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Dealing with the Problem: Discretion within the Court System

David Disco

Lisa Greer

Socrates Manoukian

PANEL TWO

*Dealing with the Problem: Descretion within the Court System**

DAVID DISCO, ESQ.

David Disco received his Bachelor of Arts and J.D. from U.C.L.A. Mr. Disco presently serves as a Deputy District Attorney in Los Angeles County. His current assignment is Head Deputy of the Juvenile Division. Previously, his assignments have included Head Deputy of the Major Fraud Division, and Head Deputy of the Van Nuys, Norwalk, Pomona, and Pasadena Branch Offices.

With the District Attorney's Office, Mr. Disco is the Program Director of Legal Information for Law Enforcement, a closed circuit television series for the legal education of law enforcement personnel. He is also the Project Director and Executive Producer of a series of four films on urban justice, funded by the Model Neighbor Program of Los Angeles County and presented by the Los Angeles County District Attorney. Mr. Disco frequently lectures for the California Continuing Education of the Bar and the Los Angeles County District Attorney's Office. In 1994, he sat as a member of the Juvenile Justice Advisory Committee of the Little Hoover Commission.

I'd like to say that I think this symposium is a great idea. I've learned a lot this morning from the panelists, and I think, because of the way juvenile justice is being considered throughout this country, that symposia like this are going to be important and on the cutting edge of what change is going to happen in the juvenile justice system itself. Before I get into my materials, I just parenthetically want to note that a lot of people say that the devil is in the details, which it is. We can talk about reformation of youth. We can talk about dealing with serious offenders. Then we have to talk about how we are going to do that.

I have been involved with this for about nine or ten months now on a Juvenile Justice Task Force that has been appointed to deal with the whole question of juvenile justice in the State of California. One thing

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* Special thanks to Timothy Perrin, Associate Professor of Law, Pepperdine University, for his participation as a moderator for this panel and his contribution in making this symposium a success.

that has impressed me in this process is that everyone treats this seriously, comes to it with a lot of knowledge, with points of view that are different, and we are trying to work together to resolve very, very tough issues. With that in mind, let me talk just a little about statistics in California. In 1993—this is from the Attorney General's Report of Crime Statistics—juveniles consisted of fourteen percent of the population in the State of California; however, in terms of arrest data, they were arrested for twenty-three percent of homicides and twenty-seven percent of robberies. In 1994—this is moving to a different set of statistics—the Los Angeles Police Department indicated in its arrest of juveniles that seventeen and one-half percent of homicide arrests were for juveniles. These are people under the age of eighteen, and I think this is disturbing and consistent with a lot of data that has been derived from academic research. Twenty-four percent of the robberies were committed by people under the age of eighteen. This does show and underscore what academics, such as Peter Greenwood of Rand, have said: Juvenile violence is increasing and there is more lethality to it.

Just to tell you what we do in the Los Angeles County District Attorney's Office, and the types of crimes that we handle with juveniles, let me go through a series of statistics, and when I finish with this, that's the end of statistics. Then I will be talking about some of our proposals.

In 1993, we filed 28,000 cases against juveniles; 18,000 of those cases were for felonies. There were 216 murder cases, 2800 robbery cases, and 1000 residential burglaries. In 1995, we filed 198 murder cases against juveniles, 3000 robberies, and 1000 residential burglaries. It seems that you would say that we are winning the crime war, that the figures are going down. What I left out was 1994. In 1994, it bottomed out at 177 homicides and 2800 robberies. This is the trough, which has been referred to in the academic literature in terms of the people in the crime-prone ages from fourteen through mid-twenties, which has bottomed out. We are now seeing a rise again in our statistics. So, if there is more lethality and there are more of these crimes, what are we to do?

Well, there are two things we have to do: one is to deal with those who commit violent crime and, secondly, reduce the number of people that are prone to follow a path that's going to lead them to commit violent crime. Frequently, I think the debate on this issue is one or the other, and I think some of those trying to deal with this go down a wrong path. We have to involve ourselves looking at both of these questions, and some of the speakers this morning, and the Attorney General at lunch, reminded me that, when we are talking about this, we should have a sense of humility. The juvenile justice system is not going to solve the problems that we have with youth in America today. It's going to take institutions, the family, law enforcement, community agencies, and church. It takes everyone. So, what we are talking about is one social institution and how it is approaching the juvenile crime problem.

