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# CALIFORNIA'S PROPOSITION 21: A CASE OF JUVENILE INJUSTICE

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*"[I]n our zeal to capture the hardened teen criminal, we spread the net too wide. In it we have caught the child who is too young to understand the difference between reality and fantasy, the first-time offender, the hormone-driven adolescent, the abused youth lashing out at the world. We have rewritten the rules: No more second chances, kid. It's one strike and you're out."*<sup>1</sup>

## I. INTRODUCTION

The crimes are among those that stick in your mind forever and break your heart: kids killing kids, lives wasted, and lives lost due to teen violence. Tragically, there have been too many of these cases. Most recently, a fifteen-year-old was accused of opening fire in his suburban Santee high school, killing two boys and wounding thirteen others.<sup>2</sup> Few will ever forget the two classmates who opened fire at Columbine High School in Littleton, Colorado, killing twelve students and a teacher.<sup>3</sup> Nor

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1. Editorial, *They're Too Young to Lock Away Forever*, SAN JOSE MERCURY NEWS, Mar. 16, 2001.

2. Beth Shuster, *Santee School Shootings; Youth Could Face Lengthy Sentence*, L.A. TIMES, Mar. 7, 2001, at A1.

3. Peggy Lowe, *Columbine Grads Attend Reunion*, DENV. POST, July 26, 1999, at A17.

the fifteen-year-old boy who opened fire on a high school prayer group, killing three students and injuring five others in Paducah, Kentucky.<sup>4</sup> Nor the racially motivated attack of five Latino nursery workers by eight teenagers from an affluent San Diego neighborhood.<sup>5</sup> The workers, living in a makeshift camp, were chased down, shot with pellet guns, beaten with rocks, and berated with ethnic slurs.<sup>6</sup> In fact, one only has to watch the nightly news to see yet another story about a teenager involved in violence or gangs. These violent acts awakened the nation to the danger of guns and sparked a desire to crack down on teen offenders.<sup>7</sup> Across the United States, “the philosophy of rehabilitating juveniles shifted to a philosophy of punishing juveniles.”<sup>8</sup> A big part of this nationwide “get tough” on teen offenders policy has been legislation making it easier to try juvenile offenders in criminal courts as adults. California jumped on the bandwagon with Proposition 21, the Gang Violence and Juvenile Crime Prevention Initiative,<sup>9</sup> passed by voters in March 2000.<sup>10</sup> The law revamped California’s juvenile justice system by greatly increasing prosecutorial discretion as to whether a child is tried as an adult—taking the decision away from juvenile court judges. The first juvenile offender charged directly as an adult in Orange County, California, under Proposition 21 was a sixteen-year-old accused of fatally wounding a sixty-seven-year-old woman in a drive-by shooting.<sup>11</sup> Police say it was a tragic case of an innocent bystander being killed by a bullet meant for a rival gang member.<sup>12</sup>

This Note argues that Proposition 21 fails from both social policy and constitutional standpoints. Part II of the Note will discuss how juveniles

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4. *Paducah School Shooter Sentenced*, TENNESSEAN, Dec. 17, 1998, at B2.

5. Alex Roth, *Teen Charged in Rampage Speaks Out; Youth Says Role in Attack on Elderly Latino Workers was Minor*, SAN DIEGO UNION-TRIB., Feb. 1, 2001, at NC1.

6. *Id.* See also Editorial, *Crucial Role for California Judges*, L.A. TIMES, Feb. 9, 2001, at B8.

7. Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can be Transferred To Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 785 (2000).

8. Tracey M. Hodson, Note, *The Effect of Race on the Decision to Try a Juvenile As an Adult*, 20 J. JUV. L. 82, 82 (1999).

9. See Gang Violence and Juvenile Crime Prevention Act of 1998, § (2)(k), Ballot Measure 4, 1999–2000 Legis. Sess. (Cal. 1999).

10. California Secretary of State, *Vote 2000 California Primary Election: State Ballot Measures*, at <http://www.primary2000.ss.ca.gov/returns/prop/00.htm> (last visited Mar. 3, 2002) (stating, with one hundred percent of precincts reporting, that sixty-two percent of California voters approved Proposition 21 and only thirty-eight voted against it).

11. Stuart Pfeifer, *Law Has Not Led To More Adult Trials for Juveniles*, L.A. TIMES, Jan. 6, 2001, at B1.

12. *Id.*

were historically transferred to criminal courts and how Proposition 21 changed the transfer process. Part III discusses the social policy issues impacted by Proposition 21, arguing that it shifts the long-time focus of the juvenile justice system from prevention and rehabilitation to incarceration and punishment. Part IV discusses the constitutional concerns about the amendment, including arguments that the law violates the due process and equal protection rights of juvenile offenders. The statute also violates the separation of powers doctrine by giving prosecutors, rather than judges, authority to decide whether to try juveniles as adults. This Note concludes that Proposition 21 fails California's juveniles because it is completely lacking in crime prevention efforts, focuses on the incarceration and punishment of youth offenders instead of the rehabilitation, and raises serious constitutional concerns in its implementation.

## II. JUVENILE JUSTICE IN CALIFORNIA: ITS HISTORY AND RECENT CHANGES

The juvenile court system began in the 1890s in Illinois and spread across the nation. It "called for the creation of specialized courts to hear the cases of all children, including adolescents, because they were understood to be qualitatively different from adults."<sup>13</sup> The juvenile courts developed under the paternalistic English doctrine of *parens patriae*,<sup>14</sup> which gave the king power to protect dependent subjects during medieval times.<sup>15</sup> "The creators of the juvenile court used the doctrine of *parens patriae* to argue that benevolent state treatment of children was in their best interest. The juvenile court, they argued, would act as a chancery court, not a criminal court, and seek to rehabilitate, not punish, children."<sup>16</sup> The juvenile justice system was created to be a "social service agency."<sup>17</sup> The goal was to stop the juvenile's trip down a path of crime before he or she reached adulthood.

Rather than place the primary focus on the offense, as would have occurred in adult criminal court, the purpose of the juvenile court was to

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13. David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 13, 17 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

14. *Parens patriae* literally means "parent of the country" and traditionally refers to "the role of state as sovereign and guardian of persons under disability, such as juveniles or the insane." *BLACK'S LAW DICTIONARY* 1114 (6th ed. 1991).

15. Tanenhaus, *supra* note 13, at 18.

16. *Id.*

17. Sara Raymond, Comment, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California's Juvenile Justice System and Reasons to Repeal It*, 30 *GOLDEN GATE U. L. REV.* 233, 238-39 (2000).

focus on the offender. Regardless of the offense, juvenile cases were heard only to decide whether the minor was delinquent and required supervision of the court. For example, a minor who committed murder would not be found guilty of murder, “[i]nstead, the minor would simply be found delinquent and would thereafter become a ward of the court.”<sup>18</sup>

Taking juveniles out of the criminal court system meant that cases involving minors were heard in delinquency proceedings, “where the issue was not whether the minor was guilty of a particular crime, but whether the minor was delinquent. Rather than place the primary focus on the offense, as would have occurred in adult criminal court, the purpose of the juvenile court was to focus on the offender.”<sup>19</sup> In other words, the main consideration of juvenile court dispositions is to determine what caused the juvenile to commit the crime. The juvenile court then orders “whatever interventions the judge—with input from the prosecutor and/or probation officer, child welfare professionals, family members and defense counsel—deems necessary to prevent further criminality. Thus, even incarceration is viewed primarily as a corrective, not a punitive, measure.”<sup>20</sup> The reason rehabilitation is a main goal of the juvenile court system is simply “[b]ecause children and adolescents are not fully developed cognitively, morally and emotionally, [so] they should not be held to the same standards of moral accountability, but rather be held accountable in a developmentally appropriate way.”<sup>21</sup>

The history of the juvenile court system is complicated partly because these courts are statutory creations, meaning each state has its own procedures and policies for dealing with cases.<sup>22</sup> Further, juvenile courts do not handle all of the cases involving juvenile delinquents. Almost from the inception of juvenile courts, there have been laws shielding them from certain cases. These cases, whether because of the seriousness of the crime

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18. *Id.* at 239–240. (citing Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 CRIM. L. & CRIMINOLOGY 190, 230–32 (1997)).

19. *Id.* at 239 (citations omitted).

20. Lise A. Young, *Suffer the Children: The Basic Principle of Juvenile Justice Is to Treat the Child, Not Punish the Offense; Statistical Data Included*, AMERICA, Oct. 22, 2001, at 19.

21. *Id.*

22. See PRESTON ELROD & R. SCOTT RYDER, *JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE* 14 (1999) (“Each state has its own juvenile laws, and they vary regarding the age ranges that fall under the jurisdiction of the juvenile court.”). See generally Raymond *supra* note 17, at 235–43 (discussing the creation of the juvenile court system and the various ways different states have revised the statutes that provide for their juvenile courts).

or the age of the perpetrator, are then transferred to adult criminal court.<sup>23</sup> These transfers and the legislation allowing or requiring juvenile courts to do so have been the focus of debate since the courts were created. The main issue being, when does a child cease to be a child?<sup>24</sup>

#### A. HISTORY OF TRANSFERRING JUVENILE MATTERS TO ADULT COURTS

A juvenile who is transferred to criminal court is then legally considered an adult. This means the juvenile faces the same punishments as adult offenders, including the possibility of the death penalty.<sup>25</sup> There have traditionally been three methods in the United States to transfer a juvenile matter to adult criminal court: judicial waiver, statutory waiver, and prosecutorial waiver.<sup>26</sup>

Under judicial waiver provisions, juvenile court judges use their discretion to determine whether to waive jurisdiction over a case.<sup>27</sup> “Judicial waiver provisions are generally limited by age and offense criteria and typically include criteria relating to the juvenile’s potential for rehabilitation.”<sup>28</sup> Juvenile judges must hold a hearing before transferring a minor to adult court.<sup>29</sup> The hearing is called a fitness hearing and is designed to determine whether the juvenile is fit for juvenile court. Judges consider several factors in making their determination, including the dangerousness of the juvenile and the amenability of the juvenile to rehabilitative treatment.<sup>30</sup> Additionally, during the mandatory hearing, “both sides present evidence regarding the juvenile’s personal circumstances and prior offenses, if any.”<sup>31</sup> After the hearing, juvenile court judges have the discretion to keep the case or to transfer it to adult criminal court. “A potential problem with basing waiver decisions on a

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23. ELROD & RYDER, *supra* note 22, at 205 (“The waiver or transfer of jurisdiction from juvenile court to criminal court is predicated on the assumption that some juveniles are not appropriate for processing in juvenile court and can be more effectively dealt with by criminal courts.”).

