

***Realignment's Impact on the Public
Defender and District Attorney***

A Tale of Five Counties

DRAFT FOR COMMENTS

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Summary

“Of the 31 dispositions falling under 1170(h), just one or two have included portions of mandatory supervision [...] My guess—and this is speculation here—is that judges place a higher value on incapacitating individuals than supervising them.”¹

- Ventura County District Attorney’s Office

“[Prosecutors] will seek blended sentences in the majority of [realigned] cases. In San Francisco, the phrase ‘we value incapacitation’ does not come up very often.”²

- San Francisco District Attorney’s Office

Commentators across California have proclaimed AB 109 realignment a monumental change in the state’s criminal justice system. "It's the biggest change in the criminal justice system in 35 years,"³ says Judge Phil Pennypacker, presiding judge of the criminal division of the Santa Clara County Superior Court. "It's the greatest opportunity California has had in decades to advance criminal-justice reform,"⁴ says Alex Busansky, president of the Oakland-based National Council on Crime and Delinquency. Needless to say, realignment is not going unnoticed.

At the stroke of a pen, thousands of felony offenders will no longer be handled by California Corrections and Parole. Millions of state dollars have been routed directly to

¹ Telephone interview with attorney at Ventura County District Attorney’s Office (Nov. 17, 2011).

² Telephone interview with attorney at San Francisco County District Attorney’s Office (Nov. 30, 2011).

³ Tracey Kaplan, Mercurynews.com, *California Prison Realignment to Put More Low-Level Offenders on Streets*, http://www.mercurynews.com/crime-courts/ci_18974489 (last visited Jan. 28, 2012).

⁴ David Greenwald, Davisbanguard.org, *D-Day Approaches for AB 109 and Realignment – No One Sure What it Means*, http://davisvanguard.org/index.php?option=com_content&view=article&id=4721:d-day-approached-for-ab-109-and-realignment-no-one-sure-what-it-means&catid=74:judicial-watch&Itemid=100 (last visited Jan. 28, 2012).

counties to deal with this influx of offenders. Yet while realignment is declared as the end of the notion that we should simply “lock them up,” the limitless discretion the law provides to California’s kaleidoscope of counties guarantees nothing but variability.

Our project aims to begin to understand this variability. As realignment took effect on October 1, 2011, administrators of criminal justice across the state worked to implement this complex, far-reaching law. We made it our mission to be there, interviewing prosecutors and public defenders as they adjusted to the changes mandated by AB 109. We also made it our mission to capture and understand the variability among counties. As our results will show, the State Legislature did more than just realign; it created 58 systems of criminal justice.

This paper begins with a brief orientation of AB 109 realignment. The first section explains why the law was passed, then describes what the law requires and what it leaves open to the individual counties. Next, because AB 109 is not the first time that California provided criminal justice players a wide range of latitude, the paper provides a literature review capturing the history and issues surrounding broad discretion. From indeterminate sentencing to wobblers and three strikes, California has long enacted policies that enable distinct outcomes in culturally and politically distinct counties.

With the foundation laid, the paper turns to its substance and chief contribution: the interviews themselves. A brief methodology section describes how the counties, practitioners, and topics of discussion were selected. This is followed by the results. How do prosecutors and public defenders foresee AB 109 changing the average length of incarceration? Will AB 109 change the use of rehabilitative programming? Will the law affect the relationship between prosecutor and defense attorney? What concerns do practitioners across the state have with the law? We report practitioners’ answers then

analyze how these vary across the counties. Finally, the paper concludes with future areas of research and some brief final thoughts.

Chapter 1

What is Realignment?

On April 4, 2011, California Governor Jerry Brown signed Assembly Bill 109 (AB 109) into law. Commonly referred to as realignment, AB 109 redefines felonies and shifts some of the responsibility for incarcerating convicted felons from the state to the counties.⁵ While its stated focus is to enhance rehabilitation, AB 109 gives counties wide discretion in how to punish realigned offenders, effectively creating 58 independent criminal justice systems.

Governor Brown signed AB 109 in response to the then-pending United States Supreme Court case *Brown v. Plata*. On May 23, 2011, the Court held in *Plata* that California's state prisons were so overcrowded that inmates' Eighth Amendment constitutional rights were being infringed. The Court mandated that California reduce its prison population to 137.5% of capacity within two years.⁶

Though it is widely believed that AB 109 was passed in response to *Plata*, the Legislature says otherwise.⁷ The Legislature asserts in California Penal Code section 3450 that its intent in creating the law is to “reaffirm[] its commitment to reducing recidivism among criminal offenders.”⁸ The law aims to do this by shifting the focus away from a “lock them up” attitude toward community-based corrections programs, evidence-based practices, and rehabilitative programming.⁹ However, AB 109 provides

⁵ Kathryn B. Storton & Lisa R. Rodriguez, Prosecutor's Analysis of the 2011 Criminal Justice Realignment 1-50, 5 (September 2011).

⁶ *Brown v. Plata*, 131 U.S. 1910 (2011).

⁷ Garrick Byers, Realignment 1-131, 14 (Oct. 17, 2011).

⁸ Cal. Penal Code § 3450 (2011)

⁹ Kathryn B. Storton & Lisa R. Rodriguez, Prosecutor's Analysis of the 2011 Criminal Justice Realignment 1-50, 5 (September 2011).

counties little structure on how to enhance rehabilitation, creating 58 potential applications of the law.

Before the passage of AB 109, a felony was a crime punishable by death or imprisonment in state prison. Now, in the wake of realignment, over 500 “felonies” are punishable in county jail under California Penal Code section 1170(h). Only offenders who commit non-violent, non-serious, and non-sex crimes are eligible for sentencing under 1170(h). Offenders are still sentenced to determinate terms, but are no longer placed on parole upon release. Instead, under California Penal Code section 1170(h)(5)(B), judges have the authority to either order a defendant to serve his or her full sentence in jail with no post-release supervision, or “blend” the sentence between incarceration and “mandatory supervision.” Mandatory supervision is a lot like parole—“it is supervised by the probation department under the same terms, conditions, and procedures of formal probation for the unserved portion of the sentence.”¹⁰ Yet mandatory supervision differs from parole in two significant aspects. First, it is run by the county, not the state, in part to “improve public safety outcomes among adult felon parolees and [] facilitate their successful reintegration back into society.”¹¹ Second, it provides different consequences for violators. Before October 1, 2011, parolees who violated a condition of their parole would likely return to prison. Now, with realignment, violators will not go to prison unless they actually commit a new crime.

Realignment not only affects 1170(h) offenders sentenced after October 1, 2011, but also individuals convicted of an 1170(h) crime before the law took effect. Under California Penal Code section 3451, 1170(h) offenders sentenced before October 1, 2011

¹⁰ Kathryn B. Storton & Lisa R. Rodriguez, Prosecutor’s Analysis of the 2011 Criminal Justice Realignment 1-50, 5 (September 2011).

¹¹ Cal. Penal Code § 3450 (2011)

will be subject to “mandatory supervision” by the county instead of state parole, for up to three years at the conclusion of their incarceration.¹²

Realignment is arguably the biggest change California’s criminal justice has seen in over 35 years, and it has been met with mixed reactions. Many people are confused by the lengthy law and do not know what to expect. San Francisco Public Defender Jeff Adachi sums it up best when he says,

Realignment—depending on who is describing it—is either the long-overdue dismantling of the state’s regressive prison system in favor of rehabilitation or an unbearable burden dropped on the broken, cash-strapped backs of California counties, leaving just as many people incarcerated. Right now, the plan is *terra incognita*, an uncharted region where we’re likely to run into both friend and foe.”¹³

While many are frightened by the financial burden AB 109 will place on counties, others think it is the only viable option to pull California out of its financial crisis. Matt Cate, the Secretary of California’s Department of Corrections and Rehabilitation, believes in the new law. He calls California’s state prisons “broken” and “an expensive proposition [] we just can’t afford” any more.¹⁴ Sacramento Judge Steve White echoes Cate’s sentiments and emphasizes the importance of prosecutorial discretion. “If you’re going to be a county that sends many people to prison for life, then pay for it and don’t

¹² *Id.*

¹³ David Greenwald, Davisbanguard.org, *D-Day Approaches for AB 109 and Realignment – No One Sure What it Means*, http://davisvanguard.org/index.php?option=com_content&view=article&id=4721:d-day-approached-for-ab-109-and-realignment-no-one-sure-what-it-means&catid=74:judicial-watch&Itemid=100 (last visited Jan. 28, 2012).

¹⁴ David Greenwald, Davisbanguard.org, *Commentary: The Promise of Realignment Dwarfed by Fear and Politics*, http://davisvanguard.org/index.php?option=com_content&view=article&id=4768:commentary-the-promise-of-realignment-dwarfed-by-fear-and-politics&Itemid=100 (last visited Jan. 28, 2012).

have those counties that are being much more cautious and careful and thoughtful about how they decide who should get three strikes and who should be sent for life—[don't] have those pay for it.”¹⁵

Some supporters favor the law not only because of California’s economic situation, but also because of the belief that California needs to shift focus away towards rehabilitation. Allen Hopper, an attorney for the ACLU of California, declared, “The new movement is to be smart on crime instead of just tough on crime. It’s more than throwing an offender in jail—it’s about making it less likely that they will commit crimes again once they are released.”¹⁶ Yolo County Public Defender Tracie Olson agrees. “It’s building an incentive for people to get treatment and go back into the community. The old-fashioned way of sending people off to do time bankrupted everybody.”¹⁷

Not everyone is optimistic about realignment, however. Jason Ramos, the spokesperson for Rosemont, California’s Sheriff’s Department said, “Make no mistake about it: crime will increase. We have a statistical rate of recidivism, and with more offenders being released into the community, the crime rate will go up.”¹⁸ Los Angeles District Attorney Steve Cooley agrees with Ramos. “We are going to go from the lowest crime rate in 60 years to the biggest spike in crime in our lifetime. On top of that it’s going to force more case settlements and the quality of prosecutions will decline.”¹⁹

¹⁵ *Id.*

¹⁶ Melissa Corker, *Sacramento Press*, *AB 109 Brings New Inmates and New Challenges to County Jail*, http://www.sacramento Press.com/headline/58003/AB_109_brings_new_inmates_and_new_challenges_to_county_jail (last visited Jan. 28, 2012).

¹⁷ David Greenwald, *Davis Vanguard*, *D-Day Approaches for AB 109 and Realignment – No One Sure What it Means*, http://davisvanguard.org/index.php?option=com_content&view=article&id=4721:d-day-approached-for-ab-109-and-realignment-no-one-sure-what-it-means&catid=74:judicial-watch&Itemid=100 (last visited Jan. 28, 2012).

¹⁸ Melissa Corker, *Sacramento Press*, *AB 109 Brings New Inmates and New Challenges to County Jail*, http://www.sacramento Press.com/headline/58003/AB_109_brings_new_inmates_and_new_challenges_to_county_jail (last visited Jan. 28, 2012).

¹⁹ David Greenwald, *Davis Vanguard*, *D-Day Approaches for AB 109 and Realignment – No One Sure What it Means*, http://davisvanguard.org/index.php?option=com_content&view=article&id=4721:d-day-approached-for-

It is clear that realignment defies consensus opinions. However, regardless of whether commentators view AB 109 as a long-overdue return to rehabilitation or a costly, unsafe burden on the counties, all agree on the law's magnitude. From the widespread transfer of post-release supervision to the counties, to the wide latitude given to county judges in sentencing defendants to jail or mandatory supervision, it is no wonder that AB 109 is described as the greatest change to the criminal justice system in 35 years.

