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Distinguishing Starfish from Cobras: The Importance of Discretion for the Juvenile Judge in Fitness Hearings

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INTRODUCTION

Story One:

> Walking on a beach after a receding tide, a tourist saw a native frantically picking up starfish and throwing them back into the ocean. The tourist, a worldly fellow, asked the native what he was doing. The native explained, "I am throwing these starfish back into the ocean so that they do not suffocate." The tourist asked, "There must be thousands of starfish on this beach and hundreds of miles of beaches. There are so many starfish. Can't you see that you can't possibly make a difference?" The native, with grim resolve, bent down and picked up yet another starfish. As he threw it back into the ocean, he replied, "It made a difference to that one, didn't it?"[1]

Story Two:

> Question: What is the difference between being bitten by an adult cobra and being bitten by a baby cobra? Answer: If you are the one bitten, nothing.

These two stories define the role of the bench officer in a juvenile delinquency court fitness proceeding[2] who, in cases involving offenses specified in various subsections of section 707[3] of the California Welfare

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* I would like to dedicate this Article to Justice Patricia Bamattre-Manoukian, California Court of Appeal, Sixth District, and to thank her for her encouragement and support for almost 25 years.

1. This is a paraphrasing of a story by Jack Canfield and Mark V. Hansen. Jack Canfield & Mark V. Hansen, *One at a Time, in* CHICKEN SOUP FOR THE SOUL 22-23 (Jack Canfield & Mark V. Hansen eds., 1993).

2. The objective guidelines for the conduct of a fitness hearing are listed in California Welfare & Institutions Code, § 707, and in California Rules of Court 1480 to 1483. *See* CAL. WELF. & INST. CODE § 707 (West 1984 & Supp. 1996); CAL. R. CT. 1480-1483.

3. CAL. WELF. & INST. CODE § 707(b), (d)(2), (e) (listing offenses). Although the lists of offenses in the subsections are similar, they are not identical, and there is

and Institutions Code,[4] is asked to separate starfish from cobras and to force the cobras to stand trial in adult court based on the five statutory criteria.[5]

At the present time, there is a desire on the part of some concerned entities within the juvenile delinquency system to change existing procedures. These reform proposals include:

- putting more law enforcement officers on the street
- housing minors who turn eighteen years of age in adult prisons
- mandating sanctions for the commission of public offenses
- eliminating confidentiality by requiring law enforcement officials to release names of arrested juveniles
- establishment of magnet schools
- holding parents accountable for public offenses committed by their children
- bypassing the juvenile court and letting the district attorney directly file criminal actions in adult court for juveniles fourteen years of age or older

All of these proposals are laudable. Most, if not all, already exist in one form or another. For example, there is already a provision on the books to open up to the public and to the media certain types of proceedings.[6] There are procedures to house unfit minors in county jails

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nothing apparent in the statutes that suggests a reason for the difference. *See id.*

4. All statutory citations are to the California Welfare and Institutions Code unless otherwise specified.

5. CAL. WELF. & INST. CODE § 707(a), (c) (West 1984 & Supp. 1996). The five criteria are:

(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 offense alleged in the petition to have been committed by the minor.

Id. § 707(c).

6. For example, § 676 allows media and public access to proceedings involving certain specified offenses. CAL. WELF. & INST. CODE § 676 (West Supp. 1996).

while they await trial in adult court.[7] Parents have long been responsible for damages caused by their children.[8]

Most bench officers realize that polemic makes good law review article titles but poor law. Juvenile fitness proceedings may involve as much, if not more, appeal to emotion as they do to logic.[9] There has always been a desire on the part of those interested in the juvenile delinquency field to review the juvenile court and probation department laws and procedures in a critical and intellectually honest manner and to ensure that the current method of making determinations of fitness or amenability

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7. Section 707.1(b)(1) states:

> The juvenile court, as to a minor alleged to have committed an offense described in subdivision (b), paragraph (2) of subdivision (d), or subdivision (e) of Section 707 and who has been declared not a fit and proper subject to be dealt with under the juvenile court law, or as to a minor for whom charges in a petition or petitions in the juvenile court will be transferred to a court of criminal jurisdiction pursuant to Section 707.01, or as to a minor whose case has been filed directly in or transferred to a court of criminal jurisdiction pursuant to Section 707.01, *may order the minor to be delivered to the custody of the sheriff upon a finding that the presence of the minor in the juvenile hall would endanger the safety of the public or be detrimental to the other inmates detained in the juvenile hall.* Other minors declared not fit and proper subjects to be dealt with under the juvenile court law, if detained, shall remain in the juvenile hall pending final disposition by the criminal court or until they attain the age of 18, whichever occurs first.

