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## The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s

*Franklin E. Zimring\**

The boundary between the juvenile court's delinquency jurisdiction and the adult criminal process should be an obvious fault line in courts, academics, and state legislatures. What are and what should be the differences in emphasis between a court for seventeen-year-old burglars and a court that claims jurisdiction over those with identical charges but earlier dates of birth?<sup>1</sup> The discussion of what justifies separate treatment for adolescent offenders should be an important and jurisprudentially thick discourse, but it is not.

Regardless of the general age boundaries imposed by state legislation between juvenile and criminal court, special proceedings are available to transfer youth under the usual age threshold from juvenile to criminal court.<sup>2</sup> Even if general rules such as maximum jurisdictional age are rarely influenced by extensive analysis, surely these exceptional cases where a youth might be removed from juvenile court present the sort of high-stakes individual dramas that provoke deep thought and require resort to the basics of legal philosophy, to a search for fundamentals. Standards for transfer should inspire detailed legislative debate about the purposes and limits of juvenile courts. Judicial decisions about waiver from juvenile to criminal court should be thoughtful, meticulous, and impartial. Appellate review of judicial-waiver decisions should be one of the major intellectual challenges of a state appeals court career. Transfer, however, is a jurisprudential wasteland. The gap between theory and practice in transfer decision-making is huge at every branch of state government, and the poverty of judicial performance in waiver decisions and appeals is a particular disappointment. Why? What is there about the jurisprudential issues raised by waiver that produces legislative and judicial underperformance?

Part of the problem was a disingenuous theory of waiver in the original juvenile court, which has been exacerbated by political debates where transfer policy is generally a crude surrogate for

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1. FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 69–87 (1998).

2. See David S. Tanenhaus, *The Evolution of Transfer Out of Juvenile Court*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 13 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

support or opposition to juvenile courts. For the entire existence of the juvenile court, the waiver of some serious cases into a criminal court has been a practice in search of a theory. The problem initially was not the absence of a prominent rationale for a separate juvenile court but rather the embrace of an implausible cover story that only justified rejecting the delinquent if he was not a fit subject for rehabilitation. Therefore, the task of the juvenile court judge was to determine if the subject of the petition was "amenable to treatment."<sup>3</sup>

From the beginning, an emphasis on amenability did not sound plausible because there were few or no treatment programs administered by early juvenile courts.<sup>4</sup> To be sure, repeated failure on probation and in custody was predictive of transfer to criminal court, but the tone of the discussion in such cases sounded much more like contempt of court than any more complex assessment of amenability.<sup>5</sup> Two elements of cases that have no direct bearing on amenability to specialized treatment have been important in predicting transfer—the advanced age of the juvenile and the seriousness of the charge.<sup>6</sup> Joel Eigen found that juveniles accused of homicide were 25 times as likely to be transferred in Philadelphia as those charged with robbery.<sup>7</sup> Why were robbers so much more amenable to treatment?

This first great credibility gap in transfer jurisprudence was rich in potential for misrepresentation.<sup>8</sup> The juvenile court judge was supposed to inquire about whether the subject of the hearing

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3. ZIMRING, *supra* note 1, at 162.

4. See FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 36–39 (2005).

5. Joel Eigen, *Punishing Youth Homicide Offenders in Philadelphia*, 72 J. CRIM. L. & CRIMINOLOGY 1072, 1091 (1981).

6. ZIMRING, *supra* note 1, at 109, 111 (noting that age and seriousness have been particularly influential in transfer decisions); see also Robert Dawson, *An Empirical Study of Kent Style Juvenile Transfers to Criminal Court*, 23 ST. MARY'S L.J. 975 (1992); Eigen, *supra* note 5, at 1077.

7. ZIMRING, *supra* note 1, at 110 (citing Joel Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia*, in *MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY* 333, 337, 341 (John C. Hall et al. eds., 1981); Joel Eigen, *The Borderlands of Juvenile Justice: The Waiver Process in Philadelphia* (Jan. 1, 1977) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with Penn Libraries, University of Pennsylvania)). This 25-to-1 ratio is calculated using two pieces of data collected by Eigen—first, about half of all juvenile homicide arrests were waived to adult court, while around 2% of all robbery cases were waived to adult jurisdiction. Hence, Eigen found that juveniles accused of homicide were 25 times more likely to be transferred to adult court than robbery suspects in Philadelphia.