Now, in the materials that I forwarded to the school, our office has put forward a proposal to deal—and change dealing—with juvenile crime as we now know it. First, we proposed to modify the way we deal with first-time offenders. Many first-time minor offenders are brought into juvenile court. They are filed on for an offense, a misdemeanor. They will get a lawyer. They are then introduced into the gameplaying process of criminal litigation. I don't think that is a particularly productive way to deal with somebody for the first time in a criminal proceeding. I think the way to deal with it is the way they did before the *Gault*[1] decision imposed a certain rigidity on the juvenile court. This was before lawyers got involved, and it was before district attorneys and public defenders and private attorneys got involved. Our approach is to have misdemeanors in California dealt with in what we call an informal court setting. This would be a setting where a person who committed a misdemeanor would be cited, given a ticket, and would come to this informal court. In this court, there could be a judge, a referee—whomever. And there would be no lawyer there. A concomitant of that is that there would be no custody sanctions, no going to camp, no going to C.Y.A., none of that. Their sanctions would be sanctions that are meaningful to this first-time offender. Those sanctions would be restitution, community service, and, to a lot of young people one of the most significant things, suspension of the driver's license if they fail to comply with the orders of the court.

In addition, we believe that this court, this simple court process, should also involve the parent being cited in. The parent would be cited in, and the parent would be asked to follow the orders of the court in terms of parenting classes and other kinds of counseling programs. There would be no custody involved at all. Now, you could say, well, what happens if you don't have the hammer of custody over a specific individual? Well, I think you'd get compliance. And studies show that over seventy percent of juveniles who come in contact with the criminal justice system don't return again. This is regardless of whether they've had intensive counseling, whether they've had contact with the police department, whether they have been filed on.

Also, statistics show that the vast majority of people who are dealt with in the juvenile court are not sent to camp, they are not sent to C.Y.A., and they are not waived to the adult court. What happens with them? They are sent home on probation. So, our proposal is to recognize those realities and find a quick, immediate way we can bring a juvenile

1. *In re* Gault, 387 U.S. 1 (1967).

who has committed a minor crime in front of a bench officer to be given some meaningful sanction. Now, that is one part of our proposal to deal with the prevention aspect. When I say that, I mean prevention as far as the criminal justice system can do it. This will not solve the problem of juvenile crime. But I think it is one aspect where we can deal with juvenile crime in the juvenile justice system and help on the prevention end.

Now, the more controversial area is, of course, dealing with the serious violent offender, and we have some proposals with respect to that. Before I talk about those, I just would like to remind you what Judge Haight said earlier. Now, I thought it really formed sort of a keynote, at least in my mind, in terms of approaching this area. She said—correct me if I am wrong, Judge—that laws are reflective of the values of society. You're right. And the measure of that value is the consequence of violating those laws. And this, the consequence, assumes the higher value when we're dealing with a more serious crime.

Now, juvenile courts have always recognized, even from their inception, that violent serious offenders may be inappropriate for dealing with, in terms of the juvenile court. So, there are various mechanisms to remove them from that court and have them dealt with as an adult. There are three popularly used mechanisms. One is the one we use in California, the judicial waiver. That's where the district attorney would ask a judge to have a specific minor sent from the juvenile court to the adult court, and the judge would have standards, which Judge Haight set forth, to weigh evidence and would make a decision. California and six other states utilize this approach exclusively.

There are other ways to do it, however. One is to substitute the judge's decision for the prosecutor's decision. The prosecutor, then, as the case would come before him or her, would decide which court the minor should be tried in: either in a juvenile or an adult court. Lastly, there is what is called legislative waiver. This is where the legislature defines out of the system certain crimes, or what they call a crime offense and age matrix—crimes committed by individuals of a certain age. They say that if that person of a certain age commits that crime, they can't be prosecuted in juvenile court, but must be prosecuted in adult court. So, there are three ways that it is done in the United States. The most prevalent way it is done is by a mixture of these systems. Forty states have a mixture of these three systems. The most prevalent mixture in thirty states is legislative exclusion and, secondly, judicial waiver for another class of cases. So, California is in the minority in terms of how it deals with removing a serious, violent offender from the juvenile court.

Now we come down to a fundamental question, this is the tension between the juvenile system and adult system. The juvenile system looks at the best interests of the child. It looks at that because it makes an assessment that, if we deal with the best interests of the child, the child is reformed, made better, and all of us, society as a whole, will profit

from that, because the child will not engage in that kind activity. To do that, you have to look at not so much the crime, but you've got to look at the child—him or herself in terms of the social needs that each has, the background where each comes from. That is the natural preserve of the juvenile court, and it is a rough job. It calls upon discretionary judgments of a number of people, and it's a most difficult job for the judges who are assigned it.