Id. § 707.1(b)(1) (emphasis added).

8. *See* CAL. CIV. CODE § 1714.1 (West Supp. 1996) (imposing civil liability on parents for minor's willful misconduct); *id.* § 1714.3 (imposing liability on parents for minor's discharge of firearm); Robertson v. Wentz, 232 Cal. Rptr. 634, 639 (Ct. App. 1986) (test for holding parent negligent for failure to supervise son); Reida v. Lund, 96 Cal. Rptr. 102, 104-05 (Ct. App. 1971) (holding parents negligent in supervising and controlling a child).

9. For example, in a fitness proceeding, a bench officer will be reminded that the minor is charged with offenses that, if found true in adult court, could require, under the current Rules of Court and sentencing provisions of the Penal Code, that the minor spend more than 25 years in prison. *See* CAL. PENAL CODE § 667.61 (West Supp. 1996); *id.* §§ 1170.84, 2933.1; CAL. R. CT. 421, 425, 426; CAL. PENAL CODE § 667.6 (West 1988 & Supp. 1996); *id.* §§ 1170.1, 1170.95 (West 1985 & Supp. 1996). It has been said that certifying a minor to the adult court starts him in "the first step of a legal and social journey to the human trash pile." Mortimer J. Stamm, *Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceedings, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law*, 62 KY. L.J. 122, 144-45 (1973). Use by counsel of such hyperbole is of no help to an experienced bench officer.

for treatment under the juvenile laws is the most efficacious. A review of juvenile delinquency procedures, or any legal process, is always healthy.

Currently, the mission of the juvenile delinquency court is the rehabilitation of the minor, and therefore the fitness hearing is an amenability hearing. Use of guidelines to supplement the five statutory criteria employed in juvenile fitness proceedings—whether mandatory or advisory—will aid the bench officer in effectively conducting a fitness hearing when the purpose of the guidelines is to attain the laudable goals of uniformity, predictability, and immediacy of outcome. Nonetheless, the legislative and executive branches of government must be aware that the courts will view any reform proposals in light of the separation of powers doctrine. All three branches of government must recognize that guidelines can create a general contempt for the juvenile courts when the public perceives that a mandated result is too lenient or too harsh in proportion to the offense in question or that the result otherwise amounts to a bill of attainder.[10]

MISSION OF THE JUVENILE COURT

The California Legislature defined the original jurisdiction of the juvenile court in a straightforward and simple manner:

> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.[11]

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10. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." 7 B.E. WITKIN & NORMAN L. EPSTEIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 416 (9th ed. 1988). Both the United States Constitution and the California Constitution prohibits such a statute. *Id.*

> Attainder, in former English law, [is a] penalty following judgment of outlawry or sentence of death for treason or felony. Attainder required the forfeiture of the property of a condemned person and of the person's civil rights to inherit or transmit property to an heir, a condition known as corruption of blood. A parliamentary act imposing attainder without a judicial trial was called a bill of attainder. An English statute of 1870 abolished attainder in its entirety. The U.S. Constitution in (Article III, section 3) provides that 'The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.' Similar provisions are included in the constitutions of some of the states. In other states all forfeiture of property because of criminal judgments against the owners has been abolished.

Attainder, ENCARTA MULTIMEDIA ENCYCLOPEDIA (Microsoft 1994); *see* U.S. CONST. art. III, § 3.

11. CAL. WELF. & INST. CODE §§ 602 (West 1984), 608 (West Supp. 1996). Section

The general purpose of the juvenile court is to simultaneously protect the public at large and each minor within its jurisdiction.[12] Specifically, the court seeks to preserve and to strengthen the familial relations of the minor, only removing the minor from the home and asserting custody when "necessary for his or her welfare or for the safety and protection of the public."[13] Minors requiring protective services will receive those services in the form of care, treatment, and guidance in a manner consistent with both the best interest of the minor and of the public.[14] Guidance, which may include punishment, will be given as appropriate for the particular minor and as consistent with the rehabilitative objectives of the juvenile court laws.[15] In enforcing, interpreting and administering the juvenile court laws, the juvenile court and other public agencies will consider, consistent with the dual purpose of the juvenile court, the safety and protection of the public and the best interests of the minor.[16]

Punishment, in the context of the juvenile court laws, means the imposition of sanctions upon minors, which include payment of fines, performance of community service without compensation, probation or parole, commitment to a detention or treatment facility, or commitment to the Department of the Youth Authority.[17] Yet, punishment under these laws does not include retribution.[18]

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608 provides that:

> In any case in which a person is alleged to be a person described in [Welfare & Institutions Code] Section 601 or 602, or subdivision (a) of Section 604, and the age of the person is at issue and the court finds that a scientific or medical test would be of assistance in determining the age of the person, the court may consider ordering an examination of the minor using the method described in "The Permanent Mandibular Third Molar" from the Journal of Forensic Odonto-Stomatology, Vol. 1: No. 1: January-June 1983.

