respondents were given the choice of charging a series of offenses that resulted in county jail prison or state prison. Respondents were given a set of choices for which all but one would send the offender to county jail and one would send him to prison.

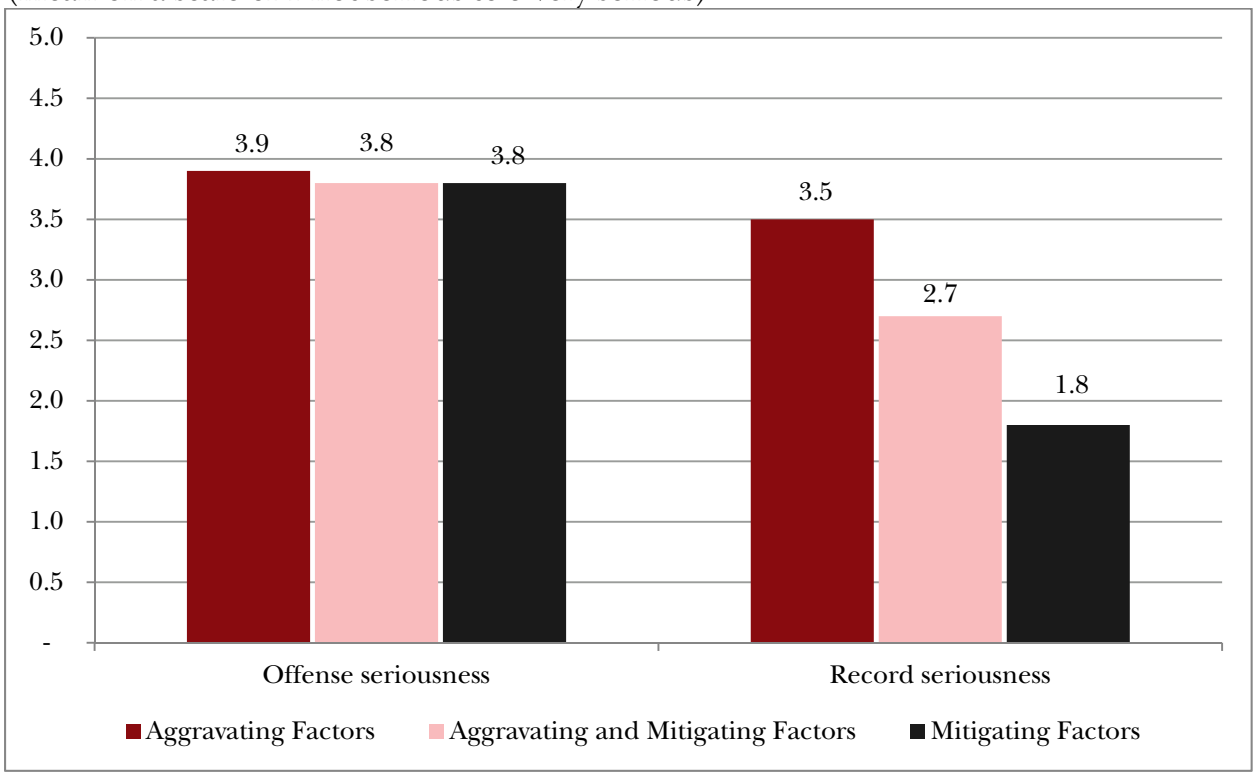
If the prosecutor offered both Penal Code §12022(c) and Penal Code §29800, the defendant would not go to prison. The relationship among these statutes falls under Penal Code §654 (requiring that an act which is punishable in different ways shall be punished under the provision that provides for the longest potential term of imprisonment). Thus, Penal Code §29800 would be stayed because it has the shorter term of imprisonment, and so the defendant would be punished according to Penal Code §12022(c) and go to jail. If the prosecutor only offered Penal Code §29800, however, the defendant would go to prison.

The main purpose of this set was to test the proclivity of prosecutors to choose state prison over county jail, but also to test the independent effect of preference of length of incarceration over site of incarceration.

In the "aggravating" version of the hypothetical (question 8), the defendant was on Post-Release Community Supervision (PRCS) and was apprehended with three kilograms of methamphetamine and a gun on his person. His record in this hypothetical was that he was on PRCS for second-degree burglary and that he had convictions in the past five years for grand theft, controlled substance sale, possession of PCP, misdemeanor firearm discharging from a vehicle, and possession of a firearm in violation of a temporary restraining order. The question also noted that the defendant had never successfully

completed parole or probation. More than half of respondents (11 of 20) rated the offense as a 4 (mean score of 3.9) and half rated the record as a 3 (10 of 20 respondents, with a mean score of 3.5) as shown in Figure 6. Five of 20 respondents would have charged the defendant with a prison-eligible offense. Half would have charged the offense with two counts, resulting in county jail prison (see Figure 7).

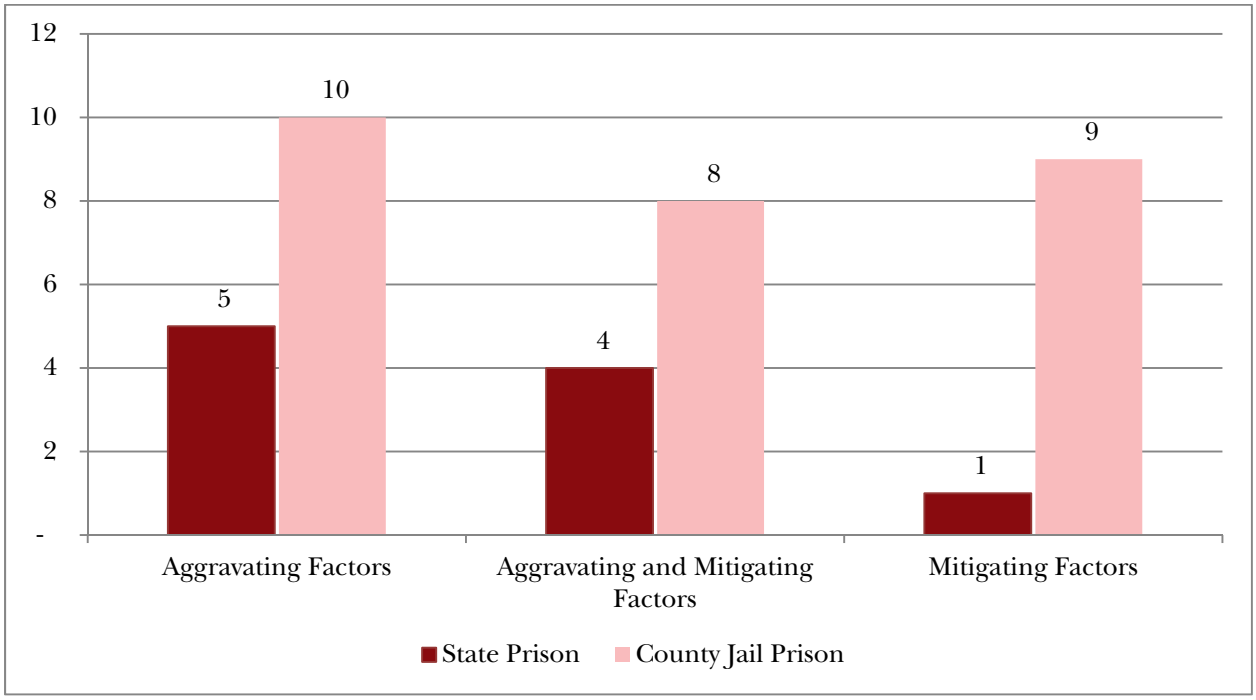
Figure 6: Realigner with Enhancements Hypotheticals (Methamphetamine), Seriousness of Offense and Record
(mean on a scale of 1 not serious to 5 very serious)



In the second version of the hypothetical (question 22), the defendant was on probation, loitering at a gas station in midday with a gun on his person. His record included a conviction within the past year for petty theft and openly carrying an unloaded handgun, a conviction in the past three years for two counts of possession of methamphetamine, and a conviction ten years ago for misdemeanor theft and unlawful driving/taking of a vehicle. For this answer, the most common rating of offense seriousness was a 3 (eight respondents out of 20), although the mean score decreased only slightly to 3.8. The record seriousness was most often rated a 2 (10 respondents out of 20), with the mean score dropping to 2.7. For this question, four respondents would have charged a prison-eligible set of offenses, and eight would have charged the offense with two counts, resulting in county-jail prison.

In the final, "mitigation only" form of the question (question 9), the defendant was on a bus and was apprehended with three kilograms of methamphetamine and a gun on his person. His record included a two year-old conviction of possession of more than 28.5 grams of marijuana, but he had successfully completed probation. He also had a 10 year-old conviction for misdemeanor theft and unlawful driving/taking of a vehicle. For this answer, the most common rating of offense seriousness was a 3 (10 respondents out of 20), although the mean score remained unchanged. The record seriousness was most often rated a 1 (nine respondents out of 20), with the mean score dropping to 1.8. For this question, only one respondent would have charged a prison-eligible set of offenses, but nine would have charged the offense with two counts, resulting in county-jail prison.

Figure 7: Realigner with Enhancements Hypotheticals (Methamphetamine), Charging Options
Number charged as state prison v. county jail prison (N=20)



Further, because of the effect of Penal Code §654, this set of questions also potentially tested how well prosecutors understand this aspect of the AB 109 statutory regime. We had learned from our interviews that there was a considerable lack of information and/or uncertainty among prosecutors about how these charging decisions would affect where the sentence would be served. That is, although respondents' choices would determine whether incarceration would be in county jail prison or state prison, we had reason to surmise that respondents did not realize they were necessarily deciding site of incarceration. Thus, we asked respondents a follow up question to these scenarios:

> If you knew that a defendant who was convicted of PC §12022(c) [firearm possession in commission of possession for sale violation] or PC §12022(c) and PC §29800 [prior felony conviction plus firearm possession] would be sent to county prison jail [sic], whereas a defendant convicted only of PC §29800 would be sent to state prison, would your charging decision change?

Half of the respondents (10 of 20) said yes. This outcome, we believe, leads to the most significant inference to be drawn from this trio of questions: that the factors that ultimately matter most might not be well known, at least as Realignment's changes are still in their infancy. Perhaps as a result of this uncertainty, this hypothetical showed very little movement across scenarios.

Assault (Realigner): Questions 10, 11, and 12

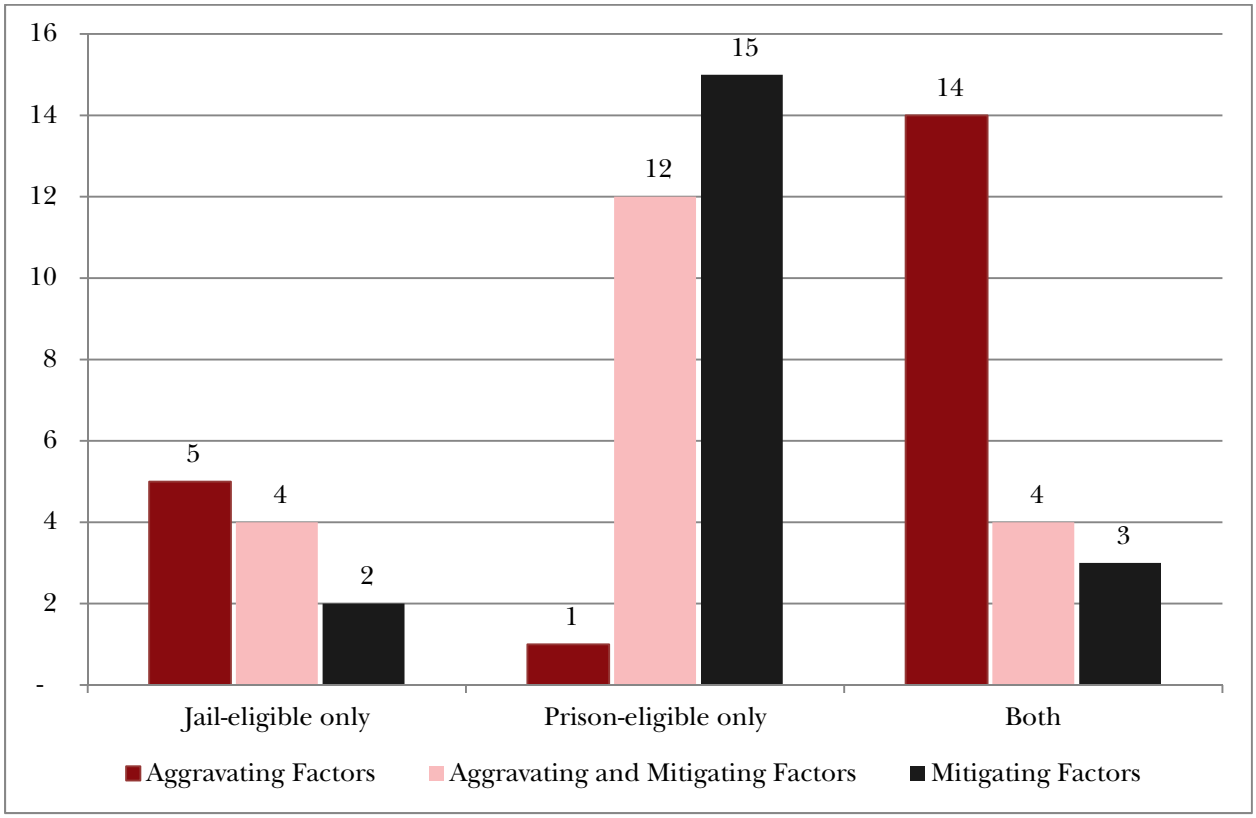
Questions 10, 11, and 12 dealt with an assault, and respondents could choose among a single charge of felony battery with serious bodily injury (Penal Code §243(d)), a jail-eligible offense, felony assault with force likely to produce great bodily harm (Penal Code §245(a)(4)), a prison-eligible offense, or both. Even though §243(d) is an 1170(h) offense, some prosecutors told us that most of the time it is committed in a way that in their view it should be classified as a "serious" felony and not a "triple-non."[84]

The most influential variable in this set of questions was in the offender's record. The addition of mitigating factors changed charging choice dramatically, even in the presence of aggravating factors. In fact, the difference between aggravation only and aggravation plus mitigation was more significant than the difference between aggravation plus mitigation and an offender with no record at all.

In the "aggravating" version of the hypothetical (question 10), the defendant, jealous of his ex-girlfriend's new relationship, lay in wait outside her workplace, punched her in the face (resulting in the loss of two teeth and severe bruising), and was apprehended with a pocketknife. His record in this hypothetical included a conviction in the past five years for three counts of misdemeanor assault with force likely to produce great bodily harm, one count of misdemeanor stalking, and one count of assault weapon possession. More than half of respondents (12 of 20) rated the offense a 4 (with a mean of 4.2), and more than one-third of respondents (eight of 20) rated the record as a 3 (with a mean of 3.9). More than two-thirds of respondents chose to charge both offenses (14 of 20), with one charging only the (prison-eligible) assault as shown in Figure 8.

[84] Somewhat mysteriously, these prosecutors told us that when they have alleged Penal Code §243(d) as a "serious crime" in their charging documents, judges have ordered state prison even though, pursuant to §1170(h), they should have ordered county jail time. Unfortunately, we had no way to investigate or verify these assertions.

Figure 8: Realigner Hypotheticals (Assault), Charging Options
Number charged as jail only, prison only or both (N=20)



In the second version of the hypothetical (question 11), the defendant was waiting in line for a hot dog at a baseball game and beat up an opposing team's fan when the fan cut in line (despite this fan having his arm in a sling). The punches aggravated the fan's arm injury and resulted in bleeding. The defendant's record in the past five years included one count of misdemeanor assault with force likely to produce great bodily harm. For this answer, the most common rating of offense seriousness was a 3 (nine respondents out of 20), with a mean score of 2.7. The record seriousness was rated a 2 by more than half of respondents (11 respondents out of 20), with the mean score dropping to 2.2. In this scenario only one-fifth of respondents (four of 20) recommended charging both crimes, though now 12 of 20 recommended charging only the (prison-eligible) assault (see Figure 8).

In the final, "mitigation only" form of the question (question 12), the defendant did not have a prior record. The narrative was that when the defendant and his friend were fired from their jobs, the friend punched the boss (giving him two black eyes) while the defendant restrained the boss's arms. For this answer, the most common rating of offense seriousness remained a 3 (10 respondents out of 20), with a mean score that also remained 2.8. The effect on charging was also slight, with only three people changing

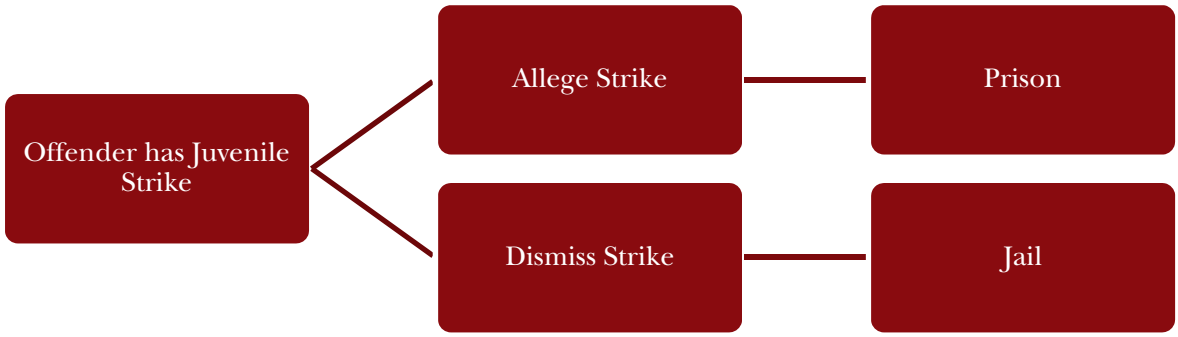
their recommendations at all (two now choosing to charge the assault, as opposed to the battery, and one choosing to charge only the assault, not both offenses), for a total of three people recommending both charges, and 15 of 20 recommending charging only the (prison-eligible) assault, as shown in Figure 8.

Thus, this set of hypotheticals does not evince any significant tilt toward sending assaulters to prison rather than jail. Where the offender did not exhibit any mitigating factors, most prosecutors thought he deserved to be in prison. Where he exhibited mitigating factors, prosecutors generally tilted toward to rely on jail-eligible felony charges.

