

## Comments

# Deferred Entry of Judgment: An Overlooked and Undervalued Benefit of Proposition 21

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IN MARCH OF 2000, the voters of California passed Proposition 21, the “Gang Violence and Juvenile Crime Prevention Act of 1998,”<sup>1</sup> which altered sections of the Welfare and Institution and Penal Codes as well as created new sections that delineate a supervision program for certain minors brought before the courts. Proponents hailed the initiative as a “get tough on juvenile crime and gangs” measure, while opponents argued it was a draconian attempt to incarcerate more children for longer periods of time, and was too sweeping in its effect.<sup>2</sup>

Challengers have attacked several pieces of Proposition 21 in the courts, but the California Supreme Court has consistently held the initiative as a whole to be constitutional.<sup>3</sup> The biggest outcry came over the portion of the initiative that modified the statutory provisions

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1. SEC’Y OF STATE, STATE OF CAL., 2000 CAL. PRIMARY ELECTION, VOTER INFORMATION GUIDE/BALLOT PAMPHLET 42–45 (2000), available at <http://primary2000.ss.ca.gov/VoterGuide/Propositions/21text.htm> (last accessed Jan. 18, 2004) [hereinafter *Cal. Proposition 21*] (providing official title, summary, analysis, arguments, and text of Proposition 21).

2. See Mike McKee, *With Few Qualms, Justices OK Prop 21*, THE RECORDER (San Francisco), Mar. 1, 2002, at 1.

3. See *Manduley v. Superior Court*, 41 P.3d 3, 8–9 (Cal. 2002) (holding that Proposition 21 does not violate the separation of powers doctrine; does not deprive minors of the due process of law; does not violate equal protection; does not violate constitutional prohibitions against cruel and unusual punishment; and does not violate the single-subject rule).

addressing the “fitness process,”<sup>4</sup> the method by which a juvenile can be transferred to and tried in adult court. Proposition 21 increased the circumstances under which prosecutors may file charges against juveniles directly in adult court.<sup>5</sup> Critics also denounced how Proposition 21 broadened the reach of gang affiliation enhancements, thus increasing the punishment and registration requirements for gang participation.<sup>6</sup>

Yet, the portions of Proposition 21 that altered informal supervision and created Deferred Entry of Judgment have not met with either significant court challenges or extensive academic criticism.<sup>7</sup> In fact, the general public as well as law enforcement, practitioners, and academics appear unaware of the effect that the changes produced.<sup>8</sup> Yet it is these remaining revisions to California’s juvenile laws that will affect far more juveniles than the previously mentioned controversial sections of the initiative.<sup>9</sup>

The passage of Proposition 21 created Deferred Entry of Judgment (“DEJ”), a little known yet potentially significant piece of legislation.<sup>10</sup> As defined in sections 790 through 795 of the Welfare and Institutions Code, the DEJ provisions construct an entirely new approach to adjudicate juvenile felony petitions under certain circum-

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4. See CAL. WELF. & INST. CODE § 707(a)–(e) (Deering 2001).

5. See GARY C. SEISER & KURT KUMLI, CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE § 3.60[1] (8th ed. 2003) (discussing the historical background of the process to transfer juveniles to adult court).

6. See CAL. PENAL CODE §§ 186.22, 186.26 (Deering 2001).

7. See generally *In re Johnny M.*, 123 Cal. Rptr. 2d 316 (Ct. App. 2002); *In re Sergio R.*, 131 Cal. Rptr. 2d 160 (Ct. App. 2003); *Martha C. v. Superior Court*, 133 Cal. Rptr. 2d 544 (Ct. App. 2003). The aforementioned cases are the only published appellate cases concerning DEJ. None of these cases criticize DEJ, nor has the author found any law journal articles that specifically address DEJ or its significance as a new development in juvenile rehabilitation.

8. See cases cited, *supra* note 7. Thus far, only three cases have gone to the appellate court. Although Proposition 21 receives significant media attention, DEJ has not received any publicity and some counties have not implemented the program heavily. See CRIMINAL STATISTICS CTR., CAL. DEP’T OF JUSTICE, JUVENILE JUSTICE IN CALIFORNIA 2002 v (2003) [hereinafter JUVENILE JUSTICE 2002] (indicating that only 5.1% of all Juvenile Court dispositions were handled through “diversion, deferred entry of judgment or transferred”).

9. Interview with Kurt Kumli, Supervising District Attorney, Juvenile Unit, Santa Clara County, in San Jose, Cal. (Dec. 16, 2003). Santa Clara County has direct filed approximately 15–20 fitness cases since the law passed, while over 1,500 minors were placed on DEJ. Cf. JUVENILE JUSTICE 2002, *supra* note 8, at 47 (indicating that only eight cases were direct filed statewide in those counties reporting). Although these statistics conflict with the Santa Clara County numbers, they give some indication that the number of direct file cases is low.

10. See CAL. WELF. & INST. CODE §§ 790–795 (Deering 2001).

stances.<sup>11</sup> In general, DEJ makes offenders fourteen years of age or older, who commit particular felony offenses, eligible for a probation program that upon successful completion will not result in a juvenile record.<sup>12</sup> For example, the court could place on DEJ sixteen-year-old "Edward" who commits a felony auto theft if he has not previously been a ward of the court, failed probation, or been referred to the Youth Authority.<sup>13</sup> If Edward admits the charge and then completes the court's requirements, in one to three years the court will dismiss his case and the record of his arrest will be deemed never to have occurred. Proposition 21 also alters the administration of informal supervision for minors<sup>14</sup> by modifying section 654.3 to take into account the new section 790 provisions.<sup>15</sup>

This Note proposes that Proposition 21 produced positive changes to California's adjudication process for juveniles. First, DEJ provides an improved statutory approach for handling first-time offenders and offenders who commit certain felony offenses. Second, Proposition 21 placed more appropriate limits on the implementation of informal supervision.