The adult court looks at things differently, and they operate on the principle that, if you commit a crime, you are responsible for that act and you are going to be punished for it. And there are various ranges of punishment. So, to move somebody from one system, where we are looking at your needs and not the crime, to another system, where we are looking at the crime and the consequences, poses a real tension. It is an issue that a lot of people can come at differently from judgments about the nature of human beings, the power of the state and how it should be exercised, and all of us, I would say, have differing approaches as to how that should be done. I think one example of this tension that exists between two systems—and it relates to serious and violent crime—are those crimes that require mandatory prison sentences if they are committed by an eighteen-year-old, but, if they are committed by a seventeen-year-old, the whole range of juvenile treatment modalities are available. I think people look at the question: If this crime is a crime that requires mandatorily that you go to prison, how can it change suddenly to be something that is not of the same consequence when it is committed by somebody who is underage. The answer, people will say, is that there is not enough maturity or development for us to apply any adult sanctions. That, I think, is a philosophical position that one can take. I think that's a struggle, that we're all involved, as a society, to determine how that should be done. I believe that for the serious and violent crimes, we have to come down on what the consequence is and look at the crime. That is why we have made several proposals, and these proposals deal with a mixed system. Now I will just go through it briefly with you.

Our proposal for the crime of murder is that it be legislatively excluded. We believe that—with the crime of murder—you do not belong in a system that is looking at your best interests as the primary goal. This does not mean that prisoners should be treated inhumanely, or that juveniles should be housed with adults. It is looking at criminal responsibility. Secondly, we believe that there should be a legislative exclusion for serious and violent crimes—we are talking about robberies, rapes, you know, the intentional infliction of injury. There should be an age matrix sixteen years, and above it you should be excluded. The reason is

sixteen and seventeen-year-olds commit the most of these kinds of crimes. Lastly, we believe that the waiver procedures themselves should be re-evaluated. In our view, looking at who is amenable to treatment as a juvenile is, with respect to the judges that are present here, an amorphous guide that can be a screen for unjust decisions. Not only unjust decisions as far as the prosecutor goes, but as far as the defense goes. Because if you have a discretion that is not structured, that is a threat to the liberty of all of us, because when we deal with power it has to be structured in an objective way. I could talk about more, but I hope that gives at least a brief idea of our proposal.

LISA GREER, ESQ.

Lisa Greer received her J.D. from Yale School of Law in 1984. She currently serves as a Deputy Public Defender in the Los Angeles County Public Defender's Office, where she is the juvenile appellate training deputy to the nation's largest delinquency defense agency. In her position, Ms. Greer conducts appellate litigation on juvenile law issues in the California appellate courts and the California Supreme Court. She acts as a statewide consultant on delinquency law, and develops training materials for delinquency specialists.

Prior to joining the Public Defender's Office, Ms. Greer had a career in entertainment law with both Fox Television and Colombia Pictures, and as a prosecutor with the Los Angeles City Attorneys Office.

Ms. Greer serves as the co-chair of the CACJ Juvenile Justice Committee and is a member by appointment of the California State Bar Committee on Justice for Children. She is also the editor of A PRACTICAL GUIDE TO JUVENILE DELINQUENCY LAW *(1994 & 1995 editions), and writes a regular column on delinquency issues in the quarterly publication "Forum," published by CACJ. Ms. Greer has been an outspoken and active participant in the Blue Ribbon Commission, created by AB-2428, (Epple), to study and publish a comprehensive report on juvenile justice reform, due out in late April-early June, 1996.*

Good afternoon, everyone. Well, one of the oldest college philosophy jokes I've heard is the student who goes up to the professor and says, "What's the answer?" and the professor says, "What's the question?" So, what I'd like to try to do today is not so much come up with a series of answers, because I think we are hearing a lot of proposals and a lot of answers, and answers, as we all know, can be a dime a dozen. What's difficult to formulate are the right questions we should be trying to answer in this complex area. I'd like to challenge us to try to ask the right questions and to give you a numerical perspective on where the right questions may lie.