Auto Theft (Juvenile Strike): Questions 13, 14, and 15

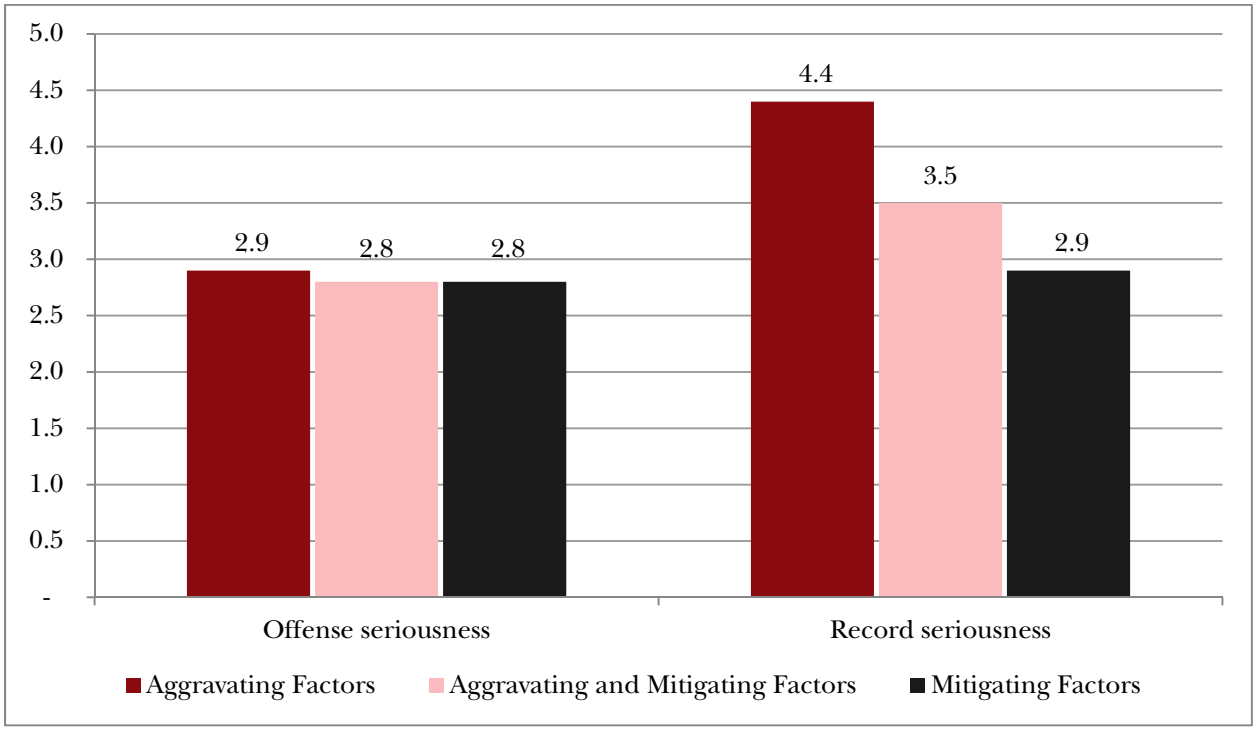
In this set of questions, prosecutors were asked whether they were likely or unlikely to make the defendant admit his prior juvenile strike. Unlike the case of a prior adult strike, for the offense in question here (California Vehicle Code §10851), if a judge strikes a juvenile strike then the defendant is 1170(h) eligible. If the juvenile strike is imposed, the defendant must be sent to prison (Figure 9). The result of this set of questions is fairly clear. The severity of the underlying strike crime is the key factor. One can surmise that prosecutors view the severity of the juvenile crime as a key measure of the dangerousness of the defendant's character, and believe that the new crime gives them a legitimate opportunity to send him to adult prison. In the sequence of three questions, as the prior crime goes from attempted murder, to firing a weapon at a house in a gang dispute, to a robbery of a cellphone with use of a knife, the percentage of respondents who would deploy the strike to send the offender to prison drops significantly. The answers surely do *not* reveal prosecutors will presumptively take advantage of a strike to charge around AB 109 and off-load the offender from the county system.

Figure 9: Process of Juvenile Strike



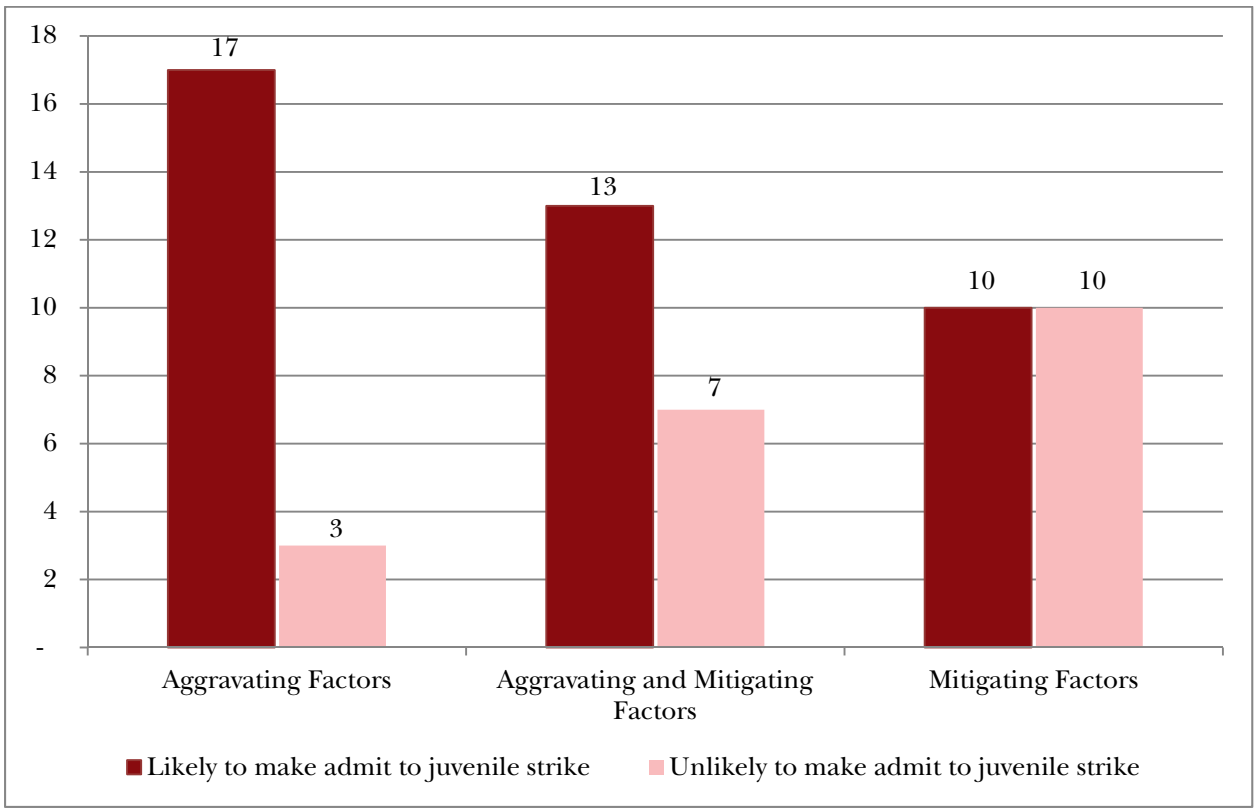
In the aggravated version of the question (question 13), the defendant posed as a valet parking attendant and drove off with a car. His juvenile strike was for attempted murder when he was 17, arising out of a gang-related plot to kill a rival gang member, in which the attempt involved lying in wait with three others and the firing of shots that missed completely. As an adult, the defendant had been convicted of two offenses in the past five years for second-degree burglary and grand theft. He had never successfully completed probation. As depicted in Figure 10, more than half of respondents (13 of 20) rated the offense as a 3 (mean of 2.9) but almost half of respondents (nine of 20) rated his record as a 5 (mean of 4.4). Seventeen of 20 respondents would make the defendant admit to his prior juvenile strike (Figure 11).

Figure 10: Juvenile Strike Hypotheticals, Seriousness of Offense and Record
(mean on a scale of 1 not serious to 5 very serious



In the second version of the question (question 14), the defendant was looking for cars to steal and hot-wired an unlocked vehicle and drove it away. His juvenile strike was for discharging a firearm at an inhabited dwelling when he was 17, when he fired a gun into a rival gang-member's home as a warning sign. As an adult, the defendant had been convicted 3 times for petty theft and misdemeanor theft and unlawful driving/taking of a vehicle. This time, the most common rating for offense seriousness was also 3 (nine of 20 respondents), with the mean dropping slightly to 2.8, as shown in Figure 11. Record seriousness dropped almost a full point (mean of 3.5) with the most common answer (eight of 20) rating it a 3. Under this scenario, 13 of 20 respondents would make the defendant admit to his prior juvenile strike (Figure 11).

Figure 11: Juvenile Strike Hypotheticals, Admission of Strike
Number likely to admit to strike v. unlikely to admit to strike (N=20)



In the final version of the question (question 15), the defendant was pulled over while speeding and admitted to driving a car he helped his friends steal (distracting the car's owner in conversation as his friends grabbed the keys and drove away). He had no adult record. His juvenile strike was for robbery at the age of 16, when he grabbed a cell phone from a young man and then drew a pocketknife when the young man tried to get his phone back. The most common rating for offense seriousness was a 2 (8 of 20 respondents), with the mean staying unchanged at 2.8. Record seriousness dropped to a mean of 2.9 with the most common answer (10 of 20) rating it a 3. For this variation, half of respondents (10 of 20) would make the defendant admit to his prior juvenile strike.

Methamphetamine Possession (Realigner): Questions 5, 6, and 7

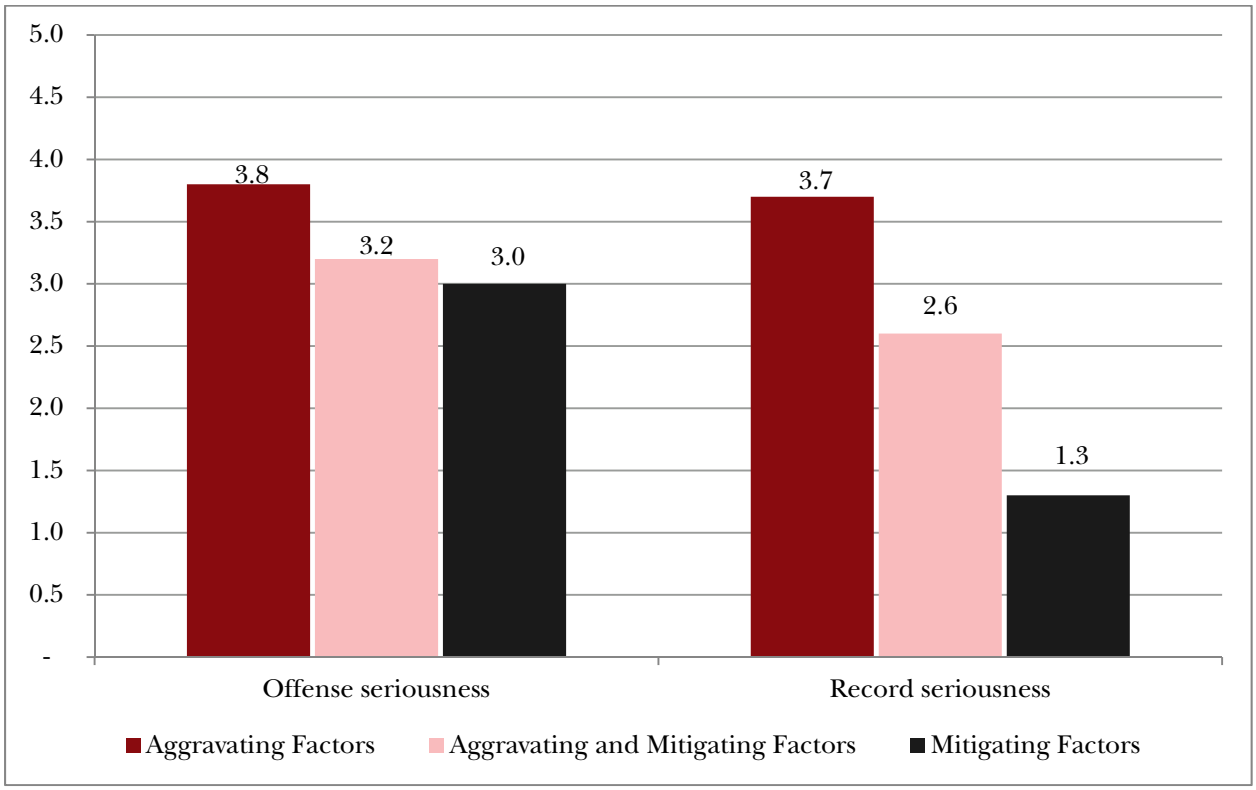
Questions 5, 6, and 7 tested the effect of sentence length. California Health and Safety Code §11377 and California Penal Code §12022(a) are both 1170(h) offenses, while California Health and Safety Code §11370.1 is a prison-eligible offense. Yet, if a prosecutor charges the 1170(h) offenses, the offender would potentially receive a longer sentence than if the prosecutor charged the latter prison-eligible offense. Thus, this hypothetical could potentially measure whether prosecutors prefer a shorter prison sentence over a longer jail sentence and thus give some indication of their view of the severity—or deterrent or rehabilitative power—of the experience of prison per se.

This trio showed no declines in sentencing between the first form of the question (only aggravating factors) and the second form of the question (aggravating factors with mitigation added), but it did show a slight decline when aggravating factors were removed. In other words, the addition of mitigating factors did not result in lower mean sentences, but the removal of aggravating factors did—though only slightly. In some ways, this outcome is similar to the results observed in the trio of questions 2-4, although since one fewer person recommended charging as a felony, the sentence recommended technically went down. Both these sets of results could also be read as indicating that factors did not change sentencing practice very much—but, again, these results are, at best, tentative. But one possible inference, which merits testing in a future study, is that prosecutors take an unusually harsh view of methamphetamine. While most drug felonies have become 1170(h) crimes under Realignment, when methamphetamine is at stake, prosecutors will opt for a prison-eligible felony because of their especially condemnatory view of offenses involving this drug. They do so even where there is the possibility of a longer total incarceration in county jail under a combination of 1170(h) charges. The reason may be a sense that prison is simply more serious and stigmatic, regardless of length, or a lack of confidence in county systems to deter or rehabilitate (or guarantee incapacitation of) the methamphetamine offender. Notably, this inference is consistent with results from our earlier judicial survey, where among various 1170(h) crimes, judges were most likely to choose the longest possible jail term among given alternatives when the crime involved methamphetamine.[85] But again, this inference is very tentative, because given the limited number of responses we obtained, this apparent pattern could just as well be the result of randomness or unaccounted variables.

[85] For a full discussion, see Weisberg, Robert and Lisa T. Quan. "Assessing Judicial Sentencing Preferences After Public Safety Realignment: A Survey of California Judges." *Stanford Criminal Justice Center* (2014). at 45.

In the "aggravating" version of the hypothetical (question 5), the defendant was on PRCS, loitering on a dark street corner with 50 grams of methamphetamine and a loaded, operable gun. In this hypothetical, he was on PRCS for second-degree burglary and had convictions in the past five years for misdemeanor assault by means likely to produce great bodily injury, felon in possession of a firearm, grand theft, controlled substance sale, possession of PCP, misdemeanor firearm discharging from a vehicle, and possession of a firearm in violation of a temporary restraining order. The question also noted that the defendant had never successfully completed parole or probation. More than two-thirds of respondents rated both the offense and the record as a 4 (14 of 20 for the offense and record), with mean scores of 3.8 and 3.7, respectively as shown in Figure 12. More than two-thirds of respondents (14 of 20) reported that they would likely only charge the defendant with "possession while armed" rather than "possession for sale" and "felony while armed" (see Figure 13).

Figure 12: Realigner Hypotheticals (Methamphetamine Possession), Seriousness of Offense and Record
(mean on a scale of 1 not serious to 5 very serious)

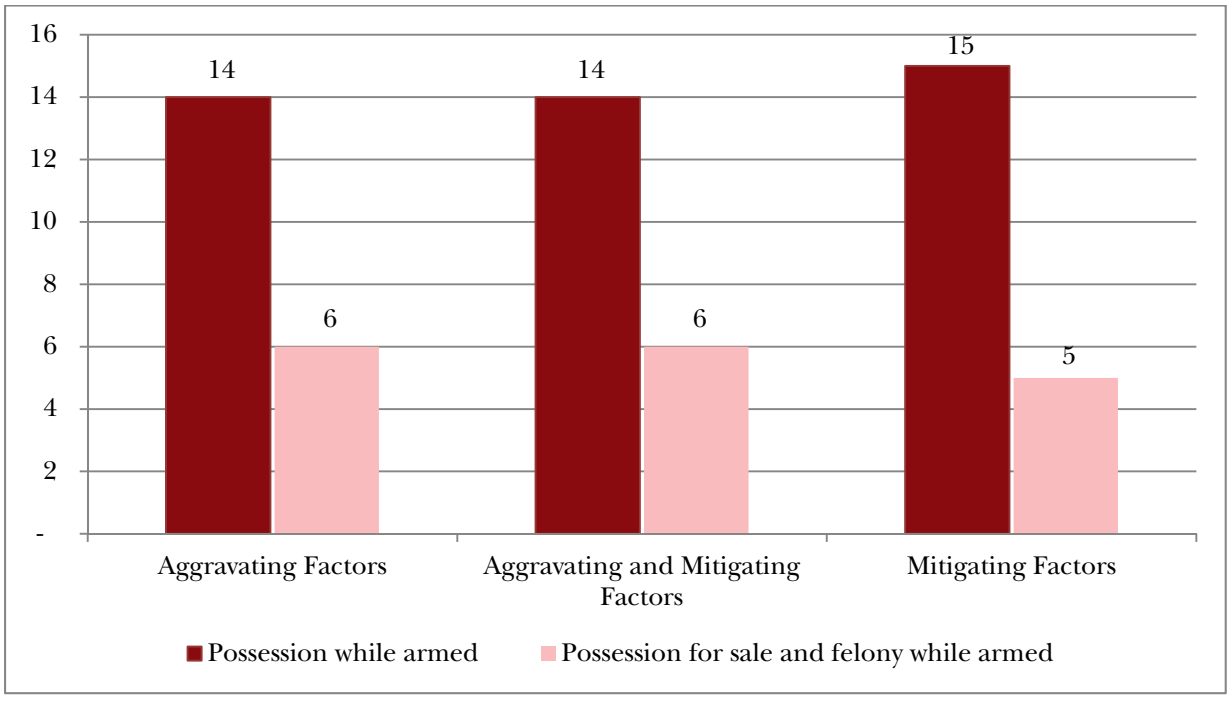


In the second version of the hypothetical (question 6), the defendant, who was on probation, was loitering in front of a gas station with 5 grams of methamphetamine and a

loaded, operable gun. His record in this hypothetical was that he was on probation, that he had a one-year-old conviction for petty theft and openly carrying an unloaded handgun in a public place, and that he had two three-year-old convictions for possession of methamphetamine (one felony and one misdemeanor). For this answer, more than two-thirds of respondents rated offense seriousness as a 3 (16 respondents out of 20), with a mean score of 3.2. The record seriousness was rated a 2 by half of respondents (10 respondents out of 20), with the mean score dropping to 2.6. The charges sought, however, did not change, however, with more than two-thirds of respondents (14 of 20) continuing to report that they would likely only charge the defendant with "possession while armed" rather than "possession for sale" and "felony while armed."

