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PREVENTING OR ABETTING CRIME?

Proposition 21 Cracks Down Hard on Young Teens Who, Critics Say, Will Become Criminals If They Are Imprisoned With Adults

By John Roemer
Daily Journal Staff Writer

Opponents scornfully call it "Three Strikes for Tykes." Proposition 21, the "Gang Violence and Juvenile Crime Prevention Act," is drawing vehement opposition as the campaign over the March ballot initiative gears up.

"It targets middle-schoolers," objected Susan L. Burrell, a staff attorney at the Youth Law Center in San Francisco. "And it's completely false to put the word 'prevention' in the title."

But backers think they'll easily have the votes to pass another tough-on-crime measure in California — even one that targets children at a time when crime is declining nationwide.

"All we're trying to do here is to clear the worst of the worst out of the juvenile system," said David LaBahn, deputy executive director of the California District Attorneys Association.

Last week Sacramento County Superior Court Judge James T. Ford ordered both sides to tone down misleading arguments that will appear in the official voters' handbook.

The initiative is a 42-page rewrite of dozens of state laws from the penal and welfare and institutions codes. It cracks down hard on errant 14- to 17-year olds.

Among other provisions it transfers from judges to prosecutors the decision to try juveniles as adults on some charges. The California Judges Association is currently evaluating the proposal and has yet to take a position on it, a spokesman said.

Proposition 21 also mandates tougher penalties for home-invasion robberies, carjackings, witness intimidation and drive-by shootings.

Designed by Gov. Pete Wilson in 1998, the proposal's principal backers now are the California District Attorneys Association and the California Peace Officers Association, along with scores of local police chiefs and sheriffs.

That presents a knotty challenge to Attorney General Bill Lockyer, who has so far taken no position on the measure.

"It would be unusual for there to be an initiative all those groups wholeheartedly endorse that the AG opposes," acknowledged Lockyer spokesman Nathan Barankin. He added:

"But I'd find it very unlikely for Lockyer to express any position on any ballot measure until we figure out which ones might be litigated and we'd be defending in court. Whatever momentary pain we might feel being called pansies for taking no position is nothing compared to what it would be like to go into court to defend a measure and have our endorsement language quoted back to us."

Passage of Proposition 21 would be a tragedy, Burrell said. Adopting a lawyerly approach, she spent weeks analyzing key provisions of the proposed act and relating them to current law.

Burrell also factored in references to legislation signed in October by Gov. Gray Davis intended to make the ballot measure unnecessary by making less dramatic changes in the juvenile justice system.

S. TODD ROGERS/Daily Journal

SUSAN L. BURRELL — "The fact is that this initiative is out of phase and from another time period."

That legislation, SB334, takes effect Jan. 1.

The result of Burrell's labors is a 34-page chart comparing in side-by-side columns the legal status quo with provisions of SB334 and Proposition 21. Another column discusses policy considerations related to the proposed changes.

"I've been a lawyer for 20 years, and this was the hardest piece of analysis I've ever done," she said last week.

"Much of the initiative lists issues by Penal Code section, and it's extremely difficult to keep each piece of the puzzle straight. It gives me a headache just thinking about it."

Among Proposition 21's provisions:

- Juveniles will be tried as adults in all "special circumstances" murders as well as for "one-strike" sexual offenses if the defendant is at least 14 years old.

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■ All gang-related felonies will be "strikes."

■ Juvenile probation can be revoked on reliable hearsay under a standard lowered to a preponderance of the evidence.

■ Sealing or destroying records of violent offenses by juveniles 14 or older is prohibited.

■ Judicial ability to close juvenile court hearings is limited.

■ Local police must register all gang members convicted of felonies.

One observer calls Burrell's analysis "the Rosetta stone" that can be read to unlock the confusion surrounding Proposition 21.

Under current law, for example, any person who conspires to commit a felony may be punished as if he or she actually committed the felony. SB334 leaves that provision intact, Burrell's analysis shows.

In contrast, Proposition 21 defines individual street gang members as conspirators in any felony the gang commits. The wording of the proposed law appears to apply regardless of when and where the crime occurs and whether or not members personally agree to be part of it.

"This and other ambiguities in drafting are sure to result in lengthy, costly, successful legal challenges," Burrell notes in the "Policy Considerations" part of her analysis.

'Because of the current juvenile justice system, her husband's killer will be released in three years.'

Stricken pro-Prop. 21 ballot language

The state's legislative analyst and the department of finance estimate the initiative will cost hundreds of millions of dollars annually and one-time costs of at least several hundred million dollars.

