

**AN OVERVIEW OF JUVENILE LAW
AND THE ELECTED PROSECUTOR'S ROLE**

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INTRODUCTION

Traditionally it has been readily accepted that poor judgment and lack of foresight are an inherent attribute of childhood. Often times the indiscretions of a minor are the regrets of adulthood. In short the making of mistakes is an inescapable part of a child's development. Another attribute of children is their ability to rehabilitate, change unacceptable behavior and learn new beneficial behaviors. Thus is the foundation upon which many states have built their juvenile codes in response to juvenile delinquency. The idea that a child shouldn't forever be tainted with the cloak of criminality for certain behaviors is not a product of recent trends but an age old realization that children are continually growing and learning new behaviors and with that process goes the inevitability of errors as they feel their way through this process.

However old the realization of childhood weaknesses in conscience and the ability to curb impulsive behavior, in recent times the public concern has been with combating juvenile crime and deterring future criminal acts. As the media parades incident after incident of juveniles committing serious crimes the community's cry for justice and retribution are unmistakably heard. So how does the elected prosecutor balance the community's demands for being tough on crime with the duty and obligation to raise our children in a manner that will produce good contributing members of society? How does one know when to punish and when to rehabilitate? When a child needs to be incarcerated to protect society and when the child is in need of social services? It all comes down to deciding which children are salvageable and which are beyond repair. This is the delicate scale the Juvenile Prosecutor must keep in balance.

If the whole approach to juvenile crime could be summed up in one phrase it would be, "To prevent the child offender from becoming an adult criminal while protecting the community."

THE COMMUNITY'S RESPONSE TO JUVENILE CRIME THE PURE JUVENILE MODEL

Traditionally juvenile crime had been handled as a civil matter. The Rules of Civil Procedure governed evidentiary matters and trial procedures. Children were afforded less protection of their rights than their adult counterparts under the assumption that once in the system the child was being helped and not punished. The idea was that even though the child would find himself in court or under detention, the bottom line was that they were there for their own good, liberty issues aside. However, as American society evolved and became more sophisticated, the community as a whole suffered the growing pains of having increased crime. Of course, the juvenile crime rate also increased. In response to this increase, the Juvenile Justice System began to take an evolutionary course towards a more criminal justice model than its earlier civil model. Where before hand the emphasis was on rehabilitating the child, the trend was now towards protecting the community

Originally most states had two systems to address crime, the adult system and the juvenile system. That is the child was either going to be tried as a juvenile or as an adult. If tried as a juvenile, the child if adjudicated delinquent, would face the prospect of being placed on probation either in home or out of home to address the juvenile's rehabilitative needs. At the very worst the child could face incarceration in a "reform school" until his 21st birthday, the age of majority. If tried as an adult, the child no longer enjoyed his juvenile status but was treated as an adult for all purposes in the criminal justice system. That meant that the child was incarcerated with adults pending trial if not released on bond, and if any prison term was assessed he would serve that term in an adult prison. Some states in the United States still operate in this fashion having to make the weighty decision to either certify the child as an adult or proceed through the Juvenile Justice System.

THE TEXAS MODEL

In light of passed history and the public's concerns over the increased juvenile crime rate, Texas has developed somewhat of a hybrid between the adult system and the

juvenile system. Of course the State still maintains a juvenile system which is in the traditional model, while still maintaining the option of certifying a juvenile to stand trial as an adult. But, in an effort to address violent or habitual crimes committed by children, Texas has developed what has been entitled Determinate Sentencing.

DETERMINATE SENTENCING

Under Determinate Sentencing the State, at the election of the prosecutor, can proceed to try the juvenile and expose him to a greater range of punishment than the regular juvenile system provides. The election process is triggered by certain enumerated offenses in the Juvenile Justice Code¹ which are first, second and third degree felonies.² For a first-degree felony the juvenile would be facing a penalty range from probation to 40 years incarceration.³ For a second-degree felony, the range of punishment would be from probation to 20 years incarceration, and for a third degree felony it would be from probation to 10 years incarceration.⁴ For the same degree offenses in the adult system, a juvenile could expect the range of punishment to be probation to 99 years incarceration⁵, probation to 20 years incarceration, and probation to 10 years incarceration respectively.⁶ The only difference is that a first-degree felony in the adult system carries 59 more years of exposure.⁷

In its application, Determinate Sentencing is a useful tool in addressing the violent juvenile offender who poses a threat to the community while at the same time offering the juvenile the rehabilitative services provided in the pure juvenile model. The juvenile adjudicated delinquent under a Determinate Sentence Petition, if given a term of years as a sentence, would initially begin his sentence at the Texas Youth Commission (TYC) and then possibly transferred to the adult prison system (The Texas Department of Corrections-TDC) for the remainder of the sentence. At TYC the child would receive

¹ Texas Family Code Title 3 (Vernon 1996).