Chapter 2

Literature Review: The Evolution of Discretion

Realignment provides unprecedented discretion to California's 58 counties in imposing "blended" sentences and spending the millions of dollars diverted from state coffers. But this is not the first time California has provided such wide latitude to the administrators of its criminal justice system. Accordingly, this section consults the literature to provide an overview of the historical arc of discretion. We examine California's shift from an indeterminate sentencing scheme to a more cabined determinate system, and the reasons accompanying this shift. The section next provides examples of how, even before AB 109, California provided wide latitude in how counties might apply California criminal law. Finally, the section concludes with an examination of the parallels between realignment and the system of indeterminate sentencing that Californians rejected in the 1970's.

From the 1930's until the mid-1970's, United States criminal justice was marked by a wide latitude provided to individual system actors. Michael Tonry explains:

Every State, the Federal Government, and the District of Columbia had an indeterminate sentencing system in which legislatures set maximum authorized sentences (and occasionally, but seldom, minimum sentences); judges chose among imprisonment, probation, and fines and set maximum sentences; corrections officials had broad powers over good time and furloughs; parole boards set release dates; and virtually all these decisions were immune from review.²⁰

²⁰ Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, U.S. Dept. of Justice Sentencing & Corrections Issues for the 21st Century (Sept. 1999).

This scheme maximized case-by-case flexibility and latitude, virtually guaranteeing variation. By definition, the latitude afforded to individual actors would effect widespread differences among counties.

The fundamental idea underlying these indeterminate sentencing schemes was, as Tonry describes, “Individualization.”²¹ He explains, “At every stage officials needed broad authority to tailor dispositions to the treatment needs of individual offenders and the public safety risks they posed.”²² Of course, premising this scheme was the idea that treatment and rehabilitation can actually be effective. Official drafts of the Model Penal Code, written in the 1950’s, list the number two purpose of sentencing as “To promote the correction and rehabilitation of offenders.”²³ It is no exaggeration to say that the goal of rehabilitation was literally written into indeterminate sentencing law.

Yet as critics cast doubt on the idea that criminals could change, the discretion inherent in indeterminate sentencing became less appealing. In the 1970’s, research findings showed that treatment programs were ineffective.²⁴ Conservatives pointed to these findings and argued that “broad discretion permitted undue leniency and undermined the deterrent effects of sanctions.”²⁵ In other words, if treatment was not working, it only served to lighten sentences and incentivize crime. Attacking from the opposite angle, liberals critiqued sentencing discretion by arguing that outcomes

²¹ *Id.* at 3

²² *Id.*

²³ *Model Penal Code (Tentative Draft No. 2)*, Philadelphia: American Law Institute, 1954; *Model Penal Code (Tentative Draft No. 5)*, Philadelphia: American Law Institute, 1956; *Model Penal Code (Proposed Final Draft No. 1)*, Philadelphia: American Law Institute, 1961.

²⁴ Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, U.S. Dept. of Justice Sentencing & Corrections Issues for the 21st Century, 5 (Sept. 1999).

²⁵ *Id.*

reflected judges' racial biases.²⁶ As a result of these critiques, some states began to change their criminal justice systems.

California was one of the first states to change. Until 1976, California used an indeterminate sentencing scheme that gave judges enormous discretion in sentencing and parole authorities equally vast discretion in releasing inmates.²⁷ Policy-makers rejected this system on account of, among other reasons, its lack of uniformity and for unrealistically promoting rehabilitation as one of the principal goals of sentencing.²⁸ In 1976, the State Legislature enacted the Determinate Sentencing Act, "explicitly describing the new law's philosophy as rooted in 'punishment' rather than in rehabilitation."²⁹ The law created a "triad" sentencing scheme, still in effect today, where each offense is assigned a low, middle, and upper sentence. Additionally, parole authorities were stripped of their discretion to release inmates before the expiration of their sentences. Discretion simply lost its appeal.

Yet even in states employing determinate sentencing schemes, there is often room for discretion. For example, a significant number of "offenders who face mandatory prison sentences if convicted find themselves being diverted from prosecution altogether."³⁰ This reality of discretion within determinate sentencing exists in California. While the state still employs the triad scheme and deprives parole officers of the authority to release inmates early, pre-realignment features of California criminal justice, such as wobblers and three strikes, allow actors a sizable amount of

²⁶ American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America*, New York: Hill and Wang, 1971.

²⁷ Kara Dansky, California Progress Report, *Why California Needs a Sentencing Commission*, <http://www.californiaprogressreport.com/site/why-california-needs-sentencing-commission> (last visited Jan. 28, 2011).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, U.S. Dept. of Justice Sentencing & Corrections Issues for the 21st Century, 2 (Sept. 1999).

latitude. To better understand the latitude created by realignment, we studied this discretion.

Discretion in Charging Wobblers

Under California Penal Code section 17, prosecutors, magistrates, and judges are all given discretion to reduce certain crimes, or “wobblers,” from felonies to misdemeanors.³¹ Examples of wobblers include assault with a deadly weapon, not a gun (Cal. Penal Code § 245(a)(1)); domestic violence (Cal. Penal Code 273.5(a)); grand theft (Cal. Penal Code § 487(a)); possession of a controlled substance (Cal. Health & Saf. Code § 11377(a)); and joyriding (Cal. Veh. Code § 10851(a)).³²

The first act of discretion is that of the District Attorney who makes the initial choice of whether to charge a wobbler as a felony or a misdemeanor. The California District Attorney’s Association (CDAA) publishes the Uniform Crime Charging Standards, listing a series of factors that prosecutors might consider: prior record, probability of continued criminal conduct, severity of the crime, eligibility for probation, and cooperation of the accused, among others.³³ But these factors are mere guidance. The prosecutorial decision of whether to reduce a wobbler felony to a misdemeanor is wholly discretionary.³⁴

In 2010, three researchers at Stanford University tracked how District Attorney’s Offices across California used this wide discretion. Their article, “Wobblers & Criminal Justice in California: A Study into Prosecutorial Discretion,”³⁵ analyzes county-by-

³¹ Megan Berwick, Rachel Lindenberg & Julia Van Roo, *Wobblers & Criminal Justice in California: A Study Into Prosecutorial Discretion*, Public Policy Practicum at Stanford University 1-67, 4 (March 20, 2010).

³² *Id.*

³³ *Id.* at 6

³⁴ *Id.*

³⁵ *Id.*

county 2007 data. The article focuses on prosecutors' charging decisions of California Health & Safety Code section 11377(a), a wobbler that makes it illegal to possess certain drugs, including methamphetamine, ecstasy, and PCP, among others.³⁶ The authors selected this crime because it was the single most frequently charged crime in California in 2007, and because counties' practices in choosing whether to charge it as a felony or misdemeanor were more varied than with other wobblers.³⁷

And varied they were (*see* Table 1 below). In 2007, the percentage of California Health & Safety Code section 11377(a) offenses charged as misdemeanors, by county, ranged from 0% (e.g. Fresno) all the way up to 61% (Humbolt). The authors of the article conducted interviews with representatives at District Attorney's Offices in several counties to gain a window into the counties' widely divergent charging practices.³⁸ On one end, the District Attorney in Ventura "believes that there is never a reason to exercise discretion for § 11377(a) and implements a policy of charging all § 11377(a) cases as felonies."³⁹ On the other end, data from San Francisco County shows that section 11377(a) cases are rarely charged, constituting just 4% of crimes charged in the county, compared to a statewide average of 11%. And when charges *are* filed, they are filed as misdemeanors in a full 50% of cases.⁴⁰

Table 1: Use of Wobbler Discretion by County⁴¹

	All Crimes	Wobblers	§ 11377(a)		
COUNTY	Number Charged	Percentage Charged as	Number Charged	Percent of All	Percent charged as

³⁶ *Id.* at 8

³⁷ *Id.*

³⁸ *Id.* at 14

³⁹ *Id.*

⁴⁰ *Id.* at 12

⁴¹ *Id.*

		Misdemeanors		Crimes	misdemeanors
Fresno	9,081	3	1,249	14	0
Los Angeles	57,076	41	3,686	6	33
San Francisco	5,778	43	210	4	50
Santa Clara	10,463	13	2,123	20	8
Ventura	5,111	35	406	8	2

The Three Strikes Law: When do Prosecutors Strike a Strike?

California's Three Strikes Law provides another example of wide discretion within a determinate sentencing scheme. In 1994, the Three Strikes Law was signed by former California Governor Pete Wilson and was also passed as a voter initiative. The law provides that individuals with one serious or violent prior offense who are convicted of a second serious or violent offense receive double the sentence that would ordinarily apply. Individuals with two serious or violent prior offenses who are convicted of *any* third felony receive a life sentence.

Though the Three Strikes Law requires that prosecutors allege all prior strike offenses, it also allows them a large amount of discretion. They have wide latitude to dismiss or "strike" a prior offense in the interest of justice. While there is no clear definition of "in the interest of justice," prosecutors who elect to use their discretion look to many factors such as the nature of the recent offense, the defendant's prior criminal history, and how much time passed between prior offenses and the most recent offense. The law also gives judges discretion to dismiss or "strike" a prior offense in the interest of justice. Judges often look to the background, character, and prospects of the defendant when deciding whether to exercise their discretion.⁴²

⁴² *People v. Williams* 17 Cal. 4th 148 (1998).

In 2000, two researchers studied how prosecutors across California exercised their discretion. Their article, “It’s Not the Old Ball Game: Three Strikes and the Courtroom Workgroup”⁴³ reports the results of interviews and surveys the authors conducted in 1996 with officials in six California counties: Alameda, Fresno, Los Angeles, Orange, Santa Clara, and San Diego. The interviews and surveys were targeted to evaluate the officials’ knowledge of the Three Strikes Law, as well as their assessment of how often prosecutors exercise their discretion.

The interviewees were asked several questions, including in what percentage of cases they believed district attorneys did not file known prior offenses. The results, which are depicted in Table 2 below, vary widely by county.⁴⁴ Officials’ estimates ranged from 0.80% in Fresno County to 39.29% in Alameda County. Interviewees were also asked to estimate in what percentage of cases they believed prosecutors would strike a prior offense when the defendant had no violent criminal history and was currently charged with a non-serious offense.⁴⁵ The results, which are depicted in Table 3 below, ranged from 0.60% in Fresno County to 34.63% in Santa Clara County. Interviewees reported that “In jurisdictions where the district attorney’s policy is to charge all priors, the court actors believe that priors are rarely ignored” even for low-level crimes such as drug possession.⁴⁶

The article demonstrates how sentiments on the Three Strikes Law vary widely across counties. While prosecutors in some counties such as Fresno rarely exercise their discretion and almost always charge eligible crimes as strike offenses, prosecutors in

⁴³ John C. Harris & Paul Jesilow, *It’s Not the Old Ball Game: Three Strikes and the Courtroom Workgroup*, 17 Just. Q. 185 (2000).

⁴⁴ *Id.* at 193

⁴⁵ *Id.* at 195

⁴⁶ *Id.*

other counties, such as Santa Clara, do so much more often. Though the language of the law is the same, it is applied very differently throughout California's 58 counties.