Let's just keep in mind that Los Angeles, the largest jurisdiction in California, is probably responsible for roughly forty percent of the formal delinquency petitions in the state of California. Twenty-nine thousand petitions were filed in Los Angeles in 1995. We are talking about 782 petitions total in which the district attorney was requesting a transfer to adult court, and that's roughly .02% of the cases that were filed in total. Of those 782 requests by the district attorney for transfer to adult court, 624 were granted—that's an eighty percent waiver rate to the adult court. It means that folks in my office were losing eighty percent of the time. So, I think that the waiver issue is a bit of a diversion from the more pressing problems that face the juvenile justice system. The juvenile justice system has two components: the juvenile court system and the juvenile correction system. In my view, the really global problems we're facing are located in the juvenile corrections areas, and they are principally problems that have to do with funding streams. So, I just want to give you a litany of some of the things that I think are pointing in the direction of what is really wrong in California.

California has the highest juvenile incarceration rate in the country. We are running at twice the national average. California, as of 1992, according to Department of Justice statistics, had 12.7% of the nation's youth. Yet we incarcerated 28.4% of the youths incarcerated nationally. We were incarcerating, in 1992, at a rate of 500 youths per 100,000 people in the population, as opposed to 224 per 100,000 nationally. These are pretty reliable figures. It is estimated by the Little Hoover Commission and the Legislative Analyst's Office that one-third of the minors currently incarcerated in California Youth Authority, which is basically baby prison, are committed for non-violent offenses at $32,000 per annum.

All this is occurring in a context in which probation's funding throughout the 1970s, 80s, and 90s has been steadily decimated, resulting in a complete evisceration of prevention services and community-based programs at the local level. California has not seriously funded prevention efforts. I think that you will find that the scandal in the California juvenile justice system, is not in the court system; it resides in the corrections system, specifically, in the funding streams that are flowing to the corrections system. Just like in Watergate, Deep Throat told you, "Follow the money." That's what you need to do with juvenile justice reform in California. You will find an overinvestment in back-end incarceration, versus funding prevention and a community-based continuum of graduated sanctions, consequences, and incentives for wards at the local level. So, the juvenile justice version of "Field of Dreams" is, "If you fund it, the programs will come." But for right now, it is just a field of dreams

because the funding isn't there.

I would like to turn to the issue of waiver, even though we have now noted that it is numerically a very small problem with respect to the total corpus of cases that we are dealing with in the system. It is philosophically a very important problem because it delineates the boundaries of the juvenile justice court and, in a sense, it delineates the boundaries of our conception of childhood. When is a child no longer going to be treated as a child? When does a child need to be ejected from the juvenile justice system into the adult court system, where we deal with retribution proportional to the crime? I think to answer that question we need to go back to fundamentals; that's why it is such a sexy issue. It takes us back to the fundamental issue of why do we have a juvenile court?

We have a juvenile court, I think, because some people about a hundred years ago had a very profound intuition—that has been substantiated by a lot of science in the intervening one hundred years—that children, youth, and adolescents are fundamentally, developmentally different than adults. That is the core reason we have a juvenile court—to have a form of justice that acknowledges the developmental differences of youth. This entails recognition of the fact that adolescents are inherently egocentric, that they have emerging problems with their sexual identity, that they are particularly vulnerable to peer influence.

These immature qualities translate into a form of diminished capacity, or of lessened moral accountability. To operationalize this form of "developmental justice," we have juvenile court judges who are supposed to develop an expertise not only in the criminal law, but also in adolescent development, gang sociology, and adolescent psychopathology. These judges exercise broad, but structured discretion to administer and individualize justice, case-by-case, scrutinizing on an individual level, "What is going on with this minor?" "What were the circumstances of the crime?," and "What are the circumstances, psychologically and socially, going on with this child, both in the family and in the community?"

Since the inception of the juvenile court, there has always been a small number of cases in which the offense behavior of the minor was so serious, that the degree and quality of punishment called for court—and there is a great deal of punishment available in juvenile court—exceeded the degree and quality of punishment the juvenile court could administer. The question becomes, "How do you jurisprudentially identify which cases should be ejected from the system?" In California the method is known as judicial waiver. The juvenile court judge, on a case-by-case basis, exercises structured discretion by looking at the case, the crime, and the minor with reference to five statutory criteria. The law is tough; it is tough for a kid to remain in juvenile court based on those five criteria, as can be seen by the fact that 624 of the 782 cases filed in Los Angeles last year got popped up to the adult system. That is an eighty per-

cent transfer rate and a twenty percent retention rate based on last year's filings.

What I want to ask is what evidence is there that the twenty percent of the cases that were retained in the system represent inappropriate decisions? We have got largely Wilson and Deukmejian appointees populating the courts right now. It is not like we have a lot of flamboyant, soft-on-crime types letting murderers run rampant through the streets of Los Angeles. What evidence is there to suggest that those twenty percent of the cases that were retained did not represent unusual cases with unusual equities? I think that the D.A.'s problem in this area is that they are not winning 100% of the time. The question is, if the D.A.s think that is a problem, do you?

