Juvenile Waivers and the Effects of Proposition 21

Jonathan E. Cruz

INTRODUCTION

The perception that juvenile crime is growing in quantity and gravity combined with the notion that the consequences minors face in the juvenile justice system are too lenient has led to a trend of "get tough" laws being enacted throughout the nation. Predictions by criminologists and sociologists that young "superpredators" were going to produce a wave of violent crime between 1992 and 2010 (Beresford 2001) have produced the sentiment that juveniles should serve "adult time for adult crimes" (Pete Wilson 1998). Adding to this sentiment are the tragic and unforgettable school shootings the media has shown the nation in Columbine, Santee, and El Cajon – horrific but rare mass murders by teenagers that with such media coverage creates a public fear of young people.

One example of these new policies is revisions of juvenile "waiver" laws. A waiver of juvenile court jurisdiction is used under certain circumstances to transfer a child's case from the juvenile system to the criminal court system. The guidelines for the waiver process vary from state to state. Guidelines for the state of California can be found in section 707 of California's Welfare and Institutions Code.

In an effort to fight against young offenders committing serious crimes, California voters have recently passed initiatives like Proposition 21, the Gang Violence and Juvenile Crime Prevention Act (March 2000). This piece of legislation is very controversial but for the purpose of this paper, focus will be placed on Proposition 21's effects on the waiver. Proposition 21 made it easier for juveniles to be transferred into the jurisdiction of adult criminal court by adding other transfer mechanisms, enumerating more crimes requiring mandatory transfer, and lowering the age limits at which the criminal court can take jurisdiction. Legislation like Proposition 21 shifts the focus of juvenile justice from rehabilitation to punishment as the number of waivers continues to increase nationwide.

Waiver laws are sociologically interesting because they exemplify a more general set of issues concerning the relationships between law and politics. The separation of power into three branches of government is ideally supposed to allow the court system to be autonomous. This autonomy would mean that the court's

Law and Society Review at UCSB, Volume 1 (2002).
© 2002 *Law and Society Review at UCSB.* All Rights Reserved.

decisions should not be affected by ethical, social, political, or economic considerations (Sutton 2000). On the other hand, the United States balances formal law with substantive justice emphasizing ethics. The juvenile justice system has traditionally individualized its decisions due to its rehabilitative nature and perception that children do not have fully developed conceptualizations of right and wrong (Fagan & Deschenes 1990). The debate over the statutory changes made by Proposition 21 raises serious questions about the political agendas behind such legislation. Not only does Proposition 21 focus on punishment, it shifts discretionary power from judges to prosecutors and from the courts to the legislators who have political agendas and the power to draw the support of manipulated voters.

METHODS

After reviewing the recent literature on juvenile justice to understand the history of the system and the role it has in society, an interview schedule was created to get a grasp of the waiver process in California's juvenile court system. Probation officers, attorneys from both the Public Defenders Office and District Attorney's Office, as well as a juvenile court judge from a small California county were asked the same questions about the waiver process and their experiences with it. When all of the subjects identified Proposition 21 as significantly changing the waiver process, the focus of this research shifted to the effects that Proposition 21 has had on the waiver process. Each subject was asked the same basic questions, ranging from their job titles to how they would change the current laws if they could. The majority of questions were dedicated to the waiver process and Proposition 21. Depending on their responses, different follow-up questions were asked providing four different perspectives of juvenile court waivers from the key participants in the system. Due to the sensitivity of the subject, juveniles who had experience with the process were not interviewed and no confidential information viewed during the course of this research will be disclosed. Points of interest will be discussed without going into specific details that might identify any juvenile person. Since the sample included only a small group of subjects from one county, results presented here may not be representative of how the waiver process works elsewhere in California or the nation. Nonetheless, the data collected from them is important to understanding the effects of Proposition 21 on the waiver process from first hand experiences.