Table 2: Estimated Percentages of Cases Which the District Attorney Did Not File Known Priors by County

County	Mean (Percentage)
Alameda	39.29
Fresno	0.80
Los Angeles	5.57
Orange	3.54
Santa Clara	9.11
San Diego	2.84

Table 3: Estimated Priors Stricken by Prosecutors in the Least Serious Third Strike Cases by County

County	Mean (Percentage)
Alameda	28.93
Fresno	0.60
Los Angeles	30.27
Orange	2.54
Santa Clara	34.63
San Diego	17.76

Discretion Inherent in Realignment

AB 109 provides administrators of California's criminal justice system a number of new and significant areas in which to exercise discretion. County probation officers can now assess the needs of, monitor, and violate a large subset of released offenders. And in a manner that evokes the indeterminate sentencing scheme rejected decades ago, judges can now sentence offenders to pure incarceration or blended sentences that include just a fraction of time behind bars. Prosecutors and defense attorneys can now

bargain over these blended terms, essentially deciding, alongside judges, how terms are to be served. A two-year sentence is no longer simply a two-year sentence.

In many ways, realignment reopens the decades-old debate over indeterminate sentencing. The arguments on both sides are so similar, one need only replace “indeterminate sentencing” with the word “realignment.” Recall that in the 1970’s, policy-makers attacked the indeterminate sentencing scheme for its lack of uniformity and for unrealistically promoting rehabilitation as one of the principal goals of sentencing. AB 109 promotes rehabilitation and does so expressly in the text of the law. And the law guarantees nothing if not a low degree of uniformity. The wobbler and three strikes data surveyed above shows that California counties use latitude to shape criminal justice in a local direction; there is no reason to believe realignment, an even greater grant of autonomy, will unfold differently.

Chapter 3

Methodology

In this paper we report the results of interviews with management-level attorneys from Public Defender and District Attorneys' Offices in five California counties: Santa Clara, Los Angeles, Ventura, Fresno, and San Francisco. These attorneys were asked a series of questions on four major topics. How will realignment affect the average length of incarceration in your county? Will the law facilitate an increased use of rehabilitative programming? How will the dynamic between District Attorney and Public Defender be affected? Finally, what are your concerns regarding realignment?

The Selection of Counties

We selected Santa Clara, Los Angeles, Ventura, Fresno, and San Francisco counties to capture the widely divergent approaches California counties have taken to criminal justice. The selection of counties was based on an analysis of two factors: (1) the county's previous use of discretion in charging wobblers as felonies versus misdemeanors; and (2) county voters' perspectives on the criminal justice system. As this analysis left a large number of prospective choices that would achieve our goal of divergent criminal justice approaches, we considered our contacts in the respective counties in making a final determination of which counties to include.

Discretion in Charging Wobblers

One of the factors included in our selection of counties is an analysis of California counties' use of discretion in charging "wobblers" as either felonies or misdemeanors.⁴⁷ For our study of realignment, we selected counties displaying a wide range of approaches to charging wobblers under the theory that past use of discretion can be used to predict how counties will use the tremendous discretion offered to them by AB 109 (see Table 1 above). For example, in 2007, the percentage of § 11377(a) offenses charged as misdemeanors in counties we selected ranged from 0% in Fresno to 50% in San Francisco.

Politics

The final data we used to guide our selection of counties were a series of indicators of voter views on criminal justice. District Attorney's Offices can develop their own culture and perspectives on crime and punishment that differ, however slightly, from those of their constituent populations. Counties' application of wobbler discretion might therefore fail as a predictor of the implementation of AB 109 if the voters view things differently—after all, District Attorney is an elected position.

Accordingly, we examined three indicators of voters' general views on criminal justice: countywide percentages of those voting yes on Proposition 66, percentages of those voting yes on Proposition 36, and the percentage of registered republicans.⁴⁸ Proposition 36, passed in 2000, changed the sentencing scheme of non-violent drug possession crimes, mandating probation and treatment instead of incarceration. The

⁴⁷ Megan Berwick, Rachel Lindenberg & Julia Van Roo, *Wobblers & Criminal Justice in California: A Study Into Prosecutorial Discretion*, Public Policy Practicum at Stanford University 1-67, 4 (March 20, 2010).

⁴⁸ California Counties' Voting Data from Dr. Jeffrey Lin, University of Denver (on file with author).

failed Proposition 66, introduced in 2004, would have altered the Three Strikes Law to require that the final strike be serious or violent. We selected these variables in the hope that they capture, however imperfectly, voters’ perspectives on whether the purpose of criminal justice is to punish or rehabilitate.

These data show a wide variance between voters across California (see table 4 below). Among counties we ultimately selected, the percentage of registered Republicans ranged from 13% (San Francisco) to 46% (Fresno). Votes to limit the Three Strikes Law ranged from 48% (Fresno) to 76% (San Francisco). Votes to reform drug possession law were similarly varied, with Fresno and San Francisco again landing at the extremes of 38% and 70%, respectively. To a large extent, this variation correlates with the percentage of Republican voters. We selected counties with such disparate views with the intention that these views are reflected in perspectives on realignment.

Table 4: County Politics and Views on Criminal Justice

County	Percent Republican	Yes on Prop. 66	Yes on Prop. 36
Fresno	46%	48%	38%
Los Angeles	28%	65%	50%
San Francisco	13%	76%	70%
Santa Clara	29%	65%	52%
Ventura	42%	60%	39%

Conducting Interviews

Once we selected counties to study, we set about identifying attorneys at both Public Defender and District Attorney’s Offices to interview. We chose to interview prosecutors and defense attorneys because these stakeholders were in a good position to evaluate our topics of interest—realignment’s affect on the average length of incarceration, the use of rehabilitative programming, general concerns with the law,

and, perhaps most of all, changes in the leverage and character of bargaining between defense and prosecuting attorneys. Interviewing these lawyers enabled us to view AB 109 from the vantage point of those implementing its provisions from the trenches.

We used two primary criteria in selecting interviewees. We first wanted all subjects to occupy a management-level position at their respective offices. This would help ensure that, to some degree, the individual's opinions and predictions are representative of the office. Our second requirement was that the interviewees understand the contours of AB 109. To find attorneys who fit our two criteria, we relied primarily on the assistance of Dr. Joan Petersilia of Stanford Law School, as well as Jon Wolff and Dane Gilette of the California Department of Justice. In most instances, the attorneys with whom we spoke were self-reported office experts on the subject of realignment, though some acknowledged that their views may not be identical to those of their colleagues.

The interviews were conducted over a roughly three-month period between October and December of 2011. All but one of these interviews were conducted over the phone, and all were transcribed. The interviews ranged between 20 and 60 minutes. At the outset of each interview, we informed the subjects that their identity would remain anonymous and that we would reference only their county and office. Additionally, we told the subjects that we would not publish any of their quotations without prior approval.

We began the interview process knowing the four primary topics of inquiry: predictions of changed length of incarceration, and use of blended sentences; changes in the use of rehabilitative programming; changes in the character of bargaining between prosecutor and defense attorney; and general concerns posed by the law. While we

attempted to cover these topics in every interview, the earlier interviews had a more exploratory format. This enabled us to discover subtopics that seemed to be of interest to many attorneys—e.g., the possibility of prosecutors using enhancements and their general charging discretion to remove defendants from 1170(h) sentencing.

While most offices and attorneys with whom we spoke were eager to share their perspectives on realignment, some offices presented more resistance. The Los Angeles District Attorney's Office declined to answer most of our questions. The Fresno District Attorney's Office, while initially expressing willingness to speak, ultimately refused to be interviewed. The Ventura Public Defender's Office was similarly resistant and, as of this time, has not agreed to an interview. Nevertheless, most offices and attorneys were willing to speak and shared their candid opinions and predictions on realignment.

Interview Questions

Average Length of Incarceration

The first topic discussed in our interviews was how AB 109 might affect the average length of incarceration—in other words, the average amount of time that criminal defendants will spend in jail. One of the most flexible, and to us intriguing, areas of realignment is the provision of blended sentences. Judges across the state are given the option of sentencing defendants to a range of incarceration from virtually no jail time to the entirety of the sentence. We asked attorneys, “Will this new ability of judges to split sentences reduce the amount of time served for 1170(h) eligible defendants? Are judges handing down split sentences in your county? Why or why not?” We also asked how AB 109 might affect the average length of incarceration through means other than the use of split sentences.

Use of Rehabilitative Programming

The second topic of our interviews was whether the law would facilitate any change in counties' use of rehabilitative programming. The text of AB 109 is peppered with references to rehabilitation—newly returned as an express purpose of criminal justice. We chose to focus on the use of rehabilitative programming because of this centrality to the law, as well as what we suspected might be widely divergent results in different counties. We asked attorneys, “Will AB 109 expand rehabilitative programming? Why or why not?”

Changes in Bargaining Leverage

Realignment introduces a number of significant changes to California criminal justice: prison is off of the table for a subset of offenders, rehabilitation is reintroduced as a stated justification of criminal punishment, and a new category of debate is open in every case—what proportion of the sentence will be time served in jail? These changes bring with them the potential to alter the dynamic between the District Attorney and the Public Defender. We asked attorneys, “Does AB 109 affect the leverage enjoyed by the prosecution and the defense? In addition to any changes in power, does the law affect the character or nature of bargaining?”

Other Concerns

Finally, because realignment brings such significant and abrupt changes to California criminal justice, we wanted to discuss with stakeholders their concerns with the law. In each interview, we asked the open-ended question of concerns posed by AB

109. We anticipated, and received, answers presenting a series of fascinating and often unexpected complications.

Chapter 4

Interview Results

Length of Incarceration

Summary

Intuitively, one would believe that AB 109's provision of blended sentences would serve to reduce the average length of incarceration. But predictions of how realignment will affect the average length of incarceration vary dramatically by county. Some counties will use blended sentences in the majority of cases, while others will use them sparingly.

In San Francisco, representatives from both the District Attorney and Public Defender's Offices are confident that the large majority of 1170(h) sentences will include a period of mandatory supervision, driving down the average length of time served. The attorneys point to their county's confidence in evidence-based practices and prosecutors' desire to see defendants receive post-release supervision. "In San Francisco, the phrase 'we value incapacitation' does not come up very often."⁴⁹

Contrast this to counties such as Ventura, where, according to the District Attorney's representative, just one or two of the 31 sentences imposed at the time of interview included any provision of mandatory supervision. "My guess—and this is speculation here—is that judges place a higher value on incapacitating individuals than supervising them."⁵⁰ Similarly, the Los Angeles Public Defender representative

⁴⁹ Telephone interview with attorney at San Francisco County District Attorney's Office (Nov. 30, 2011).

⁵⁰ Telephone interview with attorney at Ventura County District Attorney's Office (Nov. 17, 2011).

expressed confidence that judges will not hand down blended sentences because of prosecutorial and judicial resistance.⁵¹

Not all interviewees expressed such unequivocal views. Fresno's Public Defender representative believed that judges will hand down blended sentences on at least some occasions because sentences without post-release supervision "make people very nervous,"⁵² but the attorney was not comfortable predicting how often. Attorneys from Santa Clara's Public Defender and District Attorney's Offices were themselves in disagreement on the prevalence of blended sentences. The District Attorney representative estimated that just 20-25% would include post-release supervision, while two interviewees from the Public Defender's Office expressed a general confidence that judges will impose blended sentences, inconsistent with the District Attorney's estimate.

Public Defender representatives from three very different counties—Santa Clara, Fresno, and San Francisco—expressed concerns that judges will hand down longer sentences to maintain pre-realignment length of incarceration and some amount of post-release supervision. One explained, "There may be a tendency for courts to determine that a defendant should be sentenced to a middle or aggravated term, instead of a mitigated term."⁵³ Similarly, another Public Defender noted, "We are kind of having to fight for this concept—for example, that case A was worth 16 months before realignment and that it isn't worth *more* after realignment. But some of these judges are having a hard time redoing the currency on these sentences."⁵⁴ No attorneys from District Attorney's Offices mentioned overuse of aggravated terms or variance among judges as concerns.