Now one of my favorite little proverbs about legal reform is attributed to Lord McCauley, who was the author of the Indian Penal Code during the colonial times in India. He was overheard to say, "Reform, sir? Don't speak to me of reform. Things are bad enough as they are." This is a way of saying, "Hey, if it ain't broke, don't fix it." Attorney General Meese said it earlier in a different way, when he warned us to: "Do no harm." So before we go changing things, we had better have a clear idea of what is broken about the way we currently do it in the judicial waiver system—case by case.

I will tell you quickly what the wrong answers are to as to why the current system of judicial waiver may be broken. Wrong answer number one is what I call the "lemming" argument: "Well, everybody else is doing it across the nation. Forty states do it different than us, so join the party." That is, I think, the rush of the lemmings over the cliff into the sea. Wrong answer number two is the *res ipsa loquitur* argument: if the rates of juvenile crime are high that means that juvenile court processes are failing and should be changed. And we see it in the invitation to this seminar—I think it was a quote from Professor Rossum's article that said, "America's juvenile justice system is failing abysmally. Serious juvenile crime is skyrocketing." Now, do you see the non sequitur there? The non sequitur is that somehow the fact that the juvenile crime problem is rocketing up—and it is specifically a gun-related violence problem—means that juvenile court processes are failing. Where is the causal connection there? Does the fact that there is a lot of adult crime out in society mean we should abolish the criminal court system? The juvenile court system is not responsible for the amount and intensity of pathology out there in society. It is a reactive system, not a proactive system. So I don't think we should equate a crisis with gun-related youth violence to a crisis regarding juvenile court procedures.

Now the dark side of the sentiment "If it ain't broke, don't fix it," is "Cheer up, things can get a lot worse," and they most certainly can. How I think the juvenile crime problem can get a whole lot worse is if we politicize the transfer decision process by allowing prosecutors to be the sole decisionmakers. The D.A.'s proposal, which is wholesale exclusion of cases based on offense category, is, in truth, a wholesale power grab. It operates this way: Wholesale exclusion is based on the category of the offense, but who decides what the offense is to be charged? The prosecutors! In that charging decision, you have no acknowledgment of the developmental characteristics of the offender or the individual circumstances of the crime. You end up eviscerating the prestige of the juvenile court because you take away all the hard, tough cases from the juvenile court. You damage the third branch of government by constraining the legitimate exercise of judicial discretion. I truly believe that if you step off this cliff and you take away the tough cases from the juvenile court, you have substantially taken a step towards eradicating the juvenile court as an institution.

Moreover, in the states that have done this, primarily New York and Florida, the evidence indicates that doing so will overinclusively double to triple the rate of minors sent to the adult court system. This massive waiver of adolescent boys to the criminal court system has done nothing to reduce the juvenile crime rate in either New York or Florida. I would ask in the context of California, now with the three-strikes context that we have, what's going to be the impact on our adult system when we are sending all these kids up and we suddenly have to give them jury trials? How can we justify this radical proposal when the studies from New York, Florida, and Idaho—states that have gone the way of the district attorney's proposal to exclude by offense category—demonstrate that increasing the number of kids going to adult court has no deterrent effect on the crime rate?

We don't run many experiments in California, but when we do we sure run quick ones because we just changed the law of fitness in 1995. We lowered the age of waiver eligibility from sixteen to fourteen. No one has any data at this point that reliably tells you what the impact of that change to the system has been. California destroyed its data collection system in the early 1990s. If you are a strict retributionist and what you care about is deserts—and I don't think "just deserts" because I think "just deserts" means you have to take a look at the developmental characteristics of the child that you are dealing with—if all you care about is desserts, like punishment for like offense, then you don't need any data, right? All you have to know is what kind of crime it was and what the adult punishment is for that crime, and everybody gets treated equally.

If you are coming at it fundamentally as utilitarian and you want to achieve long term public safety, you need data. You need to know what the public safety impact will be of changing the law along the lines that

the district attorney has indicated. We simply don't have the needed data. The Department of Justice has commenced a five-year study, of four different jurisdictions. The study will be out in mid-1997. I say wait until we have the results of the study and let's be responsible about this and not write juvenile justice policy on the back of a napkin.

In conclusion, I say let's collect data, let's study it, and for now let's do the very non-sexy thing of wait, and do no harm.