In the third version of the hypothetical (question 7), the defendant had two grams of methamphetamine and a loaded, operable gun. His record was that he had a two-year-old conviction of possession of more than 28.5 grams of marijuana but had successfully completed probation. Most respondents (14 of 20) rated the offense seriousness a 3, with the mean dropping to 3. The record seriousness was rated a 1 by more than four-fifths of respondents (17 respondents out of 20), with the mean score dropping to 1.3. The charges sought changed, but only slightly, with only one additional respondent (for a total of 15 out of 20) reporting that they would likely only charge the defendant with "possession while armed" rather than "possession for sale" and "felony while armed."

Figure 10: Realigner Hypotheticals (Methamphetamine Possession), Charging Options
Possession while armed v. possession for sale and felony while armed



Has Realignment changed sentencing recommendations?

The previous hypotheticals dealt solely with charges. Even though charges obviously have effects on sentencing—both site and length of incarceration—the next sets of questions focus on sentence recommendations within the same offense, and, in particular, on sentence recommendations where split sentencing is an option.

In the first set of questions (questions 16-18) respondents could choose sentences of probation, jail, or a split sentence (a combination of jail and post-release supervision). Respondents had to choose from three specific jail terms but were required to write in their own split sentence terms. In the second set of questions (questions 19-21) respondents could choose between a jail term alone ("straight jail") or a split sentence. For this set of questions, respondents could write in both their jail terms and their split sentence terms.

For these questions, sentence lengths were all over the map, providing evidence of differences in sentence recommendations for the same offense. Even within split sentences, we see tremendous variation—short custodial sentences with a short community supervision tail, short custody/long tail, long custody/short tail, and long custody/long tail. Putting these outcomes in the form of a hierarchy that could be statistically analyzed is a challenge beyond the scope of this survey and our limited data; therefore, we merely present the outcomes descriptively.

Second-degree Felony Burglary: Questions 16, 17, and 18

These questions provided respondents with choices between straight sentences (in jail), split sentences, and probation. As the offense/record factors got less serious, respondents recommended probation more often (though it should be noted that probation can, in other cases, result in longer times in custody and on supervision).[86]

In the "aggravating" version of the hypothetical (question 16), the defendant intended to rob a convenience store and was thwarted just as he was about to brandish a knife. He was on probation for grand theft. In the prior year was convicted for carrying a concealed firearm in a vehicle, and in the past five years he had three grand theft and four petty theft convictions. The offense was most often rated a 4 in terms of seriousness (nine of 20 respondents, with a mean of 3.9). The record was rated a 3 by two-thirds of

[86] For full discussion, see ibid. at 51-53.

respondents (14 of 20 respondents, with a mean of 3.3). Two-thirds of respondents (13 of 20) reported that they would likely recommend a split sentence for this offense, but the range varied from 90 to 180 days with a three year probation tail, to five years jail with a one year tail. The most common jail term of a split sentence was one year (8 of 14), and the most common tail was also one year (6 of 14), though only one respondent actually chose a one year/one year sentence. All of those not choosing split sentences chose jail terms of two years.

In the second version of the hypothetical (question 17), the defendant took out tools to remove an anti-theft device from purses worth $2,000. His record in this hypothetical was that in the prior year he was convicted for grand theft and that he did not successfully complete probation. In the past five years he had two petty theft convictions. The offense was most often rated a 2 in terms of seriousness (nine of 20 respondents, with a mean of 2.7). The record was rated a 2 by more than half of respondents (13 of 20 respondents, with a mean of 2.5). Half of respondents (10 of 20) reported that they would likely recommend probation. Five respondents chose jail terms (two chose one year terms, three chose two year terms). Of the four respondents choosing a split sentence for this offense, terms ranged from 12 months with a five year tail to 1.5 years with a 1.5 year tail (though one respondent said "not sure" to both terms).

In the third, "mitigating" version of the hypothetical (question 18), the defendant was stopped as he exited a grocery store with $950 in stolen food and medicine, telling police that he had recently lost his minimum wage job and had no other way to provide for his wife and four children (including one infant). His record was that he was convicted last year for petty theft, after stealing makeup worth $60. The offense was rated a 2 by more than half of respondents (11 of 20 respondents, with a mean of 1.9). The record was rated a 1 by more than three-quarters of respondents (17 of 20 respondents, with a mean of 1.4). Four-fifths of respondents (16 of 20) reported that they would likely impose probation for this offense. One respondent reported that they would recommend a two year jail sentence, and the other three recommended split sentences of 30 days/two years, 90 days/two years, and one year/two years.

The overall pattern (or non-pattern) of the answers is clear. The first two hypotheticals produced widely disparate results along three dimensions: The choice between probation and an 1170(h) sentence; the length of the 1170(h) sentence; making that sentence straight or split, and the fractioning of the split. Only in the third, "mitigating," version of the hypothetical did consensus emerge—around probation. These outcomes suggest that the introduction of possible long county jail sentences for felonies and the possibility of fitting them into a regime that already contained traditional felony probation has led to great variation in prosecutorial preferences and the possibility of significant disparity in actual charging and sentencing.

Drug Trafficking: Questions 19, 20, and 21

This trio of questions concerns offenses more serious than those in the previous trio and involves transporting narcotics for sale between non-contiguous counties (an offense with a triad of three, six and nine years) and a weight clause adding 15 years. Here the defendant will be punished for a significantly longer period of time than in questions 16, 17, and 18. Moreover, unlike in the prior trio sets, in these hypotheticals, felony probation was not offered as a choice. Thus, the goal of the trio is to determine if these longer sentences make a difference in regard to the choice between straight and split. (As a reminder, note that some prosecutors indicated that they hesitate to recommend split sentences for defendants who receive short sentences, either because they think the offenders deserve more incarceration time or because they think programming cannot be effective in such a short period of time.)

In the "aggravating" version of the hypothetical (question 19), the defendant had pressured his 15-year-old brother into driving him. In this hypothetical he was on PRCS for transporting narcotics for sale between non-contiguous counties, and in the past 10 years he had one conviction for felony possession of cocaine base for sale, two counts of possession of an assault weapon, and two counts of misdemeanor manufacturing drug paraphernalia to be used with cocaine. The offense was rated a 4 by half of respondents (10 of 20 respondents, with a mean of 4.2). The record was rated a 4 by nine of 20 respondents, with a mean of 3.9. More than two-thirds of respondents (14 of 20) reported that they would likely recommend a split sentence for this offense, but the range varied from one year/five years to 12 years/12 years to 18 years/three years. The six jail sentences were nine years (twice), 15 years, 20 years, 21 years, and 24 years.

In the second version of the hypothetical (question 20), the defendant was in a train station when a police dog alerted on his suitcase. The defendant tried to flee but was apprehended. In this hypothetical the defendant's record was three prior convictions in the past five years of possession of more than 28.5 grams of marijuana. The offense was most often rated a 3 (eight of 20 respondents, with a mean of 3.8). The record was rated a 1 by more than half of respondents (13 of 20 respondents, with a mean of 1.6). Four-fifths of respondents (16 of 20) reported that they would likely recommend a split sentence for this offense, but the range varied from nine months/five years to 6 years/15 years to 18 years/three years. The four jail sentences were 18 months, 18 years (twice), and 20 years.

In the third, "mitigating" version of the hypothetical (question 21), the defendant was exiting a bus when a dog alerted on his suitcase. In this hypothetical he had no prior offenses in the past five years. Most respondents (17 of 20) rated the seriousness of the offense between 3 and 4 (with a mean of 3.7). All but three respondents (17 of 20)

reported that they would likely recommend a split sentence for this offense, but the range varied from one year/two years to four years/17 years to 18 years/three years. The recommended jail sentences were six years, 18 years and 20 years.

With split sentencing in particular, the nature of sentencing creates difficulties with analysis of responses. In particular, as has been pointed out elsewhere,[87] the complex variations of combinations of jail term and supervision, and the different views of the relative severity of the experience of supervision, make it very hard to rank sentences in terms of severity. It is also difficult to determine which sentences are even, in the abstract, "more serious" than others. We asked respondents to rate offense and criminal history on a 1 to 5 scale, with 1 being least serious and 5 being most serious. We did not, however, ask for a similar qualitative ranking of the sentence that they imposed. Instead, we only asked for particular dispositions. Some of these decisions are easily arranged in a hierarchy—e.g., charging as a felony versus charging as a misdemeanor—but, for split sentences versus jail versus probation, it is difficult to tell which is the more "serious" sentence in the abstract without looking at the particular term of years imposed. Straight jail terms—those involving time in custody in the local jail—are often seen as less severe than split sentences—those involving a jail term and a community supervision "tail."[88] The reason is that time in jail is credited two for one (two days of credit for each day in custody), and when jails are crowded, sheriffs are authorized to release prisoners early. Thus, a two-year jail sentence might result only in 12 months time served; at that point, there is no supervision because the sentence has been fully served. A split sentence of 24 months, with half in jail and half on supervision, would result in six months custody and 12 months supervision. If, at any time during supervision, the offender violated his terms of release, he could be recommitted for violation of those terms.

Under the above scenario, then, split sentences could be seen as more severe than jail terms. The problem arises when the sentence duration changes. A jail term of 20 years is obviously more severe than a split sentence term of four years (two years of custody and two years of supervision), though it is obviously difficult to place these differences on a linear scale from 1 to 5 (with 1 being least severe). Two trios of questions involving a possibility of split sentences reflected the variation in sentencing and corresponding difficulty in categorizing them for easy analysis. In one set (questions 16-18) respondents could choose sentences of probation, jail, or a split sentence (a combination of jail and post-release supervision). In another (questions 19-21) respondents could choose between a jail term alone ("straight jail") or a split sentence. The set involving probation

[87] See, e.g., Ball, W. David. Defunding State Prisons. Crim. L. Bull 50 (Forthcoming 2014). on the difficulty of determining both a "real offense" and a "real sentence."

[88] For elaboration of this point, see Weisberg, Robert and Lisa T. Quan. "Assessing Judicial Sentencing Preferences After Public Safety Realignment: A Survey of California Judges." *Stanford Criminal Justice Center* (2014). at 51.

(questions 16-18) allowed respondents to choose from three specific jail terms but to write in their own split sentence terms, while the set involving jail versus split sentences (questions 19, 20, and 21) allowed respondents to write in both their jail terms and split sentence terms.

In the former trio (questions 16, 17, and 18), the maximum jail term offered was two years, and this roughly corresponded to the maximum time sought in split sentences. The split sentences varied quite considerably, though, from 90 days custody followed by three years of supervision, to a one year custody/five year supervision split, to a five year custody/one year supervision split. The most common recommendation for custody was one year, and the most common recommendation for supervision was also one year, although only one respondent actually recommended a one year/one year split (most of those recommending one year of supervision recommended a two year custodial sentence; most of those recommending one year of custody recommended two years of supervision). We have not, therefore, attempted to measure sentence severity with split sentences.

In the latter trio, ranges were much wider. In question 19, jail sentence recommendations ranged from eight years to 21 years, while split sentence recommendations ranged from one year/five years (custody/supervision) to 16 years/eight years and 18 years/three years. In question 20, jail sentence recommendations ranged from 18 months to 18 years[89] while split sentence recommendations ranged from nine months/60 months (custody/supervision) to six years/15 years and 18 years/three years. In question 21, jail sentence recommendations ranged from six years to 20 years [assuming this is years, no years or months given], while split sentence recommendations ranged from one year/two years (custody/supervision) to four years/17 years and 18 years/three years.

As with the previous trio, though here without the alternative of felony probation, this trio most obviously suggests a notable degree of variance induced in prosecutorial choices by the new menu of alternatives in the straight/split sentence concept. The overall pattern (or non-pattern) of the answers is clear. Split sentences are novel at the local level, and it might be that some of the variation in sentencing (either in providing for extremely long tails or extremely long custodial sentences) might even itself out over time, as a "market price" for split sentences develops. However, given that jail release orders (due to overcrowding) might affect the actual time served, estimating actual time served will remain more art than science.

[89] One response was "20" but it was not clear whether the respondent intended his/her answer to be 20 months or 20 years.

Analysis and Summary of Hypothetical Results

On the whole, when asked directly about factors affecting their decisionmaking, prosecutors cited traditional factors involving the severity of the offense and the background of the offender. We find something of a paradox when we asked district attorneys to rank factors in terms of importance: Jail space was listed as the least important, but then on a separate question many respondents acknowledged jail space concerns when queried how Realignment had influenced their policies.

In response to particular charging hypotheticals, the pattern of answers did not diverge in any striking way from offense and offender severity, and we see some correlation between the choice of charge and the ranking of severity for particular scenarios. Nevertheless some patterns in responses reflect a reaction to various legal and economic consequences of Realignment.

In terms of specific hypotheticals, where given a chance in a "wobbler" case to choose between a jail-eligible misdemeanor and a prison-eligible felony charge, the answers followed a traditional pattern of tilting toward the prison felony only when aggravating factors were dominant. Combined with our disposition study indicating little post-AB 109 change in arrest-to-complaint ratios, this result would cast doubt on any surmise about "charging up" under Realignment. Somewhat similarly, in an assault scenario, severity correlated with tilt toward a prison charge, although the key factor was the presence or absence of mitigating factors rather than the presence or absence of aggravators. Also consistent was an auto theft scenario where the decisive factor in whether a juvenile strike would be alleged, thereby leading to a prison-eligible charge, was the severity of the underlying juvenile crime.

Results of other hypotheticals, while consistent with reliance on traditional charging factors, indicated that a problem after AB 109 is that prosecutors may not be fully apprised of or focused on its change in the rules, especially where the revised penal code structure has some counter-intuitive effects. For example, in one methamphetamine scenario, the choice between two sets of charges would determine whether the offender went to prison or jail. The initial results correlated greater severity of offense and offender with the prison charge. But a follow-up question noted the statutory oddity that the sentence for the prison-eligible charge would actually be shorter than that for two jail-eligible charges, and half the respondents then said that after being so informed they would change their answer.

A further nuance in attitudes toward the prison-jail difference came from scenarios involving methamphetamine and weapons. Here it was clear that the prison-eligible charge would lead to a shorter sentence, yet it was the clear majority choice. This result may reflect a conscious view that this is an especially harmful type of crime should send the offender to prison to signal a greater moral stigma, independent of the sentence length. (The result is also consistent with the view that prosecutors are concerned that jail sentences are de facto far shorter than they are de jure. But this latter inference is very speculative because it is not reflected in results from other sets of questions.)

But perhaps the most striking finding in these results came in the questions about sentencing recommendations. For some questions the respondents had to choose between straight and split sentences and, where they chose a split, to recommend the proper fractions of jail and supervision time. For other questions, they had those choices as well as the option of felony probation. The clear dominant takeaway from these questions is huge variance along all these dimensions. In a drug trafficking scenario, the variation for both whether and how to split was great. Any effort to link chosen sentences to severity ranking for those questions is difficult, because rank ordering this complex menu of sentences in terms of severity itself is inherently difficult. Comparisons between supervision time and jail time and between 1170(h) supervision and probation are unavoidably apples-to-oranges. Nevertheless, we can say that respondents' severity rankings bore no clear relation to recommendation choices. Moreover, when the probation choice was added for a store burglary charge, that option only increased the wide variation in choices. The only thing close to consensus was that results for the question where there were no aggravators and some mitigators led to a majority choice for probation.

Variance in Charging Practices across Counties

Has Realignment operated differently across counties?

Realignment has changed charging behavior in all counties—at least according to DAs themselves. In response to our question, around two-thirds of respondents (13 of 20) said that charging was different after Realignment, with the most-cited example being the availability of split sentencing. At the same time, all but three respondents said that Realignment did not mean their offices had chosen not to charge certain low-level offenses due to resource constraints.

We did not find any differential patterns of charging in our results across counties (e.g., "high" and "low" use counties). Again, we are reluctant to push any results too far, given the lack of data and the lack of reliability. Nevertheless, we did observe some interesting results when comparing a given county's results to the mean result. One county (moderate in population size and largely suburban/rural) rated each offense and record as a 5—most serious—despite the significant differences in the facts for a given set of hypotheticals. At the same time, this county, on average, charged a little less seriously than the mean. Another county tended to rate both offense and record less seriously than its peers (an average of 20% and 28% less, respectively), but charged above the mean (approximately 17%). We are hesitant, again, to draw too many inferences from this behavior, given that it might have been the result of someone trying to answer the survey quickly, that it might not reflect official policy, that it could be the result of chance, etc., but it does point out a potential issue with the study of prosecutorial discretion (and any policies relating thereto): Reasonable prosecutors can agree on the facts' seriousness and disagree as to the right sentence these facts call for, and this disagreement can either manifest itself in different charging behavior or mask disagreements.[90]

This study, then, does not provide data either showing or disproving the hypothesis that DAs have changed their charging behavior in response to Realignment, except for some statements excerpted above. We do not see any evidence (nor do we have reliable evidence) suggesting that DAs in different counties respond differently to Realignment in a predictable way, although these results should be seen less as proving or disproving the hypothesis and more as being not responsive to it. We do note, though, that there are some areas of the law not completely understood by those with responsibility for charging decisions—namely, issues relating to hypotheticals 8, 9, and 22 discussed above.