Part I of this Note provides background on the petition process and the requirements and application of informal supervision under sections 654 and 654.2 of the Welfare and Institutions Code. Part II addresses the changes that Proposition 21 made to informal supervision by amending section 654.3. Moreover, Part II discusses the addition of the DEJ provisions that appear in sections 790 through 795, as well as their implementation. Part III addresses the ramifications of the DEJ legislation, positive and negative, and why it is superior to the options available before Proposition 21 and under "old" informal supervision. In Part IV, the author discusses the Santa Clara County Juvenile Court's unique and successful utilization of DEJ. This Note concludes with the proposition that juvenile courts statewide should adopt those practices.

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11. *See id.*

12. *See id.* and discussion *infra* Part II.B.

13. The minor in the example would also need to be otherwise eligible to qualify for DEJ. *See infra* Part II.B for discussion of eligibility requirements.

14. *See* CAL. WELF. & INST. CODE §§ 654, 654.2.

15. *See id.* § 654.3(h) (precluding informal supervision for felony offenses committed by minors fourteen years or older except in unusual circumstances).

## I. The Juvenile Delinquency Petition Process and Informal Supervision Pre-Proposition 21

The delinquency process is, in some ways, similar to the adult criminal justice process. In general, when a crime is committed, police investigate, make an arrest, and then take their report to the prosecutor. The prosecutor then decides whether or not to file charges and the case then moves through the criminal justice system where possibly a preliminary hearing, a trial, and if necessary, a sentencing hearing will be held. In delinquency, the person who allegedly violated the law is referred to as a minor rather than a defendant and a petition is filed, rather than a criminal complaint. Unlike the adult criminal process where the police take a report directly to the district attorney, in a juvenile matter, the police report goes to the probation officer for a determination of how to proceed. The probation officer has great discretion in this process and can choose to do nothing with the referral or to settle the matter with a reprimand, by a referral to a community agency, by placing the minor on informal supervision, or by filing a petition, thus instituting a court proceeding.<sup>16</sup>

Juveniles can be placed on informal supervision in two ways as provided by sections 654 and 654.2 of the Welfare and Institutions Code. Informal supervision, or informal probation, means that a minor brought to the attention of authorities for a law violation does not have a petition sustained and is not made a ward of the court, but the probation officer supervises the minor for six months.<sup>17</sup> Section 654 allows the probation officer discretion upon receiving a police report regarding a minor to decide whether to file a petition based on certain statutory criteria.<sup>18</sup> Section 654.2 permits the court to order informal supervision following the filing of a petition.<sup>19</sup> The criteria used to determine eligibility for informal supervision under either method

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16. See *id.* § 654; see also JUVENILE JUSTICE 2002, *supra* note 8, at v.

17. See CAL. WELF. & INST. CODE §§ 654, 654.2.

18. See *id.* § 654 (giving probation officer discretion, in lieu of filing a petition to declare the minor a ward of the court or requesting that the prosecuting attorney file such a petition, to delineate a particular program of supervision for the minor, for no more than six months).

19. See *id.* § 654.2(a) (explaining that once a petition has been filed pursuant to section 602 of the Welfare and Institutions Code to declare the minor a ward, the court has authority to continue any hearing on said petition for a period of six months and order the minor to participate in an informal supervision program pursuant to section 654); see also *id.* § 654.2(b) (stating that in referring the case to the prosecuting attorney, the probation officer can recommend informal supervision if otherwise eligible).

is spelled out in section 654.3.<sup>20</sup> In theory, any minor who commits an offense is eligible for informal supervision. Yet, in practice, as can be seen by reviewing the list of restrictions in section 654.3, the seriousness of the offense is a significant factor in the determination. Whether a minor receives informal supervision before or after a petition has been filed, the same requirements apply.<sup>21</sup> Either the probation officer or the court imposes certain conditions that the minor must follow to successfully complete his or her program,<sup>22</sup> including if necessary, counseling for controlled substance problems and mandatory participation by the minor and parents in a counseling or education program.<sup>23</sup> The purpose of the informal supervision process is to implement corrective measures that help “adjust the situation which brings the minor within the jurisdiction of the court or creates the probability that the minor will soon be within that jurisdiction.”<sup>24</sup>

Section 654 authorizes probation-granted informal supervision. Using his or her own discretion, each probation officer can file a petition, or request that the prosecutor do so, if the minor fails to satisfactorily involve himself in the designated program during the six-month period or for up to ninety days after completion of the six-month period.<sup>25</sup> Under 654.2, which authorizes court-granted informal supervision, the probation officer can, in his or her discretion, recommend to the court that the minor be failed from the program or receive additional time to complete it. The court may grant extensions, up to three months at a time, for a period not to exceed twelve months.<sup>26</sup> Fifteen days prior to the expiration of the informal supervision program authorized by section 654.2, the probation officer is required to

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20. See *id.* § 654.3 (stating that no minor is eligible for section 654 or 654.2 informal supervision in the following cases, except in an unusual case where the interests of justice would best be served and the court specifies on the record the reasons for the decision: a violation of sections 707(b), (e) or (d)(2); possession for sale of a controlled substance; violation of Health & Safety Code sections 11350 or 11377 if violation occurred on a school campus; violation of Penal Code section 186.22; the minor participated previously in informal supervision; the minor was adjudged previously a ward of the court; or restitution in the present offense exceeds one thousand dollars).

21. See CAL. WELF. & INST. CODE §§ 654, 654.2.

22. See *id.* § 654.

23. See *id.*

24. *Id.*

25. See *id.*

26. See *id.* § 654.2(a); *In re Anthony B.*, 128 Cal. Rptr. 2d 349, 353 (Ct. App. 2002) (“[W]here proceedings under section 654.2 are resumed on the one-year anniversary of the filing date of the petition, the resumption occurs ‘12 months from the date the petition was filed,’ and is thus timely.”).

submit a follow-up report to the court addressing the minor's progress.<sup>27</sup> If the minor successfully completes section 654.2 supervision, the court dismisses the petition and consequently, the minor's criminal violation will not appear on his record. This is important since a criminal record can be an obstacle to employment and educational opportunities in the future.