Waiver Process

The juvenile court system is based on the concept that the court has the role of parens patriae, to act in the best interest of the child. The juvenile court was first established in Cook County, Illinois in 1899, with the intentions of investigating, diagnosing, and prescribing treatment to young offenders, in order to rehabilitate and not necessarily punish (Beresford 2000). Emphasizing treatment, supervision, and control, the goal of the juvenile court was "to resolve the wayward youth's family, social, and personal problems and prepare the youth to be a healthy, productive, and law abiding adult" (Fagan & Deschenes 1990). A distinction to be made between the juvenile courts and adult courts is that juvenile proceedings are to be considered civil as opposed to criminal, therefore supposedly less stigmatizing (Champion & Mays 1991; Fagan & Deschenes 1990). Additionally, the juvenile court provides special rights and immunities for children such as a shielding from publicity, detention only among other juveniles, and the retention of certain future civil rights (*Kent v. U.S.* 1966). For more than half of the 20th century, the Juvenile Court had jurisdiction over offenders under the age of 18, with the exception of cases waived to criminal court after a full investigation was made to decide whether or not a youth offender was fit for the juvenile court process.

In *Kent v. U.S.* (1966), the first major change in juvenile justice took place, creating guidelines for due process in the juvenile court requiring fitness hearings, right to counsel, and a statement of reasons by the court for any waiver decision. In California, until the passage of Proposition 21, the juvenile court has relied solely on the judicial mechanism via fitness hearing for waiving minors to criminal court (Raymond 2000). Proposition 21 incorporates two other mechanisms for transfer: legislative and concurrent jurisdiction or prosecutorial waiver.

The Judicial Waiver Process

As ruled in *Kent*, due process is required in the judicial waiver of juvenile court jurisdiction. When a child is arrested and has committed one of the violent offenses enumerated in Welfare and Institutions Code section 707 (b) after reaching the age 14 or 16, depending on the offense as provided by Proposition 21, the District Attorney's Office has 48 hours to decide whether or not to request a fitness hearing. After the fitness hearing is requested, the defendant usually waives his rights to a speedy trial so that both counsels can

adequately prepare their arguments for the fitness hearing. While the People and the Defense are working out their arguments, the probation department prepares its own fitness report for the juvenile. All of the entities involved refer to California Welfare and Institutions Code section 707 and address the following criteria that decide fitness:

1) The degree of criminal sophistication exhibited by the minor.
2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.
3) The minor's previous delinquent history.
4) Success of previous attempts by the juvenile court to rehabilitate the minor.
5) The circumstances and gravity of the offence alleged in the petition to have been committed by the minor (California Welfare & Institutions Code 2001).

The process of a fitness hearing appears to be very thorough for all of the parties involved. After considering all of the statements as well as the criteria enumerated above, the judge makes the decision of whether or not the juvenile is amenable to the treatments of the juvenile court. Other factors that weigh into the judicial decision are public safety and the best interests of the child. If the child is deemed fit he or she remains under the jurisdiction of the juvenile system. If the judge decides that a child is unfit, the juvenile is then tried in the criminal court.

Statutory Exclusion – The Legislative Waiver Mechanism

The national trend of "getting tough" on juvenile crime has brought legislatures to statutorily exclude certain young offenders from juvenile court jurisdiction based on age and/or offense criteria. Some states have defined the upper age limit for juvenile court jurisdiction as 15 or 16, excluding a large number of offenders under the age of 18 from the juvenile justice system (Snyder, Sickmund & Poe-Yamagata 2000). Voters added statutory exclusion to California's waiver mechanisms via Proposition 21, which lowers the minimum age for juveniles to be eligible for transfer from 16 to 14 and by enumerating more felony offenses for which a juvenile can be considered for transfer.

Proposition 21 altered the law to increase the number of children eligible to be tried in adult criminal court. According to California Welfare and Institutions Code section 602 (b), 14-year-olds who are accused of committing murder or sex crimes are mandated to be subject to criminal court jurisdiction. As of March 8,

2000, California Welfare and Institutions Code section 707(b) enumerates felonies for which a 14-year-old receives a fitness hearing but has the burden of proving fitness for juvenile jurisdiction. These felonies include arson, robbery, assault causing great bodily injury, making or selling one–half ounce or more of a controlled substance, carjacking, and other serious crimes. The law varies based on the nature of the offense and prior history as to whether or not a juvenile is presumed fit or unfit for the jurisdiction of the juvenile court. The law also provides for the third waiver mechanism.

