BAIL REFORM ESSAYS

By

Julius Wachtel

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CATCH AND RELEASE

Sometimes there really is no substitute for common sense

By Julius (Jay) Wachtel. "If you're talking about somebody who the rap sheet in front of you shows is potentially a dangerous person, has a gun, has a criminal history, common sense says don't let him out until you make one phone call." New York City Mayor Michael Bloomberg's criticism was directed at Evelyn Laporte, a Brooklyn judge who had brushed aside a prosecutor's request to set $2,500 bail and released a man arrested on drug possession and child endangerment charges on his own recognizance.

Yet the suspect, Lamont Pride, 27, wasn't an unknown quantity. Officers had caught him packing a knife a couple months earlier, a tangle that cost Pride a day in jail. Authorities in Pride's home town, Greensboro, North Carolina had recently secured felony warrants accusing Pride of shooting a man in the foot as they quarreled over a woman. Pride, who allegedly used a .22 pistol, was charged with assault with a deadly weapon with intent to inflict serious injury, felony conspiracy, and possession of a firearm by a felon, the latter relating to a prior conviction for armed robbery, an offense for which he served 13 months in prison.

Now here's the part that's hard to swallow. Greensboro's warrants specified "in-state extradition only." Police and prosecutors would later explain that they didn't consider Pride a flight risk and thought "he could still be in the area." So why not authorize extradition? One can guess that in these times of strapped budgets there were second thoughts about sending officers to another state to bring back a local ne'er-do well, particularly if injuries, as in this case, were minor and the victim was no one special.

The story doesn't end there. When NYPD arrested Pride for drugs and child endangerment an officer called Greensboro PD to confirm that they wouldn't extradite. That fact was passed on to Judge Laporte, who also got a look-see at Pride's long rap sheet. But she O.R.'d him anyway. Still, NYPD wasn't done. A detective called Greensboro a few days later. Whatever transpired during that little chat clearly had an impact, and on November 8 North Carolina's warrant was amended to authorize extradition.

Alas, it was too late. Pride skipped his New York City court appearance and was nowhere to be found. On December 12, NYPD officer Peter J. Figoski, 47, a 22-year veteran and father of four, responded to a report of a residential armed robbery. (It turned out to be a vicious attempt to rip off a local drug dealer.) While searching a dark

apartment building officer Figoski and his partner were surprised by Pride, who allegedly pulled a 9mm. pistol and shot Figoski dead. Pride was caught during a foot chase.

Felons on the lam are always dangerous. On June 29, 2010 Dontae Morris allegedly shot and killed Tampa police officers David Curtis (l) and Jeffrey Kocab during a traffic stop. Morris, whose record includes arrests (but not convictions) for murder and weapons violations was released from prison two months earlier after serving a two-year term for possession and sale of cocaine. Only thing is, Morris had an active felony warrant for bad checks. "Right now we're not going to start pointing the fingers of blame," said Tampa PD Chief Jane Castor. "And frankly, it's not going to bring the officers back."

The deaths of officers Curtis and Kocab have been attributed to a complex tangle of bad decisions. Equally lethal results can flow from simple paperwork blunders. On January 23, 2011 "low-risk" parolee Thomas Hardy, 60, shot Indianapolis police officer David Moore during a traffic stop. Hardy was arrested after robbing a convenience store an hour later. Actually, Hardy shouldn't have been on the street in the first place, as he had recently been arrested for felony theft. Regrettably, Hardy's parole status hadn't been entered into the computer, and he didn't tell, so he was let go after arraignment.

Officer Moore succumbed to his injuries. Both his parents were cops. His father was a retired Lieutenant, his mother an active-duty Sergeant.

We've suggested in the past that bad decisions can be often attributed to a tendency to "dismiss, dismiss, dismiss." Going to "extraordinary lengths to routinize information and interpret questionable behavior in its most favorable light" can have tragic consequences. Here are a few examples:

- Perhaps fearing that they might be branded as bigots, military authorities repeatedly ignored warning signs about the radicalization of Nidal Hasan, the Army major who killed eighteen and wounded twenty-eight at Fort Hood.

- A lack of regulatory will and Federal law enforcement resources were clearly at work in the case of Bernie Madoff, the record-breaking Ponzi artist whose decades-long scheme cost victims billions.

- Parolee Phillip Garrido enjoyed so much slack while under supervision that he was able to kidnap a young woman and, with help from his wife, confine her to a backyard pen for eighteen years as his sex slave.

- After doing fifteen years for rape, Cleveland serial killer Anthony Sowell was ignored by police despite a string of odd and violent goings-on at his home involving various women, including one who supposedly "fell" from a window.

- And who could forget would-be underwear bomber Umar Abdulmutallab, a self-made Nigerian terrorist whom American consular and intelligence authorities failed to place on the do-not fly list even after Umar's father warned them that his radicalized kid was up to no good.

When funding is tight criminal justice agencies must economize. And yes, there are consequences. States have been granting early paroles by the bucketful, releasing inmates left and right to make room and save money. Yet predicting someone's threat to society is chancy. In August three top Wisconsin juvenile corrections officials were suspended after police arrested three Milwaukee teens for a vicious robbery-murder. Two had been granted early releases while serving terms for violent crimes. One, now 18, did less than three years for directing a killing in which his adult codefendants got twenty years.

Decisions that can let potentially dangerous individuals go free should be taken in a reflective atmosphere with sufficient time to gather and evaluate all pertinent information. In the efficiency-obsessed atmosphere that pervades today's criminal justice system that ideal is rarely reached. Pressures to economize can lead well-intentioned practitioners such as Judge Laporte to lose their way and forget why they're there. It's precisely for such reasons that Mayor Bloomberg's admonition to use "common sense" should be taken to heart. Officers Figoski, Curtis, Kocab and Moore would ask for nothing less.

Posted 2/5/12

CATCH AND RELEASE (PART II)

An "evidence-based" pre-trial release program lands Milwaukee in a pickle

By Julius (Jay) Wachtel. Ever since NIJ adopted the "evidence-based" mantra it's been *de rigueur* for governments at all levels to demand solutions that are founded in science and empirically verifiable. But in criminal justice, where it's often hard to say what factors to consider in the first place, let alone how to measure their effects, thoughtlessly crunching data is risky.

