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The Power Politics of Juvenile Court Transfer in the 1990s

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The boundary between the juvenile court's delinquency jurisdiction and the criminal process should be one of those obvious fault lines between sharply different approaches to the same sort of problems that provoke analysis and debate in courts, in the academy, and in state legislatures. What are and what should be the differences in emphasis between a court for 17-year-old burglars and one that claims jurisdiction for those with identical charges but earlier dates of birth (Zimring 1998, ch. 5)? The discussion of what justifies separate treatment for adolescent offenders should be an important and jurisprudentially thick discourse, but it's not. Why?

Whatever the general age boundaries imposed by state legislation between juvenile and criminal court, there are always in the United States special proceedings that are available to facilitate the transfer of youth under the usual age threshold from the juvenile to the criminal court (Tanenhaus 2000, 13–35). Even if general rules such as maximum jurisdictional age are rarely informed 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 the 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 ambivalent. Appellate review of judicial waiver decisions should be one of the major intellectual challenges of a state appeals court career. But transfer 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, and this has been exacerbated by political debates where transfer policy is a crude surrogate for support or opposition to juvenile courts generally. For the entire duration 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 from day one wasn't 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." So the task of the juvenile court judge was determining whether the subject of the petition was "amenable to treatment" (Zimring 1998, 162).

From day one an emphasis on amenability didn't sound plausible, because there were few or no treatment programs administered by early juvenile courts (Zimring 2005, 36–39). 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 that any more complex assessment of amenability. And two elements of cases that have no direct bearing on amenability to specialized treatment seem always to have been important in predicting transfer—the advanced age of the juvenile, and the seriousness of the charge. Joel Eigen found that juveniles accused of robbery homicide were 25 times as likely to be transferred in Philadelphia as those charged with robbery where no death occurred (Eigen 1981a; Eigen 1981b). Why were robbers so much more amenable to treatment?

This first great credibility gap in transfer jurisprudence was rich in potential for misrepresentation (Fagan & Zimring 2000, 4–6). The juvenile court judge was supposed to inquire about whether the subject of the hearing was "mature," but the reward for this status might be eligibility for capital punishment!

The problematic nature of nonamenability to treatment as a justification of waiver may help explain the lack of probing analysis in judicial opinions about transfer from juvenile to criminal court, because 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 don't 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—and that is 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 all waiver is problematic and display zero tolerance for theories about its potential value (Zimring & Fagan 2000, 408–410). Critics of the juvenile court as soft on crime prefer maximum authority to transfer offenders into what is regarded as a more appropriately punitive criminal court (408–410). But this makes 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. In this chapter, I try to determine the major reasons for legislative change on transfer in the last decade of the twentieth century. My argument is that identifying the central motives behind the 1990s shifts can help to create more effective strategies for protecting modern juvenile courts from the corruption of their mission. And misidentifying the real motives of legislative change can provoke well-intentioned people to make disastrous mistakes.

In the decade or so after 1990, there was a substantial trend in American states to pass legislation designed to increase the number of cases that could be transferred from juvenile court and to change the allocation of authority between judge and prosecutor in making transfer decisions (Zimring 1998, 11–15; Snyder & Sickmund 1995). The provocation for this legislative activity in the media was an increase in youth homicide in urban areas (Zimring 1998, 11–15 and ch. 3). To the extent that there was a mandate for change implied in this new legislation it was increasing punishment of youth violence, but it was far from clear how broad that mandate was or how much dissatisfaction with priorities and processes of juvenile courts was a major theme 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 some of the attempts to maintain the reach of juvenile courts by changing their policies either appropriate or successful in defending the juvenile court from diminished jurisdiction?

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. 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.

I will argue in this chapter that the most important struggle during the 1990s wasn't about the jurisdiction of juvenile courts—or indeed even about the content of punishment policy for young offenders—but rather was an attempt to expand prosecutorial power in juvenile justice. I will also show that confusion among supporters of the juvenile court about the nature of the threat to juvenile justice produced one defensive strategy—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.

Dimensions of Difference

Figure 2.1 provides a rough estimate of different levels of secure confinement for the 13- to 17-year-old age groups at the end of juvenile court jurisdiction in most states and the 18- to 24-year-old age group where criminal courts provide exclusive jurisdiction.