Id. § 608.

12. CAL. WELF. & INST. CODE § 202(a) (West Supp. 1996)

13. *Id.*

14. *Id.* § 202(b).

15. *Id.*

16. *Id.* § 202(d).

17. *Id.* § 202(e).

18. *Id.* The concept of retribution is an ongoing conundrum in juvenile court. As defined in the common dictionary, retribution generally may mean either "something justly deserved; recompense" or "something given or demanded in repayment, especially punishment." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992). In a theological context, retribution means "punishment or reward distributed in a future life based on performance in this one." *Id.* From the minor's point of

> One of the principal tasks of a democratic society is to nurture its children to a successful, productive adult life. In the United States we rely primarily upon the family to provide to children most of what they need. . . .
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> Other institutions participate in the socialization process, notably schools, churches, and recreational groups, but the fundamental authority for child rearing resides with a child's family.
>
> When the family fails or is unable to rear its child within acceptable norms, society has an interest in intervening to achieve its own goals. Dysfunctional families which are unable to raise their children within societal norms threaten the viability of the order.
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> Our legislators and courts have recognized the importance of responding to family dysfunction. Numerous laws detail society's response to a family which cannot control a child's delinquent behavior, a family which cannot adequately provide for a child, a family which cannot protect a child from abuse, or a family which cannot or refuses to educate its child.
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> The ultimate authority for the resolution of these problems is the juvenile court. The person given the responsibility for carrying out the mandates of the legislature is the juvenile court judge. There are many other persons and institutions the child and family may encounter prior to reaching the court, but if all else fails, the legislatures in the United States have entrusted the authority to address the problems facing dysfunctional families and children to the juvenile court.[19]

THE FITNESS HEARING IS AN AMENABILITY HEARING AND MUST FOCUS ON THE MINOR, NOT THE CHARGED CRIME

The fitness hearing is the procedure by which the courts are mandated to implement the legislature's determination that certain juveniles, as a result of personal lifestyle choices, are no longer amenable to the services of the juvenile court. It is a "critically important" step of the proceedings affecting significant constitutional rights of the minor.[20] In *Kent v. United States*, the United States Supreme Court established threshold requirements for a fitness hearing under the Due Process Clause of the Fourteenth Amendment.[21]

The decision as to whether a minor in California can benefit from the resources available to the juvenile court is governed *exclusively* by section 707 of the California Welfare and Institutions Code.[22] The *Kent* court noted that "[i]t is clear beyond dispute that the waiver of jurisdic-

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view, any punishment is retribution. Retribution, as used in the juvenile delinquency arena, probably means punishment that is imposed without consideration as to whether it is designed to rehabilitate the minor.

19. Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1, 1 (1992) (miscellaneous footnotes, citations, and internal quotations omitted).

20. *See* Kent v. United States, 383 U.S. 541, 556 (1966).

21. *Id.* at 560-62; *see* U.S. CONST. amend. XIV.

22. *See* CAL. WELF. & INST. CODE § 707 (West 1984 & Supp. 1996).

tion is a critically important action determining vitally important statutory rights of the juvenile."[23] The juvenile court may waive its original jurisdiction *only* over those minors it finds, after a fitness hearing, could not benefit from the resources available to the juvenile court.[24] As the California Supreme Court stated, "The certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.'"[25]

Section 707[26] and the California Rules of Court 1480 to 1483 provide the procedures required for a fitness hearing.[27] Under Rule 1480, subsection (a), the prosecuting attorney may request a fitness hearing "[i]f a child who is the subject of a petition under section 602 was 16 years of age or older at the time of the alleged offense, or had reached the age of 14 but not yet reached the age of 16 and is alleged to have committed an offense described in section 707(d)(2)."[28]

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23. *Kent*, 383 U.S. at 556.

24. People *ex rel.* Jesus G. v. Superior Court, 139 Cal. Rptr. 846, 847-48 (Ct. App. 1977).

25. People *ex rel.* Ramona R. v. Superior Court, 693 P.2d 789, 795 (Cal. 1985) (quoting Note, *Separating the Criminal from the Delinquent: Due Process in the Certification Procedure*, 40 S. CAL. L. REV. 158, 162 (1967)). The court made this statement in the context of a murder case. *Id.* A minor, if tried and convicted of first degree murder as an adult, could receive life or a capital sentence. CAL. PENAL CODE § 190 (West Supp. 1996). If found fit, a minor "convicted of a felony and committed to the [California Youth Authority] shall be discharged when such person reaches his 25th birthday." CAL. WELF. & INST. CODE § 1771 (West 1984).