For an example look no further than Milwaukee's brand-new pretrial release program. Developed by Justice 2000, a small Milwaukee nonprofit founded in 2001 to promote the "safe release and community integration of criminal offenders," it applies a set of measures to estimate the likelihood that a defendant might fail to appear or reoffend. Staff members collect information about the nature of the offense, criminal record, previous failures to appear, drug and alcohol use, mental impairment, community bonds and family ties from official records and personal interviews. Results are computed and furnished to a court commissioner who makes the final decision about bail and release.

Justice 2000's director says that its protocol is based on a study of two years' worth of release data, and that everything is done impartially. "We're neutral, just supplying information and applying the tool."

It's not the first time that Justice 2000 has provided pretrial services. In 2003 it took over the city's "Municipal Court Alternatives Program," which offers persons cited for minor transgressions community service, drug treatment and counseling as alternatives to jail and fines. In 2004 the main outcome metric, fewer jail days, was 13,288, saving the city $531,520 in housing costs.

Justice 2000's new program is different. Just how different was apparent a few days ago when authorities announced that Derrick Byrd was returned to custody after a commissioner acting on Justice 2000's recommendation released him on his own recognizance. What was the original charge? Robbery-murder.

Yes, that's right: Milwaukee O.R.'d an accused murderer. Stunned prosecutors (they had asked for a $150,000 cash bond) rushed to a judge, who looked things over and set bail at $50,000. By then Byrd was gone, but he surrendered after checking in with

Justice 2000 staff. His bail is now $30,000, which he still can't pay. Incidentally, there's no doubt that he was involved in the crime, the murder last October of the owner of a recycling business. According to a sketchy account, Byrd admitted that he participated in planning the heist but says that someone else pulled the trigger. Byrd reportedly has no prior criminal record and his lawyer says that he is willing to cooperate and point the finger at the real shooter.

Justice 2000's program has been in effect only since mid-January. Amazingly, Byrd isn't the only accused killer whom its staff has recommended for kid-gloves treatment. On January 24 police arrested Chasity Lewis, 18, for reckless homicide. An admitted marijuana dealer, she told police that three boys tried to take drugs without paying and that one punched her. Doing what comes natural, she pulled a .22 pistol that she carried for protection and shot her assailant, a 16-year old boy, point-blank in the chest. Based on her lack of a prior record, school attendance and "steady home life," Justice 2000 recommended O.R. But for blowback from the Byrd case, she would have gotten it. (Instead, a commissioner set bail at $20,000. Lewis remains in custody.)

All pre-trial release schemes are subject to two types of error. "Type 1" errors of overestimation (also referred to as false positives) lead to the detention of persons who would not have fled or committed another crime. "Type 2" errors of failure to include (also referred to as false negatives) cause the release of those who will likely flee or recidivate. According to Milwaukee County Sheriff David A. Clarke, Justice 2000's protocol seems purposely biased in favor of the accused. "There's a use for pretrial screening, but obviously this tool needs to be recalibrated," said Clarke, who suggested that "evidence-based decision making" and promises of saving money are sweeteners offered by those with a secret liberal agenda.

Politics aside, it may be that when it comes to murder, trying to strike the usual cost-benefit, Type 1/Type 2 balance doesn't work. When Justice 2000 played in the sandbox of municipal court the consequences of being wrong (i.e., Type 2 errors) were minimal. In general criminal court, though, releases carry far weightier implications. Predicting recidivism is a frustratingly inexact science. As we pointed out in "Reform and Blowback," when a dangerous someone is let go and maims or kills, there's no trying to explain why they were released.

Bottom line: releasing shooters on their own recognizance is a huge step into the unknown. It's a new, quantum world, with hazy parameters and unpredictable consequences.

Well, maybe not all *that* unpredictable. In "Risky Business" we discussed the dangers of chasing after defendants who go on the lam. Warrant service is an extremely

dangerous business that all-too frequently leads to shootouts and dead cops. Of course, officers serving warrants are at least forewarned. Imagine what can happen when patrol officers inadvertently come across a dangerous wanted person. "Catch and Release" featured two such examples:

- In December 2011 Lamont Pride, a robber wanted for a shooting in North Carolina, shot and killed NYPD officer Peter J. Figoski. Pride had been arrested by NYPD twice in recent months, most recently on a drug charge for which he failed to appear. He was released on low bail both times because the North Carolina warrant didn't authorize extradition.

- In June 2010 Dontae Morris, a felon with arrests for murder and weapons violations, shot and killed Tampa police officers David Curtis and Jeffrey Kocab during a traffic stop. Morris, who had been recently released from a prison term for sale of cocaine, had an active warrant for bad checks.

Just how Milwaukee came to endorse release practices that could lead to O.R.'s for murder suspects will be fodder for discussion for years to come. Partnering with what clearly seems to be an advocacy group (in 2010 Justice 2000 merged with Community Advocates) may have been imprudent. Budget-conscious county officials might have been seduced with promises of cost savings and freeing up bed space. Perhaps the appeal of an "evidence-based" based strategy was too hard to resist.

But don't just trust *Police Issues*. It's been a year since Malcolm K. Sparrow's superb research article cautioned against assuming that "evidence-based" approaches can yield practicable solutions to the real-life dilemmas encountered by police. Those that prove useful, he said, tend to be rebranded variants of what cops have already done. Dr. Sparrow counseled academics to heed the advice of practitioners, as they're the real experts at the game. Last May judges in St. Louis, Missouri took that notion to heart. Sick and tired of gun violence, they started setting $30,000 bail, full amount cash only, on everyone caught illegally packing guns. No surprise, most remained locked up. Homicides promptly began to drop, and the year ended with 114, 20 percent less than in 2010 and the fewest since 2004. Researchers now studying the program think that it holds special promise.

Milwaukee, meet St. Louis.

Posted 11/10/15

MORE CRIMINALS (ON THE STREET), LESS CRIME?

Debating the virtues of a less punitive agenda

By Julius (Jay) Wachtel. During the early 1970s New York's "Rockefeller laws" sought to quell rampant drug dealing and drug-related violence by imposing mandatory prison sentences on persons caught selling or possessing modest quantities of heroin, cocaine and other illegal drugs. In 2009 the state changed course. Many so-called "low-level" drug offenders – meaning possessors and dealers whose involvement was modest and who lacked a prior conviction for a violent crime – could escape incarceration by completing a course of treatment. Six years later the Vera Institute announced the outcome of a study that compared matched samples of offenders processed under both schemes. The results seemed encouraging. Fifty-four percent of those sentenced under the old, punitive Rockefeller laws were rearrested within two years of release or discharge, six percent for a violent offense. For those diverted to treatment under the new laws, the outcomes were thirty-six percent and three percent, respectively.