8. See Jeffrey Fagan & Franklin E. Zimring, *Editors' Introduction to THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 2, at 1, 4–6.

was “mature,” but the reward for this status might be eligibility for capital punishment!<sup>9</sup>

The problematic nature of non-amenability to treatment as a justification for waiver may help explain the lack of probing analysis in judicial opinions about transfer from juvenile to criminal court. The obvious inconsistencies in the conceptual schema can generate feelings of insecurity about allowing deep inquiry into the foundations of transfer policy. If the underpinnings of transfer policy do not make sense, then covering transfer discussions with huge grants of discretion to the decision-maker is one natural strategy to avoid confronting fundamental inconsistencies.

There is a second reason why discourse about transfer rarely displays depth or subtlety—the crude preferences that animate the actions of most participants in the process. Attitudes toward transfer seem to come in only two conclusory varieties. Friends of the juvenile court believe that all waiver is problematic and display zero tolerance for theories about its potential value.<sup>10</sup> Conversely, critics who label the juvenile court as soft on crime prefer maximum authority to transfer offenders into what is regarded as a more appropriately punitive criminal court.<sup>11</sup> This, however, transforms a debate about transfer into a referendum on the whole of the juvenile court rather than an exceptional outcome reserved for special cases.

The crude and mislabeled nature of discourse about transfer makes the identification of the reasons for policy changes difficult to identify. This Article seeks to determine the major reasons for legislative change on transfer in the last decade of the twentieth century. Identifying the central motives behind the shifts in the 1990s helps to create more effective strategies for protecting modern juvenile courts from corruption of their mission. Misidentifying the real motives of legislative change can provoke well-intentioned people to make disastrous mistakes.

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In the 1990s, many states passed legislation designed to increase the number of cases that could be transferred from

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9. ZIMRING, *supra* note 1, at 164 (noting that the perceived level of maturity of an offender plays an important role in determining whether juvenile jurisdiction is appropriate).

10. See Franklin E. Zimring & Jeffrey Fagan, *Transfer Policy and Law Reform*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 2, at 407, 408–10.

11. *Id.*

juvenile court and to change the allocation of authority between judge and prosecutor in making transfer decisions.<sup>12</sup> The media often portrayed this increase in legislative activity as a response to the increase in youth homicide in urban areas.<sup>13</sup> To the extent that there was a mandate for change implied in this new legislation, it was a tightening up of punishment policy towards youth violence.<sup>14</sup> It was unclear, however, how broad that mandate was or to what degree dissatisfaction with priorities and processes of juvenile courts played a role in the legislation. Was the legislative barrage of the 1990s the opening wave of an attempt to profoundly alter the power and jurisdiction of juvenile courts? If so, were attempts to maintain the reach of juvenile courts by changing their policies appropriate or successful?

There were two important contrasts between juvenile and criminal courts in the United States of the 1990s. The first was a difference in the level of secure confinement imposed on offenders, with the criminal courts much more punitive than the juvenile courts.<sup>15</sup> The second was a substantially different allocation of power between judges and prosecutors—criminal courts were run by a plea-bargaining dynamic which gave prosecutors much more power than judges, while juvenile courts conferred much more power on judges and probation staff.<sup>16</sup>

This Article argues that the most important struggle during the 1990s was not about the jurisdiction of juvenile courts—or even about the content of punishment policy for young offenders—but rather was an attempt to expand prosecutorial power in juvenile justice. This Article also shows that confusion among supporters of the juvenile court about the nature of the threat to juvenile justice produced one defensive strategy—the so-called “blended jurisdiction”—that facilitated rather than deflected the major threat to the integrity and authority of the juvenile courts in the United States.<sup>17</sup>

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12. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 154 (1995); ZIMRING, *supra* note 1, at 11–15.

13. ZIMRING, *supra* note 1, at 11–15, 31–47.

14. *Id.*

15. *Id.* at 169 (discussing the punishment gap between juvenile and adult jurisdictions).

16. *Id.* at 109.

17. *Id.* at 169–72.