If the minor fails to successfully finish the program under either 654 or 654.2, the matter proceeds to a formal hearing to adjudicate the matter.<sup>28</sup> In other words, the case starts at the beginning, with a petition (one is filed if it has not been already) and proceeds through the typical court process with pretrial hearings and possibly a trial. If the petition is admitted or found true, the minor could be declared a ward and placed on formal probation. One consequence of proceeding on the petition is that informal supervision cannot be granted once the petition has been sustained; informal supervision and sustaining a petition are mutually exclusive options.<sup>29</sup>

Significant to both forms of informal supervision is that in a legal sense the minor does not admit to any wrongdoing. Any adjudication on a formal petition is "put off" for the six-month period.<sup>30</sup> Under section 654, the minor does not make an admission to a petition since none has been filed; though in agreeing to participate in the program the minor is implicitly admitting to some sort of a law violation. Under section 654.2, the court delays any hearing on the petition in hopes that the minor will sufficiently modify his or her behavior and adequately meet any court imposed obligation (i.e. restitution or counseling) so that formal wardship is unnecessary.

There are several problems with this procedure. First, informal supervision procedures in general give the probation officer signifi-

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27. CAL. WELF. & INST. CODE § 654.2(a).

28. *Id.* § 654.2. Accordingly, the minor is placed in exactly the same situation as he or she would have been if the petition had been filed in court originally and informal supervision was never attempted.

29. See *In re Adam R.*, 67 Cal. Rptr. 2d 76, 78 (Ct. App. 1997) ("By making true findings of guilt on section 602 petition allegations and at the same time ordering the minor to participate in a section 654 informal supervision program, the court impermissibly amalgamated two separate procedures."); see also *In re Omar R.*, 129 Cal. Rptr. 2d 912, 914 (Ct. App. 2003) ("The juvenile court's acceptance of the minor's admission to the charge constituted an adjudication of the petition, a procedure 'inherently inconsistent' with the purpose of section 654.2.").

30. See CAL. WELF. & INST. CODE § 654.2.

cant discretion as to whether to file a petition in the first place.<sup>31</sup> Moreover, prior to the passage of Proposition 21, the probation officers' broad discretion allowed them to act without consulting the district attorney with all felony offenses not already listed in section 654.3 (which includes 707(b) offenses,<sup>32</sup> possession of a controlled substance for sale, certain drug offenses at school, and participation in gang-related offenses).<sup>33</sup> The discretion permitted under section 654 allows each probation officer to make his or her own decision about whether to file a petition in the first place, or whether to fail a minor from the informal supervision program. No consultation with other juvenile justice officials is required, which potentially leads to a lack of uniformity in how informal supervision is granted. One probation officer can review a case and come to a vastly different decision about how to handle it than another officer with a similar case. Further, each probation officer can impose different probation conditions and terms of supervision on each minor, without any judicial oversight or review. There is great potential for disparate treatment and the possibility of poor decision-making. Prior to Proposition 21, the consequences were potentially more serious since this discretion allowed the probation officer to make these decisions even where a minor has committed a felony offense.

Second, the court or the probation officer can grant informal supervision regardless of whether the minor admits culpability for his actions. This causes difficulties for the prosecution if they must prosecute a case following a minor's failure to complete the program. Informal supervision may last for a maximum of twelve months.<sup>34</sup> If the court or probation officer, at any time during that period, deems the minor to have failed the program, and wants to proceed on a petition, the prosecuting attorney would then be forced to try the case and prove the petition with potentially stale evidence and witness or victim recollections dimmed with the passage of time.<sup>35</sup> Thus, a minor could be on informal supervision for up to a year and then fail to meet the conditions forcing the prosecutor to gather evidence, contact wit-

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31. *See id.* §§ 654, 654.2. Additionally, the probation officer has sole discretion under Welfare and Institutions Code section 654 to decide whether or not a petition should subsequently be filed when the minor is failing to perform on informal supervision.

32. *See id.* § 707(b). A section 707(b) offense consists of the most serious felony offenses, i.e. murder, arson, rape, robbery, kidnapping, etc.

33. *See id.* § 654.3.

34. *See id.* §§ 654, 654.2(a) (originally granting informal supervision for six months, but allowing for the court to continue the program twice in three-month increments).

35. *See id.* § 654.2.

nesses, victims, police officers and try to prove a case with details and information that the parties have quite likely forgotten. The passage of Proposition 21 limited the use of informal supervision, thus addressing some of these problems, as well as created DEJ, a superior way to adjudicate most delinquency petitions.

## II. Proposition 21

### A. Amendments to Informal Supervision

Though the procedures for sections 654 and 654.2 of the Welfare and Institutions Code remain the same, Proposition 21 placed limits on cases eligible for informal supervision. Section 654.3, as amended, continues to restrict the granting of informal supervision for minors who commit serious felony offenses such as murder, arson, rape, robbery, or kidnapping. These serious felony offenses are categorized as section 707(b) violations.<sup>36</sup> Most significantly however, the legislation now further restricts informal supervision when minors at least fourteen years of age commit a felony offense, except in unusual circumstances.<sup>37</sup> The new paragraph 654.3(h) takes away some of the discretion previously granted to the court or the probation officer to place a minor on informal supervision under sections 654 and 654.2. In those felony cases where the minor is fourteen years of age or older, the matter must proceed under the usual formal petition adjudication procedures or through the Deferred Entry of Judgment option as created in section 790.<sup>38</sup>

These new limitations on the use of informal supervision appear to allow for the placement of very few minors under that type of supervision, and instead, make the vast majority eligible for DEJ. In reality, many crimes do not bring minors to the attention of the juvenile court in the first place.<sup>39</sup> Most juveniles who commit misdemeanors

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36. *See id.* § 707(b).

37. *See id.* § 654.3(a) (deleting section 707(e) or (d)(2) offenses and adding new paragraph (h) which provides:

The minor is alleged to have committed a felony offense when the minor was at least 14 years of age. Except in unusual cases where the court determines the interest of justice would best be served by a proceeding pursuant to Section 654 or 654.2, a petition alleging that a minor who is 14 years of age or over has committed a felony offense shall proceed under Article 20.5 (commencing with Section 790) or Article 17 (commencing with Section 675).