² Texas Family Code §53.045(a) (Vernon 1996).

³ Texas Family Code §54.04(d)(3)(A) (Vernon 1996).

⁴ Texas Family Code §54.04(d)(3)(B) and (C) (Vernon 1996).

⁵ Capital Felonies are punishable by imprisonment for life or by death. Texas Penal Code §12.31(a) (Vernon 1996).

⁶ Texas Penal Code §§12.32, 12.33, and 12.34 (Vernon 1996).

rehabilitative services to include education, counseling and any other services the child needs to adequately rehabilitate. In this process the juvenile holds his fate in his own hands. If the child paroled out of TYC by his 18th birthday he would continue on TYC parole until his 21st birthday and then his parole would be transferred to the adult system where any violations of parole would land the juvenile, now turned adult, in TDC. Of course if the juvenile failed to take advantage of the services provided at TYC he would administratively be transferred to the adult system upon reaching the age of 19 to carry out the rest of his sentence.

Thus in a real case scenario in January 1999 The El Paso County Attorney's Office successfully prosecuted a 16 year old juvenile under the Determinate Sentencing Statute for the offense of murder (IN THE MATTER OF: MMJM). Briefly the facts of the case were that MMJM and the victim, a 15-year-old female, were out for a night of driving the victim's mother's automobile. During the drive the victim and MMJM were using illegal drugs. At approximately 2:30 a.m. after MMJM and the victim had sexual relations some sort of argument arose between the two resulting in MMJM strangling the victim to death with his hands. After the murder MMJM disposed of the body by dumping it in a canal. MMJM then spent the rest of the morning and following day driving the vehicle around town, going shopping and giving rides to friend's of his. Several children found the victim's body the next day as they walked home from school after they were dropped off at a bus stop. The juvenile who stood trial by jury received a 40 year sentence. So how this plays out is, MMJM will be at TYC for a minimum of three years, thus even if he were to parole out of TYC at age 19 he would be on adult parole for the remaining 37 years. If MMJM would at any time violate his conditions of parole, if he in fact paroled out, he would be sent to the adult Texas Department of Corrections. The bottom line is that MMJM will either serve 40 years or will be on parole for 40 years with the possibility of being returned to adult prison for that period.

In contrast, one month prior to MMJM's trial two known gang members who were certified as adults stood trial in adult criminal court for the offense of murder. The facts in that case were that the two defendants, one being 16 and the other being 14 years

⁷ In addition, under Determinate Sentencing the maximum punishment a juvenile can receive for a capital felony is 40 years. In contrast, under the adult system, the possible range of punishment for a capital felony is up to life imprisonment or death. See Texas Penal Code §12.31 (Vernon 1996).

of age when the offense occurred, were at a party where they saw the victim. At some point in the evening a dispute broke out between the victim and the two defendants resulting in the defendants, who were cousins, bludgeoning the victim to death with a club and metal rod. The case was tried to a jury, and both defendants were convicted and received a sentence of 10 years probation from a jury. This scenario proves a very powerful point in that adult juries are reluctant to send children tried as adults to an adult prison. In essence the jury in the MMJM case gave a more severe penalty under the juvenile Determinate Sentencing Statute resulting in a chance for the juvenile's rehabilitation while protecting the community for 40 years. In application of the statute the juvenile, MMJM, will be allowed to mature into his punishment spending his minor years in a juvenile setting and then being incarcerated in an adult prison upon him reaching majority.

**THE DECISION TO CHARGE
BY PETITION
OR DETERMINATE SENTENCING**

As noted earlier most children enter the juvenile justice system because of inexperience and the exercise of poor judgment, which is an inherent attribute of childhood. It suffices to say that in this instance the unilateral decision of the prosecutor to charge the child under the pure juvenile model will adequately address the concerns of the community and the needs of the child. The goal as stated earlier is to offer the child rehabilitative services which benefit both the child and the community by producing a future productive and contributing member of society. However what must the prosecutor do when a child commits a heinous crime or a crime which the community views as an increasing threat? What obligation does the elected prosecutor have towards his constituency? What is his obligation to the victim? What is his duty to the alleged delinquent child? What in an addition to the foregoing factors must he consider? Finally since he is given great discretion in the charging and handling of cases, how much discretion can the prosecutor exercise to make sure justice is done.