⁵¹ Telephone interview with attorney at Los Angeles Public Defender's Office (Oct. 26, 2011).

⁵² Telephone interview with attorney at Fresno Public Defender's Office (Nov. 14, 2011).

⁵³ *Id.*

⁵⁴ Telephone interview with attorney at Santa Clara Public Defender's Office (Nov. 8, 2011).

On occasion, our interviewees responded to our questions regarding length of incarceration by introducing unexpected complications. The Los Angeles Public Defender predicted that overcrowding will reduce average time served despite a lack of blended sentences because the Sheriff will simply have to release misdemeanants, and possibly even felons, well in advance of their release dates.⁵⁵ San Francisco's District Attorney explained that some defense attorneys will advocate for straight jail time to avoid violations while the prosecutor fights for some form of post-release supervision.⁵⁶ Based on our divergent interviews in five counties, it appears that AB 109 will introduce issues and sentencing schemes unique to each county.

Santa Clara County Public Defender's Office

We interviewed two management-level attorneys at the Santa Clara Public Defender's Office. Their attitudes regarding length of incarceration and the use of blended sentences was optimistic, yet guarded.

One attorney predicted, "Blended sentences will happen."⁵⁷ However, she named as a concern the possibility that certain judges will increase sentence length to maintain the status quo (i.e. a two-year prison felony with parole will become a three-year jail felony to maintain incarceration length and some post-release supervision). She also noted that some judges simply are not giving blended sentences. "We're seeing a lot of variation in how judges are determining sentences. For example, judges who do probation violation calendars seem less likely to include mandatory supervision in their

⁵⁵ Telephone interview with attorney at Los Angeles Public Defender's Office (Oct. 26, 2011).

⁵⁶ Telephone interview with attorney at San Francisco County District Attorney's Office (Nov. 30, 2011).

⁵⁷ In-person interview with attorney at Santa Clara Public Defender's Office (Oct. 18, 2011).

sentences than a judge who is seeing a defendant for the first time.”⁵⁸ Overall though, “length of hard time served seems to be going down or at the very least staying the same.”⁵⁹

Another attorney we spoke with from the same office expressed a similar sentiment. “I am hopeful that once people embrace the spirit of realignment, the amount of time people spend incarcerated will be reduced.”⁶⁰ This attorney noted, however, the critical issue of judicial education. “Right now it seems like we are kind of proselytizing the spirit of realignment. We are kind of having to fight for this concept—for example, that case A was worth 16 months before realignment and that it isn’t worth *more* after realignment. But some of these judges are having a hard time redoing the currency on these sentences.”⁶¹

Santa Clara County District Attorney’s Office

We interviewed a management-level attorney at the Santa Clara District Attorney’s Office. In contrast to the Santa Clara Public Defenders, the District Attorney representative with whom we spoke was less confident that length of incarceration would be reduced in any major way.⁶²

The DA representative stated, “In the long run, I am not sure how realignment will affect the average length of incarceration.”⁶³ The attorney emphasized that judges have a new component of discretion—i.e. whether or not to impose a blended sentence—and it is unclear how they will use this new power. “Some individuals will no doubt

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Telephone interview with attorney at Santa Clara Public Defender’s Office (Nov. 8, 2011).

⁶¹ *Id.*

⁶² Telephone interview with attorney at Santa Clara District Attorney’s Office (Nov. 7, 2011).

⁶³ *Id.*

receive terms that include mandatory supervision, but in the 90 or so cases we've seen so far, the vast majority have been sentenced to 1170(h) jail terms without any mandatory supervision.”⁶⁴ The attorney estimated that about 75-80% received non-blended sentences and stated that he was unsure as to why this was the case. He predicted that, ultimately, “Courts will feel comfortable with certain types of crimes receiving certain kinds of sentences, but it is too early for us to make a call as to what those will be.”⁶⁵

The Santa Clara District Attorney's Office, according to its representative, has no formal policy regarding when to seek full jail terms and when to accept a blended sentence with mandatory supervision. He also noted that it is unlikely Santa Clara prosecutors will use the flexibility offered to them, i.e. of charging different counts, to preserve the types of dispositions occurring pre-realignment.⁶⁶

Los Angeles County Public Defender's Office

We spoke with one senior-level trial attorney at the Los Angeles Public Defender's Office. He expressed a general confidence that realignment will effect a reduction in incarceration time in Los Angeles County but *not* via blended sentences.⁶⁷

The LA Public Defender representative forecasted that the problem plaguing California State Prisons would soon inundate Los Angeles jails: overcrowding. “The Sheriff is going to run into problems that prisons are facing now, and will be subject to the same type of lawsuit eventually. Jails were not meant to house this number of

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Telephone interview with attorney at Los Angeles Public Defender's Office (Oct. 26, 2011).

people for this length of time.”⁶⁸ Though the county set aside 700 beds for realignment, “the beds will be full soon and it will only take a minute for an inmate to register a complaint that overcrowding is causing cruel and unusual punishment.”⁶⁹ The attorney predicts that because of this overcrowding, inmates will be released well in advance of their release dates, thereby lowering the average length of incarceration time. “This overcrowding will particularly affect misdemeanants sitting in jail; they will be the population released first by the Sheriff.”⁷⁰

While the Sheriff may have no choice but to reduce length of incarceration because of overcrowding, the other responsible parties have so far shown no inclination to do so. The representative believes “Los Angeles DA’s are not hinting at any change in their policy.”⁷¹ Similarly, “I do not believe blended sentences will be used. In Los Angeles County, to this date, a few judges in Los Angeles County have used the split (or blended) sentences but those sentences are uncommon.”⁷² When asked why judges are not using blended sentences, the representative stated that it was because, “It will only mean more bodies for them to supervise.”⁷³ He also stated such resistance from judges and the District Attorney may be attributable to the fact that both are elected.

Los Angeles County District Attorney’s Office

We interviewed one management-level attorney at the Los Angeles District Attorney’s Office. As with the other topics we tried to discuss, the representative admonished that it was too early to predict whether the average length of incarceration

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

would change.⁷⁴ She did inform us that while the office has guidelines on AB 109 that could not be shared with us, each case is approached on an individualized basis—there are no categories for which the District Attorney’s Office would, or would not, accept blended sentences.

Fresno County Public Defender’s Office

We interviewed one senior attorney at the Fresno Public Defender’s Office. He expressed a general hopefulness that length of incarceration would decline for at least three reasons.⁷⁵

The Fresno Public Defender representative began by explaining how he believed judges in his county would impose split sentences containing mandatory supervision.⁷⁶ “Under the law as written, judges are not supposed to hand down middle and aggravated terms that would have previously been lower or middle terms. But they might. That being said, the use of split sentences still should reduce the time inmates spend incarcerated.”⁷⁷ The attorney noted, however, that fewer sentences than would be desirable are blended with a tail end of mandatory supervision—perhaps just 20% or so.

The second reason he cited is that AB 109 “does not impose an upper limit on the length of a county jail felony term.”⁷⁸ He believes that because county jails have not been built for long-term occupancy, “judges are going to be reluctant to impose long county jail sentences, but will instead be more likely to split sentences.”⁷⁹ He noted, however, that “years from now, there may be some counties that build facilities that are

⁷⁴ Telephone interview with attorney at Los Angeles District Attorney’s Office (Nov. 28, 2011).

⁷⁵ Telephone interview with attorney at Fresno Public Defender’s Office (Nov. 14, 2011).

⁷⁶ The Fresno PD prefers the term “split” to “blended,” though their meaning is the same.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

better geared to longer incarceration”⁸⁰ which may change how judges impose sentences.

The final factor the Fresno Public Defender representative believes will play a role in reducing the length of incarceration is the desire by the court and others for post-release supervision. “If a full sentence is imposed, there is no post-release supervision at all, and that makes people very nervous.”⁸¹ He stated, “I do not doubt that the desire for post-release supervision is a real reason for split sentences.”⁸²

The attorney explained that “Courts are supposed to decide first—is this crime worthy of a middle, mitigated, or aggravated term? Impose it, and then decide whether to split it.”⁸³ However, he expressed concern that while he has not observed the phenomenon himself, “there may be a tendency for courts to determine that a defendant should be sentenced to a middle or aggravated term, instead of a mitigated term. A judge may be more inclined do this if she knows the person is going to go local instead of prison.”⁸⁴ The attorney predicts that “Judges are going to be reluctant, at least at first, to impose county jail felony terms at a mitigated length and then split the sentence.”⁸⁵

Ventura County District Attorney’s Office

We interviewed one management-level attorney at the Ventura County District Attorney’s Office. He confidently predicted that length of incarceration would not see

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

much impact resulting from realignment because of judicial and prosecutorial priorities.⁸⁶

According to the Ventura County District Attorney, at the time of interview, nearly all post-realignment sentences are terminal sentences consisting exclusively of jail time. “Of the 31 dispositions falling under 1170(h), just one or two have included portions of mandatory supervision.”⁸⁷ When asked why this would be the case, the representative stated, “My guess—and this is speculation here—is that judges place a higher value on incapacitating individuals than supervising them.”⁸⁸ The attorney noted that prosecutors play a significant role in this process. “The DA would be sitting there in court, in many cases advocating for longer jail sentences with lesser supervision time. District Attorneys, culturally and through training, place a high value on incarceration.”⁸⁹

The Ventura DA also commented on the office’s official policies on this topic. “Our preliminary policy contains a significant amount of discretion. We look at things on a case-by-case basis.”⁹⁰

San Francisco County Public Defender’s Office

We spoke with one management-level representative from the San Francisco Public Defender’s Office. He believed that San Francisco County would see a significant reduction in incarceration time resulting from heavy use of blended sentences.⁹¹

⁸⁶ Telephone interview with attorney at Ventura County District Attorney’s Office (Nov. 17, 2011).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Telephone interview with attorney at San Francisco Public Defender’s Office (Nov. 30, 2011).

The San Francisco PD representative predicts, “Well over half of sentences will include some form of post-release supervision.”⁹² He commented, “If everyone buys into evidence-based practices, 1170(h) offenders should see a significant reduction in actual incarceration time and a lot of blended sentences.”⁹³ Interestingly, this is not necessarily a good thing for a run-of-the-mill defendant. “As a defense attorney, in at least some cases I do not want post-release supervision. This is same reason that many of my clients take issue with parole. But the District Attorney *does* want some form of supervision.”⁹⁴ When asked how judges may react to realignment, the San Francisco representative stated a concern that some judges may increase overall sentence length to preserve the status quo. “I haven’t seen it yet, but it’s so new—it doesn’t mean it isn’t happening.”⁹⁵

San Francisco County District Attorney’s Office

We interviewed one management-level representative of the San Francisco District Attorney’s Office. She described San Francisco County’s heavy use of blended sentences and the interesting effect this is having on the role of prosecuting and defense attorneys.⁹⁶

The San Francisco DA representative predicts that prosecutors “will seek blended sentences in the majority of 1170(h) cases.”⁹⁷ She notes, however, that San Francisco will see a role reversal between defense attorneys and DAs. “District Attorneys may actually prefer for defendants to have shorter jail sentences followed by a longer period

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Telephone interview with attorney at San Francisco County District Attorney’s Office (Nov. 30, 2011).