38. *See id.*

39. *See* JUVENILE JUSTICE 2002, *supra* note 8, at 20 (indicating that 80.8% of referrals handled by probation departments were "closed at intake"). *See also* Megan Kurlychek et al., *Focus on Accountability: Best Practices for Juvenile Court and Probation*, JUV. ACCOUNTABILITY INCENTIVE BLOCK GRANTS PROGRAM ("JAIBG"), Aug. 1999, at 3. JAIBG is a monthly bulletin

do not enter the juvenile justice system in any formal sense. Generally, those minors who do enter the juvenile justice system are those who have experienced significant adjustment problems in school or at home, received referrals for other offenses, or owed significant victim restitution. Usually, upon receipt of a misdemeanor referral, the probation department handles the matter through reprimanding, counseling, and/or diverting the minor to community organizations for educational or rehabilitative services, in an effort to curb the inappropriate behavior.<sup>40</sup> In those remaining cases where a juvenile commits a misdemeanor offense and the minor himself or the circumstances surrounding the offense warrant further guidance and attention, informal supervision continues to be an option.

## B. Deferred Entry of Judgment

Proposition 21 created a new form of probation supervision for minors known as Deferred Entry of Judgment ("DEJ"). It provides a way for minors to admit the offense with which they are charged, but defer entry of judgment on the petition and formal disposition of the case pending successful completion of a rehabilitative program. Welfare and Institutions Code sections 790 through 795 delineate who is eligible and procedurally how the program operates.<sup>41</sup> Eligible minors are generally first-time offenders, fourteen or older, who have committed a non-707(b) felony offense and meet certain other criteria.<sup>42</sup> One of the significant components of section 790 is paragraph (b), which details the procedures and requirements for DEJ eligibility and determines who makes that decision.<sup>43</sup> Under former informal supervision procedures, the probation officer and/or the court made the eligibility decision. Under DEJ, the prosecutor reviews the minor's file

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published by the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention. In 1996, only 36% of all referrals resulted in minors being placed on formal or informal probation. *But see* Howard N. Snyder, *The Juvenile Court and Delinquency Cases*, 6 THE FUTURE OF CHILD., Winter 1996, at 53, 56-57. Between 1989 and 1993, one quarter of delinquency cases were dismissed or diverted to community agencies. During that same period, 51% of delinquency cases were handled formally through the court process, i.e. not diverted or handled informally.

40. See Kurlychek, *supra* note 39, at 6 (describing diversion to community programs as a "desired alternative to court" and potentially an effective rehabilitative tool).

41. See CAL. WELF. & INST. CODE §§ 790-795.

42. See *id.* § 790 (explaining that the minor cannot have previously been a ward for a felony offense, cannot have been committed to the Youth Authority, cannot have had probation previously revoked without being completed, and must be probation eligible as defined in Penal Code section 1203.06).

43. See CAL. WELF. & INST. CODE § 790(b).

to ensure statutory eligibility, but in addition, the prosecutor, defense attorney, probation officer, and juvenile judge all must agree that the minor is an appropriate candidate before the case proceeds.<sup>44</sup> DEJ's requirement of consensus ensures that all parties are "on the same page" with respect to the minor's suitability for the program and the minor's potential for success. Moreover, everyone now has a stake in the minor's rehabilitation.

Once the prosecutor determines the minor is statutorily eligible and the parties agree with the determination, the minor must admit to the offense and indicate a willingness to participate in DEJ.<sup>45</sup> Then the court may summarily grant DEJ or refer the matter to the probation department for further investigation.<sup>46</sup> The probation officer prepares a report for the court, detailing the minor's age, maturity, education, family relationships, level of motivation, and treatment history, if any.<sup>47</sup> Additionally, the court considers other mitigating or aggravating factors relating to the minor's potential to benefit from counseling, treatment, or rehabilitative efforts.<sup>48</sup> The court then makes the final determination with respect to whether DEJ is the appropriate program of rehabilitation of the minor.<sup>49</sup>

To implement DEJ, the prosecuting attorney must provide the minor with written notification of the roles and authority of the participants in the program, namely the probation department, prosecutor, and the court.<sup>50</sup> Additionally, the prosecutor must explain to the minor that instead of traditional jurisdictional and dispositional hearings, the court may grant DEJ;<sup>51</sup> that upon successful completion of the program, the charges against the minor will be dismissed; and what the effect of DEJ on the minor's rights relative to future inquiries about an arrest record will be.<sup>52</sup> Further, the prosecuting attorney

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44. *See id.*

45. *See id.* §§ 790(b), 791(a)(3), (6)(b).

46. *See id.* § 791(b).

47. *See id.*

48. *See id.*; *see also* CAL. R. CT. 1495(d)(3) (Deering Supp. 2003).

49. *See id.*; *see also* *Martha C. v. Superior Court*, 133 Cal. Rptr. 2d 544, 547 (Ct. App. 2003) (finding it important for the trial court to look at whether or not the juvenile could benefit from or be rehabilitated by DEJ, not whether granting DEJ sends a message of leniency to others who may potentially violate the law).

50. CAL. WELF. & INST. CODE § 791(a)(2).

51. *Id.* § 791(a)(3) (provided the minor admits the entire petition, waives time, and receives a positive recommendation from probation, the prosecutor will make a motion and the court shall dismiss the charges within one to three years of minor's referral to the program).