Questions about Characteristics of Respondents and Their Counties

What community supervision and treatment services are most available? What community supervision and treatment services are most effective?

[90] To understand how prosecutorial discretion may play a role in how punitive a county is (how often/likely they send offenders to prison), see Lin, Jeffrey and Joan Petersilia. "Follow the Money: How California Counties are Spending Their Public Safety Realignment Funds." (2014).

We asked respondents to rank how the availability and effectiveness of community supervision and treatment. DAs in our survey said that drug rehabilitation was, generally, most available and most effective, which is important given that a large number of realigned offenders will be serving drug-related offenses. Most DAs said drug rehabilitation services were the most available resource in their county (11 of 20 respondents, with a mean of 2), and seven of 20 respondents said it was the most effective service (with a mean ranking of 2.4).

For other services, half of respondents said mental health was the second-most available resource (mean of 2.8). Housing was generally seen as least available, with two-thirds of counties ranking it fourth most available or less (mean of 4.3). The other factors considered were re-entry facilities and vocational training, which available roughly between housing and mental health. (Two counties also identified collaborative courts and transportation as being most and second-most available.) As for effectiveness, no clear patterns for any of the above factors existed except drug rehabilitation.

How are probation officers managing their caseloads? How effective is the working relationship between the county's district attorney's office and the probation department? How have budget cuts affected county agencies?

We asked four questions about supervision, with respondents noting concerns about capacity but nevertheless reporting good working relationships with their local probation agencies. Three questions asked about the capacity of probation officers with regard to felony probation, mandatory supervision, and post-release community supervision, and one question asked about the working relationship between the District Attorney's office and probation. Approximately one third of respondents said all three kinds of probation had "excessive caseloads" (a score of 6, on a scale of 1 to 7, with 1 being sufficient capacity to double their caseload and 7 being caseloads more than double capacity), with a mean between 4.3 and 4.7 (that is, between "Have just about the right match between capacity and caseload" and "Do not have the capacity to take on more cases"). The working relationship was seen as "very effective" to "effective" by all but three respondents, an average rating of "effective" and no respondent rating the relationship worse than "neither effective nor ineffective."

A final capacity question asked about other agencies affected by budget cuts: the police department, court staff, the probation department, the public defender's office, and the District Attorney's office. We asked respondents to rank these agencies from 1 to 5 (with 1 being most affected by budget cuts). More than three-quarters of respondents said the public defender's office was least or second-least affected by budget cuts (with a mean

score of 4.2). There was less consensus on the other agencies: All of them received at least one individual rank of 1 or 5, with mean scores between 2.3 and 3.2. By asking this question we were concerned not so much with the accuracy of the estimation on the ground, but with the perceptions of DAs. It appears, at least from these survey results, that perceptions (and realities) in different counties in terms of who has been affected by resource shortfalls differ across the state. We should, therefore, be hesitant to assume that the situation on the ground—or the perceptions driving policies—should be similar in different areas of the state. The relative uniformity of DAs opinions about the effect of budget shortfalls on public defenders is worth noting, however. It could be that these results reflect relative abundance of resources for public defenders, though this seems unlikely, given the general view that indigent defense funding is increasingly imperiled.[91] It might, instead, reflect the adversarial nature of the criminal justice system, whereby money to the "other side" is seen as zero sum. In the post-Realignment world, whereby more collaboration is desired (and, in some cases, assumed), this result might indicate that there is still some room to grow.

[91] Backus, Mary Sue and Paul Marcus. "The Crisis in Indigent Defense: A National Perspective." *Faculty Publication,.* Paper 1649 (2006). http://scholarship.law.wm.edu/facpubs/1649.

Conclusions and Recommendations

Conclusions

One initial observation to note is the inherent difficulty of surveys of prosecutors. While answering questionnaires is time-consuming for busy officials, we learned from numerous conversations that DAs are very jealous of the confidentiality of their decisionmaking processes and very wary of putting information out in public that might cause them to be viewed in negative light. In addition, some prosecutors fear that information about their decisionmaking might enable defense lawyers to gain strategic advantages. Because it is in the nature of the prosecutor's role in our legal system that they are under no legal obligation to explain how they think through these decisions, we faced a great obstacle here. We therefore consulted as much as possible with DAs themselves in designing the survey, asking them what they would like to learn from their colleagues in other counties, assuring them of confidentiality, and reaffirming them that were embarking on this project without any preconceptions.

Nevertheless, many offices refused to participate—in one case, even when a high-ranking member of the particular office itself had spent between ten and twenty hours helping us refine our hypotheticals. This finding underscores an important point: DAs undoubtedly have the most power and discretion in American criminal justice, and they have very little to gain from greater transparency. Moreover, even where individual line prosecutors might be open to such surveys, their supervisors might prefer that the office speak with a single voice and so limit the volume of responses we can achieve. We emphasize that this finding is not to say that scrutiny would reveal that DAs are doing a poor job—but, in some sense, merely that asking the questions tends to be seen as intrusive and exhibiting distrust

Hence, research on prosecutorial preferences that examines prosecutorial thinking processes (as opposed to statistical analyses of criminal justice outcomes) may often require focusing on one office or very few offices and building up long term researcher-prosecutor relationships of the sort undertaken by Vera. Simply put, breadth may have to be traded off for depth. Nevertheless, we believe that the response rate we did achieve, given its representation of the great majority of the California population, was strong enough to yield useful insights.

As for specific substantive conclusions, the undramatic one is that most charging or recommendation preferences remain consistent with traditional severity factors and do not manifest major alterations in light of AB 109. The more dramatic general conclusion

is that there is a great deal of uncertainty and variation in the responses we received. This phenomenon manifested itself particularly when prosecutors had to choose from the menu of straight, split, and probation sentences.

In some ways, Realignment's most headline-worthy innovation—split sentencing—is just old wine in new bottles. Realignment undoubtedly changed the places where certain sentences could be served, but it still uses a combination of custodial and non-custodial sentencing. As has been observed elsewhere, before Realignment, judges could sentence offenders to a "jail plus tail" sentence via probation. The biggest difference now has to do with the straight/split sentencing choice, which is an important legal change but also has financial and institutional implications for the counties. Most obviously, there is the question whether counties now have to internalize costs that had once been externalized on the state—which depends on the complexities of AB 109 funding. The question also exists whether prosecutors are consciously concerned about this cost-internalization, whether in strict dollar terms or in terms of jail crowding. These factors might plausibly alter prosecutorial thinking, and barely two years into Realignment prosecutors may still be in a process of absorbing and adapting to them in varied ways. Nevertheless, it remains striking that, on identical facts, recommended terms for split sentences were all over the map, ranging from short terms of both jail and supervision, to short jail and a long tail, to long jail and a short tail.

At the same time, jail sentences, obviously available before Realignment but now extended to formerly prison-eligible sentences, were also wildly divergent on the same facts, ranging from a year or less to 20 years or more. This might be due to local population pressures (or lack thereof)—DAs worried about early release from jail—but it seems notable that professionals implementing the same statutes could recommend such different sentences.

In terms of the hypotheticals in the study, we did not find any differential patterns of charging in our results across counties (e.g., "high use" and "low use" counties). Again, we are reluctant to push any results too far, given the lack of data and the lack of reliability. Nevertheless, we did observe some interesting results when comparing a given county's results to the mean result. One county rated each offense and record as a 5—most serious—despite the significant differences in the facts for a given set of hypotheticals. At the same time, this county, on average, charge a little less seriously than the mean. Another county tended to rate both offense and record less seriously than its peers but charged above the mean. We are hesitant, again, to draw too many inferences from this behavior, given that it might have been the result of someone trying to answer the survey quickly, it might not reflect official policy, it could be the result of chance, etc., but it does point out a potential issue with the study of prosecutorial discretion (and any policies relating thereto): Reasonable prosecutors can agree on the facts' severity and

disagree as to the right sentence these facts call for, and this disagreement can either manifest itself in different charging behavior or mask disagreements.

This study, then, does not provide data either showing or disproving the hypothesis that DAs have changed their charging behavior in response to Realignment, except for some statements excerpted above. We do not see any evidence (nor do we have reliable evidence) suggesting that DAs in different counties respond differently to Realignment in a predictable way, although these results should be seen less as proving or disproving the hypothesis and more as being not responsive to it. On the other hand, since we find evidence of lack of information or clarity among many prosecutors about the new rules of AB 109, we must allow for the possibility that as prosecutors are more fully trained in this area, variations across counties might arise.

In terms of open-ended questions about the effects of Realignment, around two-thirds of respondents did say, in very general terms, that charging was different after Realignment, with the most-cited example being the availability of split sentencing. At the same time, the great majority said that Realignment had not led them to adopt a policy of declining prosecution for low-level offenses because of resource constraints. On the set of questions about perceptions of the role of other agencies, a few patterns emerged. Respondents generally gave high marks to the quality of probation and related agencies engaged in supervision and treatment, and said that their offices had good relations with those agencies. Many, however, lamented the increasing case overloads of those agencies. When asked about sufficiency of resources for police, courts, probation, public defenders, and their own offices, answers varied widely in terms of where funding was sufficient or lacking, with one exception: Respondents evinced a consensus that that the defense bar was entity least hurt by resource constraints in the wake of Realignment.

Recommendations

Given our findings and analyses, we strongly recommend the following:

(1) Some mechanism must be developed to address and mitigate the AB 109's statutory ambiguities as to the relationship between felony probation and split sentences. Currently, the legislation explains the procedural distinction between these two types of sentences but does not guide prosecutors (or judges) about the substantive goal of AB 109 in terms of how to choose between these options.

(2) In our parallel survey of judges we recommended that the California State Legislature consider amending AB 109, whether by formulaic statutory rule or some form of presumptions or guidelines, to advise judges how to choose among these sentencing

options. As an alternative means to the same end, we suggested that the California Judiciary itself establish consistent approaches to the choices between traditional felony probation and 1170(h) sentences and determine how sentences should be split—under what circumstances and for which crimes, and what fractions offenders should serve in jail and under mandatory supervision— while still retaining necessary discretion.[92] Were either of these approaches to be implemented the result would be salutary as a mandate to prosecutors as to what criteria should guide their own choices for charging or recommendation as they face this new array of sentencing choices.

(3) In the absence of any such legislative or judicial action, we recommend that prosecutors themselves, perhaps through the California District Attorneys Association and perhaps with the help of the California Attorney General in convening county prosecutors, share views and practices on these sentencing options and seek to establish at least general norms and presumptions to somewhat reduce the problem of extreme unpredictability and disparity. In addition, the prosecutors themselves, possibly with the assistance of the Attorney General, should ensure that all assistant district attorneys are fully trained in the technical details of AB 109's new sentencing rules.

(4) To improve the use of the new sentencing tools under AB 109, including split sentences, counties should ensure, and the State must supply sufficient funding for, rigorous evidence-base supervision and effective community-based treatment resources whether the offender is under felony probation or the mandatory supervision portion of a split sentence. Better supervision is of inherent value, but it also serves a purpose directly relevant to this survey: Regardless of how the statutory relationship between felony probation and 1170(h) is resolved, prosecutors are more likely to make consistent and confident recommendations about probation or supervision if they have some solid faith in the likelihood that supervision, in either form, shows promise of reducing offender recidivism.

(5) While jail crowding is a complex subject outside the scope of this study, we recommend that the legislative and executive officials who control funding and space for jails pay attention to the effect of jail crowding on prosecutors. While concern about burdens that convictions place on jail and prison resources is a legitimate part of prosecutorial discretion, severe crises in jail crowding can cause unfortunate distortions of that discretion.

(6) Future research in this area should focus on recorded data about actual charging and recommendation outcomes to help test whether the concerns raised in this study

[92] Weisberg, Robert and Lisa T. Quan. "Assessing Judicial Sentencing Preferences After Public Safety Realignment: A Survey of California Judges." *Stanford Criminal Justice Center* (2014).

about undue disparity in stated preferences of prosecutors are manifested or mitigated over time as prosecutors adapt to the new AB 109 regime.

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Appendix A: Public Safety Realignment Prosecutorial Survey

Q1.1 Thank you for participating in Stanford's California Public Safety Realignment Prosecutorial Survey.

The survey will proceed with several hypothetical fact patterns that ask you how you would charge the defendant based on the information you are given. Even though you may feel you need more information to answer a particular question, please answer every question using the information with which you are provided. There will be an opportunity for you to provide clarifying remarks in the survey.

Please note that in the questions below, when you see reference to "seriousness of offense," we do not mean the seriousness of the statutory crime compared to other statutory crimes. Rather, this term asks about the relative seriousness of the defendant's actions among the range of actions that can plausibly fall within the definition of the specified criminal statutes.

To preserve the integrity of the survey and its resulting research, we ask that you refrain from taking this survey more than once. Please be assured that we will maintain strict confidentiality of the responses provided in this survey. The survey will take approximately 20-30 minutes to complete.

Q2.1 Offense: The defendant admitted that for the past year he has been aggravated by his mother-in-law. He blamed her for trying to break up his marriage by instigating fights between him and his wife. Last week he convinced his cousin to accompany him to confront his mother-in-law and her boyfriend with whom she lived. When he arrived at her apartment, he soon realized that only she was home. An argument escalated in the kitchen, and the defendant punched his mother-in-law in the face. Before he could punch her again, his cousin pulled him away and out of the apartment. When the police arrested the defendant three blocks away, they found a knife in his possession. The mother-in-law suffered a black eye and had to have stitches to repair a small cut on her cheek.

Record: During the commission of the crime, the defendant was on probation for PC §368(b) [misdemeanor physical abuse of elder] against his mother-in-law. In the past five years, the defendant has been convicted of PC §240 [misdemeanor assault], PC §273.5(a) [misdemeanor violence against spouse], and PC §273a(a) [misdemeanor child abuse].

Q2.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q2.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q2.4 Based on the information above, if you were to charge the defendant for violating PC §245(a)(4) [assault by means of force likely to produce great bodily injury], you would be likely to charge PC §245:

- ❍ as a felony.
- ❍ as a misdemeanor.

Q3.1 Offense: The defendant admitted that he became extremely upset when he discovered that his ex-wife had vandalized his car. He walked over to her house and waited outside for her to return. When his ex-wife arrived home, the defendant began screaming at her. She yelled back at him, and he punched her multiple times. She began crying, and he then left. The ex-wife suffered from extensive bruising on her face.

Record: Last year, the defendant was convicted of PC §241(b) [assault against a parking control officer] when he threatened to hit the officer if given a parking ticket. Two years ago, the defendant was convicted of PC §273.5 [misdemeanor domestic violence].

Q3.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q3.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q3.4 Based on the information above, if you were to charge the defendant for violating PC §245(a)(4) [assault by means of force likely to produce great bodily injury], you would be likely to charge PC §245:

- ❍ as a felony.
- ❍ as a misdemeanor.

Q4.1 Offense: The defendant confessed that on a weeknight he became extremely annoyed with his neighbor, who was playing loud music, something he had repeatedly asked him not to do past 11 PM. The defendant walked over to the neighbor's house and demanded he turn off the music. His neighbor refused, and the defendant started yelling and then attempted to hit his neighbor, but missed. The neighbor called the police, who came and arrested the defendant.

Record: Last year the defendant was convicted of Health & Safety Code §11364 [possession of narcotics paraphernalia].

Q4.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q4.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q4.4 Based on the information above, if you were to charge the defendant for violating PC §245(a)(4) [assault by means of force likely to produce great bodily injury], you would be likely to charge PC §245:

- ❍ as a felony.
- ❍ as a misdemeanor.

Q5.1 Offense: A defendant, on post release community supervision (PRCS), was loitering on a dark street corner. A patrolling police officer searched the defendant, and found him in possession of 50 grams of methamphetamine and a loaded operable gun.

Record: When arrested by the police, the defendant was on PRCS for PC §459 [second-degree burglary]. In the past five years, the defendant has been convicted of PC §245(a)(4) [misdemeanor assault by means of force likely to produce great bodily injury]; PC §29800 [prior felony conviction + firearm possession]; PC § 487(a) [grand theft]; Health & Safety Code §11375(b)(1) [sale of controlled firearm possession]; Health & Safety Code §11377(a) [possession of PCP]; PC § 26100(d) [misdemeanor discharging firearm from vehicle]; and PC §29825(a) [possession firearm in violation of temporary restraining order]. The defendant has never successfully completed parole or probation.

Q5.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q5.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q5.4 Based on in the information above, if you had to decide between the following charges, you would likely charge the defendant with:

- ❍ Health & Safety Code §11377 [possession for sale] with PC §12022(a) [felony while armed].
- ❍ Health & Safety Code §11370.1 [possession while armed].

Q6.1 Offense: The defendant, who was on probation, was loitering at a gas station at midday. A patrolling police officer searched the defendant and found him in possession of 5 grams of methamphetamine and a loaded operable gun.

Record: Last year, the defendant was convicted of PC §488 [petty theft] and PC §26350(a)(1) [openly carrying unloaded handgun while in a public place]. Three years ago, the defendant was convicted twice (one misdemeanor and one felony) of Health & Safety Code §11377 [possession of methamphetamine].

Q6.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q6.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q6.4 Based on in the information above, if you had to decide between the following charges, you would likely charge the defendant with:

- ❍ Health & Safety Code §11377 [possession] with PC §12022(a) [felony while armed].
- ❍ Health & Safety Code §11370.1 [possession while armed].

Q7.1 Offense: While talking to the defendant, a police officer saw a small packet of a white substance fall out of his pocket. Upon searching the defendant, the police officer found him in possession of 2 grams of methamphetamine and a loaded operable gun.

Record: Two years ago, the defendant was convicted of possession of Health & Safety Code §11357(c) [possession of more than 28.5 grams of marijuana]. The defendant successfully completed probation.