> The [protection] therefore, is that petitioner—then a boy of 16—was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the "exclusive" jurisdiction of the Juvenile Court. In these circumstances, considering particularly that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.

Kent, 383 U.S. at 557.

26. CAL. WELF. & INST. CODE § 707.

27. CAL. R. CT. 1480-1483.

28. CAL. R. CT. 1480(a). The required notice for a fitness hearing is at least five judicial days. *Id.* 1480(b).

The statutory framework of section 707 segregates minors into several categories and assigns the burden of proving fitness or unfitness to one party or the other, depending on the age of the minor and the nature of the crime.[29]

A minor sixteen years of age or older will be presumed fit under section 707(a) when the charged offense is any offense other than those listed in subsection (b).[30] A minor fourteen years of age or older, but under the age of sixteen, will be presumed fit, under subsection (d), when the charged offense is any offense listed in subsection (d)(2).[31] In a fitness hearing under either scenario, the prosecuting attorney has the burden of proving that the child is unfit.[32]

Under subsection (c), a minor sixteen years of age or older will be presumed unfit when the charged offense is any offense listed in subsection (b).[33] A minor fourteen years of age or older, but under sixteen years of age, will be presumed unfit under subsection (e), when the charged offense is any murder offense described in section 707(e) (1) to 707 (3)(e)(3).[34] Under these provisions, the burden of rebutting the presumption of unfitness rests with the child.[35]

The party who has the burden of proof then presents evidence on the issue of fitness or unfitness based upon the following statutory criteria:

(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.

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29. CAL. WELF. & INST. CODE § 707. "In a fitness hearing under section 707(a) or 707(d), the burden of proving that the child is unfit shall be on the petitioner, by a preponderance of the evidence." CAL. R. CT. 1482(a).

"In a fitness hearing under section 707(c) or 707(e), the child is presumed to be unfit, and the burden of rebutting the presumption shall be on the child, by a preponderance of the evidence." *Id.* 1483(a). Because the minor is presumed unfit, it is his burden, by a simple preponderance of the evidence, to prove that he is "amenable to the care, treatment, and training program available through the facilities of the juvenile court." *Ramona R.*, 693 P.2d at 790 (citing California Rule of Court 1483(c)(4)).

30. CAL. WELF. & INST. CODE § 707(a); *see id.* § 707(b). The subsection (b) offenses include murder, arson, armed robbery, assault, rape, kidnapping, and carjacking. *Id.* § 707(b).

31. *Id.* § 707(d)(1); *see id.* § 707(d)(2). The offenses in subsection (d) are virtually the same as those in subsection (b0. *Id.* § 707(d)(2).

32. *See supra* note 29.

33. CAL. WELF. & INST. CODE § 707(c); *see id.* § 707(b); *see supra* note 30.

34. CAL. WELF. & INST. CODE § 707(e); *see id.* § 707(e)(1)-(3).

35. *See supra* note 29.

(5) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.[36]

Section 707 states that the minor will be presumed unfit "unless the juvenile court concludes, based upon evidence, which evidence *may* be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment and training program available through the facilities of the juvenile court based upon an evaluation of . . . [the five] criteria."[37] Thus, although a minor may present extenuating or mitigating circumstances to the court as part of the evidence to rebut the presumption of unfitness, a minor is not required to do so.

The procedures described in section 707 are extremely important. Findings of unfitness and fitness have been overturned by writ because the juvenile court did not closely follow the section's dictates. For example, in *People ex rel. James B. v. Superior Court*,[38] the trial court's statement of reasons for the finding of amenability was "directly contrary to the specific statutory procedure governing fitness hearings, constituting an act in excess of jurisdiction amenable to correction by extraordinary writ."[39] In *People ex rel. Zaharias M. v. Superior Court*,[40] the trial judge found that the minor's participation in a bank robbery was a heinous and sophisticated offense.[41] The court refused to follow the statutory mandate, however, stating instead that it had "to look to the totality of the situation."[42] In the grant of the People's petition for an extraordinary writ, the appellate court found that "the trial court completely ignored [the statutory and case law] precedents and instead fashioned its own 'gestalt' approach to ruling on a fitness motion."[43]

The letter and spirit of section 707 seem to suggest that the only issue of a fitness hearing is the amenability of the minor to rehabilitation under the juvenile court. The California Supreme Court stated: "Whether

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36. CAL. WELF. & INST. CODE § 707(a).