## I. DIMENSIONS OF DIFFERENCE

Generally, the juvenile-court jurisdiction ends with the 13 to 17 year old age group. In this age group, approximately 489 persons per 100,000 males are in secure confinement.<sup>18</sup> This number increases to 2,642 persons per 100,000 males for the 18 to 24 year old age group where criminal courts provide exclusive jurisdiction.<sup>19</sup>

The male incarceration rate for ages 18 to 24 is not available separately for jail and prison for each year in the age category. The aggregate rate for 18 to 24 year olds is more than five times the confinement rate in ages 13 to 17. The confinement or incarceration rate for the oldest groups under the age of 18 is 946,<sup>20</sup> so the comparison at the age boundary between 17 and 18 year olds is probably much closer than five to one.<sup>21</sup> The 18 to 24 year old incarceration rate grew rapidly in the last three decades of the twentieth century,<sup>22</sup> so there was reason to believe that juvenile courts were less likely than criminal courts to increase incarceration rates.

While the large gap between juvenile and adult incarceration rates might be a product of either smaller percentages of juveniles receiving custody, or shorter custodial stays, the substantial “front loading” of the juvenile system with detention suggests that much of the difference in aggregate incarceration populations is a result of shorter stays for the younger groups. If the ratio of prisoners-to-jail inmates on any given day is more than two-to-one in the 18 to 24 year old group, this ratio is *much* higher than the ratio of post-adjudication confinement-to-detention in the juvenile system. The most probable contrast between juvenile and criminal courts is a large number of short stays at the front end of the juvenile court as opposed to much higher rates of post-adjudication imprisonment in the criminal court.<sup>23</sup>

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18. *Census of Juveniles in Residential Placement Databook*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://ojjdp.ncjrs.org/ojstatbb/Cjrp> (last updated Apr. 14, 2008).

19. See HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2007 (2008), available at [http://www.realcostofprisons.org/materials/BJS\\_2007\\_Prison\\_Statistics.pdf](http://www.realcostofprisons.org/materials/BJS_2007_Prison_Statistics.pdf). See also *infra* Figure 1 for an explanation of the methodology used.

20. The phrase “the oldest group under 18” refers to the incarceration rate of the oldest age group within the 13 to 17 age range. Hence, the incarceration or confinement rate of this smaller subgroup is 946 persons per 100,000.

21. See *Census of Juveniles in Residential Placement Databook*, *supra* note 18.

22. ZIMRING, *supra* note 4, at 46 fig.4.1.

23. See ZIMRING, *supra* note 1, at 169 (noting that there is a penalty gap between the juvenile and adult systems whereby juveniles often receive shorter confinements).

There is no doubt that the juvenile court's reputation for relative leniency played a major role in the legislative politics of the 1990s and that public fear of juvenile violence was a major element in legal change.<sup>24</sup> But there are two different strategies for increasing severity that could be adopted to close any so-called "leniency gap" between juvenile and criminal courts. One method would be to push cases that would otherwise be handled in juvenile courts into the criminal courts, where harsher policies are already in place. A second method would be to increase the penalties and punishment priorities in the juvenile court to bring the values closer to those of criminal courts. These two separate threats to the traditional priorities of juvenile justice might both be pushed by the same actors at the same time. To the extent that one threat is larger than the other, they call for different strategies of legal response in the juvenile court and by its traditional supporters.

The most visible form of legislative change in the 1990s came with changes to the standards and procedures for transfer of serious crimes to criminal courts.<sup>25</sup> The longstanding method of transfer was a hearing held before a juvenile court judge who had the power to waive the juvenile court's jurisdiction.<sup>26</sup> This "waiver" would allow the prosecutor to bring a charge in criminal court.<sup>27</sup> Much of the legislation during the 1990s was designed to increase the number of charges and of juveniles eligible for judicial waiver by reducing the minimum age for waiver, by increasing the charges that could provide a threshold for transfer, or by changing the burden of proof for judicial decision to waive.<sup>28</sup> Two other methods of increasing transfers were also frequently proposed and passed. The first was legislation that provided original jurisdiction in criminal courts for particular charges brought against older juveniles.<sup>29</sup> The second was an explicit grant of discretionary power to prosecutors to file in either juvenile or criminal court at their discretion.<sup>30</sup>

The heavy emphasis on transfer legislation might have created the impression that a major priority of the legal change was to reduce the jurisdiction and power of juvenile courts. In fact, the emphasis on murder cases as the source of public concern required a focus on waiver because killings had always been the leading

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24. *Id.* at 9 (noting that the perception that some juveniles go unpunished influences media coverage and legislative priorities).