52. *Id.* § 791(a)(5) (explaining the effect of DEJ on arrest record retention and disclosure).

must make a "clear statement" that if the minor fails to comply with the program of probation, the prosecutor, probation department, or the court on its own may move to declare the minor a ward of the court and proceed to disposition on the previously admitted petition.<sup>53</sup> Finally, the prosecutor must inform the minor that if he fails DEJ, the previously admitted offense may "serve as a basis for a finding of unfitness" under section 707(d) of the Welfare and Institutions Code in the event that the minor subsequently commits two additional felony offenses.<sup>54</sup> A finding of unfitness means the minor has been found inappropriate for treatment and rehabilitation in the juvenile court and for all purposes the case will now be adjudicated in adult criminal proceedings. By advising the minor of the potential impact of failing DEJ, the prosecutor is simply informing the minor that the offense underlying a failed DEJ petition has the same post-adjudication effect of the identical petition adjudicated on a similarly aged minor who was not placed on DEJ.<sup>55</sup>

As to specific program requirements, once a minor is accepted as a DEJ participant, the court may impose various conditions of probation. One mandatory condition is warrantless search of the minor's "person, residence, or property under his or her control, upon the request of a probation officer or peace officer."<sup>56</sup> In addition, the court can order, if appropriate, drug and alcohol testing, curfew, regular school attendance, and restitution.<sup>57</sup> The realm of possible probation conditions is limited only by the judge's determination of what conditions listed in the Welfare and Institutions Code may assist in the minor's rehabilitation.<sup>58</sup> Section 795 provides that the probation officer implements and supervises the treatment program for each minor placed on DEJ.<sup>59</sup>

Most significantly under DEJ, in contrast to informal supervision, the minor must admit to the petition in its entirety, as well as "waive

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53. *Id.* § 791(a)(4).

54. *Id.* § 791(a)(6). Section 707(d)(3) provides for prosecution of a minor in adult court if the minor is sixteen years of age or older, commits one of the listed offenses, and has previously been found to be a person described in section 602 by reason of the violation of any felony offense, when fourteen years of age or older.

55. *See id.*

56. *Id.* § 794.

57. *Id.*

58. *Id.*

59. *Id.* § 795 (providing for probation officer determination of a case plan development, monitoring, and supervision).

time”<sup>60</sup> for judgment.<sup>61</sup> The greatest advantage of DEJ to the minor is that upon successful completion of DEJ, the charges will be dismissed, despite the minor’s prior admission to the petition, the arrest will “be deemed never to have occurred,” and the juvenile court records will be sealed.<sup>62</sup> Should the minor fail to comply with the terms of probation, the prosecutor, probation officer, or the court may move to proceed to disposition on the petition and adjudge the minor a ward of the court.<sup>63</sup> In addition, the minor may fail the program by not “performing satisfactorily” or not “benefiting from” the rehabilitative program imposed, or by being declared a ward of the court for any felony offense or two misdemeanor offenses committed separately while in the DEJ program.<sup>64</sup> Regardless of the reason, should the minor fail DEJ, the juvenile court reports the minor’s entire criminal history to the Department of Justice pursuant to section 602.5 of the Welfare and Institutions Code.<sup>65</sup> This provision alone should be strong incentive for minors to participate in and successfully complete DEJ. Due to the Department of Justice’s access to juvenile records, a minor who fails DEJ but subsequently seals his local county juvenile records cannot be assured that immigration authorities, future employers, educational institutions, and military institutions will not have access to his delinquent history. Needless to say, a criminal record, even a juvenile one, could negatively impact the minor’s future plans. Further, depending on the minor’s age and the offense, some sustained petitions may be counted as felony convictions in the future for the purposes of sentence enhancement in adult court under the “3 strikes” law.<sup>66</sup>

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60. *See id.* § 702. Once the court makes a finding on the petition, the minor can agree to continue disposition beyond the statutorily provided time period, which is ten days if in custody and thirty days if not. Under DEJ, disposition is deferred for one to three years. Thus, the minor must be willing to forego disposition—waive time—until DEJ is completed.

61. *Id.* § 791(a)(3) (requiring that the minor admit “each allegation contained in the petition”).

62. *Id.* § 793(c); *see also id.* § 793(b) (avoiding the consequences of having a criminal record reported to the Department of Justice as discussed *infra* Part II.B).

63. *Id.* §§ 791(a)(4), 793(a).

64. *Id.* § 793(a).

65. *Id.* § 793(b). Welfare and Institutions Code section 602.5, adopted as part of Proposition 21, requires the juvenile court report the complete criminal history of any minor found to be a ward of the court because of a felony offense. This makes DEJ incredibly significant for minors who qualify since the petition they have admitted will be dismissed if they successfully complete the program and they will not become a ward. Thus, they can avoid the reporting of this offense and their entire criminal record to the Department of Justice.

66. *See CAL. PENAL CODE* § 1170.12(b)(3) (West Supp. 2004) (stating that juvenile adjudications constitute prior felony convictions for purposes of sentence enhancement if

### III. DEJ: A Positive Addition to Juvenile Probation Options and an Improvement on Informal Supervision

#### A. The Benefits of DEJ

Changes made through DEJ could significantly impact the process by which large numbers of minors are adjudicated, making DEJ far superior to previous informal supervision in a number of ways. For example, it offers benefits in handling many felony offenses as well as cases formerly eligible for informal supervision. DEJ's requirement that a minor admit to the offense(s) charged encourages immediate accountability and provides for immediate consequences, both important components in rehabilitation.<sup>67</sup> By admitting to the petition at the first appearance, there is no delay for pretrial hearings, for plea bargaining, or for trial. Similar to a parent's desire to discipline his or her child for misbehavior immediately after it occurs, this enables the child to connect the bad behavior and the consequences. The rehabilitation of juvenile offenders should be addressed in similar fashion.

In the usual process of adjudicating a juvenile petition, the probation officer submits a police report to the prosecutor, who then files the petition. The matter proceeds much like adult court.<sup>68</sup> Absent DEJ, the time from arrest or citation to a court appearance can be a matter of days if the minor is currently in custody, or weeks if not.<sup>69</sup> If the minor denies the charges, the court may arrange a pretrial hearing during which the defense and prosecution attempt to resolve the

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the juvenile is sixteen years or older and the offense is listed in section 1170.12 of the Penal Code or section 707(b) of the Welfare and Institutions Code and the minor was adjudged a ward because of a 707(b) offense); CAL. PENAL CODE § 667(d)(3) (West 1999) (stating that a prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if the juvenile is sixteen years or older and the offense is a section 707(b) offense of the Welfare and Institutions Code or listed in section 667 of the Penal Code as a felony and the minor was adjudged a ward because of a 707(b) offense); see also CAL. WELF. & INST. CODE § 707(b). This is particularly true in light of the historical expansion of the 707(b) offense list and subsequent use of felonies on that list as strikes.