24. Tanenhaus, *supra* note 13, at 31.

25. ELROD & RYDER, *supra* note 22, at 205.

26. Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of The Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 374 (1998).

27. HOWARD N. SNYDER, MELISSA SICKMUND & EILEEN POE-YAMAGATA, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILE TRANSFERS TO CRIMINAL COURT IN THE 1990’S: LESSONS LEARNED FROM FOUR STUDIES*, at xi (2000).

28. *Id.*

29. Shannon F. McLatchey, Note, *Juvenile Crime and Punishment: An Analysis of the “Get Tough” Approach*, 10 U. FLA. J.L. & PUB. POL’Y 401, 407 (1999). The Supreme Court established the requirement for a hearing in *U.S. v. Kent*, 383 U.S. 541 (1966). *Id.*

30. *Id.*

31. *Id.* at 409.

youth's amenability to treatment in juvenile justice programs or adult programs is that such determinations can be highly subjective."<sup>32</sup>

A statutory or legislative waiver exists when the legislature mandates that juveniles who fall into certain categories automatically will be transferred to adult court.<sup>33</sup> Normally, these are cases where a juvenile is charged with a certain serious act or violent crime. "In these cases waiver is not discretionary; it is based solely on statutory criteria. There is a presumption that the juvenile offender is dangerous and not amenable to rehabilitation."<sup>34</sup> An Illinois statute is a good example of this type of waiver. The statute excludes any child age fifteen or older charged with murder, armed robbery, or rape from juvenile court jurisdiction.<sup>35</sup> As a result, the rate of adult criminal prosecution of juveniles more than tripled "to 170 transfers [in one year], 151 of which resulted from the automatic transfer provision . . . [T]his figure represents 151 *children* who are being treated as adults without any preliminary consideration of who these children are and how they could benefit from the juvenile system."<sup>36</sup>

Lastly, a legislature may give prosecutors discretion to determine whether to file in adult criminal court or juvenile court.<sup>37</sup> These so-called prosecutorial waiver statutes give prosecutors discretion to decide whether to file directly in criminal court. "In recent years, legislatures across the country have shown an increasing preference for statutory exclusion and direct file. It is clear that legislatures are seeking to remove judicial discretion in and procedural barriers to the transfer of juveniles."<sup>38</sup> Currently, there are twelve states with legislation allowing prosecutors to file certain cases directly in criminal court.<sup>39</sup> California's Proposition 21 is a perfect example of this trend. "This transfer method is the most controversial because the juvenile is not afforded a hearing and discretion rests exclusively with the prosecutor with little statutory guidance."<sup>40</sup> To put it simply, the prosecutor is not burdened with having to prove why a juvenile should be transferred to adult criminal court.

Many other states have passed laws analogous to Proposition 21. Some states have granted concurrent jurisdiction to adult and juvenile

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32. ELROD & RYDER, *supra* note 22, at 206.

33. Klein, *supra* note 26, at 390.

34. McLatchey, *supra* note 29, at 412.

35. Klein, *supra* note 26, at 390.

36. *Id.*

37. *Id.* at 394.

38. *Id.* at 374.

39. ELROD & RYDER, *supra* note 22, at 207.

40. McLatchey, *supra* note 29, at 410.

courts if the crime meets certain criteria. In Arizona, “the prosecutor ‘may bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is at least fourteen years of age’ and accused of an enumerated offense.”<sup>41</sup> Prosecutors have discretion whether to file in criminal court in cases concerning a number of crimes committed by juveniles age twelve or older in Nebraska.<sup>42</sup> “In Florida, the prosecutor can file directly in criminal court when the offense involves a fourteen- or fifteen-year-old minor.”<sup>43</sup> Prosecutors in Michigan can automatically choose to file juveniles in criminal court who are as young as fourteen, if they commit “specified juvenile violations,” including arson, murder, attempted murder and armed robbery.<sup>44</sup> Other states with laws granting either direct prosecutorial discretion or concurrent jurisdiction include: Arkansas, Colorado, Connecticut, Georgia, Louisiana, Montana, Nebraska, and Wyoming.<sup>45</sup>

Some states have added protection for juveniles from waiver statutes called “reverse waiver” provisions. In fact, at the end of 1997, twenty-three states had such provisions.<sup>46</sup> Several appellate courts have emphasized the importance these provisions have in ameliorating the unfairness possibly associated with overinclusive statutory categories.<sup>47</sup> “Many of these reverse waiver proceedings give legislative exclusion statutes the effect of a judicial waiver statute with a presumption of criminal court jurisdiction and the burden of proof placed on the juvenile to rebut the presumption.”<sup>48</sup> The Vermont Supreme Court, in upholding a law placing juveniles between the ages of fourteen and sixteen who are charged with serious crimes in criminal court jurisdiction, emphasized that the law “required a hearing and findings of fact to determine whether the juvenile should be transferred to juvenile court.”<sup>49</sup>

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41. Beresford, *supra* note 7, at 814.

42. *Id.* at 815.

43. *Id.*

44. ELROD & RYDER, *supra* note 22, at 207.

45. Beresford, *supra* note 7, at 814 n.221.

46. Lynda E. Frost Clausel & Richard J. Bonnie, *Juvenile Justice on Appeal*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 13, at 181, 204 n.29.

47. *Id.* at 190.

48. *Id.* “Other reverse waiver proceedings apply after conviction in criminal court to permit the court to sentence the offender as a juvenile.” *Id.* at 204 n.30 (emphasis omitted).

49. *Id.* at 190.

## B. HOW PROPOSITION 21 CHANGES CHARGING JUVENILE CRIMES IN CALIFORNIA

California's Proposition 21, the so-called "Juvenile Justice Initiative," was approved on March 7, 2000, by a sixty-two percent majority of the state's voters. It gives prosecutors, not judges, the power to decide whether juveniles as young as fourteen will be tried as adults for major crimes. "Adult courts can sentence youths to full criminal terms, up to life in prison, while juvenile courts can order them held only until age 25."<sup>50</sup> The ballot measure was sold as the latest in a series of get-tough-on-crime laws and legislation broadening the prosecution of juveniles, following many well-publicized and tragic school shootings involving teens. "The solution has become to lock up early the children who have displayed a propensity for crime and keep them locked up for a long time. To achieve this goal, states and the federal government have increasingly turned to the quick-fix solution of trying juveniles as adults."<sup>51</sup>

Proposition 21 confers mandatory, automatic adult criminal court jurisdiction for prosecution of minors fourteen years or older for specified offenses, including murder if one or more special circumstances is alleged, and several sex offenses if the prosecutor alleges the minor personally committed the offense.<sup>52</sup> Proposition 21 also provides that "a minor *16 or older* for whom a motion for unfitness has been filed based on his alleged commission of *any felony* offense *is presumed* unfit for juvenile court jurisdiction if such minor has been adjudged on one or more prior occasions to be a ward of the court and was found to have committed two or more prior felonies after the age of 14."<sup>53</sup> The law also permits prosecutors to file accusatory pleadings directly in criminal court without a

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50. Bob Egelko, *Court OKs Youth Justice Initiative; ACLU Challenge That Prop. 21 Was About More than One Subject Is Rejected*, S. F. EXAMINER, Sept. 27, 2000, at A5.

51. Klein, *supra* note 26, at 373.

52. LISA GREER, LAW OFFICES OF THE LOS ANGELES PUBLIC DEFENDER, A PRACTICAL GUIDE TO JUVENILE DELINQUENCY LAW 109 (2000). The law also confers adult jurisdiction if the prosecutor alleges circumstances under the One Strike law, CAL. PENAL CODE § 667.6 (d), (e), including "prior conviction of specified sex crimes, and circumstances in the present case including kidnapping with additional risk of harm, mayhem or torture, present offense arose during a burglary, great bodily injury, use of dangerous or deadly weapon, multiple victims, forcible administration to controlled substance to victim." *Id.* The sex offenses covered include: rape, forcible sex offenses in concert with another and forcible penetration by foreign object, forcible lewd and lascivious acts on a child younger than fourteen, and sodomy or oral copulation by force or fear of bodily injury. *Id.*

53. GREER, *supra* note 52, at 109 (emphasis added).

This presumption of unfitness can be overcome only upon a finding by the juvenile court that the minor is fit on each of the five fitness criteria. If such a minor is found fit to remain in the juvenile system, he or she *must be* placed in a juvenile hall, ranch camp, forestry camp, boot camp, secure juvenile home or the Youth Authority. *Id.*

fitness hearing in juvenile court against a minor fourteen years or older if the youth commits certain offenses.<sup>54</sup>

Additionally, the law limits the privacy and confidentiality rights of juvenile offenders.<sup>55</sup> Before this law, juvenile proceedings were open to the public, and the minor's name was released, only in limited circumstances. The judge had discretion to keep the proceedings confidential if there was "good cause" to do so.<sup>56</sup> Proposition 21 "severely limits the interpretation of 'good cause' to mean necessary to protect the personal safety of the minor, the victim, or the public at large, severely restricting a judge's ability to keep juvenile delinquency proceedings closed to the public."<sup>57</sup>

The voter-approved changes mean the stakes are high for juvenile offenders. "If convicted in Juvenile Court, an offender can be imprisoned only until age 25, and in most instances they are housed at youth camps. In adult court, offenders can be sentenced to prison for life."<sup>58</sup> A teen convicted of robbery with a firearm in juvenile court would face a minimum term of three years in the California Youth Authority, while the minimum sentence for an adult is twelve years.<sup>59</sup> The latest figures, collected about nine months after Proposition 21 went into effect, show that about thirty percent of all teen offenders in California are being charged in adult court.<sup>60</sup> Some counties, however, have much higher prosecution rates. At the end of 2000, San Diego County reported that about three of every four juvenile cases in the county were filed in adult court.<sup>61</sup> Officials in the district attorney's office say the reason is "[p]rosecutors only have 48 hours after an arrest to file charges and in many cases they can't learn enough about the background of youths to decide whether or not to take them into adult court."<sup>62</sup>

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54. *Id.* at 110. See CAL. WELF. & INST. CODE § 707(d)(3) (detailing a list of the offenses where prosecutor is given authority to file directly in adult criminal court under Proposition 21).