25. SNYDER & SICKMUND, *supra* note 12, at 154.

26. ZIMRING, *supra* note 1, at 109.

27. *Id.*

28. *Id.* at 117-21.

29. *Id.*

30. *Id.*

case for transfer to the much higher maximum penalties in the criminal system.<sup>31</sup> Any set of juvenile court proposals driven by murder cases would emphasize transfer even if the proponents were not seeking to limit the jurisdiction of juvenile courts. Further, while the penal outcomes for murder in criminal courts are vastly higher than in juvenile courts, the number of homicide cases, indeed the total number of transfers in most systems, is tiny.<sup>32</sup> Only mass transfer structures such as those used in Florida and New York really cut into juvenile court jurisdiction in serious cases, and neither of these radical reforms came in the 1990s.<sup>33</sup> Despite the emphasis on transfer in the 1990s, there were none of the wholesale cutbacks that had been produced in the 1970s in New York and the 1980s in Florida.<sup>34</sup>

## II. THE DOG THAT DIDN'T BARK

Moreover, there was one other proposal significantly missing from the legislative record of the 1990s. The easiest way to alter the boundaries between juvenile and criminal courts is to alter the jurisdictional age that separates the two systems. There is wide variation already among the 50 states about the dividing line between juvenile and criminal court. Thirty-eight states extend the jurisdiction of juvenile courts to the eighteenth birthday while two states make the age transition at 16.<sup>35</sup> Because the rate of serious crime increases with each year in the mid-teens, there are greater numbers of homicide, assault, burglary, and robbery arrests between these two birthdays than in the rest of the juvenile

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31. See, e.g., *id.* at 114 (noting that Texas, for instance, had a significant contrast between waiver of juvenile homicide cases and all other offenses); see also *id.* at 110 (describing the difference in waivers between juvenile homicide cases and juvenile robbery cases).

32. *Id.* at 112–13.

33. *Id.* at 16.

34. *Id.* at 15–16.

35. Current 2009 distribution of states by maximum age for delinquency: (age 15) Connecticut, New York, North Carolina; (age 16) Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina, Texas, Wisconsin; (age 17) Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming. See *Statistical Briefing Book: Statutes, CRIM. JUST. REFERENCE SERVICE*, [http://ojjdp.ncjrs.gov/ojstatbb/structure\\_process/qa04101.asp?qaDate=2007](http://ojjdp.ncjrs.gov/ojstatbb/structure_process/qa04101.asp?qaDate=2007) (last visited July 31, 2010).



population.<sup>36</sup> This means that a simple reduction of two years in the jurisdictional age would remove a majority of serious juvenile cases to the criminal courts in states that use the age of 18 as a transition. Yet while 40 states made waiver or transfer easier in the early 1990s,<sup>37</sup> no American state cut back the maximum age of delinquency by two years,<sup>38</sup> and only two states lowered the maximum age from 18 to 17.<sup>39</sup> Clearly, the natural and simple method of expanding criminal court powers by reducing the caseload in juvenile court was never a part of the legislative agenda of the 1990s.

The absence of a major emphasis on reduction of jurisdiction means that the 1990s should not be seen as a turf battle between juvenile and criminal courts. But why then the proliferation of transfer legislation and the concentrated effort on the organization and boundaries of juvenile courts? Part of the emphasis on transfer might have been simply an attempt to do something punitive about youth violence without shifting resources or making major institutional alterations. But why multiple layers of legal change, and why were the laws so complex? One plausible explanation for both the form and content of the 1990s brand of “get tough” legislation is to regard it as an attempt to provide greater power to prosecutors within juvenile courts, to push the allocation of power in juvenile courts closer to the model of prosecutorial domination that has been characteristic of criminal courts in the U.S. for a generation.