67. See generally David E. Arredondo, M.D., *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14.1 STAN. L. & POL'Y REV. 13, 16 (2003) ("From a child development perspective, the predictability and consistency . . . is often what is most important. If a child learns that his social environment will respond inconsistently, he is much more likely to continue a behavior in the hopes that he will 'get away with it this time.'").

68. See CAL. R. CT. 1410, 1412 (Deering Supp. 2003) (providing for the presence in court of the minor, parents, prosecuting attorney, an attorney for the minor, presentation of evidence, and typical trial and procedural protections).

69. CAL. WELF. & INST. CODE § 657(a)(1) (Deering 2001) (stating that upon filing a petition, the hearing shall be set within thirty days unless the minor is in custody, at which time the hearing must be within fifteen days of detention).

matter. If the minor admits the charges, the court schedules an uncontested jurisdictional hearing. If the case is not resolved by the pre-trial hearing or the minor's admission to the charges, the court calendars a trial. During the trial, the court sits as the trier-of-fact and attempts to ascertain the "jurisdictional facts" in a non-adversarial atmosphere.<sup>70</sup> When the matter is contested, the hearings can be continued for several weeks as attorneys attempt to negotiate a favorable resolution, similar to plea bargaining in adult court. The delay lengthens the time between the minor's offending behavior and the consequences for it, dulling the effect of punishment. Additionally, negotiating for lesser charges may lead the minor to believe that his behavior was not really "that bad" or that he is not responsible for his actions. Both the delay and the negotiating over charges negatively affect the minor's rehabilitation as the time from the commission of the offense extends and the true nature of the acts are distorted by plea-bargaining.<sup>71</sup>

On the other hand, with the use of DEJ, the decision regarding the minor's eligibility is made immediately after the probation officer receives the police report or "referral" and the prosecutor reviews the file in consultation with the probation officer. The probation officer speaks with the minor to determine if he is willing to admit the petition and participate in DEJ. The prosecutor should only file the charges that accurately describe the minor's conduct and that the prosecutor can prove. For example, in a typical felony theft from a commercial establishment, second degree burglary can be charged if the offender entered with the intent to steal.<sup>72</sup> However, the prosecutor could also charge possession of stolen property<sup>73</sup> (whatever "goods" were taken) and a simple petty theft (if there was no intent upon entry).<sup>74</sup> The theory behind charging all three is that through the court process, one or more of the charges will be admitted or proved and the attorneys can negotiate which ones.<sup>75</sup>

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70. See CAL. R. CT. 1412(a) (b); see generally SEISER & KUMLI, *supra* note 5, § 3.12 (explaining the informal and non-adversarial atmosphere juvenile court should follow in its procedures and hearings).

71. This distortion can occur because the prosecutor overcharged the case from the beginning or due to the minor's denial of any wrongdoing.

72. CAL. PENAL CODE §§ 459-460(b) (Deering 2001).

73. *Id.* § 496.

74. *Id.* §§ 484, 488.

75. Overcharging is a part of the adult criminal court process and allows for negotiation and plea bargaining. DEJ precludes overcharging since the minor must admit to the entire petition. The prosecutor must choose which charge is most accurate as in the afore-

In utilizing DEJ, the prosecutor should only file the most appropriate charge so the minor and his attorney can appear at the first court hearing prepared to admit the petition as accurately charged. Clearly, there is no guarantee prosecutors will file only appropriate, accurate charges. In practice, however, defense attorneys will not agree to have their client participate in DEJ and admit to petitions unless prosecutors file petitions that accurately reflect the illegal conduct. If expedited accountability is the goal, then it is in everyone's best interest to get the petitioned charges right the first time and get an immediate admission. There will be no need for the attorneys to seek continuances or delay the process by arguing over charges. The court and prosecutor can outline the program for the minor including the expectations, requirements, benefits, and drawbacks. The minor receives consequences for his actions swiftly and can begin his rehabilitation.

Additionally, in contrast to informal supervision and the normal adjudication procedure, with DEJ an up-front admission to the petition means certainty for victims and witnesses who might otherwise be called upon to testify later at trial. DEJ means after one court appearance the victim can have a restitution order in place and the minor can begin repaying his "debt." The victim does not have to return to court multiple times as hearings are continued for further "negotiating" or attempts to settle the matter. Nor do the victims and witnesses need to undergo the stress of testifying. Unlike the case of failed informal supervision where the prosecutor must try to prove the charges much later, with DEJ the witness or victim will not be forced to recall events that may have occurred up to a year prior. This simplification in the process and expedient resolution instills confidence and satisfaction with the justice system for victims of crime and the community as a whole.

Further, DEJ encourages "buy in" from the minor, his family, the prosecutor, the defense attorney, the probation officer, and the court. Everyone must believe and agree that the minor can and will complete his program of rehabilitation and everyone has some responsibility for his or her role in the outcome. If all parties must come to an agreement about the minor's participation, and the probation officer investigates the minor's suitability for DEJ, the minor's completion of the program is more likely. The odds of succeeding are greater because several people involved evaluate the likelihood of success from a

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mentioned theft scenario because defense attorneys will not permit their clients to admit to all the alternative charges as that would be unfair and excessive.

variety of angles. This commitment of all juvenile justice participants to the minor's success makes success far more probable. The prosecutor and probation officer can assess the likelihood of compliance. The minor and his family can decide if they believe the requirements are reasonable. The defense attorney can weigh whether the rehabilitative program is appropriate or too onerous and a set-up for failure. Under informal supervision, the probation officer, and sometimes the court, made these decisions without significant investigation and input from others. This collaboration is a vital component of DEJ.