55. Raymond, *supra* note 17, at 261–62.

56. *Id.* at 262.

57. *Id.*

58. Pfeifer, *supra* note 11.

59. Maura Dolan, *More Teenagers Face Charges As Adults*, L.A. TIMES, Nov. 30, 2000, at A3.

60. Thomas D. Elias, *Controversy Grows out of Trend to Try California Youths As Adults*, WASH. TIMES, Jan. 1, 2001, at A6.

61. Dolan, *supra* note 59.

62. Elias, *supra* note 60.

### III. SOCIAL POLICY CHALLENGES TO PROPOSITION 21

Proposition 21 is controversial due to the negative impact it has on several social policies. Topping the list is the fact that the law abandons the long-standing goal of juvenile courts—rehabilitation.<sup>63</sup> Further, the law vests enormous discretion in prosecutors. Lastly, it sends more juveniles to adult prisons, where they will be locked up with hardened career criminals.

#### A. PROPOSITION 21 DOES NOT REHABILITATE JUVENILE OFFENDERS

Proposition 21 sends juveniles to state prison. In prison, without the treatment and education available in the juvenile system, they will be confined in institutions housing hardened adult criminals. All of these young people will learn in state prison is how to be better criminals. For example, a seventeen year old boy, imprisoned in an adult correctional institute near Tampa, Florida, said teenagers in prison get an education that is almost guaranteed to lead to a life of crime:

You're surrounded by different types of criminals . . . . People who know how to burgle houses, rob banks. You've got rapists here. Murderers. Young people, some don't have the mind I do. They'll listen to the older inmate: 'This is how you do a robbery.' He might go out there and try it again. He might get away, or he might end up dead or back in here.<sup>64</sup>

Juveniles sentenced to adult prison terms, when released, go back to the streets “without having received the rehabilitative treatment afforded juveniles in juvenile detention programs.”<sup>65</sup> “Generally, adult prison staffs provide juveniles with less counseling. Whereas, juvenile detention programs discuss the importance of setting personal goals and improving family relationships.”<sup>66</sup> This lack of rehabilitation and education only increases the propensity for criminal activity.

Some judges object to the removal of their discretion over how to try young suspects, which also serves to deprive them of much of the

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63. Proponents, on the other hand, argue that Proposition 21 “protects Californians from violent criminals who have no respect for human life.” California Secretary of State, *Primary Election 2000: Argument in Favor of Proposition 21* (2000), at <http://www.primary2000.ss.ca.gov/VoterGuide/Propositions/21yesarg.htm> (last visited Nov. 1, 2000). They also say it makes the system more “efficient and convenient” by getting around the hearings and appellate reviews required with judicial waiver, where a juvenile court judge makes the determination about whether to transfer the case to criminal court. Beresford, *supra* note 7, at 816.

64. Sasha Abramsky, *Hard-Time Kids; Handing Down Adult Prison Sentences to Juvenile Criminals Isn't Solving Their Problems—or Ours*, AM.PROSPECT, Aug. 27, 2001, at 16.

65. McLatchey, *supra* note 29, at 415.

66. *Id.*

discretion they have long enjoyed in sentencing.<sup>67</sup> This discretion has often allowed youths to be sentenced to special schools, camps, or programs rather than prison.<sup>68</sup> Juvenile court judges are not the only ones offering opposition. Some prosecutors and public defenders also have expressed worries about the new system, saying it threatens to make career criminals of youths whose life course might otherwise have been altered.<sup>69</sup> They argue that the benefits of rehabilitation that juvenile courts can provide far outweigh the “violence and destruction that occur in adult prisons.”<sup>70</sup>

In contrast to adult criminal courts, juvenile courts offer numerous rehabilitation programs. For juveniles not institutionalized, probation, a conditional release of the juvenile under the supervision of the court, is the most frequently used correctional response.<sup>71</sup> There are several other community-based interventions used by juvenile courts, including restitution, wilderness probation, or outdoor education programs and day treatment programs.<sup>72</sup> Juvenile correctional institutions include detention centers, jails, forestry camps, and state training schools.<sup>73</sup> Most juvenile detention centers include educational programs, basic health care, and access to mental health professionals and counseling.<sup>74</sup> Meanwhile, state training schools, used to house serious or repeat offenders, offer a combination of academic education, vocational training, basic counseling, and behavior management.<sup>75</sup> Additionally, “over half of all training schools offer family counseling, health and nutrition counseling, substance abuse education, and sex offender treatment.”<sup>76</sup> All of these services are geared toward rehabilitating the juvenile.

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67. See Judge James T. Warren, *Proposition 21: No: Costly Law Just Isn't Needed*, PRESS-ENTERPRISE, Feb. 20, 2000 at A13 (discussing how Proposition 21 takes decisions that should be made by a judge and places them in the hands of prosecutors).

68. See *id.*

69. See Abramsky, *supra* note 64 at 16 (“[Proposition 21] wasn’t reform . . . . It was a power grab by police and prosecutors. It’s a reaction to violent juvenile crime. People take that fear and try and capitalize on it and end up with things like Prop 21. Bad lawmaking.”); Elias, *supra* note 60, at A6. Lisa Greer, a Los Angeles public defender, said “[a] child’s life is irrevocably impacted, and in all probability negatively, by being tried as an adult . . . . A judge really is best equipped to decide whether any particular kid can be rehabilitated in the juvenile justice system.” *Id.*

70. Beresford, *supra* note 7, at 822.

71. ELROD & RYDER, *supra* note 22, at 264. “For example, in 1994, 55 percent of the juveniles adjudicated in juvenile courts, nearly 539,000 youths, were placed on probation.” *Id.* (citing M. SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, THE JUVENILE DELINQUENCY PROBATION CASELOAD 1985–1994, Fact Sheet no. 54 (1997)).

72. ELROD & RYDER, *supra* note 22, at 295.

73. *Id.* at 295.

74. *Id.* at 300.

75. *Id.* at 308.

76. *Id.*

## B. RISK OF PROSECUTORIAL ABUSE WITH PROSECUTORIAL WAIVER

Under Proposition 21, the state's prosecutors are given a great deal of power. Prosecutors have complete discretion in many circumstances over whether a juvenile delinquent is tried in juvenile or criminal court. This is controversial because "it vests enormous discretion in someone whose 'primary duty is to secure convictions and who is traditionally more concerned with retribution than with rehabilitation.'"<sup>77</sup> A top concern with a prosecutor having this power is that the "prosecutor's decision to try a juvenile as an adult is not appealable and not reviewed" in a courtroom.<sup>78</sup> The prosecutor makes the determination without the fitness hearing afforded a juvenile in situations of judicial waiver. This means juveniles transferred via prosecutorial waiver are not given an opportunity to show that they are amenable to rehabilitation, and it may not take into consideration the juvenile's personal circumstances.<sup>79</sup>

The media can also create intense pressure for prosecutors to charge juveniles as adults. When the media jumps on a case, splashing it across the front pages of newspapers or making it the lead story on the local news, the attention often moves public opinion, subjecting prosecutors, whose boss is elected by voters, to public opinion and political pressure. This pressure could easily influence a prosecutor's discretion to try to transfer a case to criminal court that otherwise might have stayed in juvenile court.<sup>80</sup> A study reviewing prosecutorial transfers in Florida from 1978 to 1987 found that "prosecutors 'felt pressure to prosecute more children as adults because they felt they had been given a mandate by the legislature.'"<sup>81</sup> Prosecutorial waivers also pose an increased risk for juveniles arrested in situations involving multiple offenders, including adults, for related crimes. "Minors may be prosecuted as adults 'solely because the prosecution wishes to try the case only one time and not to expose the government's witnesses to multiple cases in different courts.'"<sup>82</sup>

Additionally, prosecutorial waiver statutes, like Proposition 21, tend to be too broad. "[T]hey frequently require inexperienced attorneys to make

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77. Beresford, *supra* note 7, at 816.

78. *Id.* at 817.

79. McLatchey, *supra* note 29, at 411.

80. See Beresford, *supra* note 7, at 816-17 ("Because the decisions of the prosecutors are reviewed through the political process, there is also potential of abuse due to political pressure.").

81. *Id.* at 817.

82. *Id.*

quick decisions based on minimal information about offenders.”<sup>83</sup> Because of the problems generated by the streamlined procedures offered by the prosecutorial waiver, many states have put corrective measures in place. These states have established the “reverse waiver” or “transfer back” provisions previously mentioned.<sup>84</sup> It is important to keep in mind, however, that the reverse waiver provisions are in the hands of criminal court judges who are overworked and do not have expertise in dealing with young offenders.

### C. RISK OF SEXUAL AND PHYSICAL ABUSE FOR JUVENILES IN PRISON

Lastly, juvenile delinquents face a very serious risk of sexual and physical abuse when sent to prison. In fact, this nation has a tragic record of sexual and physical assault of juveniles who are jailed with adults. “Teenagers are five times as likely as adult prisoners to be sexually assaulted. They’re twice as likely to be beaten by a guard and 50 percent more likely to be attacked with a weapon. And children in adult prisons are eight times more likely to commit suicide than those in juvenile facilities.”<sup>85</sup> Additionally, juveniles placed in adult prisons often become more violent in response to their surroundings. “Critics of incarcerations of juveniles in adult prisons argue that such juveniles are released with personalities that are strongly influenced by the violent world in which the juveniles have grown up: a world characterized by victimization and retaliation rather than rehabilitation and education.”<sup>86</sup> The juveniles often develop these violent personalities while trying to establish a social position in prison, where “[d]isplays of verbal and physical aggression ‘prove’ one’s toughness and masculinity . . . .”<sup>87</sup>

The violence and abuse juveniles are exposed to in adult prisons, which leads to the eventual release of someone who is more violent, goes directly against the goal behind transferring these cases to adult court in the first place—reducing crime. A University of Florida study found juvenile offenders reverted to a life of crime more quickly when they had been tried in adult court and sentenced to adult prisons than juveniles who were

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83. Donna Bishop & Charles Frazier, *Consequences of Transfer*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 13, at 227, 242.