A central mechanism of case disposition in criminal courts is plea-bargaining, and the vast majority of the power to determine punishment in plea-bargaining rests with the prosecutor.<sup>40</sup> The judge enters the legal process after the punishment determination in negotiated cases, which is the essence of what Morris and Hawkins called “[a]n administrative law of crime.”<sup>41</sup> The contrast in juvenile court is substantial for institutional as well as historical reasons. Prosecutors are one of three powerful institutional presences inside the modern juvenile court.<sup>42</sup> Juvenile court judges and referees, alone and in collaboration with probation staff,

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36. *Crime in the United States 2008: Table 38*, FBI.GOV, [http://www2.fbi.gov/ucr/cius2008/data/table\\_38.html](http://www2.fbi.gov/ucr/cius2008/data/table_38.html) (last updated Sept. 2009).

37. ZIMRING, *supra* note 1, at 13 (citing SNYDER & SICKMUND, *supra* note 12).

38. *Statistical Briefing Book: Statutes*, *supra* note 35.

39. *Id.*

40. See generally Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

41. NORVAL MORRIS & GORDON HAWKINS, LETTER TO THE PRESIDENT ON CRIME CONTROL 15 (1977).

42. ZIMRING, *supra* note 1, at 109–10.

exercise power over detention decisions.<sup>43</sup> They also have power over whether a petition will be filed in a case, whether a juvenile will be diverted, and what type of post-adjudication placement will be selected if the juvenile is adjudicated delinquent.<sup>44</sup> Both probation and judges are more influential in juvenile than in criminal courts. While prosecutors are much more powerful in juvenile courts than they were a generation ago, they are still less powerful in juvenile than in criminal courts, and this is the comparison that carries the most contemporary meaning to the modern prosecutor.

The shift from judicial waiver to discretionary or direct filing resulted in more power and less work for juvenile court prosecutors. The standard method of transfer in the twentieth-century juvenile court was a hearing where the prosecutor attempted to persuade the juvenile court judge to transfer a juvenile within the court's jurisdiction.<sup>45</sup> This type of waiver hearing is hard work for prosecutors, and while the success rate of such motions is about 80%, the risk of failure is nontrivial.<sup>46</sup> Providing discretion to prosecutors to file in either juvenile or criminal courts is an obvious and direct shift of power from juvenile court judges to prosecutors. Providing exclusive jurisdiction for some charges in criminal court is a less obvious grant of power to prosecutors but no less direct, because it is the prosecutor who determines what charges to file.<sup>47</sup> If murder charges go directly to criminal court but manslaughter may be tried in juvenile court, the selection of the charge becomes the selection of the court. The proliferation of direct file provisions is really an enhancement of prosecutorial power as much as it is a legislative judgment about which juveniles should be transferred to criminal court because it is contingent on prosecutorial charging discretions. A shift from judicial waiver to direct file not only increases the power of prosecutors, it also decreases the workload necessary to produce a waiver outcome. All of this might also enhance the power of prosecutors to bargain with defense attorneys in the very early stages of cases that might end up in juvenile or criminal courts and secure concessions in exchange for reduction of charges.

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43. *Id.*

44. Margaret K. Rosenheim, *The Modern American Juvenile Court*, in *A CENTURY OF JUVENILE JUSTICE* 341, 348–51 (Margaret K. Rosenheim et al. eds., 2002).

45. ZIMRING, *supra* note 1, at 109.

46. Dawson, *supra* note 6.

47. See generally ZIMRING, *supra* note 1, at 125–27.

## III. THE POWER POLITICS OF CALIFORNIA'S PROPOSITION 21

Searching for the true motives behind legislation is consistently something of a guessing game, and the incentives in the area of crime policy are always to represent public safety as the major reason for any proposed change in policy. This means that determining the real priorities in legal change is often difficult. However, at the close of the 1990s, a series of proposals drafted for Republican legislators by prosecutors<sup>48</sup> were packaged into a thirty-four-part initiative put on the California ballot for March of 2000 as Proposition 21 and passed by the voters.<sup>49</sup> This complex structure provides a fascinating window into the priorities of the most detailed "get tough" agenda of the era.