THE HONORABLE SOCRATES MANOUKIAN

Judge Manoukian is a Superior Court Judge in Santa Clara County, California. He is currently assigned to the Juvenile Delinquency Division of the Superior Court, and is a member of the Juvenile Justice Committee.

Judge Manoukian received an Associate of Arts degree in History from Foothill College, Los Altos Hills, a Bachelor of Arts degree in History from the University of California, Los Angeles and a J.D. from Southwestern University School of Law. Judge Manoukian practiced civil law from 1978-1993 at Early, Maslach, Leavey & Nutt, Law Offices of Burton K. Wines, and Wines & Manoukian.

Judge Manoukian is an active leader in numerous youth organizations, including Cub Scouts, YMCA basketball, Pony League baseball, Little League baseball, and the St. Nicholas School basketball team and Mens' Club. He also serves on the advisory board of the Stanford University Hospital Adolescent Drug and Alcohol Education Program.

Thank you. I'd like to dedicate this presentation to my wife. I am one of the few judges who can be overruled by the same person at work and at home. Patricia Bamattre-Manoukian, my wife, is a Justice on the Court of Appeal, Sixth District, and has been a very good source of inspiration for me in the twenty-five years that she has managed my life. Thank you.

The best way to analyze the juvenile delinquency problem, from my point of view, is a comparison of two stories. One is about a man who is walking on a beach and sees an old man picking up starfish that are stranded by the receding tide. He is throwing them into the ocean as furiously as he can. The man, taken by this scene, goes up to the old timer and says, "What are you doing?" The old timer says, "If I don't throw these starfish back into the ocean they're gonna die. They're gonna shrivel up in the sun." The first man says, "There must be thousands of

starfish on this beach, and hundreds of miles of beaches. It's not gonna make a difference." The old man picks up another starfish and says, "It does to this one." Off it goes.

The other story is a lot more earthy and it goes like this: "What is the difference between being bitten by a great big cobra and by a little cobra?" Well, the answer is, "If you are the one being bitten, absolutely nothing."

Now, the point is that many of the children that come to court—and they are all children—are in fact products of environments that you have heard about throughout the day, but many of them are not. Many of them have made choices that are incorrect, and when the victims come to court and say, "Judge, my son, my daughter, my wife, my husband, didn't have a choice. This criminal had a choice and what are you going to do about it?" Given the fact that I am a new judge I say, "Given the hour, and that the reporter needs a recess, I'll go in the back to talk to somebody." I worked for eighteen years in the insurance defense business. Governor Wilson was under pressure to appoint lots of civil lawyers, so he did. He has appointed nine civil lawyers in my county. We are all doing criminal or juvenile work.

I tell the kids when I look at them with their hardened eyes and their tatoos and their records of auto theft and assaults—and those are the girls by the way—I tell them "I can't make you change. But I can make you real miserable if you don't." That's all I can tell them. So the juvenile court judge is put in the situation of trying to separate starfish from cobras using proposals you have heard and that you'll read about. Many of these proposals are already in place. For example, the media is entitled to come and be present. The public is entitled to come and be present on any hearing involving a 707(b)[1] offense. Those are the specified violent crimes. In my thirteen months as a juvenile judge I have had only one media request, and that was excluded because the commission of that specified offense was not with a firearm. But that's one thing I would like to ask you: Where is the need to have these proceedings open? They are already open and no one is stepping forward.

There is also a provision right now concerning housing. Pursuant to Welfare and Institutions Code section 707.1(b)(1),[2] I have housed a fifteen and one-half year old minor in the adult county jail awaiting charges. This is a young gentleman who viciously stabbed another young student on a school ground for the crime of speaking spanish. While in detention in our hall he engineered assaults on three other kids. So he is sitting in the county jail now.

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1. *See* CAL. WELF. & INST. CODE § 707(b) (West 1984); *id.* § 676 (West 1984 & Supp. 1996).

2. *See* CAL. WELF. & INST. CODE § 707.1(b)(1).

In a fitness hearing, it must be kept in mind that a finding of fitness is the single worst punishment that a juvenile court can impose. Under Welfare and Institutions Code section 1771,[3] a minor who kills another person can be incarcerated up to his twenty-fifth birthday. If convicted as an adult, that is life in prison for a capital offense.

There are proposals that have been suggested about limiting the discretion of courts, or giving the prosecutor the last say in how a charge is filed. Being a good Republican and a firm believer in the doctrine of the separation of powers, I have a problem with that. It's the judges who run the court, not the D.A.'s, not the public defenders, not the probation departments, not the department of social services. There are proposals now in Mendocino County where the county tried to cut funding operations, the local court went to the first appellate district and got an order granting them the necessary funds to run their court.