Prosecutorial Waiver – Concurrent Jurisdiction

This option of transfer gives prosecutors discretion to file certain cases directly into criminal court because both the juvenile and adult court share the original jurisdiction of a case. Similar to other methods of transfer, this process has limitations on age and offense criteria (Snyder et al. 2000). Proposition 21 added this mechanism for transfer and explains the guidelines for this practice in California Welfare and Institutions Code section 707(d).

The law provides the District Attorney with the discretion to file a case directly into criminal court under a variety of circumstances. The District Attorney has discretion with juveniles over the age of 16 who commit any offense described in 707(b), with the exception of murder and certain sex offenses described in 602(b), in which case a criminal court filing is mandatory. This is also the case if an offender age 14 or older commits a 707 (b) felony, if any of the following circumstances apply:

1) The offense is punishable by death or life imprisonment were an adult to commit the same crime.
2) A firearm was personally used by the subject.
3) The minor was previously found unfit for juvenile jurisdiction.
4) The offense was gang related.
5) The offense falls under the category of a hate crime.
6) The victim was a 65 or older, blind, deaf, or otherwise disabled and the minor should have been aware of this disability.

Other factors related to the juvenile's age and prior felony history are also considered and explained in this section of the Welfare and Institutions Code. Depending on the charges and if the case is filed in juvenile or criminal court, incarceration is almost mandatory and rehabilitative programs are out of the question (Ochoa 2000).

This provision of Proposition 21, giving prosecutors the right to direct filing of juveniles to criminal court, has been the subject of much controversy. Many people believed that this provision of the

law violated the separation of powers, taking away judicial discretionary power and moving it to the prosecutor or executive power in the court system. During the course of this research, the California Appellate Court in San Diego concurred with this perspective. It was ruled that "giving prosecutors discretion to charge someone younger than 18 as an adult has the unfair effect of also determining how the youth will be sentenced," on May 16, 2001, in *Resendiz v. Superior Court* (2001). This decision prohibits direct filing, so this mechanism is not in use in California at the time this paper is being written. However, in *Manduly v. Superior Court*, the same decision was handed down in February 2001, but the prohibition was lifted when the State Supreme Court agreed to review the case in April. The legality of this provision in Proposition 21 and the mechanism itself remains debatable.

ANALYSIS

Evaluating the methods of transfer is a difficult task since there is not very much information regarding any of the recently created waiver mechanisms. Though judicial waiver has been around as long as the juvenile justice system, it is difficult to compare it to the other two mechanisms since most of the information available is unreliable and comes from other states (Dawson 2000). By interviewing the key players in the juvenile court system, some insight concerning the waiver process and effects of Proposition 21 might be gained from the people who are directly involved in the process.

The Purpose of Juvenile Court

The perspective that the juvenile court is supposed to serve a rehabilitative function has not disappeared, despite the shifting punitive focus. When the subjects were asked what they thought the role or purpose of the juvenile court was the consensus was the court's role was to rehabilitate. "Treatment" and "the best interest of the child" were also mentioned. One thing to note is that a couple of respondents explained the efforts made towards educating young offenders who were processed through the court. Apparently this county has a wide variety of juvenile services to serve as diversion programs, ranging from help with school to in-home therapy. One of the primary goals of the probation department is to "restore victims to wholeness." This could be interpreted as the offenders being victims in a sense, also since they are considered victims of society.