37. *Id.* § 707(c) (emphasis added). The Welfare and Institutions Code defines "shall" as mandatory and "may" as permissive. *Id.* § 15.

38. 175 Cal. Rptr. 733 (Ct. App. 1981).

39. *Id.* at 268. Specifically the trial court stated, "'I've read the police report and the dispositions and procedures and available remedies and sources of remedies that are present in Juvenile Court; they will suffice, and have not been totally exhausted.'" *Id.* at 266 (quoting the record of the fitness hearing).

40. 25 Cal. Rptr. 2d 838 (Ct. App. 1993).

41. *Id.* at 839.

42. *Id.*

43. *Id.* at 840.

the youth committed the act alleged in the petition is not the issue in [a section 707 hearing]; the sole question is whether he would be amenable to treatment in the event that he is ultimately adjudged a ward of the court."[44] Alibi evidence is therefore irrelevant to and inadmissible at a fitness hearing because a fitness hearing is not a culpability hearing; it is strictly an amenability hearing.[45]

It is important to remember that, as a fundamental concept, courts must treat juveniles as individuals who must receive proper diagnosis and treatment of psychological problems in order to adjust to society.[46] If a minor is amenable and the juvenile court can be rehabilitate the minor while protecting the public, all of the goals of the law will have been accomplished.[47] In fact, given that a juvenile court exists, an amenable minor may have a right to rehabilitative treatment.[48]

If, on the other hand, a minor is not amenable and open to the care, treatment, and training of the juvenile court, then the public cannot be protected upon the minor's release from the juvenile facilities. Under these circumstances, the court would be wise to send the minor to adult court to face adult consequences. One must remember that rehabilitation and public safety are consistent goals. Rehabilitation is a sure means to the important end of public safety.

Section 707 examines the concept of amenability in divisible parts. Graphically, section 707 establishes a "pie" of amenability containing five "slices" of criteria. One must view each of these "slices" as a part of a

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44. People v. Chi Ko Wong, 557 P.2d 976, 988 (Cal. 1976); *see also* People *ex rel.* James B. v. Superior Court, 175 Cal. Rptr. 733, 735 (Ct. App. 1981) ("The findings required by section 707 are a mandatory precondition to a determination of amenability.")

45. People *ex rel.* Rodrigo O. v. Superior Court, 27 Cal. Rptr. 2d 796, 800 (Ct. App. 1994).

46. *In re* William M., 473 P.2d 737, 748 (Cal. 1970).

47. CAL. WELF. & INST. CODE § 202(a) (West Supp. 1996) ("The purpose of [Juvenile Court Law] is to provide for the protection and safety of the public and each minor under [its] jurisdiction . . . .").

48. Charles R. v. Superior Court, 168 Cal. Rptr. 284, 291 (Ct. App. 1980). For a juvenile to have this right may depend on fitness. *See id.*

whole, rather than in isolation. Each criterion[49] should be analyzed as it relates to the overall concept of amenability to treatment.

To truly understand how specific criteria can be used to examine a larger, more holistic concept, consider criterion number five, the circumstances and gravity of the offense.[50] Viewing this criterion in isolation, with no connection to the overall purpose of the statute, a minor would never be able to overcome it. Viewed without regard to amenability, a minor's attorney would have to persuade a fitness hearing judge that murder, rape, robbery, and all other crimes listed in section 707 are neither grave nor serious. Obviously, an attorney could never accomplish such a task, and thus, a fitness hearing would become a mere formality. The legislature did not intend such a result. In *Edsel P. v. Superior Court*,[51] the court wrote:

> The Attorney General maintains that . . . the evidence presented against petitioner at the fitness hearing was "overwhelming" and in no event would he be able to overcome "[t]he circumstances and gravity of the offenses alleged to have been committed by [him]. The Attorney General argues, in other words, that even if petitioner has overcome the presumption that he is unamenable to the care, treatment, and training program available through the facilities of the juvenile court based upon evaluation of the first four of the five criteria specified in subdivision (c) of section 707, he cannot meet the fifth criteri[ion] i.e., "the circumstances and gravity of the offenses alleged to have been committed by the minor"—because it is indisputable that the offenses alleged against him are among the grave offenses listed in subdivision (b) of the statute. *If we were to accept this reasoning, which we do not, all fitness hearings involving a minor charged with any of the offenses enumerated in sub-division (b) would reach a foregone conclusion and thereby be deprived of purpose. Such a result is impossible to reconcile with the language of section 707, subdivision (c), which clearly does not create a mandatory or irrebuttable presumption.*[52]

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49. The Welfare and Institutions Code does not define the word "criterion." The dictionary, however, defines it as "[a] standard, rule, or test on which a judgment or decision can be based." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 314 (3d ed. 1992).