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 is more than five times the confinement rate in ages 13 to seventeen. The confinement rate for the oldest groups under 18 is 946, so the comparison at the age boundary between 17- and 18-year-olds is probably much closer than five to one. But the 18 to 24 incarceration rate grew much more quickly in the last three decades of the twentieth century (Zimring 1998, ch. 4 at Fig. 4.1), so there was substantial

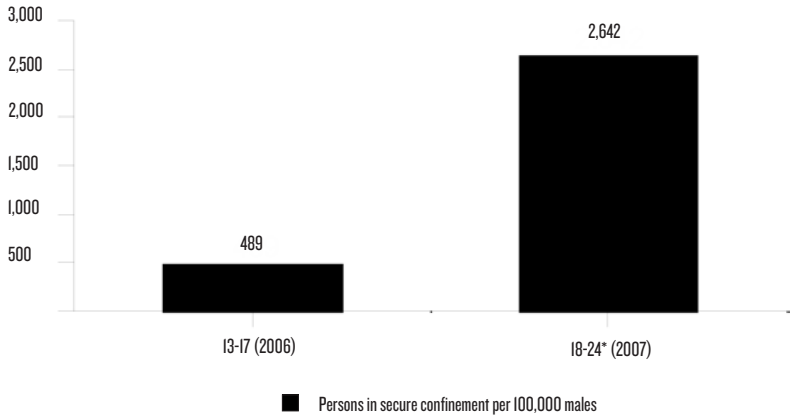

Figure 2.1. Secure Confinement per 100,000 Males for 13- to 17-Year-Olds and 18- to 24-Year-Olds, US, 2006–2007

* Based on 231,600 in prison, Bureau of Justice Statistics (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 www.ojp.usdoj.gov/bjs. The census population is estimated at 12,558 by taking two-fifths of the 15–19 total of 10,747,000 males and adding this to the 10,409,000 for ages 20–24. US Census Bureau, *Current Population Survey Annual Social and Economic Supplement, 2007*, Table 1. Sources: Melissa Sickmund, T.J. Sladky and Wei Kong (2008). "Census of Juveniles in Residential Placement Databook," http://ojjdp.ncjrs.org/ojstatbb/Cjrp/; "18 to 24, Bureau of Justice Statistics, Prisoners in 2007" and "Jail Inmates at mid-year 2007" in notes to 18–24 estimate.

reason to believe that juvenile courts were substantially less likely to greatly increase incarceration rates than criminal courts.

While the large gap between single-day 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 really more than 2 to 1 in the 18 to 24 group (as Figure 2.1 assumes), this would be *much* higher than the ratio of postadjudication 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.

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. But there are two quite different strategies for increasing severity that could be adapted to close any 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 instead, where harsher policies are already in place. A second method, however, would be to increase the penalties and punishment priorities in the juvenile court to bring it closer to the values 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. But to the extent that one threat is larger than the other, they call for different strategies of legal response in the juvenile court and among its traditional supporters.

The most visible form of legislative change in the 1990s was in changing the standards and procedures for transfer of serious crimes to criminal courts (Snyder & Sickmund 1995). The long-standing method of transfer was a hearing held before a juvenile court judge who had the power to waive the juvenile court's jurisdiction. This waiver would leave the prosecutor free to bring a charge in criminal court. Much of the legislation during the 1990s was designed to increase the number of charges and juveniles eligible for judicial waiver by reducing the minimum age for waiver, increasing the charges that could provide a threshold for transfer or by changing the burden of proof for judicial decision to waive. But 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. The second was an explicit grant of discretionary power to prosecutors to file in either juvenile or criminal court at their discretion.

The heavy emphasis on transfer legislation might have created the impression that a major priority of the legal change was reducing 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 case for transfer to the much higher maximum penalties in the criminal system. 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 court, the number of homicide cases—indeed the total number of transfers in most systems—is tiny. 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. For all 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 (Zimring 1998, 15–16).

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 sixteen.[1]

Because the rate of serious crime increases with each year in the midteens, there is a greater number of homicide, assault, burglary, and robbery arrests between these two birthdays than in the rest of the juvenile population (US Department of Justice 2009, Table 38). This means that a simple reduction of two years in the jurisdictional age would remove a majority of an age-18 state's serious juvenile cases to the criminal courts. Yet while 40 states made waiver or transfer easier in the early 1990s, no American state cut back the maximum age of delinquency by two years and only two states lowered the maximum age from 18 to seventeen. So 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 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 extraordinary concentration of 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 United States for a generation.