New York isn't alone. Last year we blogged about California's Proposition 47, which reduced penalties from felonies to misdemeanors for grand theft, shoplifting, receiving stolen property, writing bad checks, and check forgery when losses were under $950. Possessing drugs also became a misdemeanor. A similar approach was adopted by the Feds. In 2014 the U.S. Sentencing Commission relaxed Federal drug sentencing guidelines, enabling as many as 6,000 inmates to seek immediate release, and up to 40,000 more in the not-so-distant future.

Financial pressures and prison crowding prompted states and the Federal government to ease up on punishment. Approaches include releasing prisoners, amending penal codes to reduce sentence length and downgrade some felonies to misdemeanors, and instituting or expanding the use of diversion and treatment.

That doesn't mean that offending is being completely forgiven. Misdemeanors are still crimes. But shifting away from imprisonment increased the burden on parole and probation offices and local lockups. These, in turn, accommodated the influx by freeing jail inmates and limiting the length and intensity of post-release supervision. Unlike penal revisions, though, tweaks pulled off at lower levels aren't necessarily enshrined in codebooks. There is no obvious cost, until there is. In a notorious 2013 example,

California authorities repeatedly reinstated a habitual parole violator until the man, a convicted sex offender, murdered a 76-year old woman and chopped up her body.

While the outcomes of going easy aren't always so stark, the consequences of the new normal may in time prove profound. "Now, you can get away with it" bragged a chronic offender, who admitted he began stealing bicycles when California raised the felony theft threshold to $750. Even better, he could still use drugs because nothing happens when he fails to show up for drug rehab. L.A. County Sheriff Jim McDonnell said that's to be expected. "We've removed the disincentive, but we haven't created a meaningful incentive."

To help make their approach more palatable, advocates of leniency point to the crime drop that we've enjoyed since the madness of the eighties and early nineties. If crime is falling, why not experiment? However, as we mentioned in prior posts (click here and here), one likely reason for the "great crime drop" was that increased punishment deterred those who could be deterred while incapacitating the rest.

There are now disquieting signs that violence is again on the rise. As of August 2015, the murder rate in New York City wasnine percent higher than at the same point in 2014. Dallas, Kansas City, Chicago and New Orleans have reported moderate upticks ranging from 17 to 22 percent, and substantial increases were recorded in Washington, D.C. (44 percent), Baltimore (56 percent), St. Louis (60 percent), and Milwaukee (76 percent). Property crime has also gone up in many areas; most recently, with "double-digit" increases in Los Angeles.

Some argue that the threat is overblown, as only drug possessors and other nonviolent offenders are in line for a break. First, as we pointed out in "Rewarding the Naughty," that's not necessarily true. As long as a California inmate's most recent offense didn't involve the use of significant force, those with past convictions short of murder are just as eligible for relief under the new laws as anyone else. What's more, the oft-repeated screed that a majority of inmates are there for drug possession doesn't hold up. According to the Bureau of Justice Statistics, only 3.6 percent of state prisoners in 2013 were locked up for drug possession. Fifty-three percent were serving time for a violent crime and 10.5 percent for burglary. In 2014, 96.6 percent of Federal drug convictions were for drug trafficking, and only 0.9 percent for simple possession.

Secondly, and perhaps more importantly, citizens are far more concerned about the quantity of crime than the characteristics of its perpetrators. To claim that some offenders are somewhat less likely to be recidivists is little comfort when crime is on the rise. Still, this is not a call to "lock 'em up and throw away the key". Excessive

punishment drains resources while consigning human beings – for that's what convicted criminals are – to needlessly prolonged misery. Your writer would be delighted to arbitrarily halve or even quarter prison terms if adequate resources were provided to help former convicts successfully integrate into conventional society. Naturally, there would have to be vast improvements in the delivery of education, counseling, housing and job training services. To help former inmates become self-sufficient, it would probably be necessary to provide financial incentives to potential employers. But as we know from the failed deinstitutionalization movement, which promised great savings and more humane outcomes by shifting the mentally ill from state sanatoria to community treatment, successful remedies are expensive. Instead of making the necessary investments, we transformed street cops into orderlies and city jails into mental wards.

Unless we dig deep into our pockets, these are precisely the results that we will get by deinstitutionalizing criminal offenders. Count on it!

Posted 2/9/20

MUST THE DOOR REVOLVE?

Bail and sentencing reform come. Then stuff happens.

For Police Issues by Julius (Jay) Wachtel. Must the door that feeds jails and prisons forever revolve? Can we unplug the thing without causing even more pain? Let's start with three recent horror stories:

- Last November, Charles Goforth, a 56-year old Chicago-area man, shot and wounded his girlfriend. He was soon arrested in Missouri. But a magistrate released him on an $8,000 cash bond and Goforth went home to his wife. On January 30 he revisited his victim, who was recuperating at home, and shot her dead.

- "I can't believe they let me out" said Gerof Woodberry, 42. New York City cops arrested him on January 10 for "stealing or attempting to steal" from four (count 'em, four!) banks. Thanks to a new state law that abolishes bail for non-violent crimes, he was released two days later. Woodberry, who had served prison sentences in South Carolina for five strong-arm robberies, promptly robbed two banks in four days. He's now in Federal custody, where the rules are different.

- On October 13 two small children found their mother's lifeless body on the bedroom floor of their New York City apartment. She had been beaten to death. It took two months for police to arrest her alleged murderer, Asun Thomas, 46. He had been living in a halfway house since being paroled in 2016 after doing sixteen years of a 20-year term for manslaughter.

We realize that Goforth, Woodberry and Thomas can't be used to represent the universe of persons who are released pending trial or after serving a term of incarceration. They're an "accidental" sample compiled from stories that caught your blogger's eye while perusing *The New York Times*, *The Washington Post*, the *Los Angeles Times* and the *Chicago Tribune*, something he does most mornings. (And yes, he's got subscriptions. You should, too!)

