

*A Literature Review of Applicable Studies Evaluating Effects of Juvenile versus
Criminal Prosecution and Incarceration on Juvenile Recidivism*

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Introduction

For hundreds of years this Country has grappled with juvenile crime and sundry approaches to dealing with child criminals. While states convey jurisdiction over juvenile offenders to juvenile, adult and Teen Courts to address juvenile crime, a body of studies has emerged suggesting that trying juveniles in adult courts is more apt to result in an overall increase in recidivism by convicted and incarcerated youths. Nonetheless, because of concerns that juvenile courts provide a mere “slap on the hand” of offenders who, it is perceived, have become more violent in recent years, since the 1980s, states have enacted legislation authorizing or mandating the transfer of more and more juvenile offenders to adult courts for prosecution. Via these “waiver or transfer” laws, it has been posited that the juvenile justice system has morphed from one committed to rehabilitation, to a system committed to punishment; often without regard to rehabilitation. Based on studies discussed below, researchers present overwhelming evidence that the increased transfer of juvenile offenders to criminal courts creates the risk of perpetuating juvenile crime via increased recidivism, particularly among violent juvenile offenders, thus mandating a countrywide evolution in the use of criminal courts to prosecute juveniles.

History of Juvenile prosecution

Prior to 1899, juvenile offenders (i.e. typically under the age of 18) were not treated as distinct from adult offenders. (A. Campbell, 1995, p. 351). In 1899, the first juvenile justice court was established in the United States in the state of Illinois. (Campbell, 1995, p. 351 (1995); E. Miller, 2004, p.91). Thereafter, over time, every state established juvenile courts on the premise that children were incapable of being morally

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responsible for their crimes. (Campbell, 1995, pp.351-352). The primary goal of the juvenile courts was and still is to rehabilitate children and save children from the stigma of adult prosecution. (Campbell 1995; Miller 2004).

Because juvenile courts were, *historically*, “civil,” as opposed to “criminal” in nature (Miller, 2004, p.1), and presided over by judges with total discretion as to “punishment” (i.e. community service, counseling, reformatory etc.) meted out in the absence of due process (i.e. applicable rules of evidence, jury, representation by counsel), judges often sentenced juvenile offenders to “long periods of incarceration” to juvenile reformatories or adult prisons. (Miller, 2004, p.1).

Because of what was perceived as the arbitrary conduct of juvenile court judges, critics abounded. By 1970, the United States Supreme Court had rendered three (3) decisions¹ each having a momentous impact on the juvenile justice system. These cases required, respectively, criminal protections of due process afforded in adult criminal courts apply to juvenile courts and established a standard of “proof beyond a reasonable doubt” as the standard for conviction and incarceration; thus, transitioning the juvenile courts from “civil” in nature to “criminal” in nature. (Miller, 2004, p.1)

In light of these Supreme Court decisions and other public disclosures regarding juvenile courts, by 1974, the juvenile court system was deemed a failure arising from (1) skeptics who discredited the idea that “criminal and precriminal behaviors could be identified by judgments and other in the Court,” (2) juvenile court failures to divert enough children away from adult courts (3) juvenile court failures to adequately address the needs of children referred to the court and (4) the employment of an arbitrary and

¹ *Kent v. United States (1966), In re Gault (1967) and In re Winship (1970).*

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inconsistent set of procedures utilized to determine the fate of children passing through the system (Miller, 2004, p.1).

Accordingly, in 1974, Congress passed the *Juvenile Justice and Delinquency Prevention Act of 1974* (the “**1974 Act**”). The 1974 Act established the following: (1) state juvenile systems could no longer institutionalize juveniles for supposedly “precriminal” offenses; (2) the act defined a juvenile as a person under the age of 18 and juvenile delinquency as the “violation of law by a juvenile” (which, if committed by an adult, would be treated as a crime); and (3) established a minimum age of 15 at which a minor may be transferred to adult court and the guidelines for such a transfer (Campbell, 1995, pp. 351-353; Miller, 2004). In an effort to divert juveniles away from adult courts, the 1974 Act established “grants to states and local governments to assist them in planning, establishing, operating, coordinating, and evaluating projects....for the development of more effective education, training, research, prevention, diversion, treatment, and rehabilitation programs in the area of juvenile delinquency and programs to improve the juvenile justice system.” 1974 Act.² (Miller, 2004, p.2)

While, with the 1974 Act, the federal government hoped to compel or induce consistent juvenile justice approaches in the respective states, state statutes often departed

² Teen Courts (“TC”) are a third adjudication forum available to juvenile offenders. The goal of TCs is to reduce recidivism by reducing stigma and applying a reintegrative shaming approach which allows the offender to work his/her way back into society (versus a penalizing approach to adjudication). (Povitsky-Stickle, 2008, p.140) As of April 2008, TCs existed in 48 states and processed nearly 100,000 cases per year. (Povitsky-Stickle, 2008, pp.137). Until Povitsky-Stickle’s study published in April 2008, there was precious little effective or scientific research performed with respect to the effectiveness of Teen Courts on recidivism. While finding that recidivism was higher through the use of TCs than through the juvenile justice system, the Povitsky-Stickle study acknowledged limitations on its conclusions arising from the participation of a limited sample size and attrition by certain older juveniles who failed to complete the survey related to the study. (Povitsky-Stickle, 2008) In light of the absence of more comprehensive studies, TCs are not further addressed in this paper.