The Purpose of Waivers

The interviews produced much less consensus concerning the purpose of waivers. The different responses all seemed to be well explained. Containing the intractable or those who have exhausted the resources of the juvenile justice system without change was the original purpose for the judicial waiver (Bishop, Frazier, Lanza-Kaduce & Winner 1996). A response that focused directly on Proposition 21 was that the legislation was a backlash to the perception that juveniles were treated too softly under the jurisdiction of the juvenile court. The backlash of legislation happens to give the District Attorney's Office a great deal of power. A Deputy District Attorney depicted legislation as responsible for the initiative and did not critique it in any way other than saying that he voted for it. This question also drew a simple critique from a public defender that Proposition 21 was "nuts" because it was so punitive, like locking people up and throwing away the key. Providing an explanation for this critique, the subject shook her head and said that the press distorts youth crime to the public while the reality is that cases today have decreased in severity and in number. The juvenile court judge also agreed with this perception that juvenile crime was declining. His opposition to Proposition 21 was made public in local newspapers, to which he wrote articles explaining the cons of the initiative during the election period. Losing discretionary power was not the only concern of this judge. This subject is responsible for establishing important youth rehabilitation programs in the county for which some offenders will no longer have the opportunity to use with the passage of the proposition. The judge depicted the severity of the new laws in his articles and explained that young offenders who deserved adult court treatment received it under the law prior to Proposition 21. Probation representatives agreed with both the judge and the public defender in that the new laws were too punitive and they believed in the original waiver practice and purpose. The probation department deals with many juvenile offenders, many who do not even set foot in the juvenile court, and they also believe that youth crime has gone down in recent years. This perception could be inaccurate due to the variety of diversion programs available in the county as well as the fact that the more serious crimes are being waived, and therefore, not considered part of the juvenile caseload. A second explanation for this skewed perspective is that, with the exception of the probation department, all of the regular participants rotate with their colleagues to the assignment of juvenile court every few years.

Proposition 21 in Effect

When follow-up questions became very specific, all of the subjects needed to consult some type of reference to answer the question at hand. This usually happened with follow-up questions specific to changes made by Proposition 21, such as "who has the burden of proving fitness?" Consultation of various guides to California law suggests that most of the people who deal with juveniles on a day-to-day basis are still unfamiliar with the recently passed legislation. They were all quite familiar, though, with their role in a fitness hearing in terms of what they are responsible for and how much they can influence the outcome of the hearing. The Deputy District Attorney who handles juvenile cases in the subject county has the option of including a statement with the probation report, but makes it a point to prepare his own brief addressing each of the five criteria listed under the judicial waiver process (California Welfare and Institutions Code 707) for submission to court. The Public Defender, in addition to giving input to the probation officer on the case, routinely hires an expert witness such as a psychologist to meet with the child and testify in court to prove fitness. Based on the interviews from both counsels, the report prepared by the probation department is quite influential in the judge's decision for fitness.

The probation department might be thought to have little involvement in a case before it is adjudicated, but the fitness report it prepares on a juvenile is very detailed and important to the fitness decision. The fitness hearing report prepared by the probation department includes factual information about the current offense and the juvenile's prior record, as well as the subject's social, academic, developmental and employment histories, the minor's statement, statements from attorneys involved in the case, as well as statements from the victim, parents, and law enforcement officers involved. Probation gathers all of this information in addition to making a careful evaluation of the subject's fitness based on the criteria already enumerated. Both attorneys acknowledged the probation department as very important in process of a fitness hearing.

These roles for the fitness hearing were the same before Proposition 21 passed, only the criteria and the burden of proving fitness changed with the legislation. Even though their roles in the fitness hearing did not change, all of the subjects, with the exception of the Deputy District Attorney, were against Proposition 21. Apparently, the associations of Public Defenders, Probation and Judges were strongly against Proposition 21 when it was on the

ballot. In fact, the California Judges' Association voted to oppose Proposition 21, taking a position on a voter initiative directly related to the juvenile justice system for the first time in the organization's 71-year history (Ochoa 2000). The three entities that opposed the proposition would all like to go back to the law before it was passed. They all saw it as too punitive, straying away from the juvenile court's purpose. One point the Probation department made about Proposition 21 was that it had a couple of good points concerning gangs, but the scope of the changes was too wide. As for the District Attorney, when asked about his satisfaction with current waiver laws and how he might change them, the analogy was made that "he does not build the planes, he just flies them."

DISCUSSION & CONCLUSIONS

The juvenile court has been around for just over 100 years and is undergoing dramatic changes. Judicial waivers have been around since the beginning of the juvenile court system for the older teens committing heinous crimes but have only recently been called into question for the discretion and leniency given to young offenders (McNulty 1996; Myers 1999). The new waiver mechanisms of California are rigid, inflexible, over inclusive and vulnerable to political agendas (Feld 2000). Legislative exclusion allows prosecutors to determine whether or not a young offender is a delinquent or a criminal by manipulating their charging decisions (Feld 2000). At the moment, the prosecutorial waiver is unconstitutional, which is a good thing for California in order to maintain a system of checks and balances. Proposition 21 was a big mistake in terms of its waiver provisions, if not all the changes it made. Of the agencies represented by interviews, three out of four opposed Proposition 21. The only agency that favored the initiative had leverage to gain in the courtroom with its passage. Though the judge had lost some discretion with the passage of Proposition 21, the children lost the most. Based on the strong opposition the legislation received from the legal entities dealing with juvenile offenders, with the exception of the District Attorneys and traditional law enforcement, it is amazing that such an initiative could pass.