84. *Id.*

85. Joan Ryan, Editorial, *Send 'Em to Jail: But no Mortal Kombat*, *S.F. CHRON.*, Sept. 19, 2000, at A19. *See also* Beresford, *supra* note 7, at 821–22 (discussing the threat of physical and emotional harm juveniles face at the hands of older inmates while confined inside adult prisons).

86. McLatchey, *supra* note 29, at 416.

87. Bishop & Frazier, *supra* note 83, at 258.

treated in juvenile institutions.”<sup>88</sup> The study found juveniles who had been transferred to criminal court were rearrested on average 135 days after release.<sup>89</sup> In contrast, those processed in juvenile court averaged their first rearrest in 227 days.<sup>90</sup> The study also found the juveniles who had been sent to criminal court committed more crimes and more serious crimes after being released.<sup>91</sup> “Ninety-three percent of the transferred youths who reoffended were arrested on felony charges. Eighty-five percent of the nontransferred [youths] were rearrested for felonies. The difference, although not large, [is] statistically significant.”<sup>92</sup>

Another study on the effect of treating juveniles as adults by Jeffrey Fagan reached similar conclusions to the Florida research. Fagan compared the recidivism rates of fifteen and sixteen-year-old robbery offenders processed in two counties in New York with those handled in two counties in New Jersey.<sup>93</sup> A New York statute placed the cases in adult criminal court, while in New Jersey the cases were processed in juvenile court.<sup>94</sup> The study found higher recidivism rates for robbery offenders processed in adult court. Seventy-six percent of robbery offenders in criminal court were rearrested after release, compared to sixty-seven percent of those processed in juvenile court. “Significant differences were also found in the prevalence of reincarceration: fifty-six percent of robbers from the criminal court group were subsequently incarcerated versus forty-one percent of those in the juvenile court group.”<sup>95</sup>

#### IV. CONSTITUTIONAL CHALLENGES TO PROPOSITION 21

Proposition 21 is also problematic on the grounds that it arguably violates the California Constitution and the United States Constitution. The California Supreme Court heard oral arguments on the measure at the end of 2001.<sup>96</sup> This review came after several constitutional challenges to the law in lower courts and differing opinions about whether the law passes

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88. Donna M. Bishop, Lonn Lanza-Kaduce & Charles E. Frazier, *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 129, 147–48 (1998).

89. *Id.* at 146.

90. *Id.*

91. McLatchey, *supra* note 29, at 416.

92. Bishop et al., *supra* note 88, at 146.

93. *Id.* at 142.

94. *Id.* at 142–43.

95. *Id.* at 143.

96. See Harriet Chiang, *High Court Hears Arguments on New Juvenile Crime Law*, S.F. CHRON., Dec. 6, 2001, at A23 (discussing the California Supreme Court hearing oral arguments on the constitutionality of Proposition 21 and noting that the justices appeared ready to uphold the law).

constitutional muster in the state appellate courts and whether the law violates the separation of powers doctrine, due process, and equal protection principles of the United States Constitution.

#### A. PROPOSITION 21 VIOLATES SEPARATION OF POWERS DOCTRINE

Proposition 21 arguably violates the separation of powers doctrine by giving the authority to decide whether to try juveniles as adults to prosecutors, who are members of the executive branch, rather than judges.

The California Constitution provides “[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”<sup>97</sup> The goal of the separation of powers doctrine is to avoid having the “fundamental powers of the government in the hands of a single person or group.”<sup>98</sup>

Proposition 21, specifically the section amended in California Welfare and Institutions Code section 707(d), allows the district attorney to determine what charges should be filed against the juvenile and in which court.<sup>99</sup>

As explained by a California state judge, recognizing one of Proposition 21’s problems:

Under Prop. 21, [transfer] decisions will no longer be made by an independent judge but by one of the parties to the lawsuit—the prosecutor. DAs run for election and have vested interest in appearing “tough on crime.” Filing decisions are most often made by junior prosecutors who lack experience and are under pressure to appear tough on crime. Under Proposition 21 their decisions must be made at the earliest stage, often with incomplete police reports and little or no information about the background of the minor. These critical decisions should be made by a judge, who has no vested or political interest in the outcome.<sup>100</sup>

Courts have held in previous decisions that a prosecutor’s power is not unlimited. “A prosecutor does not have the authority to prevent the court from striking a prior conviction for sentencing purposes, to prevent a court

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97. CAL. CONST. art. III § 3.

98. George Mgdesyan, Note, *Gang Violence and Crime Prevention Act of 1998*, 3 J. LEGAL ADVOC. & PRAC. 128, 130 (2001). “Powers are separated so that they may act as a check on the exercise of the powers of the co-extensive branches of government.” *Id.*

99. See CAL. WELF. & INST. CODE § 707(d) (Deering 2001).

100. Warren, *supra* note 67.

from granting probation in the appropriate case, to prevent a court from reducing a felony to a misdemeanor, nor does the prosecutor have any authority from preventing a court from dismissing a strike under the three strikes rule.”<sup>101</sup> All of these decisions require judicial approval and oversight.<sup>102</sup> Further, these decisions are analogous to deciding which court to prosecute.<sup>103</sup> Yet, under Proposition 21, a prosecutor can decide to prosecute a teenage offender without any judicial oversight or consent.

Last year a three-member panel of California’s Fourth Appellate District, Division One, ruled on a separation of powers challenge to Proposition 21 in a case involving a group of San Diego teenagers facing trial as adults in connection with an attack on five Latino migrant workers.<sup>104</sup> The court struck down a key portion of law, ruling that prosecutors should not be able to decide unilaterally whether teenagers are tried as adults.

The teens’ arguments that Proposition 21 illegally strips judges of the power to decide whether minors should be treated as adults had been rejected by a Superior Court judge in San Diego.<sup>105</sup> The boys, ages fourteen to seventeen, are charged with assault, robbery and hate-crime allegations.<sup>106</sup> Prosecutors in San Diego are seeking to try the teens as adults. If tried in criminal court, the teens face sentences of between twelve and sixteen years in state prison if convicted. On the other hand, if convicted in juvenile court, the teens could only be held until age twenty-five.<sup>107</sup>

Overruling the lower court decision, the Fourth District Court of Appeal panel agreed with the lawyers for the juveniles. Justice McDonald wrote the majority opinion in the two-to-one decision:

We conclude that by placing within the discretion of the prosecuting authority the determination of which of two legislatively authorized sentencing schemes are available to the courts, Proposition 21’s

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101. Mgdesyan, *supra* note 98, at 131.

102. *Id.*

103. *Id.*

104. *Manduley v. Superior Court*, 104 Cal. Rptr. 2d 140, 142 (Cal. App. 2001), *rev’d* No. S095992, 2002 Cal. LEXIS 622, \*49 (Feb. 28, 2002). *See also* Greg Moran, *Attorneys Tell Court Prop. 21 is Flawed*, SAN DIEGO UNION-TRIB., Jan. 10, 2001, at NC-1 (discussing the argument against Proposition 21 that was made by attorneys for defendants in the case).

105. *Manduley*, 104 Cal. Rptr. 2d at 142. *See also* Tony Perry, *No Tipster Reward, San Diego City Council Decides*, L.A. TIMES, Sept. 13, 2000, at A3 (discussing the challenge to Proposition 21 being made by the defendants).

106. Moran, *supra* note 104.

107. *Id.*

amendment to section 707, subdivision (d) violates the constitutional principle of the separation of powers between the executive and judicial branches of government.<sup>108</sup>

Section 707(d) provides that, in certain specified offenses involving juveniles as young as fourteen-years-old, the district attorney is given discretion to either file a petition against the teen in juvenile court or prosecute the juvenile as an adult in criminal court.<sup>109</sup> The question before the court was whether the discretionary direct filing procedure prosecutors have under section 707(d) “is in its nature a charging decision that is properly allocated to the executive branch or is instead a sentencing decision that is properly allocated to the judicial branch and may not be delegated to the executive branch in derogation of the judicial power over sentencing.”<sup>110</sup>

The Fourth Appellate Court held that the power granted to prosecutors under Proposition 21 section 707(d) was judicial. “We conclude that the fundamental nature of the decision given to district attorneys under section 707(d) is a decision that the adult sentencing scheme rather than the juvenile court dispositional scheme must be imposed if the juvenile is found guilty of the charged offenses.”<sup>111</sup> The court said these “provisions giving the district attorney the power to preemptively veto a court’s sentencing discretion violates separation of powers principles.”<sup>112</sup>

The prosecution in this case relied on cases from other states where the courts upheld statutes giving prosecutors discretion to directly file charges against juveniles in criminal court. Justice McDonald distinguished these cases from Proposition 21, noting in those cases “the prosecution’s power to select the forum did not interfere with or restrict the court’s dispositional authority; the adult court retained the authority to prescribe a juvenile court disposition, or order the action retransferred to juvenile court, or both.”<sup>113</sup> Section 707(d) does not contain such a provision. Justice McDonald said this meant if the juvenile is convicted in criminal court, “the court may not select a juvenile court disposition[,] but

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108. *Manduley*, 104 Cal. Rptr. 2d at 142. “Both the California and United States constitutions follow the principle of separation of powers among the legislative, executive and judicial branches of government. This principle precludes one branch from exercising, or interfering with the exercise of, the functions or powers of either of the other branches.” *Id.* at 143 (citations omitted).

109. See CAL. WELF. & INST. CODE § 707(d) (Deering 2001).

110. *Manduley*, 104 Cal. Rptr. 2d at 147.