⁹⁷ *Id.*

on probation, as opposed to a sentence solely served in jail. It is a scary proposition to a DA for a defendant to be released from prison or jail without any supervision.”⁹⁸

Interestingly, she notes “Defense attorneys may turn out to advocate for straight jail time, because their clients can pick up a new violation while on probation.”⁹⁹

She also believes judges will be very receptive to imposing blended sentences. “In San Francisco, the phrase ‘we value incapacitation’ does not come up very often. San Francisco is unique. We have an elected Public Defender, a very defense experience-heavy bench, and a highly vocal jury pool that tends to be sympathetic to the needs of defendants who are impoverished or suffering from addiction.”¹⁰⁰ The attorney noted that “In San Francisco, we sent very few people to state prison even before realignment, so the argument that people should be incarcerated for less time will be very well-received by the bench and the jury pool.”¹⁰¹

Rehabilitation

Summary

Almost every attorney with whom we spoke believes that realignment will extend the use of rehabilitative services and programming. The only representative who did not share this sentiment was the attorney from the LA Public Defender’s Office. He is confident that realignment will not expand rehabilitative services for offenders in LA, mostly because of their high inmate population and insufficient funding.¹⁰²

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Telephone interview with attorney at Los Angeles Public Defender’s Office (Oct. 26, 2011).

All other representatives who were willing to comment on this issue expressed a strong belief that realignment will expand rehabilitation. Attorneys from San Francisco’s Public Defender and District Attorney’s offices share similar beliefs that San Francisco is taking the lead on rehabilitation. The representative from the Public Defender’s Office noted, “San Francisco is probably taking the lead on post-realignment rehabilitation, just as we’ve taken the lead on rehabilitation in the past.”¹⁰³ He believes that realignment represents, in part, society’s views that formerly incarcerated individuals receive a greater benefit from rehabilitation than pure incarceration. “For a long time, [the pendulum] was swinging in the direction of straight punishment. But now people see that doesn’t work, so the pendulum is swinging back towards rehabilitation.”¹⁰⁴ The interviewee from San Francisco’s District Attorney’s Office echoed his beliefs. She explained that her office “has taken upon itself to come up with creative ways to avoid incarceration”¹⁰⁵ such as creating a new position—Alternative Sentencing Planner—whose job it is to work with prosecutors to ensure an offender’s accountability and rehabilitation. She noted, “The San Francisco District Attorney’s Office emphasizes the use of transitional housing beds, job training programs, and substance abuse programs.”¹⁰⁶

Though other counties may not be as far along in their rehabilitative effort as San Francisco, representatives from Santa Clara and Fresno are hopeful that AB 109 will expand rehabilitation. Representatives from the Fresno and Santa Clara Public Defender’s Offices noted the important role judges and probation officers are playing in the rehabilitative process. An attorney at the Santa Clara Public Defender’s Office told

¹⁰³ Telephone interview with attorney at San Francisco Public Defender’s Office (Nov. 30, 2011).

¹⁰⁴ *Id.*

¹⁰⁵ Telephone interview with attorney at San Francisco County District Attorney’s Office (Nov. 30, 2011).

¹⁰⁶ *Id.*

us, “I see judges as the gatekeeper. At the end of the day, they are the ones imposing sentences, and it is on them to adopt this new concept of rehabilitation.”¹⁰⁷ She also believes that “The Probation Department seems to be giving it a very sincere effort on meeting with individuals who will be on post-release community supervision and doing a full evaluation of their needs.”¹⁰⁸ The representative from Fresno’s Public Defender’s Office shared similar sentiments.¹⁰⁹

While an attorney from Santa Clara’s Public Defender’s Office stressed the importance of AB 109’s rehabilitative language, the representative from Santa Clara’s District Attorney’s Office pointed out that AB 109’s language is not entirely one-sided. “The language in the law actually goes both ways. There is of course a good deal of discussion of rehabilitation, but the law also highlights the importance of public safety.”¹¹⁰ Still, he believes the “law is premised on the expanded use of evidence-based practices”¹¹¹ and will expand the use of rehabilitative programming.

Santa Clara County Public Defender’s Office

We spoke with two management-level attorneys at the Santa Clara Public Defender’s Office. They both expressed hope that realignment would extend the use of rehabilitative programming in Santa Clara County.

One attorney believes that realignment is a step in the right direction of adult detention reform. “We recognize that this is a slow process, but are hopeful that the text of the law recognizes the need to increase our focus on rehabilitation. There is a

¹⁰⁷ Telephone interview with attorney at Santa Clara Public Defender’s Office (Nov. 8, 2011).

¹⁰⁸ *Id.*

¹⁰⁹ Telephone interview with attorney at Fresno Public Defender’s Office (Nov. 14, 2011).

¹¹⁰ Telephone interview with attorney at Santa Clara District Attorney’s Office (Nov. 7, 2011).

¹¹¹ *Id.*

growing awareness that holding people in custody for so long does not benefit anybody.”¹¹² She also noted the importance of educating the bench on this topic. “Judges need to know which programs are available, and who is eligible.”¹¹³

Another representative is very optimistic that rehabilitative efforts will be strengthened. She points to two main players: judges and probation officers. “I see judges as the gatekeeper. At the end of the day, they are the ones imposing sentences, and it is on them to adopt this new concept of rehabilitation.”¹¹⁴ Thankfully, in her opinion, “The Probation Department seems to be giving it a very sincere effort on meeting with individuals who will be on post-release community supervision and doing a full evaluation of their needs. They seem to have changed their tone from law enforcement to social worker.”¹¹⁵

Santa Clara County District Attorney’s Office

We spoke with one management-level attorney at the Santa Clara District Attorney’s Office. Like his counterparts at the Public Defender’s Office, he believes that realignment will effect a broader use of rehabilitative programming.¹¹⁶

The Santa Clara District Attorney’s Office notes that the language in AB 109 is not entirely one-sided. “The language in the law actually goes both ways. There is of course a good deal of discussion of rehabilitation, but the law also highlights the importance of public safety.”¹¹⁷ That being said, the Office acknowledges that the law signals a change. “This law is premised on the expanded use of evidence-based practices. It also speaks of

¹¹² In-person interview with attorney at Santa Clara Public Defender’s Office (Oct. 18, 2011).

¹¹³ *Id.*

¹¹⁴ Telephone interview with attorney at Santa Clara Public Defender’s Office (Nov. 8, 2011).

¹¹⁵ *Id.*

¹¹⁶ Telephone interview with attorney at Santa Clara District Attorney’s Office (Nov. 7, 2011).

¹¹⁷ *Id.*

graduated sanctions, and the importance of keeping people in the community for longer periods of time.”¹¹⁸

Though he emphasized that AB 109 and California criminal law more generally focus on public safety, the DA’s representative predicted, “Yes, definitely, the implementation of realignment will expand rehabilitative programming. Our county plan is supportive of programming, and there is no reason to believe this won’t be reflected in actual implementation.”¹¹⁹

Los Angeles County Public Defender’s Office

We spoke with one senior-level trial attorney at the Los Angeles Public Defender’s Office. When asked how AB 109 would affect rehabilitative programming in LA, the representative laughed. He told us he was confident that realignment will not work in Los Angeles and that rehabilitation will not be used more frequently in the wake of the law, mostly due to their high inmate population and insufficient funding.¹²⁰

The Los Angeles Public Defender’s Office representative lamented, “In Los Angeles, we should focus more on treatment. But we don’t emphasize rehabilitation here. We could be using treatment courts, reentry courts, and counseling more effectively, but these things are not happening. Realignment will not be any different.”¹²¹ He explained that an individual released from county jail “is not subject to any supervision unless that person received a blended sentence. DA’s are not altering their policy and offering executed sentences. As a result, defendants are doing jail time and being released. Since they are neither on probation or parole, they are not offered

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Telephone interview with attorney at Los Angeles Public Defender’s Office (Oct. 26, 2011).

¹²¹ *Id.*

any treatment or counseling.”¹²² Additionally, “many defendants are opting for executed jail sentences as opposed to treatment in a specialized court or from probation under their beliefs that they will be released early from jail.”¹²³ The attorney noted, “The only hope for expanded rehabilitation is that judges start to realize the extent of the state’s financial crisis and sentence accordingly.”¹²⁴

Los Angeles County District Attorney’s Office

We spoke with one management-level attorney at the Los Angeles District Attorney’s Office. She did not comment on the use of rehabilitation in Los Angeles County.¹²⁵

Fresno County Public Defender’s Office

We interviewed one senior attorney at the Fresno Public Defender’s Office. He was hopeful that realignment would increase rehabilitative services that are offered to former inmates in Fresno County.¹²⁶

The Fresno County Public Defender’s Office representative believes “Fresno County will take rehabilitation seriously.”¹²⁷ He emphasized the importance of public support and noted two factors that will help expand rehabilitation. First, he is confident that “Fresno County’s probation department very much wants realignment to succeed and I’m hopeful that they will push for rehabilitative services.”¹²⁸

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Telephone interview with attorney at Los Angeles District Attorney’s Office (Nov. 28, 2011).

¹²⁶ Telephone interview with attorney at Fresno Public Defender’s Office (Nov. 14, 2011).

¹²⁷ *Id.*

¹²⁸ *Id.*

Though he believes “The probation department’s involvement is important to ensure the proper use of rehabilitation,”¹²⁹ the representative predicts that the second factor—the correct use of terminology— will play an even more significant role in expanding rehabilitative services in Fresno County. The representative believes “that the terminology the players and public use in implementing AB 109 is very important. Many people are referring to ‘local prison’ and ‘county prison.’ But this just emphasizes punishment. What realignment wants to do is implement practices to protect the public and reintegrate ex-offenders over the long term.”¹³⁰ The representative points to the language in the law and notes, “AB 109 doesn’t use the words ‘local prison’ or ‘county prison’, but instead uses the terms ‘county jail’ and ‘community-based punishment.’”¹³¹

He asserts that using the correct terminology will help determine the public’s mindset, which is essential for realignment to work. “What realignment requires to succeed is a genuine and major change in the way one approaches the aftermath of conviction. This is only possible with a change in the public’s mindset. Using the correct terminology and having the support of the probation department will help change the mindset from more punishment-based to more rehabilitative.”¹³²

Ventura County District Attorney’s Office

We interviewed one management-level attorney at the Ventura County District Attorney’s Office. Due to this attorney’s time constraints, we were unable to ask him about his predictions on AB 109’s effects on rehabilitation in Ventura County.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

San Francisco County Public Defender’s Office

We interviewed one management-level attorney at the San Francisco Public Defender’s Office. He was confident that realignment would increase rehabilitative services in San Francisco County, but only slightly.¹³³

The San Francisco County Public Defender’s Office representative opined, “San Francisco is probably taking the lead on post-realignment rehabilitation, just as we’ve taken the lead on rehabilitation in the past.”¹³⁴ He explained that the use of rehabilitation in California’s criminal justice system “swings like a pendulum. For a long time, it was swinging in the direction of straight punishment. But now people see that doesn’t work, so the pendulum is swinging back towards rehabilitation.”¹³⁵

The representative commented that because San Francisco has always been supportive of rehabilitative services for formerly incarcerated individuals, “The effect of realignment in San Francisco probably won’t be that big.”¹³⁶ He emphasized, however, “Now that the pendulum is swinging in the direction of rehabilitation, rehabilitative services will hopefully be expanded throughout the state.”¹³⁷

San Francisco County District Attorney’s Office

We interviewed one management-level attorney at the San Francisco District Attorney’s Office. She expressed the Office’s general support of rehabilitation, and is hopeful that realignment will help effectuate expanded rehabilitative services.