Recidivism is a weighty subject. DOJ's Bureau of Justice Statistics has been studying it for some time. In 2018 it published data about recidivism for a sample of 401,288 convicted felons who were released in 2005 after serving prison terms in thirty States. During their first nine years of freedom the former inmates compiled an average of five arrests each. Nearly half (44 percent) were arrested during the first year, and sixty-eight percent during the first three years. By the end of the ninth year a full eighty-three percent had been arrested at least once. As for *type* of crime, Table 7 of the report indicates that regardless of the crime for which they were originally confined – violent, property, public order or drug-related – about four in ten were arrested at least once, post-release, for a crime of violence.

Research on Federal prisoners also paints a gloomy picture. A study of 25,431 Federal convicts released in 2005 indicates that within eight years half (49.3 percent) were arrested on new charges. Nearly one-third of the sample (31.7 percent) suffered another conviction, and nearly one-quarter (24.6 percent) were re-incarcerated. Since these were former Federal inmates, a majority of the original convictions were for drug trafficking. But about one-quarter (23.3 percent) of the post-release arrests were for assault.

Are there ways to help former inmates avoid reoffending? NIJ's "Corrections & Reentry" webpage features reviews of 136 "programs" (approaches tailored to specific places) and thirty "practices" (methods used at multiple sites.) Each was rated as either "no effect," "promising" or "effective."

A "program" in Massachusetts' capital city, the "Boston Reentry Initiative," actually begins while offenders are still locked up. Meant for gang members and others at high risk of committing a violent crime, the voluntary effort – inmates must ask to join –

offers everything from assistance in getting a driver's license to help with substance abuse, housing and job training. After release there's a day center; each former offender also gets a "case manager" who provides one-on-one help for up to eighteen months. BRI's "promising" rating is based on an academic study that concluded participants were significantly less likely than non-participants to be arrested post-release. During their first three years back on the street, arrests for any crime befell 77.8 percent of the BRI cohort and 87.7 percent of a non-BRI control group. Arrests for violent crimes followed the same pattern (27.8 and 39.2 percent, respectively.)

Several efforts in NIJ's "practices" category also seemed pertinent:

- "Pretrial Interventions for Ensuring Appearance in Court" evaluated three approaches for combatting failure-to-appear and re-arrest: court notifications (reminders), cash and appearance bonds, and pretrial supervision, ranging from electronic monitoring to placement in a halfway house. Of these, only pretrial supervision demonstrated a statistically significant reduction on failures to appear (this effect, which led to a "promising" rating, was nonetheless considered "small.") None of the methods, however, reduced rearrests.

- "Day Reporting Centers" (aka "community resource centers" or "attendance centers") offer non-residential services to parolees and probationers, including supervision, drug abuse treatment and job training and placement. A 2019 meta-evaluation of nine such efforts found that none was more effective in preventing recidivism than conventional probation and parole.

- "Noncustodial Employment Programs for Ex-Offenders" offer job training, career counseling and educational services in settings such as halfway houses and group homes. Assistance is hands-on and can include resume preparation and coaching for job interviews. Alas, a review of ten programs concluded that their participants were just as likely to be re-arrested or convicted or commit a release violation as probationers and parolees who didn't take part.

Glancing at the scorecards, we noticed that only a measly eight percent of practices and five percent of programs got NIJ's "effective" nod. Even then, there seems to be pitifully little to brag about. Consider the well-regarded Boston program. While the difference between clients' 77.8 percent re-arrest rate and the comparison group's 87.7 percent rate may be statistically significant, its real-world implications are less than compelling. Even so, the program's academic evaluators seemed highly impressed. Here

are their journal article's ("Controlling Violent Offenders Released to the Community: An Evaluation of the Boston Reentry Initiative") final words:

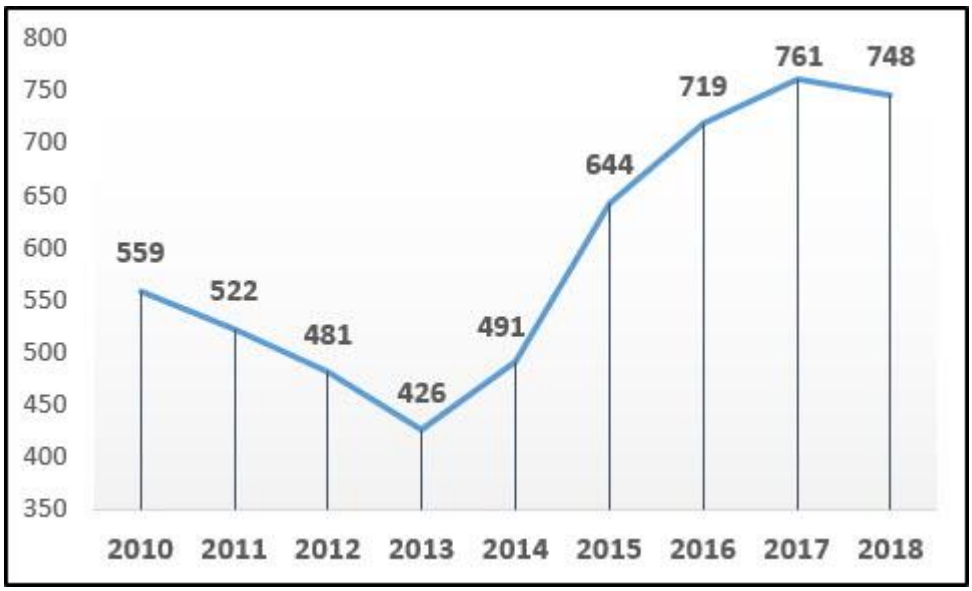
> ...these findings suggest that individualized treatment plans, facilitated by mentors and supported by a network of criminal justice, social service, and community-based organizations, can positively affect gang-involved offenders returning to high-risk communities. Effective gang violence prevention policy should focus on developing programs that facilitate prosocial transitions for gang-involved inmates after release from incarceration.

As bad old "police science and administration" (your blogger's undergrad major) gave way to the modern disciplines of criminal justice and criminology, university programs began looking on policing – indeed, all forms of social control – far more skeptically. Consider, for example, a recent lead story in John Jay college's *The Crime Report*, "Why Re-Arrest Doesn't Mean You're a Failure." Its source, an extensive essay by Professor Cecelia M. Klingele in the *Journal of Criminal Law and Criminology*, argues that re-arrest is a poor proxy of recidivism, as it fails to consider positive "life changes" and unspecified "nuances" that would yield a more accurate assessment of desistance from crime. (And, one might assume, a far more upbeat one as well.)