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from the 1974 Act proposals. For example, three states now provide that the maximum age of juvenile court jurisdiction is 15, nine states establish 16 as the maximum age and 38 states establish 17 as the maximum age. (Hammond, 2007, p.6)

Furthermore, states have established, collectively or respectively, three mechanisms that allow juveniles to be transferred to criminal courts and tried as adults: (1) judicial waiver, which are the “discretionary, mandatory, presumptive, reverse and ‘once an adult, always an adult provisions’” (2) statutory exclusion, which contemplates a statute excluding certain offenses from being tried in the juvenile courts or (3) concurrent jurisdiction arising from direct filing in the criminal court or a transfer occurring based upon prosecutorial discretion. (Hammond, 2007, p.8).

In the 1980s to mid-1990s, juvenile violence and offenses increased exponentially, with the juvenile prison population growing at one-quarter the rate of the adult population with a corresponding increase of offenses by the youngest offenders, (Hammond, 2007, p.6; Miller, 2004, p.1). Based upon this increase in juvenile violent crime and media coverage of such offenses, states have enacted ever more aggressive legislation vesting jurisdiction over an increasing number of juvenile offenses with the criminal courts. (Steinberg, 2009)

As a result of the increase in juvenile crime between 1993 and 1997, 47 states and the District of Columbia changed their juvenile crime laws in or more of the following three ways: (1) making sentencing more punitive; (2) expanding and making easier allowable transfer of juveniles to adult court; and/or (3) eliminating juvenile confidentiality provisions. (Hammond, 2007, p.13).

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As such, the U.S. juvenile justice system, as a whole, has moved away from rehabilitative goals toward punishment and accountability. (Campbell, 1995³; Hammond, 2007, p.10; Miller, 2004, p.2).

While there are many arguments for trying juvenile in adult courts (e.g. juvenile courts are weak retribution, deterrence, risk of offender to the public, juvenile crime and its offenders have changed over this last century, accountability and fairness to victims (Hammond, 2007, pp.23-24)), the arguments for keeping juvenile offenders in juvenile court are sundry and have been posited as follows: (1) felonious juvenile behavior is often outgrown; (2) the media often glamorizes and sensationalizes juvenile crime which causes unsubstantiated, knee-jerk reactions by the public and lawmakers; (3) public safety is better served when juveniles remain in the juvenile system and monitored by probation and parole officers; (4) juveniles in adult prisons are more likely to commit suicide and be sexually assaulted; (5) adult court consequences are perceived as being too harsh; (6) recent brain development research discloses anatomical differences between adults and juveniles; (7) adult systems are unable to deal appropriately with juveniles; and (8) juveniles are more likely to be rehabilitated in the juvenile system. (Hammond, 2007, pp.25-26).

³ Campbell's article is not a statistical study but, instead, an overview of applicable juvenile crime laws in England and the U.S. Campbell argues that the U.S. has moved toward a less rehabilitative system compared with England. While England's approach to juvenile offenders is not discussed in this paper, suffice it to say that England's (and other European countries' approaches to handling juvenile offenders (with resulting lower juvenile crime and recidivism rates)) could be quite instructive to states in this Country in modifying their legislation to have more success with juvenile crime rates and recidivism.

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In 1960, juvenile courts handled 400,00 juvenile cases. (OJJDP⁴, 2003, p.6). In 1999, 1,673,000 juvenile cases were handled by juvenile courts with approximately 7500 juveniles' cases referred to criminal courts. (OJJDP, 2003, p.6).

In 2008, approximately 2,111,200 juveniles were arrested countrywide. (Puzzarchera, 2009, p.1). Of this amount, 96,000 were categorized as “violent crimes ” (i.e. crimes against persons) and there were an additional 231,700 assaults that were not characterized as “violent crime,” which would typically warrant prosecution in the adult courts. (Puzarchera, 2009, p.3). Of total violent crimes in this country in 2008, one in eight was committed by a juvenile. Furthermore, of the 76% of all arrests that were *eligible*⁵ in their states for processing in the juvenile justice system, 66% were tried in the juvenile courts and 10% were transferred to criminal court. (Puzzarchera, 2009, p.5).

A U.S. Justice Department study shows that prosecutors are actively enforcing tougher laws against juvenile offenders and a Justice Department study released in 2000 concluded that violent juvenile offenders are more apt to serve out their sentences in an adult prison than they would have been in 1985. (Lipsey, 2000, p.16).

While since 1996, juvenile crime rates have dropped (OJJDP, 2003; Puzzarchera, 2009), and many state courts have reassessed their treatment of juveniles and are moving back toward, or are being compelled to employ, a more rehabilitative system, more

⁴ The OJJDP is the Office of Juvenile Justice and Delinquency Prevention, which is a agency in the U.S. Department of Justice. The OJJDP's mission is to help states and communities create and implement effective and coordinated juvenile crime prevention and intervention programs and to improve the juvenile justice system.