¹³³ Telephone interview with attorney at San Francisco Public Defender’s Office (Nov. 30, 2011).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

The San Francisco County District Attorney's representative explained, "San Francisco is unique. The DA's office has always been selective in its suggestion and support of prison sentences. Now, with realignment, we will perhaps be even more selective."¹³⁸ She told us that the San Francisco District Attorney's Office is taking realignment seriously, particularly its emphasis on rehabilitation. "Our Office has taken upon itself to come up with creative ways to avoid incarceration. We are probably the only DA's office in our state doing that."¹³⁹ When asked what she meant, she informed us of a new position at the DA's Office. "[We] recently created a new position called Alternative Sentencing Planner who is a DA staff member whose job it is to work with prosecutors to come up with mechanisms to ensure accountability of the offender, and it'll be someone who is adept at risk-management and assessment, and coming up with solutions to keep the person out of jail or prison."¹⁴⁰ She explained that the DA's office "has a unique lens on the issue of how to hold people accountable, while not putting them in jail or prison."¹⁴¹

In addition to creating a new position, the representative informed us that her office has "done some internal training on recidivism reduction and best practices to help advance our thinking as it relates to risk."¹⁴² She elaborated on San Francisco County's unique position by explaining, "We don't have overcrowded jails like a lot of other counties, and we as a county have endorsed the notion that California has relied too heavily on incarceration. I think the DA's office is in the best position to say what to

¹³⁸ Telephone interview with attorney at San Francisco County District Attorney's Office (Nov. 30, 2011).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

do instead of incarceration because we have the singular responsibility to take the victim into consideration.”¹⁴³

The representative told us that, instead of incarceration, “The San Francisco District Attorney’s Office emphasizes the use of transitional housing beds, job training programs, and substance abuse programs.”¹⁴⁴ She noted that for rehabilitation to work, “What we have to do is first agree on risk management and the method of risk management. Not all offenders will benefit from a supervision tail. For example, some low risk offenders don’t necessarily benefit from a bunch of supervision, so I don’t think that will help them. But it will for middle and high risk offenders.”¹⁴⁵ More important than helping the ex-offenders, the representative believes that “The community really needs rehabilitative services, because that’s where former offenders are going to be.”¹⁴⁶

Leverage

Summary

Nearly all interviewees agree: Realignment will increase defense attorneys’ leverage in negotiations with prosecutors, if only slightly. An attorney from the San Francisco Public Defender’s Office captured the general sentiment, “The Public Defender will have a little bit of an upper hand in the sense that more options are on the table, such as supervision, and more things are off the table, such as prison.”¹⁴⁷

Perhaps the most frequently mentioned source of defense attorneys’ newfound power is the removal of prison from the host of options facing an 1170(h) defendant.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Telephone interview with attorney at San Francisco Public Defender’s Office (Nov. 30, 2011).

The Ventura County District Attorney representative explains, “A state prison sentence used to be a big bargaining tool for us.”¹⁴⁸ Essentially, prosecutors used to induce pleas by offering to take prison off of the table if the defendant agreed to plead guilty. The San Francisco District Attorney representative expressed a similar view: “A lot of defendants who have extensive criminal histories are very clear on some of the sanctions they may be facing and are much more likely to want to settle and avoid prison.”¹⁴⁹ Most agree that the removal of prison changes the dynamics and augments the defense attorney’s leverage.

Another source of increased defense leverage is the language of the law itself. A representative from the Santa Clara Public Defender’s Office noted, “To have rehabilitation in the law so that defense attorneys can use that as a sword is a good thing. It hasn’t been there before.”¹⁵⁰ But balancing this, according to a District Attorney representative from the same county, is the law’s equal emphasis on public safety. “There’s language in the law that both sides can draw from.”¹⁵¹

In counties where overcrowding becomes a serious issue, defense attorneys may gain leverage because they can argue that a given defendant is not worth taking one of the limited spaces in jail. A Los Angeles Public Defender representative noted, “If overcrowding and early release becomes a reality, the defense may gain some leverage in negotiating.”¹⁵²

Finally, defense attorneys gain leverage, according to at least two public defense attorneys, in the opening of a new sphere of negotiation: the type of sentence to be

¹⁴⁸ Telephone interview with attorney at Ventura County District Attorney’s Office (Nov. 17, 2011).

¹⁴⁹ Telephone interview with attorney at San Francisco County District Attorney’s Office (Nov. 30, 2011).

¹⁵⁰ In-person interview with attorney at Santa Clara Public Defender’s Office (Oct. 18, 2011).

¹⁵¹ Telephone interview with attorney at Santa Clara District Attorney’s Office (Nov. 7, 2011).

¹⁵² Telephone interview with attorney at Los Angeles Public Defender’s Office (Oct. 26, 2011).

served. The Fresno PD pointed to this likely development as one of the most significant changes the law will bring to the relationship between prosecutor and defense attorney.¹⁵³ San Francisco's Public Defender representative similarly noted, "The biggest change in bargaining will be in discussions over supervision, which there didn't used to be in the past."¹⁵⁴

But not all attorneys believe that the defense attorney's gain will be significant. The Fresno Public Defender noted that while AB 109 will likely "give public defense attorneys an upper hand,"¹⁵⁵ prosecutors are going to trump charges to get offenders out of the 1170(h) category." Explains the San Francisco Public Defender, "Prosecutors can enhance charges, or charge out of 1170(h), so any increase in leverage the public defense attorneys may get is going to be small."¹⁵⁶

Santa Clara County Public Defender's Office

We spoke with two management-level attorneys at the Santa Clara Public Defender's Office. While they both expressed the belief that realignment is going to increase defendants' leverage during plea negotiations in Santa Clara County, they are in disagreement as to how significant the increase in leverage is going to be.

One attorney predicts that defendants' leverage will increase during plea negotiations for two reasons. "First, a big option has been taken off the table for 1170(h) offenders, and that's prison. Without prison on the table, a defendant's leverage is automatically relatively higher than it was before. Second, it is very publicly stated in the law and in the introduction to realignment, that we need to change the way we do

¹⁵³ Telephone interview with attorney at Fresno Public Defender's Office (Nov. 14, 2011).

¹⁵⁴ Telephone interview with attorney at San Francisco Public Defender's Office (Nov. 30, 2011).

¹⁵⁵ Telephone interview with attorney at Fresno Public Defender's Office (Nov. 14, 2011).

¹⁵⁶ Telephone interview with attorney at San Francisco Public Defender's Office (Nov. 30, 2011).

things about rehabilitation.”¹⁵⁷ The representative elaborated on how important it is that rehabilitation is now written into the law. “To have rehabilitation in the law so that defense attorneys can use that as a sword is a good thing. It hasn’t been there before.”¹⁵⁸ She continued, “The evidence-based practices piece is awesome because this business of locking people up when studies show that it isn’t the right solution has gone on for years and years.”¹⁵⁹ When asked what she meant by this, she responded, “The law is basically saying that we can take the evidence and show this isn’t how you reduce the recidivism rate—locking people up. Instead, it’s job training, and programming, and rehabilitation. That is going to be awesome.”¹⁶⁰

However, the attorney emphasized that the District Attorney’s Office is not powerless in the wake of realignment. “Though the law says that the District Attorney controls the charges and the judge controls the sentence, in fact, the District Attorney has much more control than that because they can refuse to bargain the charges.”¹⁶¹ When asked for an example, she responded, “If someone is charged with grand theft, he’d be eligible for 1170(h) sentencing. But if he is charged with robbery, then he’s not. The difference between grand theft and robbery can be really slight. It can be as slight as the amount of force used in a purse snatching.”¹⁶² She explained that if a District Attorney charges a crime as robbery, when it appears to be grand theft, there’s not much a defense attorney or even judge can do. She explained, “Even if a judge doesn’t agree,

¹⁵⁷ In-person interview with attorney at Santa Clara Public Defender’s Office (Oct. 18, 2011).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

she can't just sentence the defendant under 1170(h). She can't do it. Plus, judges don't like to go against what a DA wants."¹⁶³

Another representative at the Santa Clara Public Defender's Office believes that "The defense has more leverage in 1170(h) cases."¹⁶⁴ Like her colleague, she thinks the biggest factor is that prison is off the table. She said, "The reason for the change in leverage is because of a perceived cap on how much punishment a person can receive, and there's not a threat of prison."¹⁶⁵ She continued, "I have plenty of clients who have never been to prison and they don't want to go, so they'll take an offer no matter how crappy it may be just to keep themselves out of prison."¹⁶⁶

She also recognized that the District Attorney's Office is not powerless. However, she believes that even if District Attorneys inflates charges, it will not have a significant practical effect. "In actuality, even if prosecutors want to inflate cases such that people are spending some time in jail and some on supervision, there is a finite number of people the Sheriff can incarcerate, so there will eventually be some push back by the Sheriff, and maybe even the public."¹⁶⁷

Santa Clara County District Attorney's Office

We spoke with one management-level attorney at the Santa Clara District Attorney's Office. He was unsure whether realignment is going to significantly alter the leverage between Public Defenders and District Attorneys, but believes if it changes at all, it would most likely be in favor of defendants.¹⁶⁸

¹⁶³ *Id.*

¹⁶⁴ Telephone interview with attorney at Santa Clara District Attorney's Office (Nov. 7, 2011).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Telephone interview with attorney at Santa Clara District Attorney's Office (Nov. 7, 2011).

The representative believes that AB 109 is going to make “certain arguments more focused. But the language in realignment goes both ways. There’s a lot of talk about rehabilitation, which is great, but the law emphasizes rehabilitation just as much as it emphasizes public safety. There’s language in the law that both sides can draw from.”¹⁶⁹ Regardless of which side will ultimately benefit more from the language in AB 109, the attorney believes, “The idea and premise behind realignment is for evidence-based practices to take center stage. We want to keep people in the community for longer periods of time. I fully expect the defense to be arguing all of these things, but I think it equally applies to prosecutors’ arguments.”¹⁷⁰

Los Angeles County Public Defender’s Office

We interviewed one senior-level trial attorney at the Los Angeles Public Defender’s Office. He is confident that “if overcrowding and early release becomes a reality, the defense may gain some leverage in negotiating.”¹⁷¹

Los Angeles County District Attorney’s Office

We spoke with one management-level attorney at the Los Angeles District Attorney’s Office. When asked how, if at all, she predicts realignment is going to alter the leverage between the Los Angeles Public Defender’s Office and the District Attorney’s Office, the representative responded, “Leverage is not a term we would

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Telephone interview with attorney at Los Angeles Public Defender’s Office (Oct. 26, 2011).

use.”¹⁷² We asked her if there is a term she would be comfortable using, to which she responded, “No.”¹⁷³

Fresno County Public Defender’s Office

We interviewed one senior attorney at the Fresno Public Defender’s Office. He believes that realignment is going to give public defense attorneys more options during plea negotiations, but is concerned how the District Attorney’s Office is going to react to AB 109.¹⁷⁴

Though the representative was “uncomfortable talking about how realignment will alter power or leverage between the players,” he predicts that AB 109 will “put a premium on plea negotiations, creative sentencing advocacy, and sentence negotiations” and will likely “give public defense attorneys an upper hand.”¹⁷⁵ The attorney believes, “We are likely going to see an increase in plea negotiations considerations. There are two aspects to them. The first is negotiating the charge and the second is negotiating the sentence. They’re both going to still go on of course, but now there’s this extra dimension to both.”¹⁷⁶ When asked what he meant by an “extra dimension,” he explained, “The extra dimension on charge negotiation is where the sentence is going to be served. This wasn’t a facet before. Now there’s this extra aspect to plea negotiations.”¹⁷⁷ With respect to plea bargaining over sentences, the representatives predicts, “Sentence bargaining is probably a bigger realm because now there’s going to

¹⁷² Telephone interview with attorney at Los Angeles District Attorney’s Office (Nov. 28, 2011).