Q7.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q7.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q7.4 Based on in the information above, if you had to decide between the following charges, you would likely charge the defendant with:

- ❍ Health & Safety Code §11377 [possession] with PC §12022(a) [felony while armed].
- ❍ Health & Safety Code §11370.1 [possession while armed].

Q8.1 Offense: A defendant, who was on post release community supervision (PRCS), was loitering on a dark street corner late at night. A patrolling police officer searched the defendant, and found him in possession of 3 kilograms of methamphetamine and a gun on his person.

Record: When arrested by the police, the defendant was on PRCS for PC §459[second-degree burglary]. In the past five years, the defendant has been convicted of PC § 487(a) [grand theft], Health & Safety Code §11375(b)(1) [sale of controlled substance]; Health & Safety Code §11377(a) [possession of PCP]; Health & Safety Code §11377 [possession of methamphetamine]; PC § 26100(d) [misdemeanor discharging firearm from vehicle]; and PC §29825(a) [possessing firearm in violation of temporary restraining order]. The defendant has never successfully completed parole or probation.

Q8.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q8.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q8.4 Based on the information above, if you had to decide among the following charges/allegations to include in your plea offer, you would choose:

- ❍ HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §12022(c) [firearm possession in commission of HSC §11378 violation].
- ❍ HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §29800 [prior felony conviction+ firearm possession].
- ❍ HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; PC §12022(c) [firearm possession in commission of HSC §11378 violation]; and PC §29800 [prior felony conviction + firearm possession].

Q9.1 Offense: While on a bus, a police officer saw the defendant examining a large bag containing a white substance in his backpack. The officer searched the defendant and found him in possession of 3 kilograms of methamphetamine and a loaded operable gun.

Record: Two years ago, the defendant was convicted of possession of Health & Safety Code §11357(c) [possession of more than 28.5 grams of marijuana]. The defendant successfully completed probation. Ten years ago, the defendant was convicted of Cal. Veh. Code §10851 [misdemeanor theft and unlawful driving/taking of vehicle].

Q9.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q9.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q9.4 Based on the information above, if you had to decide among the following charges/allegations to include in your plea offer, you would choose:

- ❍ HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §12022(c) [firearm possession in commission of HSC §11378 violation].
- ❍ HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §29800 [prior felony conviction+ firearm possession].
- ❍ HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; PC §12022(c) [firearm possession in commission of HSC §11378 violation]; and PC §29800 [prior felony conviction + firearm possession].

Q10.1 Offense: The defendant confessed that he was extremely jealous of his ex-girlfriend, who recently started seeing another man. He waited outside of her workplace, and in the evening when she exited the building, the defendant started screaming at her and began punching her in the face. The ex-girlfriend fled and called the police. When the defendant was arrested less than one mile away, the police found a pocketknife attached to the defendant's belt. The victim suffered the loss of two teeth and severe bruising on her face, neck, and arms.

Record: In the past five years, the defendant has been convicted of three counts of PC§245(a)(4)[misdemeanor assault with force likely to produce great bodily harm]; and one count of PC §646.9(a) [misdemeanor stalking]; and PC §30605 [possession of assault weapon].

Q10.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q10.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q10.4 Based on the information above, you would charge the following in regard to this case:

- ❍ PC §243(d) [felony battery with serious bodily injury].
- ❍ PC §245(a)(4)[felony assault with force likely to produce great bodily harm].
- ❍ PC §243(d) and §245(a)(4).

Q11.1 Offense: The defendant recounted that he was waiting in line at a hot dog stand at a baseball game. A fan of the opposing baseball team cut in front of him. Despite seeing the sling on the fan's arm, the defendant punched the fan. The victim tried to block his face with his sling, and the defendant ended up punching the victim's injured arm. The defendant's punch caused the stitches to come undone and the victim began bleeding. Paramedics, who were close by, redressed the victim's arm. The police, also nearby, arrested the defendant.

Record: In the past five years, the defendant has been convicted of one count of PC §245(a)(4) [misdemeanor assault with force likely to produce great bodily harm].

Q11.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q11.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q11.4 Based on the information above, you would charge the following in regard to this case:

- ❍ PC §243(d) [felony battery with serious bodily injury].
- ❍ PC §245(a)(4)[felony assault with force likely to produce great bodily harm].
- ❍ PC §243(d) and §245(a)(4).

Q12.1 Offense: The defendant admitted that after his boss fired him and his friend, his friend began punching their boss. The boss tried to defend himself, but the defendant restrained the boss's arms. The victim suffered two black eyes.

Record: The defendant has no prior record.

Q12.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q12.3 Based on the information above, you would charge the following in regard to this case:

- ❍ PC §243(d) [felony battery with serious bodily injury].
- ❍ PC §245(a)(4)[felony assault with force likely to produce great bodily harm].
- ❍ PC §243(d) and §245(a)(4).

Q13.1 Offense: A 22-year-old defendant confessed to having convinced his friends to pose as valet attendants with him in front of an expensive restaurant. A customer naively gave the defendant her keys and the defendant and his friends drove off with the car.

Record: The defendant has one prior juvenile strike for attempted murder. When he was 17 years old, he was the leader of a plot to kill a rival gang member. He provided his three fellow gang members with guns. The four of them waited outside of the rival gang member's house. When their target exited his home, the defendant fired three shots, all missing the intended target. As an adult, the defendant has been convicted pursuant to PC §461 [second-degree burglary] and PC §487(a) [grand theft] in the past five years. The defendant has never successfully completed probation.

Q13.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q13.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q13.4 Based on the information above, you have decided to charge the defendant pursuant to Cal. Veh. Code §10851 [theft and unlawful driving/taking of a vehicle] and you have alleged the defendant's prior juvenile strike.

- ❍ You are likely to make the defendant admit to his prior juvenile strike at disposition.
- ❍ You are unlikely to make the defendant admit to his prior juvenile strike at disposition.

Q14.1 Offense: The 27-year-old defendant confessed to walking down the street looking for unlocked cars. When he spotted an unlocked vehicle, he hot-wired the car, and drove it away.

Record: The defendant has one prior juvenile strike for violation of PC §246 [discharging a firearm at an inhabited dwelling]. When the defendant was 17 years old, he fired a gun into a rival gang member's home. No one was injured. The shot was meant to serve as a warning sign. As an adult, the defendant has been convicted three times of PC §488 [petty theft], and Cal. Veh. Code §10851 [misdemeanor theft and unlawful driving/taking of a vehicle]. The defendant has never successfully completed probation.

Q14.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q14.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q14.4 Based on the information above, you have decided to charge the defendant pursuant to Cal. Veh. Code §10851 [theft and unlawful driving/taking of a vehicle] and you have alleged the defendant's prior juvenile strike.

- ❍ You are likely to make the defendant admit to his prior juvenile strike at disposition.
- ❍ You are unlikely to make the defendant admit to his prior juvenile strike at disposition.

Q15.1 Offense: When the police pulled over the 30-year-old defendant for speeding, the defendant admitted that he was driving a car he had helped his friend steal. As the owner of the vehicle was loading groceries into the car, the defendant engaged him in a conversation. His friend then grabbed the keys sitting on top of the car, jumped in the car, and drove it away.

Record: The defendant has one prior juvenile strike for violation of PC §211 [robbery]. When the defendant was 16 years old, he grabbed a cell phone from a young adult male. When the young adult male attempted to grab his phone back, the defendant pulled out a pocketknife, pointed it at the man, and then ran away. The defendant has no other record.

Q15.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q15.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q15.4 Based on the information above, you have decided to charge the defendant pursuant to Cal. Veh. Code §10851 [theft and unlawful driving/taking of a vehicle] and you have alleged the defendant's prior juvenile strike.

- ❍ You are likely to make the defendant admit to his prior juvenile strike at disposition.
- ❍ You are unlikely to make the defendant admit to his prior juvenile strike at disposition.

Q16.1 Offense: The defendant admitted that he had entered a 7-11 store intending to rob the cashier. Immediately after the defendant entered the store, he reached into his pants, but was tackled by an undercover police officer. Upon arrest, a knife was found in the defendant's possession.

Record: When the defendant was arrested, he was on probation for grand theft pursuant to PC §487. Last year, the defendant was convicted pursuant to PC §25400(a) [carrying a concealed firearm in a vehicle]. In the past five years, the defendant has been convicted three times for grand theft pursuant to PC §487 and four times for petty theft pursuant to PC §488.

Q16.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q16.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q16.4 As part of a plea bargain, the defendant admitted to second-degree felony burglary pursuant to PC §459. What sentence are you likely to recommend?

- ❍ A straight sentence to be served in jail.
- ❍ A split sentence with some time to be served in jail and some time to be served on mandatory supervision.
- ❍ Probation.

Answer If As part of a plea bargain, the defendant admitted to seco... A straight sentence to be served in jail. Is Selected

Q16.5 How much time would you recommend that the defendant serve in jail?

- ❍ 16 months in jail.
- ❍ 2 years in jail.
- ❍ 3 months in jail.

Answer If As part of a plea bargain, the defendant admitted to seco... A split sentence with some time to be served in jail and some time to be served on mandatory supervision. Is Selected

Q16.6 How much time would you recommend the defendant serve in jail and on mandatory supervision?

- ❑ Recommended time in jail: _____
- ❑ Recommended time on mandatory supervision: _____

Q17.1 Offense: Security cameras in a department store document the defendant taking out tools from his pocket to remove a security device from purses totaling over $2,000.

Record: Last year, the defendant was convicted of grand theft pursuant to PC §487. He did not successfully complete probation. In the past five years, he has received two convictions of petty theft pursuant to PC §488.

Q17.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q17.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q17.4 As part of a plea bargain, the defendant admitted to second-degree felony burglary pursuant to PC §459. What sentence are you likely to recommend?

- ❍ A straight sentence to be served in jail.
- ❍ A split sentence with some time to be served in jail and some time to be served on mandatory supervision.
- ❍ Probation.

Answer If As part of a plea bargain, the defendant admitted to seco... A straight sentence to be served in jail. Is Selected

Q17.5 How much time would you recommend that the defendant serve in jail?

- ❍ 16 months in jail.
- ❍ 2 years in jail.
- ❍ 3 months in jail.

Answer If As part of a plea bargain, the defendant admitted to seco... A split sentence with some time to be served in jail and some time to be served on mandatory supervision. Is Selected

Q17.6 How much time would you recommend the defendant serve in jail and on mandatory supervision?

- ❑ Recommended time in jail: _____
- ❑ Recommended time on mandatory supervision: _____

Q18.1 Offense: Store security officers stop the defendant before he exits the grocery store. His backpack is filled with food and medicine worth over $950. The defendant told the police that he had recently lost his minimum wage job and had no other way of providing for his wife, three children, and sick infant.

Record: Last year, the defendant was convicted of petty theft pursuant to PC §488 for taking makeup worth $60.

Q18.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q18.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q18.4 As part of a plea bargain, the defendant admitted to second-degree felony burglary pursuant to PC §459. What sentence are you likely to recommend?

- ❍ A straight sentence to be served in jail.
- ❍ A split sentence with some time to be served in jail and some time to be served on mandatory supervision.
- ❍ Probation.

Answer If As part of a plea bargain, the defendant admitted to seco... A straight sentence to be served in jail. Is Selected

Q18.5 How much time would you recommend that the defendant serve in jail?

- ❍ 16 months in jail.
- ❍ 2 years in jail.
- ❍ 3 months in jail.

Answer If As part of a plea bargain, the defendant admitted to seco... A split sentence with some time to be served in jail and some time to be served on mandatory supervision. Is Selected

Q18.6 How much time would you recommend the defendant serve in jail and on mandatory supervision?

- ❑ Recommended time in jail: _____
- ❑ Recommended time on mandatory supervision: _____

Q19.1 Offense: A police officer patrolling the neighborhood saw the defendant, who the officer knew was on post release community supervision (PRCS). The defendant exited a car on the passenger's side. The defendant was dressed all in black. The defendant looked cautiously around before hurriedly closing the car door and walking quickly away with a large suitcase. The car drove off. The police officer stopped the defendant, and while searching him found him in possession of 35 kilograms of cocaine. Another police officer stopped the car. The driver was the defendant's younger 15-year-old brother. The defendant admitted that he had pressured his brother into driving him across counties.

Record: The defendant is on PRCS for Health & Safety Code§11352(b) [transports for sale between non-contiguous counties]. In the past ten years, the defendant has been convicted of Health & Safety Code §11351.5 [felony possession of cocaine base for sale]; two counts of PC §30605 [possession of assault weapon]; and two counts of Health & Safety Code §11364.7(b) [misdemeanor manufacturing drug paraphernalia to be used with cocaine].

Q19.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q19.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q19.4 The defendant pled guilty to Health & Safety Code §11352(b) [transports for sale between non-contiguous counties—triad of 3,6,9 years] and §11370.4 [weight clause adding 15 years]. Assuming the defendant is ineligible for probation, based on the information above, what sentence are you likely to recommend?

- ❍ A straight sentence to be served in jail.
- ❍ A split sentence with some time to be served in jail and some time to be served on mandatory supervision.

Answer If The defendant pled guilty to Health & Safety Code §11... A straight sentence to be served in jail. Is Selected

Q19.5 How much time would you recommend that the defendant serve in jail?

Answer If The defendant pled guilty to Health & Safety Code §11... A split sentence with some time to be served in jail and some time to be served on mandatory supervision. Is Selected

Q19.6 How much time would you recommend the defendant serve in jail and on mandatory supervision?

- ❑ Recommended time in jail: _____
- ❑ Recommended time on mandatory supervision: _____

Q20.1 Offense: A police officer, who was patrolling a train station with a drug dog, attempted to stop the defendant after the drug dog became excited by the defendant's large suitcase. The defendant began to flee and attempted to get into a car that was waiting for him. The police officer caught the defendant and found 35 kilograms of cocaine in the suitcase.

Record: In the past five years, the defendant has been convicted of three counts of Health & Safety Code § 11357(c) [possession of more than 28.5 grams of marijuana].

Q20.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q20.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q20.4 The defendant pled guilty to Health & Safety Code §11352(b) [transports for sale between non-contiguous counties—triad of 3,6,9 years] and §11370.4 [weight clause adding 15 years]. Assuming the defendant is ineligible for probation, based on the information above, what sentence are you likely to recommend?

- ❍ A straight sentence to be served in jail.
- ❍ A split sentence with some time to be served in jail and some time to be served on mandatory supervision.

Answer If The defendant pled guilty to Health & Safety Code §11... A straight sentence to be served in jail. Is Selected

Q20.5 How much time would you recommend that the defendant serve in jail?

Answer If The defendant pled guilty to Health & Safety Code §11... A split sentence with some time to be served in jail and some time to be served on mandatory supervision. Is Selected

Q20.6 How much time would you recommend the defendant serve in jail and on mandatory supervision?

- ❑ Recommended time in jail: _____
- ❑ Recommended time on mandatory supervision: _____

Q21.1 Offense: A police officer was patrolling a bus terminal with a drug dog. The drug dog immediately became excited by the defendant when the defendant existed a bus. The police officer searched the defendant and found him in possession of 35 kilograms of cocaine in his suitcase.

Record: In the past five years, no criminal charges have been brought against the defendant.

Q21.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q21.3 The defendant pled guilty to Health & Safety Code §11352(b) [transports for sale between non-contiguous counties—triad of 3,6,9 years] and §11370.4 [weight clause adding 15 years]. Assuming the defendant is ineligible for probation, based on the information above, what sentence are you likely to recommend?

- ❍ A straight sentence to be served in jail.
- ❍ A split sentence with some time to be served in jail and some time to be served on mandatory supervision.

Answer If The defendant pled guilty to Health & Safety Code §11... A straight sentence to be served in jail. Is Selected

Q21.4 How much time would you recommend that the defendant serve in jail?

Answer If The defendant pled guilty to Health & Safety Code §11... A split sentence with some time to be served in jail and some time to be served on mandatory supervision. Is Selected

Q21.5 How much time would you recommend the defendant serve in jail and on mandatory supervision?

- ❑ Recommended time in jail: _____
- ❑ Recommended time on mandatory supervision: _____

Q22.1 Offense: The defendant, who was on probation, was loitering at a gas station at midday. A police officer searched the defendant and found him in possession of 3 kilograms of methamphetamine and a gun on his person.

Record: Last year, the defendant was convicted of PC §488 [petty theft] and PC §26350(a)(1) [openly carrying unloaded handgun while in any public place]. In the past three years, the defendant was convicted of two counts of Health & Safety Code §11377 [possession of methamphetamine]. Ten years ago, the defendant was convicted of Cal. Veh. Code §10851 [misdemeanor theft and unlawful driving/taking of vehicle].

Q22.2 How serious is the defendant's offense?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q22.3 How serious is the defendant's record?

- ❍ Not Serious 1
- ❍ 2
- ❍ 3
- ❍ 4
- ❍ Very Serious 5

Q22.4 Based on the information above, if you had to decide among the following charges/allegations to include in your plea offer, you would choose:

- ❍ HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §12022(c) [firearm possession in commission of HSC §11378 violation].
- ❍ HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §29800 [prior felony conviction+ firearm possession].
- ❍ HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; PC §12022(c) [firearm possession in commission of HSC §11378 violation]; and PC §29800 [prior felony conviction + firearm possession].

Q22.5 If you knew that a defendant who was convicted of PC §12022(c) and PC §29800 would be sent to county prison jail, whereas a defendant convicted only of §29800 would be sent to state prison, would your charging decision change?

- ❍ Yes
- ❍ No

Q23.1 Would you have answered any of the previous questions differently pre-Realignment?

- ❍ Yes
- ❍ No

Answer If Would you have answered any of the previous questions dif... Yes Is Selected

Q23.2 Please comment on your answer.

Q24.1 Post-Realignment (October 2011), does your office choose not to charge low-level offenses (such as, but not limited to, Health & Safety Code §11550 [under the influence of certain controlled substances]; PC §488 [petty theft]; PC §647(b) [soliciting or engaging in any act of prostitution]) due to resource constraints?

- ❍ Yes
- ❍ No

Answer If Post-Realignment (October 2011), does your office choose ... Yes Is Selected

Q24.2 Please detail what charges your office is less likely to file post-Realignment and why:

Q25.1 The following questions ask about resources in your county. We understand that you may not have enough information to answer these questions, but please respond as best you can based on your experiences in your county.