While fine-tuning our measurement tools might yield some benefits, all this newfangled sophistication threatens to distract us from the reason we bothered in the first place. Whether recidivism stands at 77.8 or 87.7 percent, it's flesh-and-blood people who pay the price. Powerful real-world examples of the human costs of crime, such as those that kicked off this essay, feed the fire of advocacy groups positioned well to the right of *The Crime Report*. Say, The Manhattan Institute. Its recent missive, "Issues 2020: Mass Decarceration Will Increase Violent Crime," uses arrest, sentencing and reoffending data to argue that "given the extremely high rates of recidivism," backing off on imprisonment can only lead to more suffering.

Consider the story of Shomari Legghette. Thanks to his early release from prison, the four-time loser with convictions for armed robbery, guns, drugs and assault was running loose on Chicago's streets. On February 13, 2019 he was approached by officers who wanted to question him about some recent gunplay. Legghette ran off, and when confronted by police commander Paul Bauer, who happened to be nearby, the forty-four year old chronic offender pulled a gun and repeatedly fired, incflicting fatal wounds. (For an account of Leggett's troubled life – in his own words, no less – click here.)

Full stop. Let's look at some numbers. This graph uses LAPD's UCR data to depict the city's violent crime trend from 2010 thru 2018, the latest full year available:



"The Blame Game" mentions three key easings during this period: a 2011 act (AB 109, the "Public Safety Realignment Act") that shifted confinement and supervision of "non-serious, non-violent" felons from state prisons and parole agents to county jails and probation officers; Proposition 47, a 2014 measure that reduced many felonies to misdemeanors; and, two years later, Proposition 57, which reduced sentences and facilitated early parole.

What caused the sharp, post-2013 uptick? Cops, prosecutors and the state peace officer's association would say: "all three." Their angst isn't purely based on numbers. Consider, for example, Michael Mejia. After doing three years for robbery, the 26-year old Southern California resident was arrested for grand theft auto and served another two years. After his release he committed a string of violations. In the old days Mejia would have been returned to prison, but thanks to A.B. 109 he merely landed in county jail, and for brief periods, at that. On February 20, 2017 Mejia gunned down his cousin and stole a car. He then shot and killed veteran Whittier, Calif. police officer Keith Boyer and seriously wounded his partner.

Whittier's grieving chief and the L.A. County Sheriff laid blame on California's legal retrenchments. Sheriff Jim McDonnell complained that his jails had become a "default state prison" and that thanks to the letup, "we're putting people back on the street that aren't ready to be back on the street."

Not everyone sees it that way. According to the liberally-inclined Public Policy Institute of California, the uptick in violence was already in progress when Proposition

47, which it supports, came to be. That view was supported by researchers at UCI's School of Social Ecology, who found no difference when comparing 2015 crime rates between California and "synthetic" equivalent states with like demographics but no changes in the laws. (Yes, that's 2015 only.) Punching back, a conservative Oakland-based group, the Independent Institute, pointed out that property crimes such as car burglaries also surged after Prop. 47 took effect. In June 2018, the Public Policy Institute partly conceded. Yes, early releases may have somewhat increased offending, but only of the "property" kind. As for the spike in violence, that's an artifact of changes in crime defining and reporting. And don't fret, they added: recidivism is on the way down.

We'll wait while the blues and the reds duke it out. And keep an ear to what's happening in New York. On January 1st. a bail reform law went into effect, eliminating cash bail for misdemeanors and "non-violent" felonies, including some robberies and burglaries. That's led to the release of many arrestees pending trial and, as the *New York Times* recently reported, is putting authorities "on edge":

> A few liberal prosecutors, including the Brooklyn district attorney, Eric Gonzalez, have embraced the changes, pointing to states that saw lower crime rates after they eliminated cash bail. But many prosecutors and police officials worry that some defendants released under the new rules will continue to commit crimes....

Really.

Posted 10/25/14

REWARDING THE NAUGHTY

A California ballot measure would reduce many felonies to misdemeanors

By Julius (Jay) Wachtel. According to its proponents, California Proposition 47, enticingly entitled "The Safe Neighborhoods and Schools Act," will *increase* public safety by *reducing* punishment. This extract from arguments in favor of the measure explains how its seemingly counterintuitive approach will work:

- Prioritizes Serious and Violent Crime: Stops wasting prison space on petty crimes and focuses law enforcement resources on violent and serious crime by changing low-level nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors.
- Keeps Dangerous Criminals Locked Up: Authorizes felonies for registered sex offenders and anyone with a prior conviction for rape, murder or child molestation.
- Saves Hundreds of Millions of Dollars: Stops wasting money on warehousing people in prisons for nonviolent petty crimes, saving hundreds of millions of taxpayer funds every year.
- Funds Schools and Crime Prevention: Dedicates the massive savings to crime prevention strategies in K—12 schools, assistance for victims of crime, and mental health treatment and drug treatment to stop the cycle of crime.

Proposition 47 reduces penalties from felonies to misdemeanors for six "non-serious, nonviolent" crimes which, depending on severity and the offender's prior record, can presently be charged as felonies. Five – grand theft, shoplifting, receiving stolen property, writing bad checks, and check forgery – would only be chargeable as misdemeanors as long as the loss is $950 or less. Possession of illegal drugs would also be a mandatory misdemeanor (the change would not affect marijuana possession, already a petty offense.) Persons already serving felony sentences for such convictions would be eligible for resentencing and early release from custody or supervision. To provide reassurance, the measure explicitly forbids giving breaks to persons who have been convicted of murder, rape and child molestation.

There are influential voices on both sides. The measure's sponsors include the current San Francisco D.A. and the former police chief of San Diego. Opponents include the presidents of the California Police Chiefs Association and the California District Attorneys Association. One of the big quarrels is over the consequences of releasing as

many as 10,000 prisoners should the initiative pass. Opponents claim it could cause a public safety disaster. Proponents say not to worry, as the text of the proposed law forbids resentencing prisoners whose criminal record suggests they present an “unreasonable risk of danger to public safety.”

Exactly what does “unreasonable risk” mean? Section 14 of the measure defines it as a prior conviction for an offense enumerated in Penal Code section 667(e)(2)(c)(iv). Here is the subsection in full:

> (I) A "sexually violent offense" as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.
>
> (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.
>
> (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.
>
> (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.
>
> (V) Solicitation to commit murder as defined in Section 653f.
>
> (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.
>
> (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.
>
> (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death.