¹⁷³ *Id.*

¹⁷⁴ Telephone interview with attorney at Fresno Public Defender’s Office (Nov. 14, 2011).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

be bargaining over split sentences. That will probably have to involve the court more, at least at first.”¹⁷⁸

The attorney is worried about how the District Attorney’s Office is going to react to AB 109. He predicts, “DAs may enhance charges. Prosecutors may increase charges to get offenders out of the 1170(h) category. However, whether that occurs in the long term depends on how things go.”¹⁷⁹ Though he is unsure how things will pan out in a year or so, the representative informed us that he “listened to the video the District Attorney Association posted on their website about realignment. It’s a presentation made by prosecutors, for prosecutors. There was at least one speaker who was very disparaging about realignment.”¹⁸⁰ He continued, “The speaker felt that defendants will view county jail as a substantially reduced punishment. And I don’t think he’s alone. In addition, I think that since innumerable prosecutors around the state have viewed this video, it has probably had an influence.”¹⁸¹ When asked what kind of influence, he informed us that, “Many prosecutors are going to feel that defendants won’t be punished unless they get a prison term. I’ve also heard that some prosecutors are still in a pre-realignment mindset, viewing it as a star or as a good thing to get more prison commitments.”¹⁸²

Though he is concerned with prosecutors’ reactions, he is hopeful. “Over the long term, if realignment is meeting its goals, then prosecutors will surely come to realize that there’s a large benefit to the county jail sentences, particularly as new prosecutors come around who didn’t come in under the old system.”¹⁸³

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

Ventura County District Attorney's Office

We interviewed one management-level attorney at the Ventura County District Attorney's Office. He predicts that realignment will increase defendants' leverage, and is concerned that defendants will view the new law as a sign that breaking the law has reduced consequences.¹⁸⁴

The representative informed us that "A state prison sentence used to be a big bargaining tool for us. Previously, the fact was that a potential prison sentence often operated to get things going quickly. Now, with the elimination of state prison for 1770(h) offenders, the defendants' added leverage may cause delays in cases."¹⁸⁵ He explained, "It lowers their motivation to resolve the case. It used to be, and it still is, but to a lesser extent, that prison influenced a certain number of dispositions. If a guy pleads out, we will remove state prison from the table. Now we no longer have that option."¹⁸⁶

The attorney is concerned that "Realignment is a serious reduction in the consequences of crime. At least that's how a lot of people are going to see it. This can change the relationship between the prosecution and the defense attorney, and not to the benefit of the prosecutor."¹⁸⁷

San Francisco County Public Defender's Office

We interviewed one management-level attorney at the San Francisco Public Defender's Office. He was unsure how realignment is going to effect leverage between

¹⁸⁴ Telephone interview with attorney at Ventura County District Attorney's Office (Nov. 17, 2011).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

defense attorneys and prosecutors, but thinks that if the relationship is changed, it will be to the benefit of defendants.¹⁸⁸

The attorney is “unsure if the power dynamic between public defense attorneys and prosecutors will shift,” but believes if it does, then “the Public Defender will have a little bit of an upper hand in the sense that more options are on the table, such as supervision, and more things are off the table, such as prison.”¹⁸⁹ He predicts that the “biggest change in bargaining will be in discussions over supervision, which there didn’t used to be in the past. This is new with realignment, and I think that if anyone will benefit from the law, it will be the defendant in the context of plea negotiations.”¹⁹⁰ However, he pointed out that “It’s so easy to re-rig the system in terms of increasing the sentence. Prosecutors can enhance charges, or charge out of 1170(h), so any increase in leverage the public defense attorneys may get is going to be small.”¹⁹¹

San Francisco County District Attorney’s Office

We interviewed one management-level representative of the San Francisco District Attorney’s Office. She predicts that realignment is going to increase public defense attorneys’ leverage in California, but expects to see a smaller effect in San Francisco than in other counties because a relatively small number of individuals were sent to prison pre-realignment.¹⁹²

The representative believes that “San Francisco has been selective in our use of prison to begin with, before realignment, so the population we are talking about—the

¹⁸⁸ Telephone interview with attorney at San Francisco Public Defender’s Office (Nov. 30, 2011).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Telephone interview with attorney at San Francisco County District Attorney’s Office (Nov. 30, 2011).

population who we would have sought prison for before AB 109, but who we cannot seek it for now, is a high-need population.”¹⁹³ She informed us that, “Having prison off the table is changing the dynamic between the PD’s office and the DA’s office. It is much easier to settle a case when the defendant thinks he is looking at state prison.”¹⁹⁴ She continued, “A lot of defendants who have extensive criminal histories are very clear on some of the sanctions they may be facing and are much more likely to want to settle and avoid prison. So if we take it off the table entirely, it changes the dynamics.”¹⁹⁵ However, the attorney explained that defendants’ increase in leverage is relatively small in San Francisco because “Our bench is already resistant to imposing prison sentences in certain cases, and often, defendants and defense attorneys will take a risk and go to trial because they know that.”¹⁹⁶

Concerns

Summary

As with every new law, realignment is not without its flaws. While most interviewees expressed a general hopefulness in realignment’s success, every representative shared some serious concerns, ranging from insufficient funding, to worry over a potential lack of post-release supervision.

The most common concern interviewees voiced was the need for more funding. The representative from Ventura’s District Attorney’s Office reported that he was “worried that funding will decline over time, leaving the counties reduced resources to

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

deal with a large number of inmates.”¹⁹⁷ Attorneys from both the Los Angeles Public Defender and District Attorney’s offices expressed similar concerns, emphasizing that LA County already suffered from inadequate funding before the passage of AB 109. A representative from San Francisco’s District Attorney’s Office was particularly upset because of San Francisco’s unique approach to incarceration. She reported, “One of our biggest concerns is the way the formula for funding was developed. The counties who sent the most people to state prison actually get the most money, and we find this to be unfair. Counties should be rewarded and not punished for their use of state resources.”¹⁹⁸

Every Public Defender representative with whom we spoke told us they are worried that prosecutors will overcharge offenders to circumvent AB 109. The Fresno representative predicts that, “Prosecutors may increase charges to get offenders out of the 1170(h) category.”¹⁹⁹ He described a video on realignment produced by the DA’s Association and told us, “There was at least one speaker who was disparaging about realignment. He felt that defendants will view county jail as a substantially reduced punishment. I don’t think he’s alone.”²⁰⁰ The representatives from District Attorneys’ offices who commented on this concern told us that their offices will not do this.

Prosecutors are not the only parties who may try to circumvent the law. Several attorneys informed us of their concern that judges are inadequately prepared to impose sentences under AB 109. A representative from Santa Clara’s Public Defender’s Office believes, “Educating judges is probably our biggest obstacle.”²⁰¹ She is worried that

¹⁹⁷ Telephone interview with attorney at Ventura County District Attorney’s Office (Nov. 17, 2011).

¹⁹⁸ Telephone interview with attorney at San Francisco County District Attorney’s Office (Nov. 30, 2011).

¹⁹⁹ Telephone interview with attorney at Fresno Public Defender’s Office (Nov. 14, 2011).

²⁰⁰ *Id.*

²⁰¹ In-person interview with attorney at Santa Clara Public Defender’s Office (Oct. 18, 2011).

judges will try to circumvent realignment to maintain pre-AB 109 sentences. The San Francisco District Attorney's interviewee expressed a similar sentiment. "I don't think our bench really understands realignment. We had members of our bench who, in September, didn't think realignment was going to happen."²⁰²

Several attorneys also voiced a concern over the possible lack of post-release supervision. While this may be detrimental to an offender's rehabilitation, representatives are also worried that a lack of post-release supervision may have a larger, more immediate negative impact on the general public. The Santa Clara's District Attorney's Office reported, "There is going to be less supervision, and the supervision we are going to see will be for smaller periods of time. This may be problematic."²⁰³ At the time of interview, according to his estimate, only 25% of 1170(h) defendants in Santa Clara County received any form of post-release supervision. The attorney noted a second, related concern.²⁰⁴ "The lack of supervision is also concerning because of the effect it might have on our ability to obtain victim restitution."²⁰⁵ The interviewee from Fresno's Public Defender's Office agreed. "If a full term county jail sentence is imposed, there is no post-release supervision at all. And that makes some people nervous."²⁰⁶

While there was a general consensus of a concern for overcrowding in jails, the representative from the Los Angeles Public Defender's Office is particularly concerned about his county. Due to the high jail population and lack of bed space, he predicts that Los Angeles will soon face the same constitutional issues that California's state prisons

²⁰² Telephone interview with attorney at San Francisco County District Attorney's Office (Nov. 30, 2011).

²⁰³ Telephone interview with attorney at Santa Clara District Attorney's Office (Nov. 7, 2011).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Telephone interview with attorney at Fresno Public Defender's Office (Nov. 14, 2011).

faced, which lead to the enactment of AB 109. He believes that an unintended consequence of realignment will be the early release of misdemeanants and low-level offenders, which can lead to a host of other problems. He concludes, “Realignment won’t work in LA County.”²⁰⁷

Santa Clara County Public Defender’s Office

We interviewed two management-level attorneys at the Santa Clara Public Defender’s Office. Both were worried that prosecutors and judges might try to circumvent AB 109 and maintain the status quo, and pointed to the importance of educating the bench.

One attorney we interviewed expressed concern that judges may be increasing sentences over what they would have given before realignment to preserve the status quo:

What we are coming up against is the courts not liking the idea that the defendant might not be on some supervision following the incarceration period. So they are inflating the offer—for instance, let’s take a simple auto theft case that used to be prison eligible. Now it’s no longer prison eligible. Previously, the offer used to be 16 months. Now some courts are offering 2 or 3 years—the mid or high term on the charge—so they have the same amount of in-custody time, and some amount of supervision time.²⁰⁸

This notion that judges will augment sentences to account for the changes of realignment is echoed by the other Santa Clara Public Defender representative.²⁰⁹

Similarly, attorneys at the Santa Clara Public Defender’s Office are concerned that certain individuals at the District Attorney’s Office might overcharge to circumvent AB 109. “Most people at the DA’s office are on board, especially [District Attorney]

²⁰⁷ Telephone interview with attorney at Los Angeles Public Defender’s Office (Oct. 26, 2011).

²⁰⁸ Telephone interview with attorney at Santa Clara District Attorney’s Office (Nov. 7, 2011).

²⁰⁹ In-person interview with attorney at Santa Clara Public Defender’s Office (Oct. 18, 2011).

Rosen, but they have the ability to charge more heavily to get out of 1170(h).”²¹⁰ When asked for an example, she offered the possibility of a relatively minor battery. “Let’s take a battery charge. Even with a small injury like a broken nose and certain angry words from the defendant, the DA can add an enhancement for great bodily injury, taking the case out of 1170(h).”²¹¹

One of the biggest concerns referenced by both attorneys was the issue of educating the bench. “Judges and DA’s are having trouble with realignment. But at the end of the day it is the judges who are imposing the sentences, and it’s on them to adopt this new concept of rehabilitation. Educating judges is probably our biggest obstacle.”²¹² The other attorney noted that, in some cases, “Judges are trying to hand down 1170(h) sentences that are actually invalid.”²¹³ Neither of the attorneys interviewed believed that that jury trial rate would increase in any appreciable way.