Section 707 states that a bench officer shall examine the issue of amenability by separating the whole into parts and then using these parts as a standard of reference, or a yardstick, whether the minor is amenable to the juvenile court's care, treatment, and training. *See* CAL. WELF. & INST. CODE § 707(a) (West 1984 & Supp. 1996).

50. CAL. WELF. & INST. CODE § 707(a)(5) (West 1984 & Supp. 1996); *see supra* text accompanying note 36.

51. 211 Cal. Rptr. 869 (Ct. App. 1985).

52. *Id.* at 876-77 (emphasis added in part) (quoting People v. Superior Ct., 173 Cal. Rptr. 788, 794 (1981) (some alterations in original)).

It would seem, therefore, that section 707 does not ask the court to decide whether the crime charged is "fit" for juvenile court. Rather, the inquiry is whether the minor himself is "fit" for juvenile court. In essence section 707 establishes a "minor-focused" approach for determining fitness, rather than a "crime-focused" approach.

A crime-focused approach to determining fitness suffers from a second fatal flaw. Consider, for example, a case in which the codefendants are equally culpable. Under a crime-focused approach, an analysis of the circumstances and gravity of the crime would determine the fate of all codefendants without inquiry into the amenability of each individual defendant. If Bench Officer A found a codefendant unfit using the crime-focused test, it would no longer be appropriate to allow him to determine the fitness of the remaining codefendants because Bench Officer A would have already decided the facts under criterion five for the particular crime committed. Recusal would be mandatory. Under the minor-focused approach, however, recusal would not be necessary because the bench officer would view each defendant individually to determine amenability.

In conclusion, a fitness hearing is not a preliminary hearing. Its purpose is not to determine whether the case has been overcharged. Rather, a fitness hearing is used both to determine whether a minor is amenable to rehabilitation and to consider evidence in mitigation *as it relates to the amenability of the minor*, not as it relates to the crime in isolation. Criterion five, viewed in the broad context of determining a minor's amenability to care, treatment, and training, asks the court to examine the circumstances in order to determine whether something can be learned about the minor's amenability. For example, the court may ask: "Was the crime committed in such a cold, callous, and vicious manner that it speaks against the possibility of the minor being rehabilitated?" or "Do the circumstances of the crime suggest that the minor is so antisocial and disturbed that any efforts to reform his character through the juvenile facilities would be fruitless?" The court may find, however, that the circumstances surrounding the crime demonstrate that the minor will continue to benefit from the juvenile court's services. In this case, the court must inquire whether the facts depict an individual who can be rehabilitated despite his flaws. These questions are true to the language and spirit of section 707 and may assist a bench officer in determining, in a principled and rational way, which children are fit for juvenile court treatment.

JUDGES ARE THE GATEKEEPERS OF THE COURTHOUSE UNDER THE DOCTRINE OF SEPARATION OF POWERS

In a crime-focused system, giving the prosecutors the ability to file juvenile matters directly in adult criminal court will create problems with the doctrine of separation of powers.

The California Supreme Court considered a similar separation of powers issue in *People v. Tenorio*.[53] In *Tenorio*, the court invalidated section 11718 of the Health and Safety Code,[54] which prohibited a court from dismissing an allegation against a defendant unless the district attorney requested it.[55] The court held that this statute violated the separation of powers doctrine under the California Constitution because it gave prosecutors the power to foreclose the exercise of judicial power.[56] The *Tenorio* court explained that "[t]he judicial power is compromised when a judge, who believes that a charge should be dismissed in the interests of justice, wishes to exercise the power to dismiss but finds that before he may do so he must bargain with the prosecutor."[57]

Similarly, the California Supreme Court in *Esteybar v. Municipal Court*[58] held that California Penal Code, section 17 (b)(5), as it was then written, violated the doctrine of separation of powers.[59] At the time, section 17(b)(5) of the Penal Code prohibited a magistrate from reducing a felony to a misdemeanor unless the prosecuting attorney consented to the reduction.[60] The *Esteybar* court invalidated this statute, reasoning that "the exercise of a judicial power may not be conditioned upon the approval of either the executive or legislative branches of government."[61]

The Third District of the California Court of Appeal relied on *Esteybar* in its *Malone v. Superior Court*[62] decision. In *Malone*, the prosecution filed a complaint wherein the wobbler charges were deemed misdemean-