Q25.2 Rank from 1 to 6 in order of importance (1 being the most important) the factors that influence whether you are likely to recommend a split sentence instead of a straight sentence.

_____ Availability/effectiveness of programming

_____ Jail capacity/overcrowding

_____ Lack of prior record

_____ Severity of crime

_____ Desire to have defendant on searchable supervision after release

Q26.1 The local jails in your county:

- ❍ are not full to capacity.
- ❍ are about to become full to capacity.
- ❍ are at capacity.
- ❍ are full to capacity.
- ❍ are beyond full to capacity.

Q27.1 Rank from 1 to 6 (1 being the most available) the availability of services in your county:

_____ Drug rehabilitation

_____ Mental health

_____ Re-entry facilities

_____ Housing

_____ Vocational training

_____ Other

Q28.1 Rank from 1 to 6 (1 being the most effective) the effectiveness of services in your county:

_____ Drug rehabilitation

_____ Mental health

_____ Re-entry facilities

_____ Housing

_____ Vocational training

_____ Other

Q29.1 Probation officers in your county (in regard to felony probations):

- ❍ Have the capacity to double their caseload.
- ❍ Have the capacity to take on a more cases.
- ❍ Have the capacity to only incrementally increase their caseload.
- ❍ Have just about the right match between capacity and caseload.
- ❍ Do not have the capacity to take on more cases.
- ❍ Have excessive caseloads.
- ❍ Have more than double the number of cases than they should have.

Q30.1 Probation officers in my county (in regard to mandatory supervision):

- ❍ Have the capacity to double their caseload.
- ❍ Have the capacity to take on a more cases.
- ❍ Have the capacity to only incrementally increase their caseload.
- ❍ Have just about the right match between capacity and caseload.
- ❍ Do not have the capacity to take on more cases.
- ❍ Have excessive caseloads.
- ❍ Have more than double the number of cases that they should have.

Q31.1 Probation officers in my county (in regard to post release community supervision):

- ❍ Have the capacity to double their caseload.
- ❍ Have the capacity to take on a more cases.
- ❍ Have the capacity to only incrementally increase their caseload.
- ❍ Have just about the right match between capacity and caseload.
- ❍ Do not have the capacity to take on more cases.
- ❍ Have excessive caseloads.
- ❍ Have more than double the number of cases that they should have.

Q32.1 Your working relationship with the probation department in your county is:

- ❍ Very Effective
- ❍ Effective
- ❍ Neither Effective nor Ineffective
- ❍ Ineffective
- ❍ Very Ineffective

Q33.1 Rank from 1 to 5 (1 being the most affected) the agencies have been most affected by budget cuts:

_____ Police Department

_____ Court staff

_____ Probation Department

_____ Public Defender Office

_____ District Attorney Office

Q34.1 The population of your county is approximately:

- ❍ more than one million
- ❍ between 500,000 and one million
- ❍ between 100,000 and 500,000
- ❍ under 100,000

Q35.1 In the course of your current regular work, do you have substantial responsibility for supervising charging decisions made by others in your office?

- ❍ Yes
- ❍ No

Q36.1 The following 5 questions are voluntary. However, providing this information would greatly aide in our research.

Q36.2 Does your county prosecutor's office have a formal internal policy governing charging decisions?

- ❍ Yes
- ❍ No

Q36.3 How many years have you been a practicing attorney?

Q36.4 Please indicate your gender.

- ❍ Male
- ❍ Female

Q36.5 Please indicate your age range.

- ❍ 29 or younger
- ❍ 30-39 years
- ❍ 40-49 years
- ❍ 50-59 years
- ❍ 60-69 years
- ❍ 70 years or older

Q36.6 Please indicate your race.

- ❍ White/Non-Hispanic
- ❍ Hispanic
- ❍ Black or African American
- ❍ American Indian or Alaska Native
- ❍ Asian
- ❍ Native Hawaiian or Other Pacific Islander

Q36.7 Can we contact you with follow-up questions if they arise? If so, please provide your e-mail address below.

Q36.8 If you would like a copy of our final report, please provide your e-mail address below.

Appendix B: Prosecutorial Survey Results

DA Survey Results - Summary[93]

AGGRAVATING

Q2.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		14	50%
4	4		11	39%
5	Very Serious 5		3	11%
	Total		28	100%

Q2.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		3	11%
3	3		13	46%
4	4		10	36%
5	Very Serious 5		2	7%
	Total		28	100%

[93] The results presented here represent gross results (N=28). The results analyzed in the body of the report exclude duplicates received from San Francisco County and answers we received with no county name (N=20).

Q2.4. Based on the information above, if you were to charge the defendant for violating PC §245(a)(4) [assault by means of force likely to produce great bodily injury], you would be likely to charge PC §245:

#	Answer		Response	%
1	as a felony.		27	96%
2	as a misdemeanor.		1	4%
	Total		28	100%

AGGRAVATING + MITIGATING

Q3.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		3	11%
3	3		11	39%
4	4		11	39%
5	Very Serious 5		3	11%
	Total		28	100%

Q3.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		9	32%
3	3		13	46%
4	4		4	14%
5	Very Serious 5		2	7%
	Total		28	100%

Q3.4. Based on the information above, if you were to charge the defendant for violating PC §245(a)(4) [assault by means of force likely to produce great bodily injury], you would be likely to charge PC §245:

#	Answer		Response	%
1	as a felony.		26	93%
2	as a misdemeanor.		2	7%
	Total		28	100%

MITIGATING

Q4.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		16	57%
2	2		9	32%
3	3		2	7%
4	4		0	0%
5	Very Serious 5		1	4%
	Total		28	100%

Q4.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		26	93%
2	2		0	0%
3	3		1	4%
4	4		0	0%
5	Very Serious 5		1	4%
	Total		28	100%

Q4.4. Based on the information above, if you were to charge the defendant for violating PC §245(a)(4) [assault by means of force likely to produce great bodily injury], you would be likely to charge PC §245:

#	Answer		Response	%
1	as a felony.		1	4%
2	as a misdemeanor.		27	96%
	Total		28	100%

AGGRAVATING

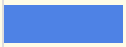
Q5.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		1	4%
3	3		7	25%
4	4		16	57%
5	Very Serious 5		4	14%
	Total		28	100%

Q5.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		1	4%
3	3		6	21%
4	4		19	68%
5	Very Serious 5		2	7%
	Total		28	100%

Q5.4. Based on in the information above, if you had to decide between the following charges, you would likely charge the defendant with:

#	Answer		Response	%
1	Health & Safety Code §11377 [possession for sale] with PC §12022(a) [felony while armed].		7	25%
2	Health & Safety Code §11370.1 [possession while armed].		21	75%
	Total		28	100%

AGGRAVATING + MITIGATING

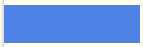
Q6.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		3	11%
3	3		20	71%
4	4		4	14%
5	Very Serious 5		1	4%
	Total		28	100%

Q6.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		16	57%
3	3		11	39%
4	4		0	0%
5	Very Serious 5		1	4%
	Total		28	100%

Q6.4. Based on in the information above, if you had to decide between the following charges, you would likely charge the defendant with:

#	Answer		Response	%
1	Health & Safety Code §11377 [possession] with PC §12022(a) [felony while armed].		8	29%
2	Health & Safety Code §11370.1 [possession while armed].		20	71%
	Total		28	100%

MITIGATING

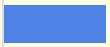
Q7.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		5	18%
3	3		17	61%
4	4		5	18%
5	Very Serious 5		1	4%
	Total		28	100%

Q7.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		22	79%
2	2		3	11%
3	3		2	7%
4	4		0	0%
5	Very Serious 5		1	4%
	Total		28	100%

Q7.4. Based on in the information above, if you had to decide between the following charges, you would likely charge the defendant with:

#	Answer		Response	%
1	Health & Safety Code §11377 [possession] with PC §12022(a) [felony while armed].		6	21%
2	Health & Safety Code §11370.1 [possession while armed].		22	79%
	Total		28	100%

AGGRAVATING

Q8.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		7	25%
4	4		15	54%
5	Very Serious 5		6	21%
	Total		28	100%

Q8.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		1	4%
3	3		12	43%
4	4		13	46%
5	Very Serious 5		2	7%
	Total		28	100%

Q8.4. Based on the information above, if you had to decide among the following charges/allegations to include in your plea offer, you would choose:

#	Answer		Response	%
1	HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §12022(c) [firearm possession in commission of HSC §11378 violation].		7	25%
2	HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §29800 [prior felony conviction+ firearm possession].		5	18%
3	HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; PC §12022(c) [firearm possession in commission of HSC §11378 violation]; and PC §29800 [prior felony conviction + firearm possession].		16	57%
	Total		28	100%

AGGRAVATING + MITIGATING

Q9.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		12	43%
4	4		9	32%
5	Very Serious 5		7	25%
	Total		28	100%

Q9.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		13	46%
2	2		12	43%
3	3		2	7%
4	4		0	0%
5	Very Serious 5		1	4%
	Total		28	100%

Q9.4. Based on the information above, if you had to decide among the following charges/allegations to include in your plea offer, you would choose:

#	Answer		Response	%
1	HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §12022(c) [firearm possession in commission of HSC §11378 violation].		16	57%
2	HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §29800 [prior felony conviction+ firearm possession].		1	4%
3	HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; PC §12022(c) [firearm possession in commission of HSC §11378 violation]; and PC §29800 [prior felony conviction + firearm possession].		11	39%
	Total		28	100%

AGGRAVATING

Q10.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		2	7%
4	4		16	57%
5	Very Serious 5		10	36%
	Total		28	100%

Q10.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		9	32%
4	4		11	39%
5	Very Serious 5		8	29%
	Total		28	100%

Q10.4. Based on the information above, you would charge the following in regard to this case:

#	Answer		Response	%
28	PC §243(d) [felony battery with serious bodily injury].		6	21%
29	PC §245(a)(4) [felony assault with force likely to produce great bodily harm].		2	7%
30	PC §243(d) and §245(a)(4).		20	71%
	Total		28	100%

AGGRAVATING + MITIGATING

Q11.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		1	4%
2	2		10	36%
3	3		11	39%
4	4		5	18%
5	Very Serious 5		1	4%
	Total		28	100%

Q11.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		5	18%
2	2		15	54%
3	3		7	25%
4	4		0	0%
5	Very Serious 5		1	4%
	Total		28	100%

Q11.4. Based on the information above, you would charge the following in regard to this case:

#	Answer		Response	%
28	PC §243(d) [felony battery with serious bodily injury].		5	18%
29	PC §245(a)(4) [felony assault with force likely to produce great bodily harm].		16	57%
30	PC §243(d) and §245(a)(4).		7	25%
	Total		28	100%

MITIGATING

Q12.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		1	4%
2	2		8	29%
3	3		14	50%
4	4		4	14%
5	Very Serious 5		1	4%
	Total		28	100%

Q12.3. Based on the information above, you would charge the following in regard to this case:

#	Answer		Response	%
28	PC §243(d) [felony battery with serious bodily injury].		1	4%
29	PC §245(a)(4) [felony assault with force likely to produce great bodily harm].		22	79%
30	PC §243(d) and §245(a)(4).		5	18%
	Total		28	100%

AGGRAVATING

Q13.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		8	29%
3	3		16	57%
4	4		3	11%
5	Very Serious 5		1	4%
	Total		28	100%

Q13.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		2	7%
4	4		9	32%
5	Very Serious 5		17	61%
	Total		28	100%

Q13.4. Based on the information above, you have decided to charge the defendant pursuant to Cal. Veh. Code §10851 [theft and unlawful driving/taking of a vehicle] and you have alleged the defendant's prior juvenile strike.

#	Answer		Response	%
35	You are likely to make the defendant admit to his prior juvenile strike at disposition.		23	82%
36	You are unlikely to make the defendant admit to his prior juvenile strike at disposition.		5	18%
	Total		28	100%

AGGRAVATING + MITIGATING

Q14.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		14	50%
3	3		11	39%
4	4		2	7%
5	Very Serious 5		1	4%
	Total		28	100%

Q14.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		5	18%
3	3		11	39%
4	4		11	39%
5	Very Serious 5		1	4%
	Total		28	100%

Q14.4. Based on the information above, you have decided to charge the defendant pursuant to Cal. Veh. Code §10851 [theft and unlawful driving/taking of a vehicle] and you have alleged the defendant's prior juvenile strike.

#	Answer		Response	%
35	You are likely to make the defendant admit to his prior juvenile strike at disposition.		17	61%
36	You are unlikely to make the defendant admit to his prior juvenile strike at disposition.		11	39%
	Total		28	100%

MITIGATING

Q15.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		1	4%
2	2		14	50%
3	3		8	29%
4	4		4	14%
5	Very Serious 5		1	4%
	Total		28	100%

Q15.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		1	4%
2	2		7	25%
3	3		13	46%
4	4		5	18%
5	Very Serious 5		2	7%
	Total		28	100%

Q15.4. Based on the information above, you have decided to charge the defendant pursuant to Cal. Veh. Code §10851 [theft and unlawful driving/taking of a vehicle] and you have alleged the defendant's prior juvenile strike.

#	Answer		Response	%
35	You are likely to make the defendant admit to his prior juvenile strike at disposition.		11	39%
36	You are unlikely to make the defendant admit to his prior juvenile strike at disposition.		17	61%
	Total		28	100%

AGGRAVATING

Q16.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		9	32%
4	4		11	39%
5	Very Serious 5		8	29%
	Total		28	100%

Q16.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		1	4%
3	3		19	68%
4	4		6	21%
5	Very Serious 5		2	7%
	Total		28	100%

Q16.4. As part of a plea bargain, the defendant admitted to second-degree felony burglary pursuant to PC §459. What sentence are you likely to recommend?

#	Answer		Response	%
143	A straight sentence to be served in jail.		8	29%
144	A split sentence with some time to be served in jail and some time to be served on mandatory supervision.		18	64%
145	Probation.		2	7%
	Total		28	100%

Q16.5. How much time would you recommend that the defendant serve in jail?

#	Answer		Response	%
1	16 months in jail.		0	0%
2	2 years in jail.		8	100%
3	3 months in jail.		0	0%
	Total		8	100%

Q16.6. How much time would you recommend the defendant serve in jail and on mandatory supervision?

#	Answer		Response	%
1	Recommended time in jail:		18	100%
2	Recommended time on mandatory supervision:		18	100%

Recommended time in jail:	Recommended time on mandatory supervision:
18 mos	18 mos
50%	50%
one year	two years
90 to180 days	3years
12 mos.	20 mos.
1yr	2yrs
2	1
1.5 years	1.5 years
1 year	2 years
2 years	1 year
12 months	60 months
2	1
1 year	2 years
3 yeaars	3 years
1 year	1 year
5 years	1 year
2	1
1 year	2 years

AGGRAVATING + MITIGATING

Q17.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		15	54%
3	3		9	32%
4	4		3	11%
5	Very Serious 5		1	4%
	Total		28	100%

Q17.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		19	68%
3	3		7	25%
4	4		1	4%
5	Very Serious 5		1	4%
	Total		28	100%

Q17.4. As part of a plea bargain, the defendant admitted to second-degree felony burglary pursuant to PC §459. What sentence are you likely to recommend?

#	Answer		Response	%
143	A straight sentence to be served in jail.		5	18%
144	A split sentence with some time to be served in jail and some time to be served on mandatory supervision.		7	25%
145	Probation.		16	57%
	Total		28	100%

Q17.5. How much time would you recommend that the defendant serve in jail?

#	Answer		Response	%
1	16 months in jail.		2	40%
2	2 years in jail.		3	60%
3	3 months in jail.		0	0%
	Total		5	100%

Q17.6. How much time would you recommend the defendant serve in jail and on mandatory supervision?

#	Answer		Response	%
1	Recommended time in jail:		7	100%
2	Recommended time on mandatory supervision:		7	100%

Recommended time in jail:	Recommended time on mandatory supervision:
2 years	1 year
1.5 years	1.5 years
not sure	not sure
12 months	60 months
6 months	3 years
16 months	20 months
2 years	1 year

MITIGATING

Q18.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		12	43%
2	2		13	46%
3	3		2	7%
4	4		0	0%
5	Very Serious 5		1	4%
	Total		28	100%

Q18.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		24	86%
2	2		2	7%
3	3		1	4%
4	4		0	0%
5	Very Serious 5		1	4%
	Total		28	100%

Q18.4. As part of a plea bargain, the defendant admitted to second-degree felony burglary pursuant to PC §459. What sentence are you likely to recommend?

#	Answer		Response	%
143	A straight sentence to be served in jail.		1	4%
144	A split sentence with some time to be served in jail and some time to be served on mandatory supervision.		5	18%
145	Probation.		22	79%
	Total		28	100%

Q18.5. How much time would you recommend that the defendant serve in jail?

#	Answer		Response	%
1	16 months in jail.		0	0%
2	2 years in jail.		1	100%
3	3 months in jail.		0	0%
	Total		1	100%

Q18.6. How much time would you recommend the defendant serve in jail and on mandatory supervision?

#	Answer		Response	%
1	Recommended time in jail:		5	100%
2	Recommended time on mandatory supervision:		5	100%

Recommended time in jail:	Recommended time on mandatory supervision:
1 year	1 year
30 days	2 years
1	2
90	2 years
6 months	2.5 years

AGGRAVATING

Q19.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		4	14%
4	4		15	54%
5	Very Serious 5		9	32%
	Total		28	100%

Q19.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		8	29%
4	4		12	43%
5	Very Serious 5		8	29%
	Total		28	100%

Q19.4. The defendant pled guilty to Health & Safety Code §11352(b) [transports for sale between non-contiguous counties—triad of 3,6,9 years] and §11370.4 [weight clause adding 15 years]. Assuming the defendant is ineligible for probation, based on the information above, what sentence are you likely to recommend?

#	Answer		Response	%
156	A straight sentence to be served in jail.		9	32%
157	A split sentence with some time to be served in jail and some time to be served on mandatory supervision.		19	68%
	Total		28	100%

Q19.5. How much time would you recommend that the defendant serve in jail?

Text Response
20 years
9 years
8 years
21 YEARS
15 years
24
18 years
9
21 years

Statistic	Value
Total Responses	9

Q19.6. How much time would you recommend the defendant serve in jail and on mandatory supervision?

