

# LEVELS OF GOVERNMENT, BRANCHES OF GOVERNMENT, AND THE REFORM OF JUVENILE JUSTICE

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My topic—the political science of juvenile and criminal justice—might seem abstract and unsubstantive to a group of law professors who care about juvenile justice. But I will argue that thinking about where in the American federal system to focus reform efforts can help serve the interests of kids. And I also think that there are biases commonly found in legal academics that need to be confronted and corrected before law schools can become efficient in finding the appropriate paths to reform.

I think that law professors tend to be hierarchical and jurocentric in their consideration of how to reform laws. They are hierarchical in their approach to the levels of government in the federal system—thinking that the federal government is much more important than state government and that state government is more important than local government. Law professors also believe that courts are more important than the other branches of government, such as the executive and legislative. So the paradigm of law reform for the professor is *In Re Gault* (1967),<sup>1</sup> and more time and law reform emphasis goes to *Gault* than to legislation. The Supreme Court of the national government is the bull's-eye in the reformer's target. So cases such as *Roper v. Simmons*,<sup>2</sup> *Graham v. Florida*,<sup>3</sup> and *Miller v. Alabama*<sup>4</sup> are the center of attention for law school conferences on the interaction of juvenile and criminal law.

*Graham v. Florida* is very important in two respects. First, it sends an important signal both that kids are different from adult criminal defendants, and that the 1990s' moral panic about youth violence has passed. Second, it puts some small upper boundary on excessive State punishment of juveniles. But that provides only a defense, instead of any affirmative change in juvenile systems. If we are to reverse the punitive excesses of the 1990s, both the levels of government and branches of government that must be involved are quite

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1. *In re Gault*, 387 U.S. 1 (1967).
2. *Roper v. Simmons*, 543 U.S. 551 (2005).
3. *Graham v. Florida*, 560 U.S. 48 (2010).
4. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

different. For transfer standards and procedures, the best path to reform is the same state legislatures that passed the bad laws in the 1990s.

Table 1 resembles a graph from a high school civics text more than a roadmap for a conference on juvenile justice, but it carries important information for those who wish to reform juvenile and criminal justice.

Table 1. Government and Youth Justice

<u>Levels of Government</u>	<u>Branches of Government</u>		
	<b>Legislative</b>	<b>Executive</b>	<b>Judicial</b>
<b>Federal</b>	Congress	Departments of Justice, Immigration, etc.	U.S. Supreme Court
<b>State</b>	State Legislature	Governor Department of Corrections, etc.	State Supreme Court
<b>Local</b>	County and City Councils	Sheriff Police Prosecutor	Juvenile Courts

There are three different levels of government in this primer and three different branches of government in each level. So there are nine discrete compartments in Table 1, and that is just the start of the new mathematics of youth law reform because the executive branches of government at all three levels contain many different agencies that have a significant impact on juvenile justice.

The “level of government” message I wish to emphasize is that state and local government has always been, and will always remain, the main arena of juvenile justice policy in the United States. That is what distinguishes the United States’ federal system from many—if not most—developed democracies. It is only when the federal government takes an exceptional initiative, as in the Amie’s Law section of the Adam Walsh Act of 2006, that the national government becomes a central player in legislative reform.<sup>5</sup>

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5. See Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911 (2012) (Amie Zyla Expansion of Sex Offender Definition).

If state government is the main arena for juvenile justice legislation, it is local government where retail policy is made. Most of the legislative standards for dealing with young delinquents delegate huge discretion to local institutions and actors—to judges, to prosecutors, to probation staff. And that means a great deal of policy gets made at the county level. In my home mega-state of California, I would guess that there is as much difference between the juvenile justice sanction levels and priorities of coastal counties like San Francisco or Alameda and inland jurisdictions like Kern County or San Bernardino County as there is between San Bernardino County and Maricopa County in Arizona.

The implications of distribution of power by level of government are simple, but important. The reformers need to be where the power to make policy is located. To borrow a phrase from the 2012 presidential election, juvenile justice reform needs a “ground game.” Austin, Texas, and Sacramento, California, are important places to be present when laws get drafted and passed. Harris County and Los Angeles County are important places to be present when policy gets implemented.

The next important lesson on the geography of juvenile justice policy concerns branches of government. Courts are very important at the retail level of the juvenile system—juvenile court judges and probation officers exercise much more dispositional power than criminal court judges and criminal court probation staff. But constitutional courts and doctrine play a minor role. So, the street level judiciary is more important than constitutional courts. The United States Supreme Court is where reformers play defense in juvenile justice. The county juvenile court is where life-changing decisions are issued one at a time.

The executive branches of state and local government are hugely important. At the state level, the department that runs and funds correctional institutions makes important decisions about the scale of confinement, the conditions of confinement, and, frequently, about the duration of confinement. Those who imagine that extensive, indeterminate sentencing was only a fixture of an earlier age should brush up on the essentials of modern juvenile justice.<sup>6</sup> And the executive branch of county government, prosecutors, and those who run detention centers make a lot of policy.

Prosecutors are much more powerful in the juvenile courts of 2013 than in the juvenile courts of a generation ago, but they are much less powerful in juvenile courts than in criminal courts.<sup>7</sup> Those prosecutors who wish to recreate the power relations of the criminal court will seek to minimize the authority of probation staff on detention and the authority of judges on disposition. This was a major focus in the 1990s.

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6. See, e.g., CAL. WELF. & INST. CODE § 1766 (West 2012); 705 ILL. COMP. STAT. 405/5–750(3) (2012); N.Y. PENAL LAW § 70.05 (McKinney 2003).

7. Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 4 (2010).

There is, however, another model of the juvenile court prosecutor that is much more positive in its impact. A career juvenile court prosecutor can accept the differences in orientation and power relations in the modern juvenile court and wish to be part of a team with judges and probation staff. The prosecutor who feels closer to the juvenile court will also feel further removed from other prosecutors. Rather than serving time in juvenile court before going to criminal court, this should be a career and a distinctive identity.

Thus, one critical task for the would-be reformer is to struggle for the hearts and minds of juvenile court prosecutors. This struggle will take place in thousands of counties across the United States, far from the chambers of the federal Supreme Court. But it will leave deep impressions on the legal systems that dispense youth justice.