The seventeen separate changes in juvenile court legislation at the back end of Proposition 21 are a complicated attempt to leverage the powers of prosecutors at the expense of probation and judicial power.<sup>50</sup> The long list of changes include the usual candidates for juveniles in the 1990s—a new list of direct file categories and specific provisions making judicial waiver easier for prosecutors by expanding the list of crimes that generate a presumption of transfer and reducing the burden of proof in the judicial proceeding.<sup>51</sup>

The complicated menu of changes, however, includes two more obvious assaults on the power of other court offices. The first was phrased as a prohibition of release by probation staff if a juvenile over the age of 14 had been charged with one of a series of felonies.<sup>52</sup> Typically in California, initial detention decisions were made by probation staff (as is intake screening), and a judicial officer then reviewed the case when detention was elected.<sup>53</sup> Prior to Proposition 21, release by probation was prohibited only if a minor over the age of 14 had personally used a gun. Section 20 expanded this ban to a long list of charges.<sup>54</sup> This

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48. There is some controversy as to which prosecutors' offices had the major role. Lisa Green, then of the Los Angeles Public Defender's Office attributed most of the juvenile sections to the Los Angeles District Attorney, while other oral historians implicated Riverside.

49. See *California Law Tougher for Juveniles Now*, MILWAUKEE J. SENTINEL, Mar. 9, 2000, at 13A.

50. Amicus Curiae Brief on Behalf of Law Professors & Juvenile Justice Specialists in Support of Petitioners Morgan Victor Manduley et al. at 2, *Manduley v. Super. Ct. of San Diego Cnty.*, 41 P.3d 3 (Cal. 2002) (No. S095992) [hereinafter Amicus Brief] (on file with author).

51. CAL. WELF. & INST. CODE § 707 (West Supp. 2009).

52. *Id.* § 625.3 (West 2008).

53. Amicus Brief, *supra* note 50, at 4.

54. *Id.*

unprincipled expansion shifted the initial detention decision from probation to the prosecutor in a large number of cases because the prosecutor can select a charge that removes the probation staff's authority under the new statutory provision.

An even more visible power play was the two separate sections of Proposition 21 that deal with pretrial diversion programs of juveniles. One provision in Proposition 21, section 22, abolishes eligibility for a diversion program previously authorized by law that was administered by probation and the judiciary if a minor over the age of fourteen is charged with any felony.<sup>55</sup> But a second section of Proposition 21, section 29, without mentioning the diversion program that Proposition 21 has just trivialized, creates a new pretrial diversion program to be administered in the juvenile court by the prosecutor.<sup>56</sup> Here is the smoking gun of the proposition's real agenda. There is no theory of diversion that can explain why Proposition 21 both abolishes and introduces a pretrial diversion program. The only principle that accommodates both of these results is the positive value of prosecutorial power. What emerges from a careful reading of Proposition 21 is a zero-sum contest between prosecutors and other court personnel for the power to determine juvenile court policy.

Proposition 21 is representative of much, if not most, of the legislative legacy of the 1990s. The most parsimonious explanation of why so little jurisdiction was shifted from juvenile to criminal court is that those pushing for the new laws were not committed to reducing the importance or power of the juvenile court; they were instead interested in changing the power relations inside the juvenile court and the punitive priorities of the court. Increased prosecutorial power and harsher sanctions were desired, and there was an assumption that larger prosecutorial power would achieve more punitive outcomes. But which was the more important objective? For those who drafted specifics of the legislation (prosecutors themselves), it is hard to resist the conclusion that prosecutorial power was the higher priority.

Critics of the 1990s legislative frenzy were about half right in their diagnosis of what was happening. My conclusion in 1998 was as follows:

If the reforms of the past decade are typical of future trends, it is the mission of the juvenile court rather than its jurisdiction that is at risk. The goal of punitive reforms has been to reorient the juvenile court rather than to cut back on

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55. CAL. WELF. & INST. CODE § 654.3.