Now, consider the criteria that have been discussed in the 707(b) offense. First, is criminal sophistication exhibited by the minor. Basically, was the crime sophisticated? Second, can the minor be rehabilitated prior to the expiration of the juvenile court jurisdiction (before age twenty-five or twenty-one, depending on the offense)? Third, previous delinquent history or successive previous attempts to rehabilitate the minor. Fourth, the circumstances and gravity of the offense alleged, in the petition, to have been committed by the minor. Now, if the People are dissatisfied with a finding of fitness by a judge they can petition for a review by a court of appeal and judges like Justice Nicholson and others, will review those petitions and reverse the findings of fitness or unfitness if warranted.

The exercise of prosecutorial discretion in my mind, as I have said, many times comes into conflict with the exercise of judicial discretion. I believe that the prosecutors have a right to file whatever charges they believe are supported by the evidence. The problem is that many of the statutory offenses are very amorphous in their definition. The classic case is murder—homicide. Was it murder in the first degree? Second degree? Was it an involuntary offense? Was it some drug-crazed kid driving a car at seventy miles an hour with three or four prior drug offenses who runs a red light and hits a woman pushing a baby carriage across the street? In many courts that has been held to be murder.

3. *See* CAL. WELF. & INST. CODE § 1771 (West 1996).

Assaults. Penal Code section 241 misdemeanor assault is a maximum of one year in prison, but section 245(a)(1)[4], assault with means of force likely to produce great bodily injury, is a 707(b) offense and does not require that the person assaulted be injured. In cases where there are rapes, for example, rape is a 707(b) offense. There has been a very valid argument made that assault with intent to commit rape is not. From the point of view of the victim, that doesn't make a lot of difference. So why should the prosecutor have the last word?

The exercise of judicial discretion on many occasions works to prevent the prosecutors from dumping cases. The most famous case involved the Hillside Strangler. The trial court there was asked by the district attorney's office to dismiss the case because they thought it was unwinnable. The trial judge, in denying the motion, noted the following: "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 merely to perform the ministerial function of 'rubber stamp' approval to the district attorney's decision to abandon its order of prosecution, let an appellate court so instruct this court."[5] I found out today that the four individuals who were asked by then-Attorney General George Deukmejian to review that case and determine whether or not it was winnable, those four prominent attorneys were selected by then-Deputy Attorney General, George Nicholson, to evaluate the case. That case did more to vindicate the court system, in my mind, than perhaps any other case in the 1980s did. The rest is history, as they say.

So I think that the best way to address the question of fitness or unfitness is to work with the existing statutory criteria. If there is a question of guidelines being amorphous or subject to differing opinions, there shouldn't be any problem with using guidelines as set forth in the Rules of Court for adult felony sentencing, as in the Rules of Court 420, 421, 422, et cetera.

To use a crime-focussed approach would pose other problems. In cases of multiple defendants, each one wanting their own fitness hearing, if a judge or prosecutor were to conclude that this person is unfit because there is a finding that this is a murder, the other defendants would

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4. *See* CAL. PENAL CODE § 245(a)(1) (West 1988).

5. Memorandum of Opinion Upon Order Denying the People's Motion to Dismiss the Murder Counts by the Honorable Ronald M. George, Judge of the Superior Court and for the County of Los Angeles. People v. Angelo Buono, No. A354231 L.A. County Super. Ct. (July 21, 1981).

be found unfit before they ever got to court. So, I think the issue is one of amenability of the minor to the rehabilitation services offered by the juvenile court. *Edsel P. v. Superior Court*[6] is instructive. In *Edsel P.*, the attorney general maintained that the evidence presented against petitioner at the fitness hearing was "overwhelming and in no event would he be able to overcome the circumstances and gravity of the offenses alleged to have been committed by him."[7] The attorney general argued, in other words, that even if petitioner had overcome the presumption that he is unamenable to the care, treatment, and training program available to him through the juvenile court, he could not meet this criteria—the circumstances and the gravity of the offense alleged to have been committed by the minor—because it is indisputable that the offenses against him were among the grave offenses listed under 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 foregoing offenses would reach a foregone conclusion and therefore be deprived of purpose. Such a result is impossible to reconcile with the language of section 707(c),[8] which clearly does not create a mandatory or irrebuttable presumption."[9]

The three strikes cases that have been coming down in a flurry recently from the courts of appeal are very instructive on the separation of powers issue. There was an argument made that a strike offense could not be reduced under section 17(b) of the Penal Code from a felony to a misdemeanor and some of the courts have upheld that. There is a split of authority as to whether courts retain discretion under section 1385 of the Penal Code to dismiss in the interest of justice. My personal opinion is that they do not. However, I do believe that the superior court does retain the right under section 17(b) of the Penal Code to reduce a felony to a misdemeanor, but only after a conviction. In my own personal involvement, I have not done that unless it was by stipulation of the parties.