The Effectiveness of the Waiver

Based on studies in other states, the effectiveness of the waiver mechanisms altogether can be discussed and it can be assumed that a similar trend will be seen in California. Studies have found that

juveniles transferred into adult court serve shorter sentences than they would have received had they remained within the juvenile system, often times only being put on probation, proving the criminal court system to be softer than the juvenile (Feld 1999; Fritsch, Caeit & Hemmens 1996; Van Vleet 1999). Another folly of the "get-tough" movement is that juvenile courts have begun to answer the calls for harsher treatments, incarcerating more youths instead of putting them through the programs the juvenile justice system has worked to establish over the past few decades (Van Vleet 1999). How is the community made safer from the juveniles who should receive adult time if adult crime earns sentences of probation? Who is supposed to be rehabilitated if the public is looking to have so many offenders incarcerated? The rate of judicial waiver increased 68% between 1988 and 1992 (Feld 1999). One can assume, since the trend of "get tough" legislation continues to run its course that waivers only increase though the crime rates of juveniles have dropped nationwide. The numbers might actually show a decrease in judicial waivers but it would only be the result of the new waiver mechanisms being utilized. In any case, many studies have shown that juveniles who receive adult court sentences have higher recidivism rates than young offenders who remain in the juvenile system. Part of this surely can be attributed to the probation sentences that so many of these waived offenders receive. "Get tough" initiatives seem to be well received by people but if anything they only produce more hardened criminals that go through the criminal court system repeatedly or put young children in cells and throw away the keys. Is this what society really wants? *Time* magazine summed up the reality of the recent "get tough" trend:

> In the past five years, most states have made it easier to charge and punish children as adults. Thirteen-year-olds are therefore getting mandatory life-without-parole sentences, and there's nothing appellate courts can do to help them. We have effectively discarded these lives. Should we make 11-year-olds eligible for life behind bars? Nine-year-olds? Seven-year olds? We are inching closer and closer to a moral line (Cloud 1998).

Where To Go from Here

Finding out that the law actually has little, if any, deterrent value is disappointing but one of the great things about America is that the laws can always be amended. Prosecutorial Waiver is unconstitutional and Legislative Waiver still gives prosecutors too

much power, not to mention the fact that it is badly written and poorly thought out. The judicial waiver appears very thorough and effective, maybe because it has been around for over a century. Too bad none of the politicians decided to tell that to the voters. Further exploration into the effectiveness of waivers and the other facets of Proposition 21 is still required. It might be useful for voters to educate themselves about the laws they are voting for and the laws already in place before again engaging in Faustian trades where our children are our souls and the bliss only an illusion.

One new form of "get tough" legislation deals with blended systems. Blended systems provide juvenile judges the options of imposing juvenile or adult sentences, imposing both a juvenile and adult sentence, suspending the adult sentence under agreed terms, impose a sentence past the normal limit of the juvenile jurisdiction, having a hearing when an offender reaches the age of majority and then determining if an adult sentence needs to be imposed (Redding & Howell 2000). California currently has blended sentencing once the adult court processes the juvenile and gives the child a criminal record, therefore, some modifications on this system might make for a more efficient manner of dealing with serious young offenders.

As with most problems in our society, juvenile justice could be more effective as a whole and specifically in terms of the waiver process with some education and careful changes. While California educates its voters it can also treat the juvenile offenders with vocational or technical training so that they can be reincorporated into society and become the law-abiding adults the juvenile courts are supposed to create. Along the way it might even be possible to educate all the at-risk youth in the streets so that they never enter the system criminal or juvenile.

References

Beresford, Lisa S. (2000) "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," T*he San Diego Law Review*, San Diego Law Review Association.