56. *Id.* §§ 790–95.

its size, its influence, or its power. For those who support the traditional missions of juvenile justice, the biggest worry will be not the decline in power of the juvenile court but the new policies that a powerful juvenile justice system may soon serve.<sup>57</sup>

Why only half right? While much of the rhetoric of this paragraph wears pretty well, it also displays a regrettable failure to identify the growth of prosecutorial power as central to the threat. It was not impossible that the traditional focus of juvenile courts on limiting punishment and serving youth development could be undone by a punitive turn in the outlook of all the powerful actors in juvenile justice, but this was always unlikely.<sup>58</sup> Juvenile court judges and probation officers will not place their faith in unqualified crime suppression. The greater danger is the shift of power within the juvenile courts from the judges and probation staff who have been the bulwark of the juvenile court tradition to a regime of prosecutorial hegemony.

With the wisdom of hindsight, this Article now suggests that the largest threat to enlightened delinquency policy has always been a shift of power rather than a change of heart. Prosecutors are already a powerful presence in juvenile justice, but they are not the sole determiners of juvenile justice sanctions.<sup>59</sup> The danger of shifts like Proposition 21 is the transfer of sentencing powers—the power to detain, the power to divert, and the power to transfer—to prosecutors alone.<sup>60</sup> Attention to these allocation-of-power issues should be the most prominent part of analyses of law reform throughout the domains of juvenile court policy.

In the section that follows, this Article revisits one set of law reform activities during the 1990s where both the problem addressed and the solutions adopted were dangerously innocent of this perspective.

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57. ZIMRING, *supra* note 1, at 16.

58. *Id.* at 169 (stating that the longer duration of penal confinement for juvenile offenders is inconsistent with the premise and philosophy of juvenile court).

59. Amicus Brief, *supra* note 50, at 4 (describing the importance of the hearing conducted before a juvenile judge before Proposition 21).

60. *Id.* at 4 (detailing that section 18 of Proposition 21 would shift the ultimate power to make transfer decisions to the prosecutor, who would have “unreviewable discretion to select charges”).

## IV. THE STRATEGIC FOLLY OF BLENDED JURISDICTION

One response to the pressure for new approaches to juvenile violence was the creation of a special new unit within juvenile courts that would have the power to impose much longer-than-usual sentences and frequently would also provide more procedural protections when conducting trials.<sup>61</sup> Redding and Howell describe the appeal of what is called the “blended” model in the following terms:

[B]lended sentencing is an extension of the ideals of the juvenile court, allowing the court to maintain its jurisdiction over serious and violent juvenile offenders rather than having them transferred to criminal court and incarcerated in adult facilities. Blended sentencing is appealing to many juvenile justice officials, prosecutors, and defense attorneys, because it preserves juvenile court jurisdiction and discretionary control . . . while providing a stronger accountability sanction and greater community protection . . . .<sup>62</sup>

In my view, the basic assumptions of blended jurisdiction are wrong and the extreme versions of the system (such as Texas) are monstrous,<sup>63</sup> but the merits of blended jurisdiction are not the point of this Article. Instead, adventures of the 1990s with blended jurisdiction will illustrate rather clearly why it is dangerous to design responses to assaults on American juvenile courts without a clear notion of what is motivating the attack.

What made blended sentencing appealing to many juvenile justice officials was the notion that expanding the punishment powers available in juvenile courts would mollify critics who were attempting to cut back on the jurisdiction and influence of the juvenile court.<sup>64</sup> The problem here is that nobody was really trying to cut back on the court’s jurisdiction—there were no crusades to transfer older juveniles out of the court. There was only the attempt to make transfer easier in a few cases when huge penalties were

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61. See ZIMRING, *supra* note 1, at 169–74.

62. Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 2, at 145, 147.

63. ZIMRING, *supra* note 1, at 169–74.

64. Redding & Howell, *supra* note 62, at 170 (stating that blended jurisdiction and hybrid proceedings “are a substitute for transfer to criminal court” in many cases).

available as a consequence.<sup>65</sup> The blended system was designed to respond to a non-existent threat. In those cases where prosecutors wanted the huge adult system penalties, there were usually no provisions in the blended sentencing laws to make transfer unavailable.<sup>66</sup>

But what if the real agenda was to reorient the juvenile court's sanctions and priorities? What if "it is the mission of the juvenile court rather than its jurisdiction that is at risk"?<sup>67</sup> If the enhancement of prosecutorial power was sought and plea-bargaining was encouraged, then blended sentencing is just what the district attorney ordered. Once blended sentences become an alternative to transfer for the same juvenile (a standard condition), the district attorney offers a reduction to the blended jurisdiction if the juvenile will plead guilty in that setting. Where the blended alternative is also used as a step up from the punishment grade in regular delinquency cases, the juvenile will be choosing between a plea in the regular court or a trial in the blended tribunal. In each case, the punishment will often be determined before a judge arrives on scene.