111. *Id.*

112. *Id.*

113. *Id.* at 151.

must sentence the defendant as an adult under the adult laws.”<sup>114</sup> The court held that this meant prosecutors’ power to select the forum under Proposition 21 “interfere[s] with and restrict[s] the court’s dispositional authority.”<sup>115</sup> The court did not invalidate all of Proposition 21 because it found section 707(d) to be severable from the rest of the measure.<sup>116</sup>

In dissent, Justice Nares argued Proposition 21’s amendment of section 707(d) did not fundamentally alter or exceed prosecutors’ traditional power to charge criminals even if the choice of where to file criminal charges ultimately affects the sentencing structure available for a court to employ: “[T]he mere fact that a prosecutor must exercise discretion in determining whether to file a charge under section 707(d) in criminal or juvenile court does not render such decision unconstitutional as a violation of separation of powers.”<sup>117</sup> Justice Nares wrote that the statute did not give prosecutors’ power traditionally reserved to the judiciary:

I view the exercise of discretion under section 707(d) as akin to a prosecutor’s decision whether or not to charge an individual at all with a particular crime. All the statute does is allow the prosecutor to choose to prosecute a juvenile who meets section 707(d)’s criteria in criminal court, or not, and file in juvenile court . . . . *Anytime* a prosecutor exercises his or her discretion to charge a certain crime over another, sentencing and disposition are directly, and sometimes severely, impacted. This fact does not make the prosecutor’s decision constitutionally infirm or turn it into an improper exercise of a “judicial” function.”<sup>118</sup>

San Diego County’s District Attorney Paul Pfungst immediately appealed the Fourth Appellate District’s ruling to the California Supreme Court.<sup>119</sup> The appellate court’s ruling, if it withstands appeal, could affect hundreds of juveniles who have been or are being tried under Proposition 21, under defense attorneys’ estimations.<sup>120</sup>

The Fourth Appellate District’s ruling did not discuss in great detail why it felt granting prosecutors the power to file charges against juvenile

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114. *Id.*

115. *Id.*

116. *Id.* at 152.

117. *Id.* at 155.

118. *Id.* at 158.

119. *See id.* (granting petition for review). *See also* Tony Perry & Greg Krikorian, *Appeal Planned on Right to Try Juveniles As Adults*, L.A. TIMES, Feb. 16, 2001, at A1 (discussing the San Diego prosecutor’s plans to appeal the court’s ruling to the state’s highest court).

120. Maura Dolan, *Justices Curb Law on Prosecution of Youths As Adults*, L.A. TIMES, Feb. 8, 2001, at A1.

delinquents directly in adult criminal court amounted to a sentencing, and thus, a judicial decision. The court mentioned the fact that once a youth is in criminal court, the judge's sentencing must be made under adult laws, which often means a mandatory sentence and no judicial discretion. Further, a prosecutor's decision to file directly in criminal court under Proposition 21 is a decision that cannot be appealed. Thus, when a prosecutor brings a juvenile case in criminal court, he or she is doing more than just making a charging decision. The move amounts to a specific sentence for the juvenile if convicted.

Another reason that might have motivated the court to strike down the prosecutorial discretion portion of Proposition 21 is that the court felt this country's checks-and-balance system requires judicial participation as a check on prosecutors' power. This would have been a tough sell for the court, however, because prosecutors make charging decisions against adults everyday. Further, these decisions are always considered prosecutorial, despite the fact that many of the crimes charged carry mandatory sentences, leaving the judge with little sentencing discretion.

An additional factor possibly motivating the decision could be that the court felt the specific circumstances and status factors involved in juvenile cases are better understood and interpreted in situations where a judge is in control. When handled in juvenile court, the judge considers the specific circumstances surrounding each youth, including issues such as past abuse, education, and home situation. These considerations, fundamental to the rehabilitative goal of juvenile courts, would likely be absent when a prosecutor is in control. This argument, however, also would likely fail. Just because a judge might be better equipped to consider all the factors about a juvenile's life does not necessarily make the decision a judicial one. Again, prosecutors make charging decisions each day. They also determine when to accept plea agreements, which often involves taking a look at the specific circumstances surrounding the defendant.

About four months after the Fourth Appellate District Court's decision, California's Fifth Appellate District Court went the opposite direction, holding section 707(d) does not violate the separation of powers doctrine.<sup>121</sup> Justice Ardaiz authored the court's opinion and took a strong position against arguments that section 707(d) violates the separation of powers doctrine. "The juvenile justice system is a statutory creation which

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121. *Bravo v. Superior Court*, 108 Cal. Rptr. 2d 514, 517 (Ct. App. 2001), *review granted*, 31 P.3d 1268 (Cal. 2001) ("[W]e conclude section 707, subdivision (d) does not violate the separation of powers doctrine.").

unquestionably can be revoked by the Legislature (or the people directly through the initiative process) at any time.”<sup>122</sup> Further, the court stated,

[T]he entire juvenile system is a statutory creation, and is therefore a privilege granted by the Legislature that the electorate can restrict or modify as it sees fit. Thus, in our view there can be no ‘veto’ of a power the judiciary is not exclusively authorized by the statute to have. If there is no constitutional right to the juvenile justice system, then the electorate should be able to place reasonable limitations on the availability of that system.<sup>123</sup>

The court concluded:

Not only do we believe that the power conferred by section 707, subdivision (d) is more akin to a charging decision than a sentencing decision, we submit that to the extent such power is not clearly categorized as judicial or prosecutorial in nature it is within the power of the legislative branch to select which branch should exercise that discretion and under what circumstances. In effect petitioner asks us to grant him a constitutional right to receive what is actually a legislative grace.<sup>124</sup>

#### B. PROPOSITION 21 MAY VIOLATE A JUVENILE’S DUE PROCESS RIGHTS

Proposition 21 also arguably violates the due process rights of juvenile offenders. The right to due process is guaranteed in the Fourteenth Amendment of the federal Constitution and in the California constitution. The Fourteenth Amendment states “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”<sup>125</sup> The California Constitution provides that “[i]n criminal cases the rights of a defendant . . . to due process of law . . . shall be construed by the courts of this state in a manner consistent with the Constitution of the United States.”<sup>126</sup>

The Supreme Court has protected the due process rights for juveniles in several landmark cases. In *Kent v. United States*, the Court held that

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122. *Id.* at 518. The court also stated, “We cannot help but recognize the glaring inconsistency in allowing the Legislature to *mandate* prosecution of certain juvenile offenses in adult court but prohibiting the Legislature from allocating the discretion to prosecute certain juvenile offenses in adult court.” *Id.* at 519.

123. *Id.* at 519.

124. *Id.* at 523. The court further held that Proposition 21 does not violate equal protection, holding, “We summarily reject this claim because the statute does not treat similarly situated juveniles differently. Rather, under section 707, subdivision (d) all juveniles are subject to the prosecutor’s discretion.” *Id.* at 526.

125. U.S. CONST. amend. XIV, § 1.

126. CAL. CONST. art. I § 24.

waiver procedures in juvenile court require a full hearing, that juveniles have the right to counsel at this hearing, that counsel has the right to access all records, and that the juvenile court judge must issue a statement explaining the reasons for the waiver.<sup>127</sup> The Court held prosecutors must follow regular procedures, satisfying due process requirements. In *Kent*, the Court also appended to its opinion a list of factors for juvenile court judges to consider when deciding whether to waive the case to criminal court.

The determinative factors that a judge will consider in deciding whether Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense . . . .
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property . . . .
4. The prosecutive merit of the complaint . . . .
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults . . . .
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile . . . .
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . .<sup>128</sup>

The Court in *In re Gault* further defined the due process rights of juveniles.<sup>129</sup> The Court held juveniles were entitled to "an adequate, timely, written notice of the charge; the right to counsel; the rights to confront and cross examine witnesses; and the privilege against self-incrimination."<sup>130</sup> While these cases involve maintaining due process rights for youths in

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127. 383 U.S. 541, 561 (1966).

128. *Id.* at 566-67.

129. 387 U.S. 1 (1967).

130. 387 U.S. at 30-57. The Court noted that because the juvenile court could confine a child in a state institution for years, "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 27-28. See also Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173, 177 (1994) (discussing the Court's decision in *In re Gault* that juveniles have due process rights).

juvenile courts, these rights are also maintained for juveniles when they are sent to criminal courts.

Further, the Court in *Breed v. Jones*, applied the double jeopardy clause of the Fifth Amendment to delinquency convictions.<sup>131</sup> The Court also wrote that states must decide whether to try a minor as an adult or a juvenile before proceeding to trial.<sup>132</sup>

Under Proposition 21, prosecutors have the right to automatically file charges in adult criminal court in certain cases involving juvenile offenders.<sup>133</sup> This means the juveniles are sent to adult court without a fitness hearing.

Youths charge that “automatic adulthood” denies them the procedural safeguards required by *Kent* and constitutes arbitrary legislative classification that violates equal protection. They claim charging decisions that remove them from juvenile court without judicial hearing violate due process. They argue that arbitrary legislative classifications that require youths charged with certain offenses to be prosecuted as adults violate equal protection.<sup>134</sup>

While the Supreme Court has not ruled on the constitutionality of transferring a minor to adult court without a fitness hearing, the subject was the focus of a dissenting opinion in *Bland v. United States*.<sup>135</sup> This case involved sixteen-year-old Jerome Bland. He was charged in adult court for armed robbery of a post office in Washington D.C. Charges against the teen were filed directly in adult court pursuant to an Act of Congress that gave the United States Attorney the authority to send juvenile offenders to adult court without first holding a fitness hearing. Bland moved to dismiss the indictment, alleging that the statutory basis for prosecuting him as an adult did not provide him with procedural due process.<sup>136</sup>

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131. 421 U.S. 519 (1975). See also BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 214 (1999) (“The Court posited a functional equivalency between an adult criminal trial and a delinquency proceeding and described virtually identical interests implicated by prosecution in either system—‘anxiety and insecurity,’ a ‘heavy personal strain’ and the burdens of defending a case.”) (citations omitted).

132. *Breed*, 421 U.S. at 537–38 (stating that “a State [must] determine whether it wants to treat a juvenile within the juvenile-court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law” instead of subjecting the juvenile to two separate proceedings).

133. See CAL. WELF. & INST. CODE § 707(d) (Deering 2001).

134. FELD, *supra* note 131, at 218.

135. 412 U.S. 909 (1973) (Douglas, J. dissenting).

136. *Id.* at 909–10.