The Prosecutor's Paramount Duty

Every prosecutor in the State of Texas is charged with the duty of ensuring that justice is done. Prosecutors are not charged with the duty to secure a conviction of a criminal or juvenile at all costs. The duty to see that justice is done extends not only to the victim but also to the accused and the community at large. The basic issue that every case comes down to is "What is the right thing to do?"

Considering the offense

The first factor that the prosecutor must take into consideration is the seriousness of the offense that the juvenile is charged with. Under the determinate sentencing statute only certain offenses can be petitioned under Determinate Sentencing. Those offenses are: Murder, Capital Murder, Manslaughter, Aggravated Kidnapping, Sexual Assault, Aggravated Sexual Assault, Aggravated Assault, Aggravated Robbery, Injury to a Child, Elderly Individual, or Disabled Individual (if punishable as a felony other than a State Jail Felony), Felony Deadly Conduct (involving discharging a firearm), Aggravated Controlled Substance Felony, Criminal Solicitation, Indecency with a Child, Criminal Solicitation of a Minor, Attempted Murder or Capital Murder, Arson (if bodily injury or death is suffered by any person), and Intoxication Manslaughter.⁸

Of course by looking at the enumerated list of offenses one would initially think that they are of a nature and severity that warrant serious punishment, but application of the statute has to be done on an individual basis. For Example take the offense of Aggravated Assault. Aggravated Assault can be charged as having caused serious bodily injury to an individual, by assaulting an individual with a deadly weapon or by merely threatening someone with a deadly weapon. Now in Texas a deadly weapon can be a firearm or anything manifestly designed, adapted or used in a manner that can cause death or serious bodily injury (a knife, a pencil, a rope, fire, a motor vehicle, a poison etc.). So now let's look at two examples.

⁸ Texas Family Code §53.045(a) (Vernon 1996).

Example 1: Juvenile is an eleven year old male child who gets into an argument with a classmate at school. The argument escalates to a point where the juvenile picks up a pencil and threatens to stab the classmate. Technically the juvenile can be charged with Aggravated Assault because he threatened his classmate with a weapon which could have caused serious bodily injury (i.e. Perhaps if the child did carry out the threat and stabbed the classmate in the face the classmate could have lost sight in an eye). Upon further investigation it is determined that the juvenile comes from a single parent home headed by his mother who works two jobs and has little time to supervise the juvenile. Additionally the juvenile has been diagnosed with a learning disorder and behavior disorder. Finally looking at the juvenile's past record we find that he has no prior referrals, this is his first offense. Viewing the foregoing scenario the decision to petition the juvenile under the Pure Juvenile Model would most likely be the right thing to do. The juvenile is in need of services, no one was hurt and the juvenile demonstrates a need for services. The juvenile would be placed on probation.

Example 2: Juvenile is a fifteen-year-old male who is a self declared member of a street gang. The juvenile has been expelled from school for fighting with another student. The reason for the fight isn't very clear but school authorities determined that the juvenile was the aggressor. A couple of days after expulsion the juvenile meets up with another member of his street gang and they decide to spend their Wednesday morning driving around their neighborhood in their automobile. Upon reaching the school that he was expelled from the juvenile recognizes the student he fought with standing in front of the school along with a multitude of other students. At this point the juvenile pulls out a handgun and fires all nine rounds in the direction of the students. No one is killed but two students are hit, one in the leg and the other in arm. Upon further investigation it is determined that the juvenile has three prior referrals to the Court for

Assault, Theft and Unlawful Carrying of a Weapon. The juvenile was once on probation but completed it successfully. Additionally it is discovered that the juvenile lives with his grandmother because his father is deceased and his mother is in prison for a drug offense. The Grandmother has good intentions and tries to discipline the juvenile but is just too old to do so effectively. Looking at the juvenile he is very sympathetic looking and presents himself very well. Furthermore just two weeks prior to this offense another Juvenile was certified as an adult and was tried for Aggravated Assault where he shot an adult with a rifle. The Jury convicted him and sentenced him to five years probation. The decision here is to petition the juvenile under the determinate sentencing statute. The child has committed a serious offense, has a prior history of delinquent conduct, does not receive suitable supervision in the home and is in need of services. The decision is made not to certify the juvenile as an adult because he presents himself as a sympathetic figure and a jury would most likely not sentence him to prison time and he would most likely be placed on the less strict adult probation. In this scenario trying the juvenile as an adult or under the Pure Juvenile Model would not serve justice and would not protect the community.