The strategic choice argument this Article makes is that misreading the real agenda of the 1990s created a catastrophic error in response from many in juvenile justice. If the real danger had been the decline of court jurisdiction, then blended sentencing's expansion of punishment power might have been a remedy worth discussion. If prosecutorial power and punitive priority were the goals of the right in the 1990s, then blended sentencing was nothing short of surrender. Those who hoped to hold on to a few cases otherwise headed for criminal court by sacrificing judicial power and limited punishment system-wide would celebrate a victory only General Pyrrhus could fully appreciate.

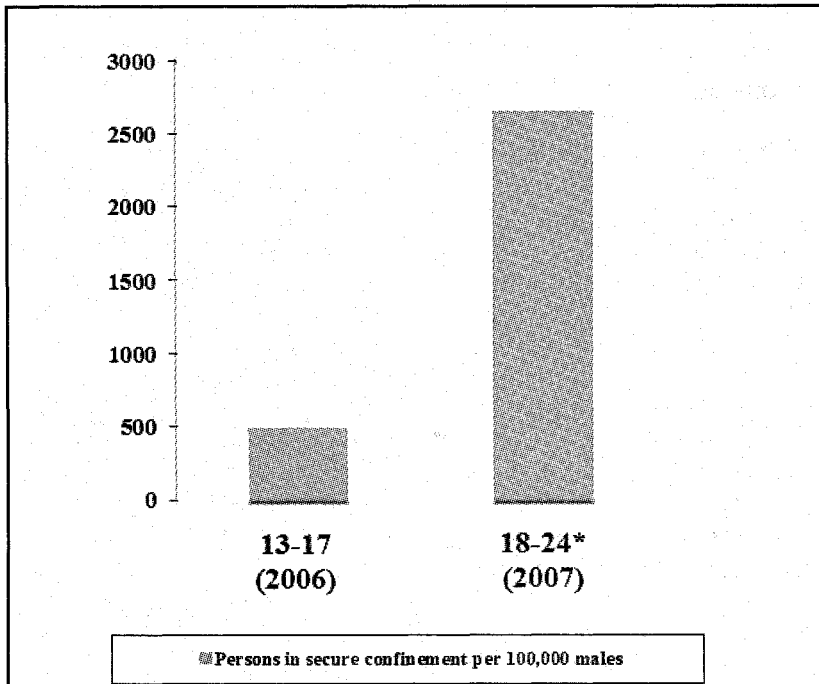
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65. *Id.* at 171 (describing how even systems that made blended jurisdiction available still provided transfer for extremely serious juvenile violence).

66. ZIMRING, *supra* note 1, at 169–174.

67. *Id.* at 16.

**Figure 1**  
**Secure Confinement per 100,000 males for 13 to 17 year olds**  
**and 18 to 24 year olds U.S., 2006-2007**



\* based on 231,600 in prison, BJS prisoners in 2007, and assuming the same ratio of jail to prison for 18-24 as for all ages, .42 times the 331,600 males, or 100,199. For jail to prison ratios, compare BJS prisoners in 2007 with BJS Jail Inmates at mid-year 2007, both at <http://www.ojp.usdoj.gov/bjs>. The census population is estimated at 12,588 by taking two-fifths of the 15 to 19 total of 10,747,000 males and adding this to the 10,409,000 for ages 20 to 24. U.S. Census Bureau, Current Population Survey Annual Social and Economic Supplement, 2007, table 1.

Sources: Sickmund, Melissa, TJ, Sladkey and Wei Kong (2008). "Census of Juveniles in Residential Placement Databook," available at <http://ojjdp.ncjrs.org/ojstatbb/cjrp/>, 18-24, Bureau of Justice Statistics, Prisoners in 2007 and Jail Inmates at mid-year 2007 in notes to 18-24 estimate.