53. 473 P.2d 993 (Cal. 1970).
54. *Id.* at 997.
55. *See id.* at 993.
56. *Id.* at 996-97.
57. *Id.* at 996.
58. 485 P.2d 1140 (Cal. 1971).
59. *Id.* at 1147.
60. *Id.* at 1142 n.2.
61. *Id.* at 1145.
62. 120 Cal. Rptr. 851 (Ct. App. 1975).

ors under section 17(b)(5) of the Penal Code.[63] The People then obtained felony indictments on these charges and dismissed the misdemeanor complaints.[64] The court of appeal held that this procedure was unlawful and therefore prohibited proceedings on the indictment.[65] The court held that after the magistrate determined the offenses to be misdemeanors under subsection (5), "the prosecutor's *ex parte* dismissal of the action and initiation of a new felony proceeding would effectively frustrate the magistrate's judicial act. Were it permissible, that conduct would unconstitutionally invade the magistrate's judicial authority."[66]

Recent appellate decisions under the "Three Strikes Laws" have generated a cornucopia of case law that will aid all parties in addressing the question of separation of powers by circumventing the juvenile court in certain cases.[67]

In *People v. Vessell*,[68] the court of appeal held that the three strikes laws do not prevent a trial judge from sentencing a wobbler as a misdemeanor under section 17(b)(1) of the California Penal Code.[69] The court of appeal rejected the prosecution's contention that section 667(c), which forbids probation, suspension of sentence, and commitment to any facility other than state prison in a three strikes case, supersedes the trial court's discretion under section 17(b)(1).[70] The court of appeal in *People v. Trausch*[71] and *People ex rel. Perez v. Superior Court*[72] reached similar conclusions.[73]

A "direct filing" scheme without a judicial check on prosecutorial discretion raises questions of fairness and potentially infringes on the equal protection rights of minors similarly situated, but prosecuted in a different court. For example, assault by means of force likely to produce great bodily injury[74] is an offense under section 707 of the Welfare and Insti-

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63. *Id.* at 852-53.
64. *Id.* at 853.
65. *Id.* at 854.
66. *Id.*
67. The "Three Strikes" cases in the following discussion are all very recent and may be subject to further action by the California Supreme Court. *See generally* Janis R. Hirohama, THREE STRIKES LAW CASE SUMMARY (1966) (discussing many of the following cases).
68. 42 Cal. Rptr. 2d 241 (Ct. App. 1995).
69. *Id.* at 247-48; *see* CAL. PENAL CODE § 17(b)(1) (West 1988 & Supp. 1996).
70. *Vessell*, 42 Cal. Rptr. 2d at 247-48; *see* CAL. PENAL CODE §§ 17(b)(1), 667(c) (West 1988 & Supp. 1996).
71. 42 Cal. Rptr. 2d 836 (Ct. App. 1995).
72. 45 Cal. Rptr. 2d 107 (Ct. App. 1995).
73. *See id.* at 113-17; *Trausch*, 42 Cal. Rptr. 2d at 839-40.
74. *See* CAL. PENAL CODE § 245(a)(1) (West 1988 & Supp. 1996).

tutions Code.[75] On the other hand, there are many types of misdemeanor assaults that do not fall within the ambit of section 707, such as those outlined in Penal Code sections 241(a) or 241(b).[76] As the California Supreme Court noted, "'When the decision to prosecute has been made, the process which leads to acquittal or sentencing is fundamentally judicial in nature.'"[77] Any "direct filing" regimen should, therefore, have a judicial proceeding similar to section 17(b)(5)[78] at the outset to determine whether the matter is more suitable for the juvenile court.

OTHER CONSIDERATIONS

It must be kept in mind that certain and immediate consequences for criminal behavior are vital to rehabilitate delinquent juveniles. Normally, there are very few pretrial motions in juvenile cases, and cases with serious charges, such as robbery or burglary, are routinely tried two to three weeks after the arrest of a minor. Felony trials usually take no more than two hours. Raising the stakes for juvenile defendants will necessarily result in more pretrial search and seizure motions, more preliminary examinations, more motions to dismiss, more jury trials, and longer trials.[79] All of these will lengthen the time it takes to move a ju-

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75. *See* CAL. WELF. & INST. CODE § 707(b)(14) (West 1984 & Supp. 1996).

76. *See* CAL. PENAL CODE § 241(a) (designating simple assault as a misdemeanor), 241(b) (designating assault against certain state and municipal officers as a misdemeanor) (West 1988 & Supp. 1996).