The United States District Court for the District of Columbia dismissed the indictment, denouncing “the statutory scheme that allowed prosecutorial waiver as a ‘short cut,’ inspired by the ‘pressures generated by the growing [juvenile] crime wave.’”<sup>137</sup>

The court then condemned the unlimited power that such a scheme places in the hands of the prosecutor as streamlining the juvenile justice system “at the expense of the individual’s right to due process safeguards.”<sup>138</sup> The court further criticized prosecutorial waiver as carrying with it a presumption of guilt, as well as an assumption that most juvenile offenders are hardened criminals who are beyond help.<sup>139</sup>

The Court of Appeals, by a divided vote, reversed that judgment, and the United States Supreme Court denied certiorari.<sup>140</sup> Justice Douglas wrote a strong dissent, however, with Justices Brennan and Marshall concurring, which questioned prosecutorial waivers. Douglas said the waivers present two “substantial” questions that raise serious constitutional issues.<sup>141</sup> First, Douglas wrote that “[a] juvenile or ‘child’ is placed in a more protected position than an adult . . . . In that category he is theoretically subject to rehabilitative treatment.”<sup>142</sup> He went on to say that when this child can, on the whim of a prosecutor, be treated as an adult and denied a fitness hearing or any chance to rebut the evidence against him or to rebut the prosecutor’s assumption that he should not be treated as a minor, due process is violated.<sup>143</sup> Second, Douglas noted that prosecutors’ decisions are “beyond the reach of judicial intrusion,” posing a serious risk of abuse of discretion.<sup>144</sup>

Quoting his dissent in a previous case, Justice Douglas said:

[I]t is true that under our system Congress may vest the judge and jury with broad power to say how much punishment shall be imposed for a particular offense. But it is quite different to vest such powers in a prosecuting attorney. A judge and jury act under procedural rules carefully prescribed to protect the liberty of the individual. Their judgments and verdicts are reached after a public trial in which a

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137. Raymond, *supra* note 17, at 273–74 (quoting *U.S. v. Bland*, 330 F. Supp. 34, 36–37 (1971)).

138. *Bland*, 330 F. Supp. at 36.

139. *Id.* at 37.

140. *Bland v. U.S.*, 412 U.S. at 909.

141. *Id.* at 911.

142. *Id.*

143. *Id.*

144. *Id.*

defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney.<sup>145</sup>

Juveniles could argue Proposition 21's automatic removal from juvenile court violates due process because they have a liberty or property interest that is being denied when they are deprived of the right to appear in juvenile court.<sup>146</sup> In the 1970s, juveniles were held to have a right to rehabilitation, something they can only get in the juvenile court system. Some courts held that "involuntarily incarcerated juveniles had a constitutional right to 'rehabilitative treatment' because the nature and duration of incarceration had to be 'reasonably related to the purpose for which the individual [was] committed.'" <sup>147</sup> This trend came to an end in the 1980s, and courts "started to find there was no obligation to provide treatment."<sup>148</sup>

The Supreme Court, however, "has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe them unless strict scrutiny is met."<sup>149</sup> Juveniles can argue they have a "fundamental right" to be a child and that depriving them of access to juvenile courts denies them the right to be treated as a child. In other words, juveniles have a fundamental right to the protections afforded children, especially the protections only provided

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145. *Id.* (quoting *Berra v. United States*, 351 U.S. 131, 140 (Black, J., dissenting)).

146. In order to make a due process claim, it must be established juveniles have a liberty or property interest that is being denied when they are not processed in juvenile court. The Fourteenth Amendment provides that a state cannot "deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

147. Michelle India Baird & Mina B. Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, 5 J.L. & POL'Y 177, 192 (1996) (citations omitted).

148. *Id.* See, e.g., *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983) (holding there is no right to rehabilitative treatment).

149. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing the right to marry is a fundamental right protected under the due process clause); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (holding parents have a fundamental right to control the upbringing of their children, and a state law requiring children to attend public schools is unconstitutional); *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) (holding the right to procreate is a fundamental right, and the government cannot impose involuntary sterilization unless it meets strict scrutiny); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding the constitutional protection for reproductive autonomy includes the right to purchase and use contraceptives); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (declaring unconstitutional a state law that prohibited the teaching in school of any language except English and holding that the term "liberty" in the due process clause protects basic aspects of family autonomy); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding the constitution protects a right for a woman choose to terminate her pregnancy prior to viability unless the restriction meets strict scrutiny); *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969) (holding the right to vote is a fundamental right protected under equal protection); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding there is a fundamental constitutional right of access to the courts).

in juvenile court. Liberty interests are those generalized in tradition, meaning courts use a tradition-based test to determine whether a claimed right is a constitutionally protected liberty interest. The fact children should get special treatment is precisely what Justice Douglas argued in the *Bland* dissent. Again, he wrote that “[a] juvenile or ‘child’ is placed in a more *protected* position than an adult.”<sup>150</sup> This right to protection is very similar to other liberty interests protected by the Court because it deals with an important human interest: the right of a child to be a child.

The tradition of protecting children is very strong. There are laws prohibiting juveniles from driving, consuming alcohol, voting, and mandating education—all of which are designed to protect minors. Juveniles seeking to be assured the right to be processed in juvenile court would need to show a substantive due process claim, stating their right to protection is being denied without adequate justification. If the court finds that juveniles do have a fundamental right to protection, it would then probably use strict scrutiny<sup>151</sup> to determine whether the government, through Proposition 21, has infringed the right without justification.

Juveniles could analogize the right to appear in juvenile court to the right to receive welfare benefits or the right to receive a public education. Minors would then argue that taking them out of juvenile court requires the same due process safeguards the Court said were required when the government terminated welfare benefits. In *Goldberg v. Kelly*, the Court held that welfare recipient’s interest in continued receipt of benefits amounted to “property” under the due process clause.<sup>152</sup> The Court held that because of this right, the government must provide due process before it terminates benefits. In this holding, the Court defines property as “entitlement.” The Court further defines what it considered property under this view in *Board of Regents v. Roth*:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to

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150. *Bland*, 412 U.S. at 911 (emphasis added).

151. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 416 (1997). Under strict scrutiny, a law will be upheld *if it is necessary to achieve a compelling government purpose*. In other words, the court must regard the government’s purpose as vital, as ‘compelling.’ Also, the law must be shown to be ‘necessary’ as a means to accomplishing the end. (citation omitted) This requires proof that the law is the least restrictive or least discriminatory alternative.

*Id.* “Strict scrutiny is used when the Court evaluates discrimination based on race or national origin . . . and for interference with fundamental rights . . .” *Id.* at 416–17.

152. 397 U.S. 254, 260–61 (1970).

protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.<sup>153</sup>

The Court explained that property interests are not created by the Constitution.<sup>154</sup> “Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”<sup>155</sup>

The problem with the *Roth* decision is that the Court’s definition of entitlement takes two approaches. One approach claims “entitlement is defined by the importance of the interest to the individual.”<sup>156</sup> In other words, “[i]f people rely on a government benefit in ‘their daily lives,’ then it should be regarded as a property interest that ‘must not be arbitrarily undermined.’”<sup>157</sup> The other approach defines entitlement as existing if there is a reasonable expectation for the continuation of the benefit.<sup>158</sup> This view “would find a property interest only if the state law creates a reasonable expectation to receipt of a benefit, regardless of the importance of the interest.”<sup>159</sup> The Court “generally has adopted the second approach,” but there still exists tension between the two views.<sup>160</sup> For example, in *Goss v. Lopez*, the Court found a property interest in continued receipt of a public education when the government creates a public school system and requires kids to attend.<sup>161</sup> “Even though the government had no constitutional duty to provide a public education, the Court found that there was a property interest in continued schooling created by state laws and a liberty interest in not being stigmatized by suspension.”<sup>162</sup>

Thus, for minors to succeed in claiming a right to access to juvenile court, it must be shown that the right to appear in juvenile court is something juveniles have “acquired,” and that when they are transferred to adult criminal court without a fitness hearing, their due process rights are being violated. This “acquiring” of the benefit of juvenile court access might prove difficult for juveniles to establish. Juveniles, however, can point to the reason juvenile courts were created, namely because minors are

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153. 408 U.S. 564, 577 (1972).

154. *Id.* at 577.

155. *Id.*

156. CHEMERINSKY, *supra* note 151, at 432.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. 419 U.S. 565, 574 (1975).

162. CHEMERINSKY, *supra* note 151, at 435.

considered different than adults. Juveniles differ from adults in that they have much less maturity and responsibility. Both of these factors weigh heavily against treating juvenile offenders the same as adult offenders.

Historically, the Supreme Court has recognized that juveniles should be held less accountable for their actions than adults.<sup>163</sup> In fact, in *Thompson v. Oklahoma*, the Court stated that there is broad agreement that adolescents “are less mature and responsible than adults.”<sup>164</sup> The Court held the Eighth and Fourteenth Amendments prohibit execution of a person who was younger than age sixteen at the time of the offense.<sup>165</sup> The Court noted that it has already endorsed the notion that less culpability should attach to a child who commits a crime than to an adult who commits a similar crime.<sup>166</sup> Justice Stevens, in the majority opinion, noted “inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”<sup>167</sup> Further, the Court wrote that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”<sup>168</sup> Additionally, in *Eddings v. Oklahoma*, the Court noted that “youth crime as such is not exclusively the offender’s fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America’s youth.”<sup>169</sup> Juveniles can also link this historic view that juveniles are different than adults to the creation of the juvenile court system in the 1890s. Juveniles can argue that they “acquired” a right to appear in juvenile court based on the intent of the creation of juvenile courts, the very creation of the courts, and the historical practice of juveniles being processed in these courts.

While there are certainly arguments that juveniles can assert in a due process challenge of Proposition 21, the chances of prevailing are not great if the way other state courts have treated similar challenges are any

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163. Shari Del Carlo, Comment, *Oregon Voters Get Tough on Juvenile Crime: One Strike and You Are Out!*, 75 OR. L. REV. 1223, 1235 (1996).

164. 487 U.S. 815, 834 (1988).

165. *Id.* at 838.

166. *Id.* at 835. See also Del Carlo, *supra* note 163, at 1235 (discussing the Court’s reasoning in the case).

167. *Thompson*, 487 U.S. at 835.