Senator Diane Feinstein, an avowed liberal who opposes the measure, pointed out that serious crimes such as burglary, armed robbery and aggravated assault are not on the list. Accordingly, should Proposition 47 pass, persons with prior convictions for such crimes would indeed be eligible for early release.

Proposition 47 may also reward the wrong people. According to the nonpartisan Legislative Analyst, nearly all offenders who stand to gain from the proposition received prison terms not because of what they actually did, but due to their prior record:

A relatively small portion—about one-tenth—of offenders of the above crimes are currently sent to state prison (generally, because they had a prior serious or violent conviction). Under this measure, none of these offenders would be sent to state prison. Instead, they would serve lesser sentences at the county level.

Another concern relates to negotiated pleas, which account for at least ninety percent of adjudications. For example, burglars frequently plead to grand theft, and dope dealers to drug possession. If Proposition 47 passes many defendants stand to benefit twice: first from a plea deal, then from mandatory misdemeanor sentencing. (Our system's dependence on plea deals makes withholding them highly unlikely.)

Recalibrating punishment may be a good idea. But if the measure's objective is to improve public safety, offender criminal histories must not be glossed over or, even worse, ignored. Neither should the proposition become an invitation to keep committing "minor" crimes. Under Proposition 47 stealing an object valued at $950 or less – say, an iPad, or an iPhone – is a misdemeanor, period. That's true even if the thief is a repeat offender or has a prior conviction for, say, burglary, armed robbery or grand theft. Indeed, Proposition 47 seems almost an invitation for pickpockets, shoplifters and common thieves to go "pro."

Imprisonment is a crude tool, but it works, if only by incapacitating offenders so they cannot strike while locked up. We might hate to admit it, but incarceration undoubtedly helped break the crime wave of the 80s and early 90s. Now that society seems eager to ease up, it must be done transparently, based on relevant and clearly articulated criteria. Efforts such as Proposition 47, which tinker with a ridiculously complex system (read the initiative, and be sure to have aspirin on hand) are likely to be ineffective, with consequences that we will all regret.

Posted 9/4/18

THE BAIL CONUNDRUM

Bail obviously disadvantages the poor. What are the alternatives?

By Julius (Jay) Wachtel. On September 19, 2017 Mickey Rivera walked out of jail, a free man. Well, relatively free. Unable to post $35,000 bail, he had been locked up for more than two years awaiting trial for his role in the 2015 gang-related killing of a Boston man. In August 2017, though, the Massachusetts Supreme Court ruled in Brangan v. Commonwealth, an unrelated case, that absent specifically documented reasons, cash bail must not outstrip a defendant's ability to pay. After all, bail isn't intended as punishment but "to provide the necessary security for [a defendant's] appearance at trial." Given that decision, Rivera's lawyers appealed. Despite his substantial criminal record, Rivera's bail was reduced to $1,000. He paid up, was outfitted with a tracking device and let go. That, a legal expert told the Boston Globe, was perfectly appropriate:

> Nancy Gertner, a retired federal judge and a senior lecturer at Harvard Law School, defended McGuire's decision to reduce bail, saying he was following a state court decision that is part of a national bail reform effort to prevent people from being jailed before trial simply because they are poor. "What the judge did is exactly right," Gertner said.

Real life tends to muddy things, and this case is no exception. In June 2018, nine months after being set loose, Rivera was arrested for drunk driving. Although he was still awaiting a criminal trial, Rivera was released without bail (his driver license was suspended.) One month later, on July 28, Massachusetts cops observed him speeding and driving erratically. Rivera took off, with cops in pursuit. The chase ended when Rivera slammed head-on into another vehicle, killing a man who had just visited his wife and newborn daughter in the hospital. Rivera was also killed, and a passenger in his vehicle died the following day.

As one might expect, Rivera's case led to considerable recrimination and finger-pointing. Lots of criticism was directed at the judges who reduced Rivera's bail in the killing to a token amount and, much later, let him walk on the DUI. Both were blamed for not making the effort to articulate the need to set a substantial bail amount, even beyond Rivera's ability to pay, as state law and the court decision allow. Of course, the judges had a built-in excuse: despite his many run-ins with the police, Rivera had always shown up.

Showing up? Is that what bail is all about? Apparently, the answer is yes. Bail's only mention in the Constitution is in the Eight Amendment, which stipulates that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." While these few words don't address bail's purpose, *Stack v. Boyle* (342 U.S. 1, 1951), the leading Supreme Court case on point, prohibits setting bail "at a figure higher than an amount reasonably calculated to fulfill the purpose of assuring the presence of the defendant…." Here is how Justice Robert H. Jackson suggested that be determined:

> Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance…This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount.

Wait a minute. Doesn't a suspect's dangerousness also matter? Unfortunately, the underlying offense in Doyle was nonviolent so that concern didn't come up. For a clue we return to Brangan, the Massachusetts case. There the crime was armed robbery, so the justices had no option but to address dangerousness. And their answer, as far as bail is concerned, was "no":

> …a judge may not consider a defendant's alleged dangerousness in setting the amount of bail, although a defendant's dangerousness may be considered as a factor in setting other conditions of release. Using unattainable bail to detain a defendant because he is dangerous is improper….(emphasis ours)

That doesn't mean that the nature of a crime is irrelevant. After all, serious crimes carry serious punishment, and that might make an accused more likely to flee. In fact, Brangan and its precedents require that factors such as the nature of an offense, community ties, mental condition, criminal record and failures to appear (FTA) be considered when setting bail, but only to evaluate the risk of flight. And there are limits. After all, bail inherently discriminates against the poor. Here's another extract from *Brangan*:

> A bail that is set without any regard to whether a defendant is a pauper or a plutocrat runs the risk of being excessive and unfair. A $250 cash bail will have little impact on the well-to-do, for whom it is less than the cost of a night's stay in a downtown Boston hotel, but it will probably result in detention for a homeless person whose entire earthly belongings can be carried in a cart.

That argument parallels the views of justice activists who have called for the elimination of bail altogether. Here, for example, is an extract from the ACLU "Smart Justice" website:

> …bail was supposed to make sure people return to court to face charges against them. But instead, the money bail system has morphed into widespread wealth-based incarceration. Poorer Americans and people of color often can't afford to come up with money for bail, leaving them stuck in jail awaiting trial, sometimes for months or years. Meanwhile, wealthy people accused of the same crime can buy their freedom and return home.