#	Answer		Response	%
1	Recommended time in jail:		19	100%
2	Recommended time on mandatory supervision:		19	100%

Recommended time in jail:	Recommended time on mandatory supervision:
15	9
60%	40%
12 years	12 years
1 year	5years
8	13
13	5
16yrs	8yrs
10	5
3 years	5 years
15 years	3 years
9	9
36 months	84 months
10	11
4 yrs	5 yrs
3 years	6 years
15 years	3 years
18 years	3 years
15	3
10	11

AGGRAVATING + MITIGATING

Q20.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		2	7%
3	3		12	43%
4	4		7	25%
5	Very Serious 5		7	25%
	Total		28	100%

Q20.3. How serious is the defendant's record?

#	Answer		Response	%
1	Not Serious 1		18	64%
2	2		7	25%
3	3		2	7%
4	4		0	0%
5	Very Serious 5		1	4%
	Total		28	100%

Q20.4. The defendant pled guilty to Health & Safety Code §11352(b) [transports for sale between non-contiguous counties—triad of 3,6,9 years] and §11370.4 [weight clause adding 15 years]. Assuming the defendant is ineligible for probation, based on the information above, what sentence are you likely to recommend?

#	Answer		Response	%
156	A straight sentence to be served in jail.		6	21%
157	A split sentence with some time to be served in jail and some time to be served on mandatory supervision.		22	79%
	Total		28	100%

Q20.5. How much time would you recommend that the defendant serve in jail?

Text Response
18
8
18 months
18
20
18 years

Q20.6. How much time would you recommend the defendant serve in jail and on mandatory supervision?

#	Answer		Response	%
1	Recommended time in jail:		22	100%
2	Recommended time on mandatory supervision:		22	100%

Recommended time in jail:	Recommended time on mandatory supervision:
10	11
60%	40%
nine years	nine years
1 year	5 years
6	12
7	2
10 yrs	11yrs
6	
4.5 years	4.5 years
not sure	not sure
6 years	3 years
4	5
9 months	60 months
9	9
2 yrs	4 yrs
6 YEARS	15 YEARS
2 years	4 years
6 years	3 years
18 years	3 years
15	3
3 years	3 years
6	12

MITIGATING

Q21.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		11	39%
4	4		11	39%
5	Very Serious 5		6	21%
	Total		28	100%

Q21.3. The defendant pled guilty to Health & Safety Code §11352(b) [transports for sale between non-contiguous counties—triad of 3,6,9 years] and §11370.4 [weight clause adding 15 years]. Assuming the defendant is ineligible for probation, based on the information above, what sentence are you likely to recommend?

#	Answer		Response	%
156	A straight sentence to be served in jail.		5	18%
157	A split sentence with some time to be served in jail and some time to be served on mandatory supervision.		23	82%
	Total		28	100%

Q21.4. How much time would you recommend that the defendant serve in jail?

Text Response
18 yrs
10 years
6
20
18 years

Q21.5. How much time would you recommend the defendant serve in jail and on mandatory supervision?

#	Answer		Response	%
1	Recommended time in jail:		23	100%
2	Recommended time on mandatory supervision:		23	100%

Recommended time in jail:	Recommended time on mandatory supervision:
8	10
60%	40%
nine years	nine years
1 year	5 year
6	12
4	2
8yrs	10yrs
10	5
4.5 years	4.5 years
2 years	5 years
6 years	3 yeas
3	6
24	84 months
9	9
2yrs	4yrs
4 YEARS	17 YEARS
1 year	2 years
1 year	2
3 years	3 years
18 years	3 years
15	3
6 years	3 years
5	13

MITIGATING

Q22.2. How serious is the defendant's offense?

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		0	0%
3	3		11	39%
4	4		13	46%
5	Very Serious 5		4	14%
	Total		28	100%

Q22.3. Click to write the question text

#	Answer		Response	%
1	Not Serious 1		0	0%
2	2		14	50%
3	3		11	39%
4	4		2	7%
5	Very Serious 5		1	4%
	Total		28	100%

Q22.4. Based on the information above, if you had to decide among the following charges/allegations to include in your plea offer, you would choose:

#	Answer		Response	%
1	HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §12022(c) [firearm possession in commission of HSC §11378 violation].		11	39%
2	HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; and PC §29800 [prior felony conviction+ firearm possession].		5	18%
3	HSC §11378 [possession for sale]; HSC §11370.4 [weight enhancement]; PC §12022(c) [firearm possession in commission of HSC §11378 violation]; and PC §29800 [prior felony conviction + firearm possession].		12	43%
	Total		28	100%

Q22.5. If you knew that a defendant who was convicted of PC §12022(c) and PC §29800 would be sent to county prison jail, whereas a defendant convicted only of §29800 would be sent to state prison, would your charging decision change?

#	Answer		Response	%
1	Yes		16	57%
2	No		12	43%
	Total		28	100%

Q23.1. Would you have answered any of the previous questions differently pre-Realignment?

#	Answer		Response	%
1	Yes		21	75%
2	No		7	25%
	Total		28	100%

Q23.2. Please comment on your answer.

Text Response
Persons going to prison pre-Realignment would have served significantly more time than local sentences now being served in over-crowded jail. Some persons pre-Realignment might have been given probation with prison hanging over their head. That option no longer applies, particularly as to drug dealers.
Because I know a straight sentence is unlikely to be fully served due to overcrowding, we will consider mandatory supervision split sentences.
Our local jail impacted at this time, meaning there is little if any available jail space. Pre-Realignment, I would not have offered a split sentence; instead, I would have sent these defendants to prison for lengthy sentences.
The county jail is approaching or at capacity due to Realignment impacts. When a plea can be taken to a felony that acts as a key to state prison (whether that person is shipped initially or not), that is how we structure things post-Realignment.
The length of time a person would serve in county jail, which would previously have been served in state prison, influences our sentencing recommendations and offers. We have insufficient space in county jail for long term sentences and this has caused our offers to be reduced. Furthermore, obviously, there was no previous opportunity to offer split sentences. Finally, prison eligible offenses are imperative when a person should be sentenced to state prison and those offenses (like 29800) are the keys.
Obviousl we would prefer defendant's to go to state prison if they would have pre AB109, especially when they committ serious crimes, have serious records or are receiving longer incarceration terms.
More likely to give felony probation now than straight or split sentence due to early release from county jail.
I would not offer split sentences and would make defendants admit some of the other enhancements to give them longer in CDC
Prior to re-allignment, I would not be making offers regarding split sentences. Each defendant would have a parole period separate from the sentence. I would not, however, make changes in the charging itself.
Of course the eligibility of a defendant for SP commitment must be considered in charging and making appropriate offers. Also a review of a defendant's prior criminal history, history on supervision and criminogenic risk and needs will be factored in on a 1170(h) v. probationary offer.
split sentences weren't an option prior to Realignment. I would have offered state prison sentences and expected supervision when the defendant was released on parole.
Prior to Realignment I virtually always offered state prison on a felon with a gun charge and on felony DUIs. With defendants now getting day for day custody credit and parole no longer being as onerous as it used to be, I now often offer probation for 5 years with 1 year in jail. I get 6 months custody time as opposed to 8 months prison time and have a five year tail on the defendant with a warrantless search condition.
Prison commitments have parole conditions so supervision would already be assumed prior to Realignment. With Realignment, supervision has to be considered as an alternative to more custody time.

Prior to Realignment, a state prison commitment provided certainty regarding actual time spent in custody. Post Realignment, a "state prison" sentence served locally varies from jurisdiction to jurisdiction and does not provide certainty of actual time of confinement which is left to the discretion of each county's sheriff. If I believe Defendant (based on current case facts and criminal history) should receive actual incarceration, then a non 1170(h) eligible offense will more likely guarantee such a result.
zzz
There was no such thing as a split sentence prior to Realignment, so that answer to any of these questions would not have been an option.
Before realighnment, there was no need to split a sentence. Everyone sentenced to prison also had to be on parole for at least 3-4 years. That option is no longer available.
The local "jail/prison" is so overcrowded that felony inmates serve MAYBE 30% of their time. Misdemeanor inmates will more often than not serve ZERO time regardless of their sentence. A "15-year" local prison sentence would never be served; the inmate will be released in very short order. Therefore, while the weight enhancement on the drug cases might previously have been stricken in order to dispo a case relatively quickly for a term in prison, that may not happen so much anymore. As far as split sentences, while we favor a period of mandatory supervision, we think that a long "tail" (period of mandatory supervision) is counter-productive and hampers the ability to charge the conviction as a "prison prior" when the def re-offends.
Realignment doesn't change my opinion as to the seriousness of a particular crime, but it does change my perspective as to disposition because of the option for a split sentence. In our county, we have programs available and required of those on MS, so if it appears the offender will benefit from the programming, he/she should be given that opportunity. If it doesn't appear the offender would benefit, then he/she should serve the full sentence and save the resources for someone who would benefit.
Split sentences were not an option. I would have had to answer those questions differently.
xxx

Q24.1. Post-Realignment (October 2011), does your office choose not to charge low-level offenses (such as, but not limited to, Health & Safety Code §11550 [under the influence of certain controlled substances]; PC §488 [petty theft]; PC §647(b) [soliciting or engaging in any act of prostitution]) due to resource constraints?

#	Answer		Response	%
1	Yes		4	14%
2	No		24	86%
	Total		28	100%

Q24.2. Please detail what charges your office is less likely to file post-Realignment and why:

Text Response
low level misdemeanor crimes so as not to clog the court system. some police agencies are focused on more serious crimes and less on quality of life crimes. We have created an alternative to court program for low-level misdemeanor crimes and our own diversion program for 18-19 year old narcotic offenses
There are simple thefts and property crimes that are less likely to have consequences that would have an impact on the Defendant.
Non violent property and drug offenses.
x,y,z

Q25.2. Rank from 1 to 6 in order of importance (1 being the most important) the factors that influence whether you are likely to recommend a split sentence instead of a straight sentence.

#	Answer	1	2	3	4	5	Total Responses
1	Availability/effectiveness of programming	6	3	8	7	4	28
2	Jail capacity/overcrowding	1	2	1	8	16	28
3	Lack of prior record	3	8	10	5	2	28
4	Severity of crime	12	12	0	3	1	28
5	Desire to have defendant on searchable supervision after release	6	3	9	5	5	28
	Total	28	28	28	28	28	-

Q26.1. The local jails in your county:

#	Answer		Response	%
1	are not full to capacity.		6	21%
2	are about to become full to capacity.		5	18%
3	are at capacity.		2	7%
4	are full to capacity.		7	25%
5	are beyond full to capacity.		8	29%
	Total		28	100%

Q27.1. Rank from 1 to 6 (1 being the most available) the availability of services in your county:

#	Answer	1	2	3	4	5	6	Total Responses
1	Drug rehabilitation	16	7	1	2	0	2	28
2	Mental health	2	13	4	4	5	0	28
3	Re-entry facilities	3	4	8	6	5	2	28
4	Housing	0	0	6	9	10	3	28
5	Vocational training	4	3	8	6	5	2	28
6	Other	3	1	1	1	3	4	13
	Total	28	28	28	28	28	13	-

Other
transportation
education
Collaborative Courts

Q28.1. Rank from 1 to 6 (1 being the most effective) the effectiveness of services in your county:

#	Answer	1	2	3	4	5	6	Total Responses
1	Drug rehabilitation	10	10	3	2	2	1	28
2	Mental health	6	6	4	6	4	2	28
3	Re-entry facilities	4	4	8	4	6	2	28
4	Housing	2	2	6	8	9	1	28
5	Vocational training	3	4	5	8	6	2	28
6	Other	3	2	2	0	1	6	14
	Total	28	28	28	28	28	14	-

Other
transportation
education
Collaborative Courts
Anger Management

Q29.1. Probation officers in your county (in regard to felony probations):

#	Answer		Response	%
1	Have the capacity to double their caseload.		0	0%
2	Have the capacity to take on a more cases.		5	18%
3	Have the capacity to only incrementally increase their caseload.		2	7%
4	Have just about the right match between capacity and caseload.		3	11%
5	Do not have the capacity to take on more cases.		6	21%
6	Have excessive caseloads.		12	43%
7	Have more than double the number of cases than they should have.		0	0%
	Total		28	100%

Q30.1. Probation officers in my county (in regard to mandatory supervision):

#	Answer		Response	%
1	Have the capacity to double their caseload.		0	0%
2	Have the capacity to take on a more cases.		7	25%
3	Have the capacity to only incrementally increase their caseload.		2	7%
4	Have just about the right match between capacity and caseload.		6	21%
5	Do not have the capacity to take on more cases.		3	11%
6	Have excessive caseloads.		10	36%
7	Have more than double the number of cases that they should have.		0	0%
	Total		28	100%

Q31.1. Probation officers in my county (in regard to post release community supervision):

#	Answer		Response	%
1	Have the capacity to double their caseload.		1	4%
2	Have the capacity to take on a more cases.		6	21%
3	Have the capacity to only incrementally increase their caseload.		3	11%
4	Have just about the right match between capacity and caseload.		6	21%
5	Do not have the capacity to take on more cases.		2	7%
6	Have excessive caseloads.		10	36%
7	Have more than double the number of cases that they should have.		0	0%
	Total		28	100%

Q32.1. Your working relationship with the probation department in your county is:

#	Answer		Response	%
1	Very Effective		7	25%
2	Effective		17	61%
3	Neither Effective nor Ineffective		3	11%
4	Ineffective		1	4%
5	Very Ineffective		0	0%
	Total		28	100%

Q33.1. Rank from 1 to 5 (1 being the most affected) the agencies have been most affected by budget cuts:

#	Answer	1	2	3	4	5	Total Responses
1	Police Department	8	4	4	7	5	28
2	Court staff	11	8	4	3	2	28
3	Probation Department	2	6	12	2	6	28
4	Public Defender Office	0	1	3	13	11	28
5	District Attorney Office	7	9	5	3	4	28
	Total	28	28	28	28	28	-

Q34.1. The population of your county is approximately:

#	Answer		Response	%
1	more than one million		10	36%
2	between 500,000 and one million		7	25%
3	between 100,000 and 500,000		6	21%
4	under 100,000		5	18%
	Total		28	100%

Q35.1. In the course of your current regular work, do you have substantial responsibility for supervising charging decisions made by others in your office?

#	Answer		Response	%
1	Yes		24	86%
2	No		4	14%
	Total		28	100%

Q36.2. Does your county prosecutor's office have a formal internal policy governing charging decisions?

#	Answer		Response	%
1	Yes		15	58%
2	No		11	42%
	Total		26	100%

Q36.3. How many years have you been a practicing attorney?

Text Response
31
17
16
32
29
17
24
17
10
26
27 years
23
30
15
27
21
28
25
33
17
33
27
12
15
27
20

Q36.4. Please indicate your gender.

#	Answer		Response	%
1	Male		16	62%
2	Female		10	38%
	Total		26	100%

Q36.5. Please indicate your age range.

#	Answer		Response	%
1	29 or younger		1	4%
2	30-39 years		2	8%
3	40-49 years		8	31%
4	50-59 years		13	50%
5	60-69 years		2	8%
6	70 years or older		0	0%
	Total		26	100%

Q36.6. Please indicate your race.

#	Answer		Response	%
1	White/Non-Hispanic		21	84%
2	Hispanic		1	4%
3	Black or African American		0	0%
4	American Indian or Alaska Native		0	0%
5	Asian		2	8%
6	Native Hawaiian or Other Pacific Islander		1	4%
	Total		25	100%

Q36.7. Can we contact you with follow-up questions if they arise? If so, please provide your e-mail address below.

Q36.8. If you would like a copy of our final report, please provide your e-mail address below.

Appendix C: Statistical Analysis Results

Realignment went into effect on October 1, 2011. The data captured by the California Attorney General's office, however, is presented by year and not month. Therefore, data from 2011 include both pre- and post-Realignment rates. Because it was not possible to split the 2011 data into pre- and post-Realignment measures, we're presenting two sets of measures. The first set, presented in section A, includes rates that have been computed using average rates from 2009-2010 (pre-Realignment) and 2011-2012 (post-Realignment). The second set is a snapshot of the year prior to Realignment—2010—and the year after Realignment—2012. The second set of measures is presented in section B.

Section A: Changes pre- and post-Realignment by crime

Looking at the average rates of complaints sought by crime, we see very little change between the years prior to Realignment and those post-Realignment. As demonstrated in Table 1, the rates of complaints sought per arrest for some offenses have increased (felonies: dangerous drugs and weapons; misdemeanors: petty theft and other drugs) while others have decreased (felonies: assault, burglary, motor vehicle theft, and narcotics; misdemeanors: assault and battery and prostitution). These changes, however, have been minimal. Paired sample t-tests indicate only one statistically significant difference between pre- and post-Realignment rates: counties had higher rates of complaints sought for petty theft (96.13 %) post-Realignment than pre-Realignment (94.69 %), $t(57) = 2.841$, $p = .006$.

Table 3: Average rate arrest dispositions resulting in complaints sought

	Pre-Realignment	Post-Realignment	Change
Felonies			
Assault (n=58)	97.89%	97.71%	-0.18
Burglary (n=58)	98.20%	97.94%	-0.26
Motor Vehicle Theft (n=57)	96.77%	96.70%	-0.07
Narcotics (n=58)	98.32%	96.37%	-1.95
Dangerous Drugs (n=57)	97.34%	97.38%	+0.04
Other Drugs (n=52)	97.33%	97.33%	–
Weapons (n=58)	97.10%	98.28%	+1.18
Misdemeanors			
Assault and Battery (n=58)	97.01%	96.91%	-0.10
Petty Theft (n=58)	94.69%	96.13%	+1.44
Other Drugs (n-57)	97.17%	97.96%	+0.79
Prostitution (n=39)	96.53%	96.00%	-0.53

Changes pre- and post-Realignment by county type

We analyzed the data according to the county types established in Tough on Crime (on the State's Dime) (Ball 2011). Counties are designated low-, medium- and high-use counties based on new felon admissions per reported violent crime. We analyzed counties with low, medium, and high prison use by crime type to determine if rates of complaints sought changed pre and post Realignment (see Table 2).