168. *Id.*

169. 455 U.S. 104, 115 n.11 (quoting CONFRONTING YOUTH CRIME: TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS 7 (1978)).

indication of future trends. In fact, most state supreme courts that have taken up the issue have rejected due process challenges to prosecutorial waiver statutes. The Colorado Supreme Court upheld a statute permitting the prosecutor to decide whether to proceed against violent offenders, who are fourteen to eighteen years old, as adults or juveniles. In *People v. Thorpe*, the defendant claimed a lack of statutory guidelines and a hearing requirement violated due process.<sup>170</sup> The defendant also claimed an equal protection violation due to the potential for different treatment of violent juvenile offenders age fourteen and older.<sup>171</sup> The court rejected both constitutional claims, quoting *U.S. v. Bland* in its ruling that “the absence of ‘suspect’ factors such as ‘race, religion, or other arbitrary classification,’ the exercise of [prosecutorial discretion does not violate] due process or equal protection of the law.”<sup>172</sup> The Montana Supreme Court, in the case *In re Wood*, upheld a statute requiring prosecutors to file in criminal court whenever the offender was sixteen or older at the time of the crime and charged with homicide or attempted homicide.<sup>173</sup> In its ruling the court declared that the Supreme Court has “never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court.”<sup>174</sup> Other state supreme courts that have addressed and rejected the same constitutional challenges include Georgia and Wyoming.<sup>175</sup>

Some recent opinions, however, have in fact expressed concern over juvenile transfer statutes. The West Virginia Supreme Court, in *State v. Robert K. McL.*, while upholding the state’s prosecutorial transfer statute, expressed constitutional misgivings about it as well.<sup>176</sup> The law required the transfer to criminal court of juveniles older than thirteen who committed certain offenses whenever the prosecutor chose to do so. The court, calling the law “statutorily unfettered” and “standardless,” argued that, standing alone, the discretion awarded prosecutors under this law might violate equal protection and due process guarantees.<sup>177</sup> The court upheld the law, however, because it included a safety net for juveniles in the form of a requirement for the criminal court judge to make a probable

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170. 641 P.2d 935, 940 (Colo. 1982). See also Clausel & Bonnie, *supra* note 46, at 194 (discussing the various state courts that have rejected constitutional challenges to prosecutorial election statutes).

171. *Thorpe*, 641 P.2d at 938.

172. *Id.* at 939 (quoting *U.S. v. Bland*, 472 F.2d 1329, 1338 (D. C. Cir. 1972)).

173. 768 P.2d 1370, 1372 (Mont. 1989).

174. *Id.*

175. Frost Clausel & Bonnie, *supra* note 46, at 195.

176. 496 S.E.2d 887, 891 (W.V. 1997)

177. *Id.* at 891.

cause determination whenever the prosecutor sought to bring charges against a juvenile in criminal court. The court felt this hearing would allow “the criminal court to consider personal factors relevant to amenability and rehabilitation ‘and to, in its discretion, return a child to juvenile jurisdiction.’”<sup>178</sup>

In sum, constitutional challenges to laws like Proposition 21 have consistently been rejected mainly because juvenile courts are a statutory creation. This means the legislature has the power to draft laws determining which minor offenders are and which are not suitable for juvenile court.

Within the limits set by the legislature’s constitutionally valid definition of chargeable offenses, “the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation” so long as “the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.”<sup>179</sup>

State legislatures, well aware of the power they wield over juvenile courts, often create classifications of juveniles they deem unsuitable for juvenile court based on the nature of the offense.

As long as appellate court judges can attribute to the legislature a ‘rational basis’ to treat serious offenders differently from minor offenders—for example, a belief that serious offenders pose a greater threat to the public, exhibit greater culpability, respond less readily to rehabilitative efforts, or interfere with the treatment of less-serious offenders—these judges affirm the constitutional validity of the classification.<sup>180</sup>

Thus, because the juvenile court is a creation of the legislature, juveniles simply have no constitutional right to be processed in one.<sup>181</sup> The legislature created juvenile courts by statute and thus, the legislature has the power to limit the courts’ jurisdiction as it sees fit.<sup>182</sup> In other words, states are free to make laws to treat minors of certain ages as adults if they have committed certain crimes. While constitutionally valid, however, “these statutes conflict with the individualized rehabilitative philosophy of juvenile courts.”<sup>183</sup>

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178. *Id.* at 893.

179. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Oyler v. Boles*, 368 U.S. 448 (1962)). *See also* FELD, *supra* note 131, at 218 (discussing the discretion courts give legislators in drafting laws like Proposition 21).

180. FELD, *supra* note 131, at 218.

181. *Id.* at 219.

182. *Id.*

183. *Id.*

### C. PROPOSITION 21 MAY VIOLATE EQUAL PROTECTION DOCTRINE

Lastly, Proposition 21 is opposed based on the grounds it violates the equal protection doctrine by denying juvenile offenders fair and equal treatment. The right to equal protection is guaranteed in the Fourteenth Amendment and in the California Constitution. The Fourteenth Amendment states “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>184</sup> The California Constitution provides “[i]n criminal cases the rights of a defendant to equal protection of the laws . . . shall be construed by the courts of this State in a manner consistent with the Constitution of the United States.”<sup>185</sup> Opponents to the law argue it is not being used the same in every county in California and that the law targets minority groups. Serious problems exist, however, with both of these challenges.

#### 1. The Law Is Not Being Applied the Same in All Counties

Proposition 21 faces challenges based on the argument that it deprives youngsters of fair and equal treatment. The claim is that the law is being applied county by county, meaning similarly situated juvenile delinquents will face different treatment depending on in which county they are processed. In fact, “[a] judge in Sonoma County already has ruled the measure illegal. In San Francisco, the district attorney has said flatly that he won’t use it.”<sup>186</sup> The fact that some counties, or even a county, refuses to use the law violates juveniles’ due process rights because similarly situated juveniles have the right to be treated equally and impartially. This argument is not likely to succeed, however.

For example, lawyers in the San Diego migrant beating case mentioned above also made an equal protection challenge, alleging a violation because the statute provides differential treatment for similarly situated juveniles based on discretionary decisions by prosecutors. While the Fourth District Court of Appeal did not examine the equal protection

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184. U.S. CONST. amend. XIV, § 1.

185. Article 24 of the California Constitution states:

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. CALIFORNIA CONST. article I § 24.

186. Valerie Alvord, *Law Challenged by “Good Boys” Facing 16 Years*, USA TODAY, Sept. 15, 2000, at A4.

arguments in detail, it did point out flaws in the allegation. The court said the law does not treat similarly situated juveniles differently because “all juveniles who have committed qualifying offenses are equally subjected to the prosecutors’ discretionary decisions.”<sup>187</sup> The court also noted that if there exists different treatment of juvenile delinquents who have committed the same crime, it is the result of filing decisions of individual prosecutors.<sup>188</sup> The court said, however that it has held that disparities among prosecutors in charging do not violate equal protection unless the decision is based on race, or other impermissible factors.<sup>189</sup>

The equal protection objection to laws like Proposition 21 has been mostly unsuccessful in other states as well. The Utah Supreme Court, on the other hand, ruled in 1995 that the direct file provisions of the state’s transfer statute violated the equal protection provision of the state constitution. In *State v. Mohi*, the court rejected part of the statute that allowed prosecutors to file charges against some juveniles as adults, yet keep others in the same situation in juvenile court.<sup>190</sup> The court held:

There is no rational connection between the legislature’s objective of balancing the needs of children with public protection and its decision to allow prosecutors total discretion in deciding which members of a potential class of juvenile offenders to single out for adult treatment. Such unguided discretion opens the door to abuse without any criteria for review or for insuring evenhanded decision making.<sup>191</sup>

## 2. Proposition 21 Targets Minority and Disadvantaged Youths

Another issue presented by Proposition 21’s transfer of juveniles to adult criminal court relates to the transfer population. Transfer practices disproportionately affect minority youths, reinforcing already serious concerns about unequal justice and the appearance of equal justice. Recent studies show more than three-quarters of youths younger than age eighteen admitted to state prison were minorities.<sup>192</sup> A study by the National Corrections Reporting Program, which compiled data from 1992–96, found minorities younger than age eighteen accounted for seventy-seven percent of new prison admissions. Blacks made up the largest portion of that total,

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187. *Manduley v. Superior Court*, 104 Cal. Rptr. 2d 140, 150 (Cal. App. 2001).

188. *Id.*

189. *Id.*

190. 901 P.2d 991, 1002 (Utah 1995).

191. *Id.*

192. SHAY BILCHIK, OFFICE OF JUV. JUST. & DELINQUENCY PREVENTION, U.S. DEP’T OF JUST., 1999 NATIONAL REPORT SERIES, JUVENILE JUSTICE BULLETIN: MINORITIES IN THE JUVENILE JUSTICE SYSTEM 15 (Dec. 1999).

accounting for sixty percent of new prison admissions of juvenile offenders.<sup>193</sup> One reason for this is that blacks make up a disproportionately high number of the youths arrested in the juvenile justice system.<sup>194</sup>

Of the ten to seventeen year old population at risk for delinquency, black youths comprise fifteen percent, yet they make up twenty-eight percent of youths arrested.<sup>195</sup> As a juvenile moves past arrest into later stages of processing, minority overrepresentation increases dramatically. For instance, research indicates that sixty-two percent of youths held in short-term detention facilities are minorities, and sixty percent of youths committed to long-term detention institutional programs are people of color.<sup>196</sup>

These numbers represent the national figures. Yet, a look at the number of minority juvenile offenders waived out of juvenile court in different states show the same disparity. For example, in Minnesota, African-American juveniles make up slightly more than fifty-five percent of the juveniles that prosecutors have filed motions for adult prosecutions.<sup>197</sup> White juveniles, meanwhile, comprised just slightly more than twenty-eight percent of the youths prosecuted as adults.<sup>198</sup> Additionally, “[a] study of youth offenders in Philadelphia showed ‘that a greater severity of sentences for juveniles waived to criminal court was due to the fact that transferred cases more often involved black offenders and white victims.’”<sup>199</sup>

These numbers illustrate that race is a factor in the decision to transfer juvenile cases to adult criminal court. Further, the figures show the groups most likely affected by Proposition 21 are minorities, which in many communities represent the most disadvantaged youths. The fact that a law disadvantages a minority group, however, is not enough for a successful equal protection challenge. In *Washington v. Davis*,<sup>200</sup> the Court held that if the challenged law is race-neutral, the fact that the law disadvantages a

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193. *Id.*

194. Hodson, *supra* note 8, at 87.

195. *Id.*

196. *Id.*

197. *Id.* at 102 (quoting Marcy Rasmussen Podkipacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 LAW & INEQ. 73, 124 (1995)).

198. *Id.*

199. *Id.* (quoting Eric. C. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173, 198 (1994)).

200. 426 U.S. 229 (1976).

minority race at a higher rate than whites is not constitutionally significant and does not trigger strict scrutiny.<sup>201</sup>

Proposition 21 is a race-neutral law, one which “on its face” makes no reference to race.<sup>202</sup> Thus, because Proposition 21 is not a suspect classification, a court would examine the law using the rational basis test.<sup>203</sup> In order to be constitutional under the test, the classification must merely be “rationally” related to a permissible or legitimate state, interest, goal or purpose. In the case of Proposition 21, the goal of the state could be deterrence of juvenile crime or protection of society from dangerous juveniles. The rational basis test is not a tough challenge for the government to meet because courts will continue any description of the law’s goal in its favor, so long as a reasonable person would believe that it might be the law’s objective. Thus, those seeking to prove lack of purpose face an insurmountable burden.