The above two scenarios are about as simple as it gets in exercising prosecutorial discretion. The facts are clear and the prosecutor's objectives are in line with the expressed purpose of the juvenile justice code. The prosecutor is concerned with the immediate parties in the offense those being the juvenile, the victims, and the community.

The community's expectations

Another factor the Prosecutor must take into consideration is the expectations of the community he serves. Often times the type of crime committed occurs in waves. At certain times of the year Assaults may increase, while at other times of the year it may be Drug Offenses or Property crime. Whatever the offense, due to its frequency over a short period of time the public's perception is that there is now a crime wave and it must be

stopped. In this situation the prosecutor must balance the community's concern with his obligation to uphold the law but still do what is correct. However, the prosecutor must determine if it is an accurate public perception or hysteria which will be replaced by some other issue in the future. For example, say that a year prior to the increase in Assaults the number of assaults reported was fairly low. Normally, during that period it would not be uncommon for first time offenders to be referred to diversion programs. In the present climate, however, the prosecutor has to decide if allowing juveniles accused of assault into these programs is the just thing to do?

In deciding how to address the issue of this reoccurring offense the prosecutor must take several steps to make sure all the parties involved are served and that justice is done. If the rise in the offense is in fact disproportional to past history and cycles, the prosecutor may in fact decide that these certain types of crimes will not be diverted and each case will be prosecuted to the fullest. If, however, the prosecutor determines that the rise is in fact not disproportional in relation to past history, the prosecutor may decide to handle these cases as in the past with diversion programs. The balance the prosecutor has to strike here is that he must assure the victims and the community of the diversion programs effectiveness while at the same time assuring that any of those juveniles who do not complete the diversion program would be vigorously prosecuted. The logic being that if a juvenile decided not to participate in the program he would face a trial or plea and be placed into the juvenile system with all its obligations, rehabilitation and restraints.

For example, in El Paso County the foregoing situation arose with regards to the offense of Criminal Mischief Graffiti. Graffiti was becoming a major concern in the community. Buildings, road signs, bridges, fences and just about any structure, which could be defaced, were being defaced. The outcry of the community was united and strong. The public wanted those people alleged to have engaged in Graffiti to be prosecuted to the fullest extent of the law. Although the perception that all those individuals committing the offense were juveniles was false, the community demanded that the County Attorney prosecute juveniles accused of Graffiti offenses harshly. The fact of the matter is that many adults commit Graffiti crimes with the same frequency as

juveniles, however the misperception caused the burden of dealing with this offense to shift to the County Attorney who deals with juvenile crime.

Being an elected official the prosecutor must be conscious of the public's sentiment but at the same time the public's only concern for punishment and retribution does not necessarily coincide with the prosecutor's duty to see that justice is done. The dilemma is further exacerbated when the media draws the community's attention to the issue with a disproportionate amount of print space and airtime. Thus the prosecutor is placed in a position where the public will support his exercise of discretion. In this instance the prosecutor can do no wrong by being tough on graffiti offenders.

The first thing the prosecutor must do is to get the media and the community on his side. In the situation in El Paso County the prosecutor formed a Graffiti Steering Committee to bring members of the community together to address the issue. In conjunction with the Juvenile Probation Department, the Adult Probation Department and various civic organizations the prosecutor organized a calculated response to address the issue. With media support the prosecutor was able to enlist the help of the Adult Probation Department to remove graffiti as soon as it was put up and to solicit funds for other anti-graffiti measures.

The second avenue the prosecutor took was to take a zero tolerance stance towards cases of graffiti. From that moment on no juvenile charged with the offense of Graffiti would be eligible for diversion programs. Additionally in any case where the juvenile was accused of committing a Graffiti offense (where the evidence pointed towards guilt) and the child did not plead guilty, the prosecutor was going to go to trial. This all or nothing approach proved to be successful. The graffiti was being cleaned up, the juvenile offenders were being held accountable and the community felt that they had won a victory.

At first blush it may appear that the prosecutor lost his ability to exercise his discretion in prosecuting graffiti offenders, but the opposite is true. Graffiti, which for the most part is a Misdemeanor offense, would normally in the course of things be handled just as any other minor offense. However the community concern and the media response supported, but did not force, the prosecutor's exercise of discretion to act harder on these cases.

Graffiti is just one example of an offense where the prosecutor's exercise of discretion was used effectively. Other challenges emerged. Early in 1998 there was an increase in juveniles moving large amounts of drugs across the border between Juarez, Chihuahua, Mexico and El Paso. Again the prosecutor took a zero tolerance stance and began prosecuting each and every juvenile who crossed the international bridge with drugs. Again enlisting the help of the media the prosecutor made the public aware of the resurgence in this offense and enlisted the help of other agencies to address the issue.