A fitness hearing is not a preliminary hearing. If there is going to be a direct filing or matrix charging by computer, there has to be a process by which a judge can review the charging document by way of either a preliminary hearing or by some other procedure in adult court. That is really, in my mind, exalting form over substance because you are just taking the fitness hearing out of juvenile court and putting into adult court. If it ain't broken, don't fix it.

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6. 211 Cal. Rptr. 869 (Cal. Ct. App. 1985).
7. *Id.* at 876 (internal quotation marks omitted).
8. *See* CAL. WELF. & INST. CODE § 707(c) (West 1984).
9. *Edsel P.*, 211 Cal. Rptr. at 876-77.

I would like to quote some language from a speech I heard last week by that great conservative thinker Martin Luther King, III, who said to a crowd of 500 people gathered to talk about community-based programs, "We have to get a handle on our children or they are going to wipe us out." He talked about when he was a young boy, how if he was with his father walking down the street or with a minister, and some wino staggering down the street saw the minister, the wino would try to lean against the wall to stand up straight—"Good morning reverend, how are you, sir?" He talked about how the Internet now makes information available instantaneously across great distances. He said that was nothing new, "In my community if I did something wrong across town, my dad found out about it in seconds."

Let me tell you a story about an unsung hero. Chris Parker, a gentleman in our juvenile detention facility (who as we speak is participating in a bike ride from San Jose to San Francisco to raise money for scholarships to participate in junior colleges) took some fellows who were housed in the detention facility, found a man who rented tuxedos to donate tuxedos for these 20 young men, found a limo company to donate limousines, and took these young men—black, Caucasian—to a NAACP meeting where, instead of being introduced as "defendants" or "criminals," they were introduced as "gentlemen." Not one of those gentlemen has been back. They're all in school; they're getting grades. Now what made a difference? It was somebody who cared.

For young men and women who come to my court, the first thing I do after chewing them out is give them homework to do, whether they're in custody or out of custody. And I have it all set up so that when they go to boys receiving and the counselors there see the homework sheet, the counselors say, "You better do that homework or the judge is going to eat you up." And they do it. A young gangster, who had a bad time in school, wrote on his history homework the story of how the Spaniards conquered the Aztecs and how the Conquistadors were smitten by the beauty of the Aztec women. And to another young man whose birthday was on the fourth of July, a young black man, thirteen years old, I said, "You have a famous holiday," and he said "Yeah I know." I said, "What holiday were you born on?" He said, "I don't know." I said, "That is Independence Day." "You know about Bunker Hill?" "No." "Don't fire until you see the whites of their eyes?" "No." He didn't know about that. So I told him, I said, "There was a man, one of the colonials, his name was Peter Salem, he looked a lot like you. He was the one who shot a bullet right between the eyes of British Major John Pitcairn." This young boy now feels connected to history.

There was also a young graffiti tagger, and I told him to do homework on Diego Rivera, the Mexican muralist. "You know who he is, right?" No, he didn't know. When he came back to court next time, he knew. The teachers in the detention facility will work with these young

people on their homework sheets to get them educated and in school.

I'm just one person, and like I say, there are lots of other people who do small things to make these children develop some self respect. Hopefully, things will work out.

There is a proposal right now written by Judge Leonard Edwards of our court, to consolidate family, delinquency, and dependency cases all in one court. So one judge, one set of trained district attorneys, one public defender, one set of court people will look at the cases for all problems of the family, whether its domestic violence, child abuse, or drug use.

And there isn't going to be drug legalization until everyone hears what I have to say about it. I think that's wrong, it's a bad mistake.

It takes the time and patience and energy, but don't say it takes money, because there isn't any.

And in closing I would like to say that William E. Bennett was right. There's a lack of morality, lack of virtue, lack of self respect, and a lack of dignity. The courts can help. Once in a while we make mistakes too. A starfish that is tossed back into the ocean sometimes lands on an oyster bed and destroys the oyster bed. But sometimes a cobra that is let loose back in the town chases away the rats that cause bubonic plague. Thank you.