Santa Clara County District Attorney’s Office

We interviewed one management-level attorney at the Santa Clara District Attorney’s Office. He mentioned at least two concerns attendant to AB 109: the risk of a lack of supervision and the difficulty of adjustment inherent to any change in the law as significant as realignment.²¹⁴

The first concern mentioned by the representative of the Santa Clara District Attorney’s Office was a potential lack of supervision of criminal defendants. “There is going to be less supervision, and the supervision we are going to see will be for smaller

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Telephone interview with attorney at Santa Clara District Attorney’s Office (Nov. 7, 2011).

²¹⁴ Telephone interview with attorney at Santa Clara District Attorney’s Office (Nov. 7, 2011).

periods of time. This may be problematic.”²¹⁵ At the time of interview, according to his estimate, only 20-25% of 1170(h) defendants in Santa Clara County received any form of post-release supervision. The attorney noted a second, related concern. “The lack of supervision is also concerning because of the effect it might have on our ability to obtain victim restitution.”²¹⁶

The second major challenge created by realignment is the adjustment it will require. “People are still wrestling with correct usage of terms. I see people discussing it at all levels and misusing the terms, for example mixing up parole with the supervision that will now be offered by the Probation Department.”²¹⁷ He noted that these adjustment issues may slow down the operation of the criminal justice system. “To what degree are we going to be able to do hearings in an expeditious fashion, to litigate some provisions of the law?”²¹⁸

Like his counterparts from the Public Defender’s Office, the attorney estimated that the jury trial rate probably would not increase. “Once you take away the possibility of state prison, for some persons, that is going to affect their view of whether or not they should settle the case or go to trial. But there is still a very real range of consequences. I don’t think that realignment will affect the jury trial rate greatly.”²¹⁹

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

Los Angeles County Public Defender's Office

We interviewed one senior-level trial attorney at the Los Angeles Public Defender's Office. He listed several problems that realignment may pose, many of them specific to Los Angeles County.

As a backdrop, the representative from the Los Angeles Public Defender's Office described the problem of overcrowding in Los Angeles County Jail. This overcrowding creates a series of unintended consequences. "If funding runs out and bed space devoted to realignment is filled, the defense bar will gain some leverage because the Sheriff will have to eventually release felons early."²²⁰

Los Angeles County District Attorney's Office

We spoke with one management-level attorney at the Los Angeles District Attorney's Office. While this attorney would not answer many of our questions, she did provide a list of concerns presented by realignment. "The greatest concern is if the state does not provide necessary funding after July 1. There is also a risk of increase in crime, concern for public safety, the woefully inadequate bed space of the LA County Jail."²²¹ Like her counterpart at the Public Defender's Office, she worried that, "particularly in LA, the county jail is going to have a revolving door."²²²

Fresno County Public Defender's Office

We spoke with one senior attorney at the Fresno Public Defender's Office. He discussed a number of concerns presented by realignment, including the possibility of

²²⁰ Telephone interview with attorney at Los Angeles Public Defender's Office (Oct. 26, 2011).

²²¹ Telephone interview with attorney at Los Angeles District Attorney's Office (Nov. 28, 2011).

²²² *Id.*

prosecutors increasing charges, the quality of jails, a lack of post-release supervision, troubles with funding, and the difficulty of changing people's mindsets.²²³

Our representative from the Fresno Public Defender's Office stated matter-of-factly, "Prosecutors may increase charges to get offenders out of the 1170(h) category."²²⁴ The attorney described a video on realignment produced by the DA's Association. "There was at least one speaker who was disparaging about realignment. He felt that defendants will view county jail as a substantially reduced punishment. I don't think he's alone."²²⁵

Whether prosecutors will act this way going forward, he believes, "will depend on whether realignment is working. If realignment is meeting its goals, prosecutors will surely come to realize that there's a large benefit to shorter county jail sentences. If realignment is not working, then we are likely to see a trend where more individuals are sent to state prison."²²⁶ Much of this will depend on the "large hurdle of finances, and the biggest problem of changing people's mindsets."²²⁷

The quality of county jails was also mentioned as an issue. "Years from now, there may be some counties that build facilities that are really more geared to longer term incarceration. But current county jails have not been built for more than one year's incarceration."²²⁸

²²³ Telephone interview with attorney at Fresno Public Defender's Office (Nov. 14, 2011).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

Finally, the Fresno PD representative pointed to the issue of post-release supervision. “If a full term county jail sentence is imposed, there is no post-release supervision at all. And that makes some people nervous.”²²⁹

The attorney noted, “The jury trial rate probably won’t change, but if it does, it will decrease. Defendants know that their realigned terms, if split, will be shorter, making a plea offer more attractive than whatever they may face at trial.”²³⁰

Ventura County District Attorney’s Office

We spoke with one management-level attorney at the Ventura County District Attorney’s Office. He mentioned a few concerns presented by realignment.

The first issue discussed by Ventura County’s District Attorney representative was funding: “Quite frankly, I am worried that funding will decline over time, leaving the counties reduced resources to deal with a large number of inmates.”²³¹ The attorney also noted the challenges of such a large-scale change. “There is going to be an adjustment period which will upset things, until a new comfort level develops.”²³²

When asked about whether realignment might affect the jury trial rate, the representative noted that the unavailability of prison could work both ways. “Post-realignment, some defendants will be more willing to take the risk of trial, and some will be less willing.”²³³ It all depends on the offender. “For some, state prison is no big deal—in some ways, it is easier than jail, where there are fewer activities and less

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Telephone interview with attorney at Ventura County District Attorney’s Office (Nov. 17, 2011).

²³² *Id.*

²³³ *Id.*

outdoor time. On the other hand, first-timers are scared of prison and taking prison off of the table might embolden them to take their case to trial.”²³⁴

San Francisco County Public Defender’s Office

We interviewed one management-level attorney at the San Francisco Public Defender’s Office. He described his belief that the jury trial rate might increase, and described his concern that all of the progress of realignment might be undone by one bad, public case.²³⁵

When asked whether realignment would affect the jury trial rate, the San Francisco PD’s representative predicted that it might increase, at least for some cases.²³⁶ He described a hypothetical 1170(h) offense where the defendant is ineligible for probation. “The judge very well might sentence for three years, with only ten days in jail and the rest as supervision. In these cases, a defendant would be emboldened to try the case—go to jury and the worst case scenario would be de facto probation.”²³⁷ However, this scenario is premised on having judges inclined to go heavy on the supervision and light on the incarceration.

The representative’s biggest concern was that one very public failure of realignment might ruin the whole law. “All it takes is a Polly Klaas—some really bad situation to make the whole thing blow up.”²³⁸

²³⁴ *Id.*

²³⁵ Telephone interview with attorney at San Francisco Public Defender’s Office (Nov. 30, 2011).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

San Francisco County District Attorney's Office

We interviewed one management-level attorney at the San Francisco District Attorney's Office. She canvassed a number of concerns including the necessity of educating the bench, the importance of proper funding, and the risks of a lack of supervision.²³⁹

San Francisco's District Attorney representative noted as a concern the need to educate judges. "I don't think our bench really understands realignment. We had members of our bench who, in September, didn't think realignment was going to happen."²⁴⁰ Luckily, the issue seems to be improving. "They are starting to catch up to speed, but we are trying to raise awareness with them."²⁴¹

The attorney also mentioned an issue somewhat unique to San Francisco: the needs of its realigned offenders. "San Francisco has been selective in its use of prison to begin with. Most of the non-violent offenders who get sent to state prison from our county—the realigned population—most have extensive criminal histories and severe issues."²⁴² As a result, she cautioned, "This will be a very difficult returning population. It's an extremely high-needs group, and it will be a challenge for us to make sure that we have the kinds of resources to keep them out of the cycle of crime."²⁴³

Related to this issue of resources is an additional concern for the San Francisco District Attorney's Office. "One of our biggest concerns is the way the formula for funding was developed. The counties who sent the most people to state prison actually get the most money, and we find this to be unfair. Counties should be rewarded and not

²³⁹ Telephone interview with attorney at San Francisco County District Attorney's Office (Nov. 30, 2011).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

punished for their use of state resources.”²⁴⁴ As opposed to the current formula, the San Francisco DA’s representative offered, “Funding should be based on general population and not prison population.”²⁴⁵ According to the attorney, this lack of funding will affect rehabilitative efforts. “We don’t feel we have been able to fund everything we know works in terms of alternatives to incarceration. So we are relying on city and county funds to make sure we can maintain transitional housing, job training, substance abuse programs, etc.”²⁴⁶

Turning to a possible lack of supervision for some subset of offenders, the attorney described that this could be a problem for at least some individuals. “Low risk offenders don’t necessarily benefit from a bunch of supervision. But it does matter for middle and high risk offenders.”²⁴⁷

When asked about changes in the jury trial rate, the San Francisco DA representative stated that it probably would not change much in San Francisco. “What’s interesting about San Francisco is that there have been tensions at times where, as prosecutors, we say to a defendant, ‘look, this is what you’re facing if you go to trial.’ But judges then allow people to be sentenced at trial lower than what the penal code says.”²⁴⁸ That being said, the attorney acknowledged that wherever “the risk of going to trial isn’t any more severe than the risks pre-trial, there is a reduced incentive to settle a case.”²⁴⁹

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

Chapter 5

Conclusions and Future Research

From our interviews, we have learned that AB 109 has not created uniform effects throughout the state. Realignment in Ventura looks very different from realignment in San Francisco, which itself looks different from Los Angeles, and so on. These exploratory interviews have shown counties using blended sentences most of the time and other counties rarely using them at all; some practitioners are confident in the expansion of rehabilitative programming, others laughed when we asked them about the topic. We expected some variance. What we got was almost five wholly separate criminal justice systems.

To us, this variance is significant and calls for future research. Is a certain subset of offenders receiving no post-release supervision in some counties? If so, this implicates weighty if not novel fundamental fairness concerns—should identical 1170(h) offenders receive slight incarceration and heavy programming in San Francisco and the opposite in, say, Fresno? A lack of post-release supervision also poses concerns in light of the growing understanding that effective rehabilitative programming requires attention both in *and* out of jail. Turning to other topics, are prosecutors in some counties altering their charging practices and using enhancements to keep defendants prison-eligible? Are some counties not developing new programming at all? These are just a few of the questions posed by the results of our interviews

Fortunately, many of these questions are amenable to future research. To build on the largely exploratory, qualitative interviews of this project, we propose the following:

1. Track actual changes in the average length of incarceration by compiling 1170(h) sentences in the five counties we have studied. What percentage are blended? Of those blended, what is the average length of mandatory supervision? Will these data match the predictions of prosecutors and public defenders?
2. Track county data of any changes in the number of common enhancements charged by prosecutors that render a defendant ineligible for 1170(h) sentencing (e.g. gang related, great bodily injury, etc.). Has the use of these enhancements risen in the wake of AB 109?
3. Is the number of enrolled participants in common rehabilitative programs rising in the five counties of our study?
4. Finally, on top of these quantitative studies, we will pursue follow-up interviews with the attorneys with whom we spoke. These interviews can be used to confirm or deny earlier predictions as well as uncover new wrinkles in AB 109 implementation that were unanticipated as the law was first unveiled.