The central mechanism of case disposition in criminal courts is plea bargaining, and the vast majority of the power to determine punishment rests with the prosecutor. The judge enters the legal process after the fact of punishment determination in negotiated cases, and this is the essence of what Morris and Hawkins (1977) called "an administrative law of crime." 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. Juvenile court judges and referees, alone and in collaboration with probation staff, exercise power over detention decisions as well as whether a petition will be filed in a case, whether a juvenile will be diverted, and what type of postadjudication placement will be selected if the juvenile is adjudicated delinquent (Rosenheim 2002, 348–351). Both probation and judges are much 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 much less powerful in juvenile than in criminal courts, and this is the comparison that carries the most contemporary meaning to the modern prosecutor.

Much of the complexity in 1990s-style transfer legislation, and certainly the shift from judicial waiver to "legislative direct file" and discretionary filing in juvenile or criminal court, creates more power or less work for juvenile court prosecutors, or both. The standard method of transfer in the twentieth-century juvenile court was a hearing in juvenile court, where the prosecutor attempted to persuade a juvenile court judge to transfer a juvenile within the court's jurisdiction. This type of waiver hearing is hard work for prosecutors, and while the success rate of such motions is about 80 percent, the risk of failure is nontrivial (Dawson 1992, 975).

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. 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. So 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. And 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 also might 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 to secure concessions in exchange for reduction of charges.

The Power Politics of California's Proposition 21

Searching for the true motives behind legislation is always 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 will mean that determining the real priorities in legal change is often difficult. But just at the end of the 1990s, a series of proposals drafted for Republican legislators by prosecutors[2] were packaged into a 34-part initiative put on the California ballot for March of 2000 as Proposition 21 and passed by the voters. This complex structure provides a fascinating window into the priorities of the most detailed get-tough agenda of the era.

The 17 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 (Gang Violence and Juvenile Crime Prevention Act of 1998, [Calif. Prop. 21]). 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 (Calif. Prop. 21, § 26).

But the complicated menu of changes 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 14 has been charged with one of a series of felonies (Calif. Prop. 21, § 20). Typically, in California, initial detention decisions have been made by probation staff (as is intake screening), and a judicial officer then reviews the case when detention is elected after about 48 hours. Prior to Proposition 21, release by probation was not allowed only if a minor over 14 had personally used a gun. Section 20 expanded this ban to a long list of charges. What this unprincipled expansion did was shift the initial detention decision from probation to the prosecutor in a large number of cases, because the prosecutor can often 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 (§22) abolishes eligibility for a diversion program previously authorized by law that was administered by probation and the judiciary if a minor over 14 is charged with any felony. But a second section of Proposition 21 (§ 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—you guessed it—the prosecutor. Here is the smoking gun of the proposition's real agenda. There is no theory of diversion that can explain why the Gang Violence and Juvenile Crime Prevention Act of 1998 both abolishes and introduces a pretrial diversion program. The only principle that accommodates both 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.

And 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 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. Both 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 legislation (prosecutors themselves), it is hard to resist the conclusion that prosecutorial power was the higher priority.

Critics of the 1990s legislative frenzy, including this one, were about half right in their diagnosis of what was happening. My conclusion in 1998 was this:

> 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 its size, its influence, or its power. For those who support the traditional mission 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! (Zimring 1998, 16).

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. We probably won't soon live in a world in which juvenile court judges and probation officers place their faith in unqualified crime suppression and distrust most juvenile offenders. The greater danger is the shift of power within the juvenile court 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, let me now suggest 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 determinants of juvenile justice sanctions. 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. And 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, I revisit one set of law reform activities during the 1990s where both the problem addressed and the solutions adopted were dangerously innocent of this perspective.

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. Redding and Howell (2000) describe the appeal of what is called the "blended" model in the following terms:

> Blended sentencing is an extension of the ideals of the juvenile court, allowing the court to maintain its jurisdiction over serious and violent 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 (147).

I have long believed that the basic assumptions of blended jurisdiction were wrong and that extreme versions of the system (such as Texas) are monstrous (Zimring 1998, 169–174), but the merits of blended jurisdiction are not my point here. Instead, the 1990s adventures 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. 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 available as a consequence. So the blended system was designed to respond to a nonexistent threat and 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.

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" (Zimring 1998, 16)? If the enhancement of prosecutorial power was sought and the creation of a structure of outcomes where 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. Sound a bit like criminal court?

The strategic choice argument I am making 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. But if prosecutorial power and punitive priority were the goals of the struggle 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.

NOTES

1. 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 US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book (2004), http://ojjdp.ncjrs.gov/ojstatbb/structure_process/qa04101.asp?qaDate=2004.

2. There is some controversy as to which prosecutor's offices had the major role. Lisa Green, then of the Los Angeles Public Defenders Office, attributed most of the juvenile sections to the Los Angeles D.A., while other oral historians implicated Riverside.

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