Bishop, Donna M., Charles E. Frazier, Lonn Lanza-Kaduce & Lawrence Winner (1996) "The Transfer of Juveniles to Criminal Court: Does It Make a Difference," 42 *Crime and Delinquency* 171- 191. Eds. D.C. Gibbons & D. Irwin. Thousand Oaks: Sage.

Champion, Dean J. & G. Larry Mays (1991) *Transferring Juveniles to Criminal Courts: Trends and Implications for Criminal Justice*. New York: Praeger.

Cloud, Jon. "For they know not what they do?" from *Time Magazine*, 1998 article cited in T*he Politics of Injustice* by K. Beckett and T. Sasson. 2000, Thousand Oaks: Pine.

Dawson, Robert O. (2000) “Judicial Waiver in Theory and Practice,” *The Changing Borders of Juvenile Justice*, Eds. J. Fagan & F.E. Zimring. Chicago: University of Chicago Press. 45-81.

Fagan, Jeffrey & Elizabeth P. Deschenes (1990) “Determinants of Judicial Waiver Decissions for Violent Juvenile Offenders,” 81 T*he Journal of Criminal Law and Criminology* 314-347, Ed. M.E. Rice. Chicago: Northwestern.

Feld, Barry C. (1999) “The Honest Politician’s Fuide to Juvenile Justice in the Twenty-First Century” *The Annals of The American Academy of Political and Social Science*, vol. 564, *Will the Juvenile Court System Survive?*, Eds. I.M. Schwartz, A.W. Heston, R.D. Lambert, E. Ginsbur & N.A. Weiner. Thousand Oaks: Sage 10-27.

Feld, Barry C. (2000) “Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique,” *The Changing Borders of Juvenile Justice*, Eds. J. Fagan & F.E. Zimring. Chicago: University of Chicago Press. 83-114.

Fritsh, Eric J., Tory J. Caeti & Craig Hemmens. (1996) “Spare the Needle but Not the Punishment: The Incarceration of Waived youth in Texas Prisons,” 42 Crime and Delinquency 593-609, Eds. D.C. Gibbons & D. Irwin. Thousand Oaks: Sage.

McNulty, Elizabeth W. (1996) “The Transfer of Juvenile Offenders to Adult Court: Panacea or Problem?” 18 Law & Policy 61-76 Ed. K. Hawkins & M. Levine. Malden: Blackwell.

Myers, David L. (1999) “Excluding Violent Youths from Juvenile Court: The Effectivenes of Legislative Waiver.” Ph.D dissertation, Department of Criminology and Criminal Justice, University of Maryland.

Ochoa, Frank (2000, March 2) “The Hidden Face of Proposition 21.” The Independent. Raymond, Sara (2000) “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,” *Golden Gate University Law Review* 223.

Redding, Richard E. & James C. Howell (2000) “Blended Sentencing in American Juvenile Courts,” *The Changing Borders of Juvenile Justice*, Eds. J. Fagan & F.E. Zimring. Chicago: University of Chicago Press. 145- 179.

Snyder, Howard N., Melissa Sickmund, & Eileen Poe-Yamagata (2000) *Juvenile Transfers to Criminal Court in the 1990’s: Lessons Learned From Four Studies.* Pittsburgh: OJJDP.

Sutton, John R. (2001) Law/Society: Origins, Interactions, and Change. Thousand Oaks: Pine Forge.

Van Vleet, Russel K. (1999) “The Attack on Juvenile Justice,” 564 *The Annals of The American Academy of Political and Social Science* 203-214. Will the Juvenile Court System Survive?, Eds. I.M. Schwartz, A.W. Heston, R.D. Lambert, E. Ginsburg, & N.A. Weiner.Thousand Oaks: Sage.

Walbert, Claude (2001, May 17) “Court Nixes Juvenile-Crime Proposition.” Los Angeles Daily Journal: 3. Wilson, Pete (1998, June 16) Voter Digest. Available: www.voterdigest.com [2001, May 2].

Cases Cited

Kent v. U.S. (1966).

Manduly v. Superior Court.

Resendiz v. Superior Court (2001).

Statutes Cited

California Gang Violence and Juvenile Crime Prevention Act (2001).

California Welfare and Institutions Code, section 602 (2001).

California Welfare and Institutions Code, section 707 (2001).