The prosecutor's exercise of discretion And the media

Thus far we have seen how the prosecutor exercises discretion when supported by the community and the media. However, what is the prosecutor to do when in exercising discretion he goes against public sentiment in order to ensure that justice is done?

In September of 1999 a juvenile, JGR a 14 year old male, committed a horrific crime. One late Sunday afternoon a six-year-old child went out to play with his friends. As he approached a neighbor's house he heard JGR call him over to a disabled van sitting in the driveway of JGR's very home. The child, who was familiar with JGR, approached the van. JGR told the child that they were going to play a game and told him to get inside the van. Once inside the van JGR stripped the child of his pants and sodomized him. Once the act was completed JGR told the child not to tell anyone what had happened but the child insisted that he was going to tell his mother. When the child told JGR this, JGR became enraged and took out a pocketknife and began to stab the child in the face approximately 30 times. The child survived the attack but lost the use of an eye. Needless to say the crime was horrific and received an overwhelming amount of media attention.

The story was front-page news in the local newspapers. The television and radio coverage was incessant. Not a day passed without print, radio or television media retelling the victim's story and his plight. Donations came flooding in for the child and his family. The local Police Department and Fire department donated \$5000 to the family. A real estate agent offered the family the use of a house, rent free, for a year. Donations were taken from the public for a glass eye to replace the eye the child lost and an out of town doctor who heard of the attack through the media offered to perform the surgery at no cost. When the child appeared to get better he and his family were given a paid trip to go the Arizona to see a professional football game. All this continued week after week being played out in the media. The parents of the child quit their jobs and stayed home and the community provided everything the family needed.

In light of the coverage of the stabbing incident, the public sentiment was to have the juvenile certified and stand trial as an adult. The pressure was put on the County Attorney's office to transfer the case to the District Attorney's office, which prosecutes

adults. The issue had come down to whether to try the 14-year-old as a juvenile, as a juvenile under the Determinate Sentencing Statute or as an adult. As days passed the Office began to look into the background of the 14-year-old juvenile. As it turned out he was an excellent student at school with no reported behavioral problems. The home study revealed that he was well behaved at home and cared for his siblings. In fact he was the neighbor of the boy he attacked and had even attended the victim's birthday party. The juvenile had never used drugs or alcohol and never demonstrated any psychological problems. The juvenile also never had any prior referrals. Still the questions lingered as to the reason the juvenile could have committed such an act. Upon further investigation it was discovered that the juvenile himself had been sexually assaulted as a child. In questioning the Juvenile Probation Department's staff about the juvenile's conduct while in detention it was reported that the juvenile was a model detainee and was in fact remorseful for what he had done. In almost a strange twist the juvenile reported that on the day of the attack he had been possessed by a demon and had no control over his actions. The juvenile stated that he knew what he did was wrong and he should be punished but he asked for help. The decision was made to try the juvenile under the Determinate Sentencing Statute.

In spite of the public's outcry for treating the juvenile as an adult the County Attorney's Office took into consideration the nature of the offense, the harm to the victim, the expectations of the community and the duty to see that justice was done. Granted the crime was horrific and the harm to the victim grave, however, with all the other qualities the juvenile demonstrated, the right thing to do was to incarcerate the juvenile for the protection of the community but also to begin his sentence in the juvenile system where he could benefit from the rehabilitative programs offered by the Texas Youth Commission. At first blush it may seem as though the office treated the juvenile with leniency, but the truth of the matter is that deep thought went into the handling of this particular case. The juvenile finally plead True to the offense and received the 20-year maximum sentence for the offense.

Looking at the possible outcome if the juvenile had been tried as an adult is troubling. It has been the experience of all counties that when a juvenile is tried as an adult, the sentence they receive is minimal. After all juveniles are children and adult

juries are very reluctant to send them for any length of time, if they do at all, to an adult prison where they will be brutalized and sexually assaulted. In the instant case the worst thing that could have occurred is that the juvenile be tried as an adult receive any length of prison time and after being totally dehumanized he would be returned to society once his sentence was served. The end result is that the system would have created a criminal predator. Sometimes society forgets that reintegration in the community is inevitable once an inmate has served his time. It takes great restraint and foresight to exercise prosecutorial discretion in a responsible and productive fashion in the face of the public's instant reaction to crime.

In the end considering all the factors combined, the bottom line for the prosecutor is to see that Justice is done.