By design, offense severity and prior record strongly influence bail setting and pretrial detention. Research has also revealed that in comparison to white arrestees, blacks and Hispanics are less able to afford bail and less likely to be released without posting bail, thus more likely to remain in pretrial custody. For example, see "Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes" (a review of recent New Jersey data) and "Recommended for release on recognizance: Factors affecting pretrial release recommendations" (an earlier review in Toledo.)

Concerns about extralegal disparities led New Jersey to implement a statewide "risk assessment" system in 2017. Pre-trial investigators collect information to help courts determine whether releasing defendants through "non-monetary means" would unduly risk their flight or imperil public safety. Cash bail remains an option but its use is heavily discouraged. As one might expect, the bail industry balked. So far, though, the statute has survived legal challenges.

Determined not to be left out, liberal-minded California recently enacted an even more sweeping measure that, as of October 2019, does away with bail altogether. Other than under exceptional circumstances, persons arrested for misdemeanors will be summarily released. Like in New Jersey, arrestees charged with more serious crimes would be evaluated by pretrial services, which could release those who pose a low-to-moderate risk to public safety or of nonappearance. Other defendants could thereafter be released by the courts, which could impose only non-monetary conditions. Characters who seems so likely to flee, or pose such an extreme threat to public safety that releasing them under any conditions seems unwise, would be subject to preventive detention. As one would expect, this involves substantial due-process safeguards, including a hearing. Other states (e.g., New Jersey, Massachusetts) have similar provisions.

One might think that minimizing the use of bail or, as in California, eliminating it altogether would satisfy activists. But according to a recent article in *Politico* one would

be wrong: "Social justice advocates that had once championed the initiative to abolish cash bail mobilized against the final iteration of the [California] bill, which they saw as having morphed from righteous to dangerous." What's so "dangerous" about risk assessment and, as a last resort, preventive detention? Given the presumption of innocence, apparently everything: "In critics' eyes, that means California will continue to give local judges the sweeping authority to keep people incarcerated before they're convicted of anything." Similar concerns have arisen in New Jersey and elsewhere.

Law enforcement officers must deal with the consequences of poor release decisions, so they usually favor a short leash. Four months after New Jersey's provisions took effect, Jules Black, an ex-con, was arrested for having a gun. Assessed as low-risk, he was released without bail. Within hours Black allegedly cornered one of his enemies and shot him dead. According to a local jailer (he's also president of the police union) career criminals are taking advantage of the reforms: "I'm seeing the same exact people every week. I'm just seeing them come in with new charges. It's more work for officers. It's a lot more work for them." Concerns that the new procedures were proving too lax were seconded in an NorthJersey.com editorial:

> In particular, officers say the new law's risk assessment, or Public Safety Assessment, leaves too much to chance and is allowing, in some instances, violent-prone individuals to be back out on the street shortly after their court appearances. This, they say, is also bringing more pressure and stress to officers on patrol.

Is assessment a solution? Newfangled protocols supposedly let authorities assign applicants for release to the appropriate risk pool. To be sure, paying specialists to make distinctions will produce…distinctions. But whether these yield groups with markedly different, real-world propensities to engage in misconduct is something else altogether.

Neither is bail a guarantor of good outcomes. "Googling" instantly turned up a recent, troubling anecdote. On May 13, a Wisconsin man with an extensive criminal record that includes "bail jumping" was out on $7,500 cash bond for a string of crimes when an officer tried to pull him over for a traffic violation. After a pursuit (a cop wound up getting dragged a short distance by the suspect's car) the man was arrested on multiple charges.

This time he was detained without bail, right? Wrong. Cash bond was set at $1,000.

Pre-trial release, on bail and otherwise, is ubiquitous and surprisingly permissive. A recent study of eleven major California counties tracked more than one and one-half million bookings (1,563,837) between October 2011 and October 2015. Forty-one

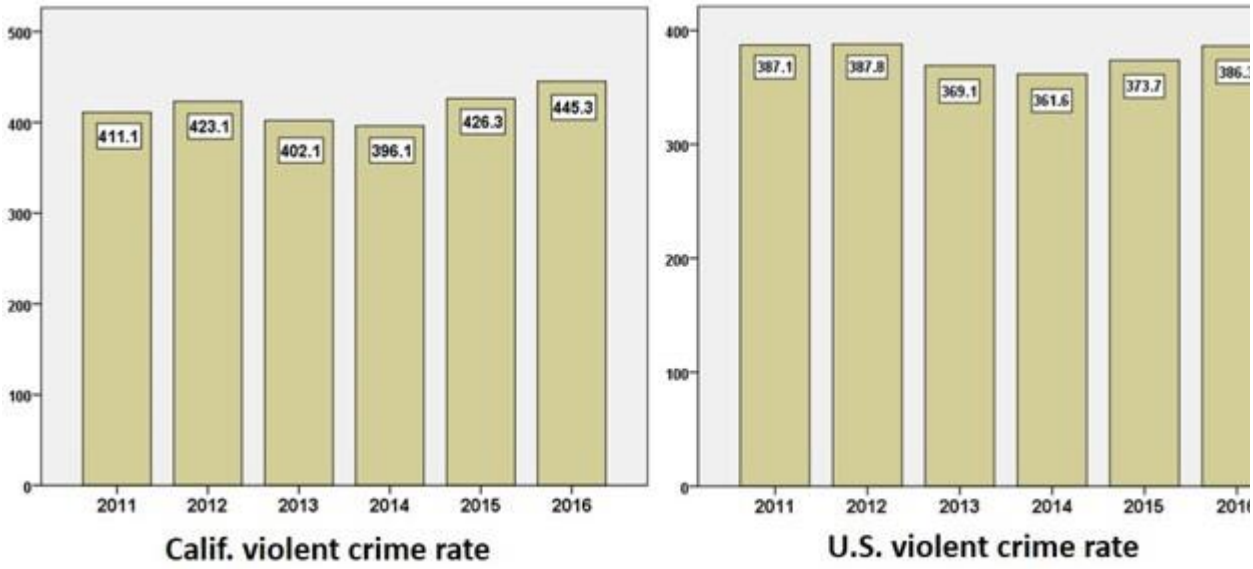
percent of the arrestees were released before trial, split about 60/40 percent between misdemeanors and felonies. Of these, a bit more than a quarter (27.8 percent) had to post bail, most often for a felony offense. About seven percent of the bookings (112,445) were for FTA on a prior charge. Thirty-eight percent of these defendants (43,029) were again let go. A previous study, of persons released from Dallas County jail in 2008, suggested that failure to appear is frequent. Including misdemeanors and felonies, the rate ranged from 23 percent of those released on bail to 39 percent of those who were simply cleared by pretrial services (N=29,416). Another, "An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court," about individuals released on misdemeanor charges in Nebraska during 2009-10, yielded a control group FTA rate of 12.6 percent (N=7,865).