DEJ's exclusion of felony offenses from sections 654 (probation-granted informal supervision) and 654.2 (court-granted informal supervision) ensures an admission to the charges and appropriate treatment of more serious offenses and more serious offenders. DEJ gives felony offenses and serious offenders the opportunity to be dealt with quickly, yet provides accountability and rehabilitation without the consequences of a criminal record and reporting to the Department of Justice.<sup>76</sup> The minor will hopefully be highly motivated to succeed since he benefits by successfully completing DEJ. Not only will the petition be dismissed, and the minor's records sealed (except as to future determinations of DEJ eligibility), but the arrest will "be deemed never to have occurred."<sup>77</sup>

## B. Possible Drawbacks and Criticism of DEJ

Clearly, supervision under a program of DEJ is only as good as the juvenile justice participants implementing it. There is potential for poor application of the statute and outright abuse. As with anything that calls for discretion, the judges and attorneys involved have to monitor the decisions made and the implementation process to ensure that it is administered appropriately and within the spirit of the statute.

The first potential problem is in the filing of petitions. Prosecutors must carefully and accurately file only the charge that most accurately reflects the conduct. The aforementioned burglary petition is an example. The prosecutor should determine if the minor entered the store with the intent to commit theft,<sup>78</sup> entered without intent,<sup>79</sup> or was only in possession of stolen property.<sup>80</sup> Charging the "lesser

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76. See CAL. WELF. & INST. CODE §§ 793(b), 793(c), 602.5 (Deering 2001).

77. *Id.* § 793(c).

78. CAL. PENAL CODE §§ 459-460(b) (second-degree burglary).

79. *Id.* §§ 484, 488 (petty theft).

80. *Id.* § 496 (possession of stolen property).

included” or “alternate” offenses is unnecessary and inappropriate if the minor’s conduct is clearly discernible and he is willing to admit to the accurate charges in order to participate in DEJ. To ensure that prosecutors file juvenile petitions appropriately requires a commitment by the District Attorney’s Office to follow this practice and oversight by defense attorneys and the court to keep them honest.

Another potential problem involves the process by which minors can be declared to have failed DEJ. Section 791(a)(4) of the Welfare and Institutions Code provides “the prosecuting attorney or the probation department, or the court on its own” can make a motion for judgment to be entered.<sup>81</sup> Also, section 793(a) provides “[i]f it appears to the prosecuting attorney, the court, or the probation department that the minor is not performing satisfactorily . . . the court shall lift the deferred entry of judgment and schedule a dispositional hearing.”<sup>82</sup> Taken alone, section 793(a) appears to give the prosecutor or probation officer the power to unilaterally declare the minor is not “performing satisfactorily,” which leaves the court no option but to lift the deferral and enter judgment.<sup>83</sup> This raises a potential separation of powers problem, since the representative of the executive branch (prosecuting attorney) should not be in the position of declaring probation failures and exercising a judicial function by forcing a dispositional hearing to be scheduled. No entity except the court should have the power to declare a minor to be a DEJ failure. Yet, this flaw need not be fatal.

For DEJ to be administered fairly, honoring the separate roles of all parties, section 793(a) must be read in conjunction with section 791(a)(4), which simply provides that the “prosecuting attorney or the probation department . . . may make a motion to the court for entry of judgment . . . .”<sup>84</sup> Because this provision allows for a motion to be made, it implies the court has discretion as to whether or not to grant the motion. If the court grants the motion, judgment is entered<sup>85</sup> and disposition scheduled; if the court denies the motion, the

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81. CAL. WELF. & INST. CODE § 791(a)(4).

82. *Id.* § 793(a).

83. *See id.* (stating that the court “shall lift the deferred entry of judgment and schedule a dispositional hearing”). This seems to preclude any discretion or investigation into why the minor is believed to not be performing satisfactorily and simply directs the court to proceed to disposition.

84. *Id.* §§ 793(a), 791(a)(4). In the author’s opinion, these two seemingly conflicting provisions can be reconciled by interpreting them together, leaving discretion with the court.

85. *Id.* § 791(a)(4).

minor remains on DEJ. The two provisions can be read together and interpreted to give the prosecutor and probation officer the ability to make a motion for failure, yet reserve for the court the discretion to grant or deny the motion. These portions of the statute require that the participants in the process act with fairness and judiciousness in assessing the minors' progress in the DEJ program and honor the spirit of the statute.

### C. Program Example: Successful Implementation of DEJ in Santa Clara County

The program currently in use in Santa Clara County, California exemplifies how DEJ can be implemented successfully. The District Attorney's Office aggressively screens potential cases for statutory DEJ eligibility, but also includes an assessment of the minor's suitability.<sup>86</sup> In discussing the case with the probation officer who brings the referral to the issuing District Attorney, both the prosecutor and probation officer are involved in the initial assessment of the minor's possible success. This process hopefully ensures that only appropriate minors are placed in the program and no unsuitable candidates are set up to fail.<sup>87</sup>

Additionally, Santa Clara County has implemented the unique practice of entering the program via a written "contract" between the minor and the court.<sup>88</sup> Once the minor agrees to participate in the program, he appears in court and admits the petition. He signs a document that details his probation conditions, thereby agreeing to follow them.<sup>89</sup> The court generally attempts to limit the number of

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86. Since implementing their DEJ process, two appellate cases have validated Santa Clara County's practice of a suitability assessment. See *In re Sergio R.*, 131 Cal. Rptr. 2d 160, 167 n.10 (Ct. App. 2003) (upholding the denial of DEJ for an eligible, but unsuitable minor, "Appellant seems to confuse two distinct essential elements of the deferred entry of judgment program: the first, *eligibility*, which is found if all of [the] 'circumstances' listed . . . are present; and the second, *suitability*, which requires a finding by the court that the minor will benefit from 'education, treatment, and rehabilitation . . . .'"); see also *Martha C. v. Superior Court*, 133 Cal. Rptr. 2d 544, 547 (Ct. App. 2003) (explaining that aside from eligibility the juvenile court "makes an independent determination after consideration of the 'suitability' factors . . . .").

87. Interview with Kurt Kumli, Supervising District Attorney, Juvenile Unit, Santa Clara County, in San Jose, Cal. (Oct. 12, 2002) (explaining that the DA issuing the petition considers the minor's previous referrals, family situation, school adjustment, substance abuse issues, and attitude).