77. People *ex rel.* Greer v. Superior Court, 561 P.2d 1164, 1169 (Cal. 1977) (quoting People v. Tenorio, 473 P.2d 993, 996 (Cal. 1970)). Recognizing the importance of the judicial role, one court stated:

> This court's decision is that our legal system should be permitted to run its normal course by appropriate submission of the issue of guilt or innocence to a jury selected from the community rather than leaving that issue to the disposition of the District Attorney as final arbiter of the case. If this court is mistaken in this perception of its duty under the law, and if in fact its obligation is to merely perform the ministerial function of giving "rubber-stamp" approval to the District Attorney's decision to abandon this murder prosecution, let an appellate court so instruct this court.

People v. Angelo Buono, No. A354231 (Cal. Super. Ct. filed July 21, 1981) (order of Hon. Ronald M. George denying People's motion to dismiss in the Hillside Strangler case).

78. *See* CAL. PENAL CODE § 17(b)(5) (West 1988 & Supp. 1996).

79. In *In re Javier A.*, the court of appeal concluded that although the minor had been denied his inviolate right to a jury trial under § 16 of Article I of the California Constitution, stare decisis required the court to uphold the denial of that right to a

venile case through the courts. While it is true that substituting administrative tribunals for judicial ones may save judicial resources, such a plan is costly to local governments. Therefore, before eliminating one method and instituting another, public officials must analyze all potential consequences and make value judgments concerning the impact on county finances.

Public officials should consider specific reforms. These include:

Increasing the number of probation officers.

Experience has shown that intense supervision of juvenile probationers is useful and probably less costly than incarceration. The Orange County Juvenile Probation Department reported good results with its "8% Program," in which the Department uses a large portion of resources on the eight percent of the juvenile population causing the largest amount of crime. The Santa Clara County Juvenile Probation Department's "FOCUS" Program is noting similar results. An increase in officers will enable juvenile probation departments to more effectively monitor the progress of minors sent home on probation through electronic monitoring and unannounced home visits for drug testing.

Developing diversion programs.

The war on the streets should be fought on the streets as much as possible and not in the courts unless necessary. Local police departments and community groups have been developing innovative programs to keep 400 to 500 delinquents a year out of the court system. For example, the City of Sunnyvale Department of Public Safety and the Santa Clara County Probation Department have developed the Sunnyvale Youth Outreach Program. In this program, professionals interview young offenders who participate in educational programs at the Department of Public Safety. Parents and family members are also involved. The focus is on accountability and responsibility rather than on punishment.

Increasing the capacities of the local detention facilities.

At-risk minors need to know that they will receive certain and immediate punishment for criminal behavior or probation violations.

Developing relationships with schools to provide better education for minors.

Grade schools and high schools should develop programs in ethics and morality.

Consolidate family, delinquency, and dependency courts.

Most observant judges believe that children become delinquent for reasons that are usually attributable to their surroundings, such as a lack

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minor in delinquency proceedings. 206 Cal. Rptr. 386, 414-16 (Ct. App. 1984).

of parental supervision, having parents who are negative role models, or being raised in an environment that did not include education in accountability and responsibility. Other reasons may include substance abuse, domestic violence, or the minors having been the victim of a violent crime. A model developed by Judge Leonard P. Edwards proposes unified family courts, in which a particular family would be overseen by one judge, one prosecutor, one defense lawyer per family member, and one team of public sector providers. This model would ensure the accountability of all people who affect a child.[80]

Additionally, the California Center for Judicial Education and Research is now making domestic violence a mandatory component of its judicial training at the New Judge Orientation and the Judicial College. Judge Peggy F. Hora of Alameda County has developed an annual one-week program on alcohol and other drugs to educate judges about the relationship between substance abuse, treatment, and domestic violence provided to judges as a part of continuing judicial education.

Realizing that William E. Bennett is right.

In a recent speech, Martin Luther King III said, "We must get a handle on our children or they are going to wipe us out."

We must recognize that America has, to some degree, lost its moral compass. Right-thinking people need to work to re-establish traditional community leadership in the schools, law enforcement departments, chambers of commerce, churches, community service organizations, and youth groups like the Girl Scouts and Boy Scouts, little league, and police athletic leagues.

CONCLUSION

On occasion, starfish that are thrown back into the ocean may propagate in an oyster bed and eventually wipe it out. However, a cobra may, on occasion, provide a valuable service to a community by driving away rats, which can carry bubonic plague. Fitness proceedings should continue to focus on the amenability of the minor in question and not on the charged offense. To that end, judges should continue to have their current discretion to determine fitness or unfitness for juveniles under section 707 of the California Welfare and Institutions Code.

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80. *See* Edwards, *supra* note 19.