## V. CONCLUSION

Proposition 21 fails California’s juvenile offenders because it is completely lacking in crime preventive efforts, focuses on incarceration and punishment instead of the rehabilitation of these troubled youths, and raises serious constitutional concerns in its implementation. The law will not reduce the number of crimes committed by juveniles. In fact, its abandonment of rehabilitation for juvenile delinquents will lead these wayward teens down a path that makes them even more likely to commit crimes in the future. Once sent to prison, where juveniles are housed with hardened criminals, the only education juveniles will receive is how to become more violent and more effective criminals.

Proposition 21 fails on all fronts. It fails to help the troubled youth of California and, in the long run, it fails protect the rest of the state as well. The criminalization of children is not in anyone’s best interest. What is needed is a system where the primary goal is rehabilitation; one in which

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201. *Id.* at 239. The Court noted “[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.” *Id.* Further, the Court said, “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.” *Id.* at 240.

202. See CHEMERINSKY, *supra* note 151, at 564–74.

203. See *id.* at 533–45.

Under the rational basis test, a law will be upheld if it is *rationally related to a legitimate governmental purpose*. In other words, the government’s objective only need be a goal that it is legitimate for government for pursue . . . . The rational basis test is enormously deferential to the government and only rarely has the Supreme Court invalidated laws as failing rational basis review.” *Id.* at 415.

juveniles in trouble with the law get the care and compassion needed so they can someday become productive members of society. The legislature and voters of California need to take another look at the Gang Violence and Juvenile Crime Prevention Act. This destructive measure is simply not the answer to any of the problems relating to juvenile crime or the juvenile courts in California.

## VI. ADDENDUM

*Opponents to Proposition 21 suffered a harsh blow in February when the California Supreme Court flatly rejected several constitutional attacks on the law. The state's highest court on February 28, 2002, upheld the constitutionality of Proposition 21 in a 6-1 decision.<sup>204</sup> The court rejected a multi-pronged attack on the juvenile justice measure, including claims it violated the state's separation of powers doctrine, that it deprives juveniles of due process of law, and that it violates the Equal Protection Clause.<sup>205</sup> The court's decision reverses the Fourth District Court of Appeal's ruling in *Manduley v. Superior Court*.<sup>206</sup>*

*The court, in an opinion written by Chief Justice Ronald M. George, held that Proposition 21, codified in part as Welfare and Institutions Code section 707(d), does not violate the state Constitution's separation of powers doctrine.<sup>207</sup> The court noted that prosecutors traditionally have enjoyed wide latitude in charging decisions for adults and juveniles. This broad power to charge crimes extends to selecting the forum, among those designated by statute, where charges shall be filed. Contrary to the majority of the Court of Appeal, the fact that such a charging decision may affect the sentencing alternatives available to the court does not establish that the court's power has improperly been usurped by the prosecutor.<sup>208</sup>*

*The court said that if Proposition 21 had conferred on prosecutors the authority to control the sentencing choices available after charges had been filed, such a scenario would violate the separation of powers*

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204. *Manduley v. Superior Court*, S095992 2002 Cal. LEXIS 622, at \*8-\*9 (Feb. 28, 2002). Justices Kathryn Mickle Werdegar and Carlos R. Moreno did not sign the majority opinion. They concurred with the judgment in all aspects, except they felt Proposition 21 did violate the single-subject limitation imposed on initiative measures under the state Constitution. *Id.* at \*102-\*03.

205. *Id.* at \*10. Petitioners challenged Proposition 21 on the grounds that it violated the separation of powers doctrine, due process, equal protection, the prohibition against cruel and unusual punishment, and the state's single subject rule applicable to initiative measures. *Id.* at \*10-\*11.

206. *Manduley v. Superior Court*, 104 Cal. App. 2d 140 (2001).

207. *Manduley*, S095992 2002 Cal. LEXIS 622, at \*\*\*8.

208. *Id.* at \*\*\*23-\*\*\*24.

doctrine.<sup>209</sup> The court held, however, that a “statute conferring upon prosecutors the discretion to make certain decisions before the filing of charges . . . is not invalid simply because the prosecutor’s exercise of such charging discretion necessarily affects the dispositional options available to the court.”<sup>210</sup> Additionally, the court found that “[a]lthough a decision to file charges directly in criminal court might preclude a juvenile court disposition, such a decision . . . constitutes an aspect of traditional prosecutorial charging discretion and does not intrude upon the judicial function.”<sup>211</sup>

The court further rejected constitutional challenges that Proposition 21 violates juveniles’ due process and equal protection rights. The due process claim stemmed from the fact that Proposition 21 denies juveniles a fitness hearing to determine if he or she is amenable for a juvenile court disposition, and instead rests the decision to file in adult court solely in the hands of prosecutors. The court flatly rejected this claim, stating that “minors who commit crimes under the circumstances set forth in section 707(d) do not possess any statutory right to be subject to the jurisdiction of the juvenile court.”<sup>212</sup>

When governing statutes provide that the juvenile court and the criminal court have concurrent jurisdiction, minors who come within the scope of section 707(d) do not possess any right to be placed under the jurisdiction of the juvenile court before the prosecutor initiates a proceeding accusing them of a crime. Thus, the asserted interest that petitioners seek to protect through a judicial hearing does not exist.<sup>213</sup>

The court also said “petitioners’ equal protection claim lacked merit.”<sup>214</sup> Petitioners in *Manduley* argued that Proposition 21 violated their rights to equal protection of the laws because it permits identically situated minors to be subjected to different laws and different treatment.<sup>215</sup> Petitioners contend that section 707(d) “might result in invidious discrimination because it contains no standards guiding the prosecutor’s discretion whether to file charges in criminal court.”<sup>216</sup> The court held

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209. *Id.* at \*\*\*24–\*\*\*25.

210. *Id.* at \*\*\*25.

211. *Id.* at \*\*\*29.

212. *Id.* at \*\*\*50.

213. *Id.*

214. *Id.* at \*\*\*64.

215. *Id.* at \*\*\*63–\*\*\*64.

216. *Id.* at \*\*\*67.

that this type of speculation is insufficient to establish a violation of equal protection.<sup>217</sup>

Justice Joyce L. Kennard, in his lone dissenting opinion, maintained that Proposition 21 did violate the separation of powers doctrine embodied in the California Constitution.<sup>218</sup> Kennard said Proposition 21 seeks to eliminate the required checks and balances that is the very purpose of the separation of powers doctrine.

[A]s to those minors who could be prosecuted in either adult or juvenile court, it allows the prosecutor to make that decision unrestrained by any legislatively prescribed standards and without judicial review. If the decision is to prosecute in adult court, and it later appears that the juvenile court would have been more appropriate, the minor has no remedy because the judicial branch is excluded from the determination. This portion of Proposition 21, in my view, conflicts with the constitutional mandate.<sup>219</sup>

Justice Kennard argued that Proposition 21 unconstitutionally invaded a judicial function for three main reasons. First, he said the juvenile court system, from the very beginning, has maintained that deciding whether a minor is unfit for the juvenile court system is a judicial function.<sup>220</sup> Second, Justice Kennard wrote that “the decision whether to prosecute in juvenile or adult court is critical, and thus deserving of the due process protections of a judicial proceeding.”<sup>221</sup> He contended that the United States Supreme Court held as much in *Kent v. United States*.<sup>222</sup> Justice Kennard rejected the majority’s distinction that a juvenile should receive due process protections only if a prosecutor’s decision to try a juvenile in adult court is made after charges have been filed.

Yet if the same decision, equally important and consequential, is made before charges are filed, then, according to the majority, the prosecutor has unreviewable discretion, subject only to the most minimal of constitutional constraints prohibiting invidious discrimination or vindictive or retaliatory prosecution. There is no judicial review to correct erroneous decisions, inconsistent decisions, or decisions that certain classes of minors, or all minors, will always be prosecuted in adult court.<sup>223</sup>

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217. *Id.*

218. *Id.* at \*\*\*126.

219. *Id.* at \*\*\*129.

220. *Id.* at \*\*\*142.

221. *Id.* at \*\*\*143.

222. *Id.* at \*\*\*143–\*\*\*44.

223. *Id.* at \*\*\*144–\*\*\*45 (citation omitted).

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Lastly, Justice Kennard noted that when the prosecutor files charges, he or she only has limited information—details of the crime and possibly the juvenile’s criminal history.<sup>224</sup> Yet, the prosecutor “may not know the minor’s family, school, or community history, all matters that are important in deciding whether the minor is suitable for juvenile court treatment.”<sup>225</sup> This lack of information, he wrote, could have tremendous consequences. “[T]he prosecutor, acting with limited information, may err in the decision, and although an error in submitting the minor to juvenile court jurisdiction is correctable, one in assigning the minor to adult court is not.”<sup>226</sup> Justice Kennard concluded by positing that the separation of powers doctrine does not require a prosecutor have no role in the decision whether to try a juvenile in adult criminal court, but it does require that each branch of the government act as a check on the power of the other branches.<sup>227</sup> Without judicial review of a prosecutor’s decision to try a minor as an adult, the separation of powers doctrine is violated.<sup>228</sup>

Because the California Supreme Court expressly rejected all of the major constitutional attacks against Proposition 21, the majority’s decision appears to shut the door for any other state challenges as to the constitutionality of the law. Opponents could challenge Proposition 21 in federal court, alleging the law violates the United States Constitution. The hope would be that eventually the challenge would reach the United States Supreme Court. It would seem the best argument for juveniles in any future argument before the Supreme Court is the allegation that Proposition 21 violates the separation of powers doctrine. Opponents would need to focus on the arguments made by the Fourth District Court of Appeals and the dissenting opinion in the California Supreme Court decision on the issue, which both found the powers vested to prosecutors under Proposition 21 improperly invaded a judicial function, thereby violating the separation of powers doctrine.

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224. *Id.* at \*\*\*145.

225. *Id.*

226. *Id.*

227. *Id.* at \*\*\*146.

228. *Id.*