FTA isn't the only issue. Released persons must often comply with other conditions; for example, wear an ankle monitor, keep away from certain persons and places, and so on. But public safety agencies have limited resources, and their practitioners can only do so much. Whether it's old-fashioned cash bail or a newfangled assessment, the sheer magnitude of pre-trial release, the uncertainties of evaluating applicants, and the frailties of human nature inevitably create error, and along with it a substantial threat to the public and police. At a certain point – and from the flub-ups, we've probably reached it – trying to fine-tune outcomes becomes an exercise in wishful thinking. Release more, and there will be more news headlines and more cause for essays like this. That's the one certainty we'll never escape.

Posted 5/21/18

THE BLAME GAME

Inmates are "realigned" from state to county supervision.
Then a cop gets killed.



By Julius (Jay) Wachtel. Cops would worry less if their workplace was more forgiving. But it's not. Legal rules and enforcement practices often seem out of sync with the "real world." There are never enough resources to consistently do a good job. Accurate information is frequently lacking, and there is often little chance to seek it out. Citizens and suspects are unpredictable and dangerous. That's why cops want evildoers behind bars. *Big* bars. Throw away the key: problem solved.

What officers want isn't necessarily what they get. California's cops got their first taste of the "new normal" in 2011. Two years after Federal judges imposed a cap on the state's overflowing prisons, legislators passed AB 109, the "Public Safety Realignment Act," shifting confinement and post-release supervision of "non-serious, non-violent [and] non-sex" offenders from state prisons to county jails and probation departments. Three years later Proposition 47 reduced many felony drug crimes and all theft and stolen property cases with losses under $950 to misdemeanors. And two years after that, Proposition 57, the "Public Safety and Rehabilitation Act of 2016," made it easier for inmates to earn release credits and for "nonviolent" offenders sentenced on multiple charges to win early parole.

Prosecutors and police opposed "realigning" prisoner populations and facilitating early release. They lost. After all, weren't crime rates way down from their peaks? With

reformers howling and politicians reluctant to pay for more prisons, all three measures remain on the books.

No, the sky hasn't fallen. But change always carries consequences. During the first year of realignment, as the state prison population dropped by twenty-six thousand, jail populations surged by over 8,500. County lockups were quickly swamped, forcing authorities to release arrestees whom police wanted to keep in custody. Sentences were waived or cut short, and parolees whose supervision was shifted to the counties remained on the streets despite repeated violations. One, Sidney DeAvila, a sex offender, used his freedom to rape and murder his grandmother and cut her into pieces. A Democratic legislator bemoaned things. "It's justice by Nerf ball. We designed a system that doesn't work."

The above graph is from FBI data. While the nation's violent crime rate remained fairly steady between 2011-2016 (it fell two-tenths of one percent, from 387.1 to 386.3), California's violent crime rate climbed 7.7 percent, from 411.1 to 445.3

In late 2016, with violent crime in California up for a third consecutive year, a columnist for the *Sacramento Bee*, the newspaper serving the state capital, wondered "whether releasing tens of thousands of criminals who otherwise would have been behind bars is having a negative effect." His concern paralleled those of the public safety community, which was convinced that re-alignment was at fault for the increase.

Not everyone was so pessimistic. A September 2016 report by the Center on Criminal and Juvenile Justice (its mission is "to reduce society's reliance on incarceration as a solution to social problems") examined whether realignment contributed to the uptick in crime during 2014-15. Conceding that there was a lot of variation in the data, and that some counties did go the other way, investigators concluded that reducing the number of persons in jail did not cause the overall increase in crime.

In the same month, the influential Public Policy Institute of California used two-year old (2014) crime data to conclude that realignment was a success. (However, it did note that preliminary 2015 statistics were somewhat troubling.) One year later the institute conceded that realignment "had modest [adverse] effects on recidivism"; particularly, that parolees whose sentences were cut short and had their supervision turned over to county probation officers were more likely to reoffend.

That's what happened with Michael Mejia. After serving a three-year prison term for a 2010 robbery, the heavily tattooed Los Angeles gang member stole a car and got two years for auto theft. Thanks to AB 109, he was released early, in April 2016, into the supervision of a local P.O. Mejia promptly amassed a string of violations and served

brief stretches in jail. On February 20, 2017, nine days after his last release, he went off the deep end. Mejia murdered a cousin, stole a car, and when confronted chose to shoot it out, killing Whittier, Calif. officer Keith Boyer and seriously wounding his partner.

Mejia's foul deed energized anti-realignment forces. A coalition of police organizations, prosecutors and victims' rights groups is presently seeking to place the "Reducing Crime and Keeping California Safe Act of 2018," an initiative that substantially rolls back the provisions of AB 109 and Propositions 47 and 57, on the November ballot.

Meanwhile, pro-realignment forces have pulled out all the stops. The Marshall Project, a "nonpartisan, nonprofit news organization that seeks to create and sustain a sense of national urgency about the U.S. criminal justice system" and the *Los Angeles Times* recently released an analysis that blames officer Boyer's death on judges and probation staff who mistakenly let Mejia into the program, then gave him too many breaks. (Click here and here.)

We won't parse the arguments pro and con in detail. What strikes us, though, is just how much is expected from those who must implement realignment's provisions in the "real world." The Marshall Project and *Times* insist (of course, with the benefit of hindsight) that Mejia's poor conduct while under supervision required that his probation be revoked. But had they reviewed the innumerable examples of probation supervision that *don't* end with the killing of a police officer, they would have discovered that Mejia's behavior, which lacked "red flags" such as weapons or violence, was really quite ordinary.

In brief, he was your typical no-goodnik – until he wasn't.

That's not to say that Mejia *should* have been on the street. Still, if all who behaved similarly were reincarcerated, the correctional system would collapse. With confinement out of favor, prisons at capacity and local resources hard-pressed, thanks in part to realignment, prosecutors, P.O.'s and judges are under immense pressure to keep no-goodniks on the street. While that's not what cops would prefer, they're not calling the shots. At least, not until November.