88. Interview with Kurt Kumli, Supervising District Attorney, Juvenile Unit, Santa Clara County, in San Jose, Cal. (Dec. 16, 2002) and interview with Judge Raymond Davilla, Presiding Juvenile Judge, Santa Clara County, in San Jose, Cal. (Oct. 11, 2002).

89. *Id.*

probation conditions to five—search and seizure, school attendance, curfew, community service, and restitution—so that the minor clearly understands what is expected.<sup>90</sup> The judge also signs the form and explains to the minor that they now have an “agreement.”<sup>91</sup> By all accounts, the minors appear to “buy in” to this contract as it gives them some feeling of power, as if they “have a say” about what is expected of them and what they have agreed to, rather than having probation thrust upon them in the usual way.<sup>92</sup>

The juvenile court has designated two afternoons per week to the “DEJ Calendar.” On these afternoons, the court places on DEJ those minors who have been found both eligible and suitable for the program.<sup>93</sup> The court also hears reviews of minors already in the program.<sup>94</sup> Though the statute does not address specifically how the one to three year supervision period should be monitored, Santa Clara County has initiated a process of periodic reviews of the minor’s progress.<sup>95</sup> The minor appears in court one month after being placed in the program and then depending on his progress, in three-month or six-month intervals.<sup>96</sup> The reviews can be adjusted if the minor’s behavior warrants more frequent court appearances due to lack of compliance or to encourage better participation. The majority of minors do not require supervision for the entire three-year period allowed for under the statute. Rather, they are often deemed to have successfully completed the program at the end of one year.<sup>97</sup>

County officials estimate that over 1,500 minors have been placed on DEJ since July of 2000, and the vast majority successfully complete it.<sup>98</sup> “Success” is defined by satisfactory fulfillment of probation condi-

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90. *Id.* Probation conditions are kept to a minimum so the minor does not feel overwhelmed or that so much is asked of the minor that he or she feels doomed to fail. Examples of other conditions are counseling, no drugs and alcohol, chemical testing, and other things individual to the minor’s needs.

91. Interview with Judge Raymond Davilla, Presiding Juvenile Judge, Santa Clara County, in San Jose, Cal. (Oct. 11, 2002).

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id. Cf. Arredondo, supra* note 67, at 18–19 (explaining that with younger children, frequency of monitoring helps promote positive development and can give minors an excuse to say “no” to peer pressure).

96. Interview with Judge Raymond Davilla, Presiding Juvenile Judge, Santa Clara County, in San Jose, Cal. (Oct. 11, 2002).

97. *Id.*

98. Interview with Kurt Kumli, Supervising District Attorney, Juvenile Unit, Santa Clara County, in San Jose, Cal. (Jan. 15, 2003). The Santa Clara District Attorney’s office estimates between 88–92% successful program completion for the first three years.

tions such as good school attendance, completing counseling programs, cessation of drug use, and payment of restitution.<sup>99</sup> Santa Clara's restitution repayment rate is an unbelievable 98%.<sup>100</sup> Translated, that means nearly every single victim of a juvenile crime, whose perpetrator received DEJ, got reimbursed 100% for their loss. Additionally, the DEJ completion rate for court-ordered community service hours is 100%. In fact, several minors actually enjoyed their assigned public service project so much, they completed more hours than the court ordered them to do.<sup>101</sup>

The length of time it takes, one year or in rare cases longer, to complete DEJ is not the measure of success or failure. A minor is only deemed a "failure" if there are additional arrests, or a lack of progress by the minor that the court, prosecuting attorney, defense attorney, and probation officer believe warrant termination.<sup>102</sup>

## Conclusion

DEJ provides an opportunity for first-time juvenile offenders and eligible serious offenders to be rehabilitated in a unique and positive way. DEJ presents minors with the chance to repay their victims and the community, as well as to benefit from probation services without the stigma of a criminal record.

Further, the victims of crime and the community as a whole benefit. DEJ provides statutory assurance that more serious offenses will be dealt with through formal channels by ensuring that several juvenile justice participants rather than just probation officers review and make determinations about the most appropriate way to handle these cases.

The swift process of immediate admissions to petitions without numerous continuances benefits the minor's rehabilitation. Additionally, a speedy process assists victims who want resolution and closure, rather than on-going court hearings that draw out the process. DEJ can provide a sense of certainty and security for victims and society; early in the process, the perpetrator takes responsibility for the crime. Under this system, prosecutors will no longer struggle months down

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99. *Id.*

100. *Id.*

101. *Id.* Judge Davilla and Mr. Kumli both provided anecdotal information about minors who came to court for case dismissal and described their enjoyment of the public service work and why they did more hours than required of them.

102. *Id.*

the road to put together a case with old evidence and faulty, diminished witness or victim recollections.

DEJ's statutory requirements reduce some of the arbitrary discretion in decisions concerning when and what kind of petitions are filed, thus guaranteeing fair and consistent review of all minors who commit similar offenses. DEJ, with the emphasis on an early admission to a petition in its entirety,<sup>103</sup> encourages that prosecutors be honest in the charges they file and only charge what they can prove. Regular court reviews as utilized in Santa Clara County ensure that minors comply with probation and specifically follow through on payment of restitution. These procedures engender confidence in the juvenile justice system itself. The community can be confident that serious crime is dealt with seriously and with judicial and prosecutorial oversight.

Because DEJ is a consensus driven program of supervision, it can be misused or not used at all. Successful implementation requires collaboration by the prosecution, defense, probation, and court. Problems in assessment of minors and differences of opinion as to eligibility will likely arise, but a commitment to improving the administration of juvenile justice must drive the system's participants to be fair, honest, and true to the spirit of the statute. DEJ, as enacted through the passage of Proposition 21, implemented a progressive and effective program to assist in the supervision and rehabilitation of juvenile offenders. Unlike the most published, controversial provisions of the Act that the public feared would unfairly criminalize and punish juveniles, DEJ is a positive alternative to standard probation supervision that offers many benefits to juveniles, crime victims, and the community as a whole.

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103. *Id.* § 791(a)(3) (providing that the "minor admits each allegation contained in the petition").