The money will go to pay for more prisons, more prosecutors and more public defenders. At present there are about 7,700 juveniles in the California Youth Authority system, a number that will increase substantially if Proposition 21 passes.

The fiscal impact on local governments will be in the tens of millions of dollars annually, with even larger one-time costs, the legislative analyst says.

A draft analysis by the California Association of Counties calls the anticipated impact of Proposition 21 "substantial for the probation, prosecution, defense and detention systems."

The Chief Probation Officers Association of California has voted to oppose the measure.

"The fact is that this initiative is out of phase and from another time period," said Burrell, who points to declining trend lines in juvenile and adult crime statistics.

"It qualified for the ballot so long ago [in 1998] that it is full of outdated statistics that really are irrelevant today."

Vincent Schiraldi of the Washington, D.C.-based Justice Policy Institute, quoting Department of Justice numbers, points out that juvenile crime dropped 11 percent last year.

But Proposition 21's introduction, for instance, refers to crime figures from 1983 to 1992. It cites fears over high crime by the 18th Street Gang in Los Angeles but fails to mention problems with prosecutions of some of those gang members resulting from misconduct by the Los Angeles Police Department's Rampart Division, currently under investigation by District Attorney Gil Garcetti.

The California District Attorneys Association's LaBahn defended Proposition 21 as necessary and appropriate.

"I don't believe it's going to cost hundreds of millions of dollars," he said. "As prosecutors, we should be involved in decisions on whether to file in juvenile or adult court."

LaBahn conceded that the measure is long and complicated. "But it flows, because a lot of these different things are interrelated. I disagree that it's draconian."

He said the prevention component of the measure appears in Section 29, where a deferred entry of judgment system for first-time juvenile offenders encourages them to stay clean.

Burrell retorted that the six-step process lacks due process and would increase the workloads of prosecutors, probation officers and defense counsel.

LaBahn declined to discuss finances, but disclosure forms show that the pro-Proposition 21 forces have a sizable war chest. Burrell and others in the opposition expect an advertising blitz early in the new year.

'We removed the big lie. They tried to unfairly use that horrible murder as a poster child for their campaign.'

Steven L. Mayer, anti-Prop. 21 attorney

Though no polls have been taken recently, LaBahn said that when signature drives were organized in 1998, focus groups' favorable percentage rating of the initiative rose to the high 70s.

"We're very optimistic," he said. "We think no polls have been taken because the race is not perceived to be close."

But Burrell and her allies haven't given up. "This is not a moneyed opposition," she said, citing support for the No on 21 campaign by groups such as the League of Women Voters, California Attorneys for Criminal Justice and the California Council of Churches. "It's people who care about children."

She predicted that those hurt most by the initiative will be borderline troubled youths. "I'm talking about the midlevel schlubby kids who would otherwise come out OK in the other side of adolescence. By putting them in prison with adults, Proposition 21 will pull way more of these kids into criminal careers."

Lawyers for the pro-Proposition 21 campaign strongly contest the allegation that imprisoned youths will be housed with adults.

One issue thrashed out at last week's hearing in Sacramento County Superior Court was whether the No on 21 campaign could argue that convicted juveniles "will be mixed with adult criminals."

Judge Ford said no, requiring the ballot handbook to read that they will be "confined in institutions with adult criminals," which allows proponents to contend that youths will be segregated from adults within the same institution.

The suit to edit the proponents' ballot argument was filed against California Secretary of State Bill Jones by Dan Macallair, director of the San Francisco-based Center on Juvenile and Criminal Justice. *Macallair v. Jones*, 99CS02532.

Proponents filed a counterclaim over the incarceration-with-adults issue.

Opponents of Proposition 21 took strong issue with a dramatic example included in the ballot argument written by backers of the measure.

It describes the 1993 bludgeoning murder of Ross Elvey by a 15-year-old and an accomplice. Elvey's widow, Maggie, a leading backer of Proposition 21, is said to be afraid the youth will strike again. Judge Ford required stricken from the argument the first part of the sentence, "Because of the current juvenile justice system, her husband's killer will be released in three years..."

Though the judge noted that the three-year release date is accurate and could remain in the argument, he ruled that the Legislature in 1994 changed the law in the wake of the Elvey murder.

Now, juveniles as young as 14 may be tried as adults and sentenced to life in prison.

"We removed the big lie," said attorney Steven L. Mayer of Howard Rice Nemerovski Canady Falk & Rabkin in San Francisco, who argued for the anti-Proposition 21 forces. "They tried to unfairly use that horrible murder as a poster child for their campaign."

Matt Ross, a spokesman for Californians to End Gang Violence, the group running the pro-Proposition 21 effort, called the changes required by the judge "just semantics."