Table 4: Changes in rates of complaints sought by felony crime and use

		Low (N= 11)	Medium (N= 27)	High (N=18)
Assault	Pre	96.73	98.91	96.88
	Post	97.13	98.17	97.18
Burglary	Pre	97.95	98.32	98.07
	Post	97.82	97.58	98.41
Motor Vehicle Theft	Pre	94.97	97.37	96.88
	Post	96.36	97.7	96.57
Narcotics	Pre	96.79	98.71	98.54
	Post	96.86	94.79	98.08
Dangerous Drugs	Pre	96.63	98.88	98.41
	Post	96.54	96.99	98.3
Other Drugs	Pre	96.14	98.14	96.79
	Post	93.34	98.99	97.73
Weapons	Pre	97.37	97.04	96.81
	Post	97.63	98.95	97.49

While there was little change experienced by high use counties (no change was greater than 1%), both medium and low use counties experienced changes for certain felony crimes. However, the only statistically significant change in low use counties was for motor vehicle theft.[94] Low use counties had higher rates of complaints sought for motor vehicle theft (96.36%) post-Realignment than pre-Realignment (94.97%), $t(10) = 2.268$, $p = .047$. While a notable decrease—2.80%—occurred within low use counties for other drug felonies, the change was not statistically significant. Medium use counties also saw a

[94] See Lofstrom, Magnus and Steven Raphael. "Public Safety Realignment and Crime Rates in California." *Public Policy Institute of California* (2013). http://www.ppic.org/main/publication.asp?i=1075.

notable decrease for drug felonies – the rate of complaints sought for narcotics dropped from 98.71% prior to Realignment to 94.79% after Realignment.

Similarly, there was little change experienced by high use counties (no change was greater than 1%) for misdemeanor crimes. For three of the four misdemeanor crimes explored, low use areas experienced an increase in the rate of complaints sought for arrest dispositions. Assault and battery and other drugs were the two crimes that saw the greatest change—1.29% and 2.42%, respectively. Medium use counties did see a decrease in the average rate of complaints sought for assault and battery and prostitution, but the statistically significant increase only occurred between pre and post-Realignment rates for petty theft. Medium use counties had higher rates of complaints sought for petty theft (94.63%) post-Realignment than pre-Realignment (92.63%), $t(26) = 2.466$, $p = .021$.

Table 5: Changes in rates of complaints sought by misdemeanor crime and use

		Low	Medium	High
Assault and Battery	Pre	94.99	97.23	97.62
	Post	96.28	96.45	97.81
Petty Theft	Pre	94.52	92.31	98.01
	Post	95.24	94.63	98.66
Other Drugs	Pre	94.09	97.49	98.34
	Post	96.51	97.94	98.76
Prostitution	Pre	95.42	95.32	99.36
	Post	96.07	93.44	99.29

Average rates were also compared by the population size of the county. Using 2011 population data, five groups were created: 0-49,000; 50,000-99,999; 100,000-249,999; 250,000-999,999; and 1,000,000+ (see Table 4). Paired samples t-tests did not indicate any statistically significant changes between pre and post-Realignment rates. Descriptively, the most dramatic changes were seen among the smaller counties (0-49,000) for felony drug crimes. The rate of complaints sought for narcotics was 99.56% prior to Realignment. Post Realignment, that rate dropped to 92.81, resulting in a drop of 6.75%. A decrease also occurred for dangerous drugs. Prior to Realignment, 99.70% of arrest dispositions for dangerous drugs resulted in a complaint being sought. After Realignment, the average rate dropped to 96.12% (down 3.58%).

The greatest drop for counties with 50,000-99,999 residents was for the crime of motor vehicle theft—97.14% to 94.76%. All other changes were less than 1%. The rates of arrest dispositions resulting in a complaint being sought remained relatively the same pre and post-Realignment for the larger counties (100,000+ residents). A jump of more than 1% did occur for counties with 100,000-249,999 residents for other felony drugs (98.09% to 99.74%).

Turning to misdemeanor crimes, the greatest changes were seen among the smaller counties. The direction of those changes, however, did differ. For example, the rate of arrest dispositions resulting in a complaint sought for prostitution increased for counties with 0-49,000 residents (87.50% to 100%) but decreased for counties with a population between 50,000-99,999 (100% to 75%). It should be noted that during some years no arrest dispositions were recorded for particular crimes. This was especially true for smaller counties and the misdemeanor crimes other drugs and prostitution.[95]

[95] When no arrest dispositions were recorded for any year between 2009 and 2012, average rates were computed based on the yearly data that was present and the denominator was adjusted. If there were no arrest dispositions recorded for any of the years included in the analysis, that county was dropped from the analysis. See Appendix A for the names of the counties dropped in each analysis.

Table 6: Changes in rates of complaints sought by felony crime and county size

		0-49,000 (N=15)	50,000-99,999 (N=8)	100,000-249,999 (N=9)	250,000-999,999 (N=17)	1,000,000+ (N=9)
Assault	Pre	98.80	99.48	99.43	99.13	91.08
	Post	97.58	99.45	99.22	99.30	91.87
Burglary	Pre	97.72	99.35	99.32	98.88	95.55
	Post	97.05	99.5	98.84	98.69	95.76
Motor Vehicle Theft	Pre	99.50	97.14	97.51	97.27	90.56
	Post	100.00	94.76	96.71	97.83	91.21
Narcotics	Pre	99.56	98.66	99.3	98.47	94.71
	Post	92.81	99.02	98.85	98.12	94.16
Dangerous Drugs	Pre	99.70	98.93	99.41	98.29	94.69
	Post	96.12	99.21	99.17	98.35	94.13
Other Drugs	Pre	100.00	100.00	98.09	98.12	90.06
	Post	100.00	99.27	99.74	97.75	89.78
Weapons	Pre	95.46	98.91	99.34	98.78	92.81
	Post	99.52	99.47	99.40	98.60	93.40

While an increase the rate of complaints sought occurred for petty theft in small and mid-size counties, paired samples t-tests indicated the only statistically significant change occurred in small counties (less than 50,000 residents)—92.50% post-Realignment versus 89.62% pre-Realignment, $t(14) = 2.411$, $p = .030$. A decrease occurred for assault and battery in most size categories—the exception being the larger counties (greater than 250,000 residents). However, these changes were all less than 1%. The one exception was the group of small counties where the average rate of complaints sought for assault and battery decreased 1.38%. Finally, a 2.28% increase in the average rate of complaints sought for other drug arrest dispositions occurred within counties with a population between 250,000 and 999,999—95.41% to 97.69%. If anything, this provides evidence that prosecutors are not charging around Realignment, since drug offenses are typically punished by in-county incarceration, not state incarceration.

Table 7: Changes in rates of complaints sought by misdemeanor crime and county size

		0-49,000	50,000-99,999	100,000-249,999	250,000-999,999	1,000,000+
Assault and Battery	Pre	96.84	98.73	98.92	96.96	93.91
	Post	95.46	98.49	98.81	97.58	94.76
Petty Theft	Pre	89.62	97.46	96.94	95.80	96.34
	Post	92.50	98.03	99.19	96.54	96.64
Other Drugs	Pre	98.43	99.00	98.17	95.41	95.89
	Post	98.79	98.61	98.17	97.69	96.36
Prostitution	Pre	87.50	100.00	98.54	96.75	97.78
	Post	100.00	75.00	96.41	96.55	97.53

Section B: Changes between 2010 and 2012 by crime

Looking at the average rates of complaints sought by crime, we see very little change between the year prior to Realignment (2010) and the year following the implementation of Realignment (2012). As demonstrated in Table 6, complaint sought rates for some offenses have increased (felonies: burglary, motor vehicle theft, other drugs, and weapons; misdemeanors: petty theft and other drugs) while others have decreased (felonies: assault, narcotics, and dangerous drugs; misdemeanors: assault and battery and prostitution). These changes, however, have been minimal—ranging from of less than 1% (0.11%) to just over 1% (1.18%). Paired samples t-tests indicate only one statistically significant difference between 2010 and 2012 rates: counties had higher rates of complaints sought for petty theft (98.30%) 2012 than in 2010 (97.12%), $t(56) = 2.174$, $p = .034$.

Table 8: Average rate arrest dispositions resulting in complaints sought

	2010	2012	Change
Felonies			
Assault (n=58)	98.22%	97.73%	-0.49
Burglary (n=57)	97.65%	97.79%	+0.14
Motor Vehicle Theft (n=57)	96.87%	96.98%	+0.11
Narcotics (n=57)	98.54%	98.07%	-0.47
Dangerous Drugs (n=57)	98.45%	98.21%	-0.24
Other Drugs (n=52)	95.99%	96.96%	+0.97
Weapons (n=58)	98.11%	98.39%	+0.28
Misdemeanors			
Assault and Battery (n=58)	97.64%	96.96%	-0.68
Petty Theft (n=58)	97.12%	98.30%	+1.18
Other Drugs (n-57)	97.59%	98.11%	+0.52
Prostitution (n=39)	98.24%	97.18%	-1.06

Changes pre- and post-Realignment by county type

Average rates were compared for low, medium, and high use counties (Ball 2011) by crime type to determine if rates of complaints sought changed after Realignment went into effect (see Table 7). The greatest changes were experienced by the low and medium use counties, though none were statistically significant at the .05 level. Starting with low use counties, the majority of crimes saw a decrease in the rates of complaints sought (narcotics, dangerous drugs, and other drugs all decreased by at least 1%). On the other hand, the average rate for motor vehicle theft increased from 94.98% in 2010 to 97.11% in 2012 (this change approached statistical significance at the .05 level—p = .054). Among medium use counties, rates for assault and narcotics dropped between 2010 and 2012—1.27% and 1.59%, respectively. However, the average rate of complaints sought for other drugs increased by 3.32%. High use counties also saw a notable increase in the average rate of complaints sought for other drugs—from 95.43% in 2010 to 98.04% in 2012.

Table 9: Changes in rates of complaints sought by felony crime and use

		Low (N=11)	Medium (N=27)	High (N=18)
Assault	2010	97.17	99.49	96.77
	2012	97.17	98.22	97.15
Burglary	2010	98.2	97.06	98
	2012	98	97.14	98.48
Motor Vehicle Theft	2010	94.98	97.84	96.59
	2012	97.11	97.24	96.2
Narcotics	2010	98.15	98.83	98.29
	2012	96.97	97.24	98.27
Dangerous Drugs	2010	97.44	98.76	98.47
	2012	96.35	98.91	98.13
Other Drugs	2010	96.52	95.73	95.43
	2012	92.02	99.05	98.04
Weapons	2010	97.74	99.05	96.8
	2012	97.55	99.39	97.31

Turning to misdemeanors (see Table 10)—low use counties experienced an increase in the rate of complaints sought for each misdemeanor crime in the analysis except for prostitution. Specifically, rates for assault and battery increased 1.26%, petty theft increased 1.78%, and other drugs increased 1.16%. The rate of complaints sought for prostitution, however, decreased from 98.21% in 2010 to 95.39% in 2012. Medium use counties also experienced a decrease the average rate of complaints sought for prostitution and assault and battery—97.49% to 96.06% and 98.50% to 96.26%, respectively. An increase occurred in the rate of complaints sought for petty theft—97.04% to 98.57%—and a paired samples t-tests indicated this change was statistically significant, $t(25) = 2.353$, $p = .027$. An increase also occurred in for high use counties—complaint sought rates for petty theft increased from 98.87% in 2010 to 99.31% in 2012.

Table 10: Changes in rates of complaints sought by misdemeanor crime and use

		Low	Medium	High
Assault and Battery	2010	95.50	98.50	97.45
	2012	96.76	96.26	97.84
Petty Theft	2010	94.15	97.04	98.87
	2012	95.93	98.57	99.31
Other Drugs	2010	95.90	97.78	98.13
	2012	97.06	98.10	97.73
Prostitution	2010	98.21	97.49	99.30
	2012	95.39	96.06	99.67

Average rates were also compared by the population size of the county. Using 2011 population data, five groups were created: 0-49,000; 50,000-99,999; 100,000-249,999; 250,000-999,999; and 1,000,000+ (see Table 9). Paired samples t-tests indicated only one statistically significant change between 2010 and 2012 rates. This change occurred in mid-sized counties (100,000-249,999 residents) for motor vehicle thefts—counties had lower rates of complaints sought motor vehicle theft (96.26%) 2012 than in 2010 (98.39%), $t(8) = -2.421$, $p = .042$.

Descriptively, notable changes occurred within all size groups. Within the smallest counties (0-49,999 residents) a decrease of close to 2% occurred for assaults—99.78% in 2010 versus 97.83% in 2012. During those same years there was an increase in the average rate of complaints sought for burglary—95.15% versus 96.43%. The greatest drop for counties with 50,000-99,999 residents was for other drugs—100% in 2010 to 98.55% in 2012. All other changes were less than 1%.

Counties with 100,000 to 249,999 residents experienced decreases in the average rate of complaints sought for most of the felony crimes explored. In addition to the change in rates for motor vehicle theft, there was a decrease of 1.18% for burglary. Decreases were also experienced for all other felony crimes except for other drugs and weapons. Only rates for other drugs increased more than 1%. Changes greater than 1% also occurred for felony two crimes in counties with 250,000 to 999,999 residents—motor vehicle theft and other drugs. The average rate of complaints sought for arrest dispositions for both of these crimes increased, 97.52 to 98.99 and 96.67 to 98.24. While there was very little change in the average rates of complaints sought for most felony crimes in the largest

counties (more than one million residents), an increase of 1.41% occurred for motor vehicle theft while a decrease of just over 2% occurred for narcotics.

Table 11: Changes in rates of complaints sought by felony crime and county size

		0-49,000 (N=15)	50,000-99,999 (N=8)	100,000-249,999 (N=9)	250,000-999,999 (N=17)	1,000,000+ (N=9)
Assault	2010	99.78	99.38	99.57	99.30	91.18
	2012	97.83	99.40	98.93	99.23	92.02
Burglary	2010	95.15	99.67	99.41	98.90	95.65
	2012	96.43	99.76	98.23	98.68	96.01
Motor Vehicle Theft	2010	99.45	96.98	98.39	97.52	90.28
	2012	100.00	96.98	96.26	98.99	91.69
Narcotics	2010	99.11	98.91	99.18	98.85	96.10
	2012	99.52	98.84	98.64	98.31	94.09
Dangerous Drugs	2010	99.52	98.76	99.53	98.61	95.15
	2012	99.47	99.52	99.07	98.30	94.05
Other Drugs	2010	100.00	100.00	95.47	96.67	88.49
	2012	100.00	98.55	100.00	98.24	88.08
Weapons	2010	99.16	99.17	98.97	98.96	93.08
	2012	100.00	98.85	99.53	98.79	93.57

Turning to misdemeanor crimes (see table 10)—there were no statistically significant changes that occurred when looking at average rates across county size. Notable changes did occur but the direction of these changes differed. For example, arrest disposition rates resulting in a complaint sought for assault and battery decreased for counties with 0-49,000 residents (99.33% to 95.02%) but increased for counties with a population over one million (93.94% to 95.02%). Similarly, arrest disposition rates resulting in a complaint sought for prostitution increased for counties with 100,000 to 249,999 residents (97.87% to 99.27%) but decreased for counties with a population between 250,000 and 999,999 (98.46% to 95.56%).

Table 12: Changes in rates of complaints sought by misdemeanor crime and county size

		0-49,000	50,000-99,999	100,000-249,999	250,000-999,999	1,000,000+
Assault and Battery	2010	99.33	98.06	99.04	97.18	93.94
	2012	95.02	98.76	98.68	97.96	95.02
Petty Theft	2010	98.59	96.49	99.13	95.39	96.68
	2012	100.00	98.59	99.64	96.79	96.91
Other Drugs	2010	98.73	98.69	98.55	96.03	96.86
	2012	98.71	98.98	98.46	98.00	96.31
Prostitution	2010	100.00	–*	97.87	98.46	97.65
	2012	100.00	–*	99.27	95.56	98.45

*No arrest dispositions recorded.

Increases in average rates of complaints sought occurred for petty theft across all county groups. Smaller counties (less than 100,000 residents) and those with 250,000 to 999,999 residents experienced the greatest changes—98.59% to 100%, 96.49% to 98.59%, and 95.39% to 96.79%. There was also a jump of 1.97% for other drugs in counties with 250,000 to 999,999 residents.

Counties in which there were no arrest dispositions reported for particular crimes are listed below in two tables.

Table 13: Section A Analysis

Crimes	Counties Dropped
No arrest dispositions for pre-Realignment rate	
Motor Vehicle Theft	Alpine
Other Drugs (felony)	Alpine, Lassen, Mariposa, Sierra
Prostitution	Alpine, Amador, Colusa, Glenn, Inyo, Lassen, Mariposa, Modoc, Mono, Napa, Nevada, Plumas, Sierra, Tuolomne
No arrest dispositions for post-Realignment rate	
Dangerous Drugs	Inyo
Other Drugs (felony)	Alpine, Inyo, Lassen, Mono, Sierra
Other Drugs (misdemeanor)	Alpine
Prostitution	Alpine, Amador, Colusa, Glenn, Inyo, Lassen, Mariposa, Modoc, Mono, Napa, Plumas, San Benito, Sierra, Tuolomne

Table 14: Section B Analysis

Crimes	Counties Dropped
No arrest dispositions for 2010 rate	
Burglary	Alpine
Motor Vehicle Theft	Alpine
Narcotics	Alpine
Other Drugs (felony)	Alpine, Colusa, Lassen, Mariposa, Modoc, Napa, Sierra
Prostitution	Alpine, Amador, Calaveras, Colusa, El Dorado, Glenn, Imperial, Inyo, Lassen, Mariposa, Modoc, Mono, Napa, Nevada, Plumas, Shasta, Sierra, Tuolomne, Yuba
No arrest dispositions for 2012 rate	
Dangerous Drugs	Inyo
Other Drugs (felony)	Alpine, Inyo, Lassen, Mariposa, Mono, Sierra
Other Drugs (misdemeanor)	Alpine
Prostitution	Alpine, Amador, Calaveras, Colusa, Del Norte, Glenn, Inyo, Lake, Lassen, Mariposa, Mendocino, Modoc, Mono, Napa, Plumas, San Benito, Sierra, Sutter, Tehama, Tuolomne, Yuba