<http://www.ojp.usdoj.gov/ojjdp/docs/OJJDPFY07ModelProgramsGuide.pdf>

⁵ We note that because some state laws determine that certain crimes (i.e. violent) may not be addressed in the juvenile courts, many violent crime juvenile cases are not reflected in this statistic. The OJJDP states that “State variations in juvenile arrest rates may reflect differences in juvenile law-violating behavior, police behavior, and/or community standards; therefore, comparisons should be made with caution.” (Puzzarchera, 2009, p.11)

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draconian methods in juvenile crime treatment continue to prevail. (Hammond, 2007, p.22).⁶

Given the number of youths affected by the criminal and juvenile court system, and the risk posed to our society if delinquent youths are mishandled and recidivate, a review of applicable studies must be undertaken to reach a countrywide consensus on the treatment and prosecution of juvenile offenders.

Factors impacting Recidivism

As a preface to addressing the major studies on the issue of juvenile recidivism, one must first assess and delineate the many factors that may impact recidivism.

While the primary issue addressed in this paper is the impact on recidivism of trying and incarcerating juveniles through the adult criminal court system, it should be acknowledged that other factors may also effect recidivism by juveniles regardless of whether their cases are processed through the juvenile justice or the criminal court system.

For example, factors which can *decrease* the risk of recidivism regardless of where a juvenile is tried and incarcerated include: duration of incarceration; interpersonal skill training; teaching behavior modification in a community-based, family-style group homes; participation in behavioral and community residential programs and treatment centers with provision of supportive services in a camp environment including vocational, remedial and/or skill-oriented training, vocational assessment; participation in camp environment providing supportive services including vocational training, skill

⁶ At the federal level, however, it is worth noting that in 2005, the U.S. Supreme Court concluded it is unconstitutional to execute juveniles. (Hammond, 2007, p.27)

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oriented education, job placement and cottage living; and psychological group and individual counseling. (Lipsey, 2000, p.5) The relative effectiveness of each of the foregoing interventions is affected by the duration of the offender's involvement in the program, and the duration each such program has been established and operating with positive results, with increased effectiveness correlating with increased duration of both of the aforementioned factors. (Lipsey, 2000, p.4). It must be noted that most of these forms of intervention are more often available in juvenile, not adult incarceration facilities. (Lipsey, 2000, pp.5-6), though such interventions may also take place upon release of a juvenile tried in the criminal courts and incarcerated in an adult prison.

Additional factors that may impact recidivism are access and support by family members and duration of incarceration (Myers, 2003, p.95).

Some of these factors are discussed in the studies related below. For the most part, however, the studies relating to juvenile recidivism, while addressing these factors, address them as having hypothetical, not an actual, impact on recidivism rates as few of the studies have been able to create effective controls to account for these factors.

Applicable Studies on Relative Recidivism

Major studies conducted on the effect on recidivism from prosecuting juveniles in criminal (adult) courts and incarcerating them in adult prison unanimously conclude that recidivism is higher for juveniles offenders who are tried and incarcerated as adults.

a. Studies Relating to the General Deterrent Effect of Criminal Sanctions

Preliminarily, researchers have concluded that the threat of adult criminal sanctions had no effect on levels of serious juvenile crime. (Singer, 1988, p.531) Singer and McDowell evaluated the effect of the New York Juvenile Offender Law (1978) on

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the rate of serious juvenile crime by evaluating monthly arrest data from 1974 through 1984 to assess the effect of the statute on violent juvenile crime rates. The NY legislation lowered the age of criminal court jurisdiction to 13 for murder and 14 for rape, robbery, assault, and violent categories of burglary. Singer and McDowell analyzed juvenile crime rates for four years prior to the passage of this Act and 6 years after its passage. (Singer, 1988). The control group consisted of juveniles in Philadelphia with offenders slightly older than those in New York. The researchers concluded that the threat of criminal sanctions had no effect on the level of serious juvenile crime. (Singer, 1988, p.532)

Likewise, a study by Eric Jensen and Linda Metsger reached the same conclusion. They evaluated the deterrent effect of a so-called “transfer” statute (i.e. a statute governing transfer of juveniles to criminal court) enacted in Idaho that required juveniles charged with murder, attempted murder, robbery, forcible rape and mayhem, to be tried as adults. (Jensen, 1994). These researchers examined data of juvenile arrested five years before and five years after the passage of the foregoing law and concluded that the law had no deterrent effect on juvenile crime in Idaho. (Jensen, 1994, p.102).

By extension, if juvenile offenders are not deterred by the threat of being tried as an adult in criminal courts, there is not much of a leap in inferring that the threat of returning to criminal courts and adult prisons will, likewise, not serve as a deterrent to reoffending, as more fully set forth in studies discussed below.

b. Studies Addressing Specific Deterrence: Effects of Criminal Prosecution on Recidivism

One of the most cited studies in this field is by Jeffrey Fagan, a Columbia University researcher. Fagan compared eight hundred 15- and 16- year olds charged with

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robbery and burglary in four similar counties in New York and New Jersey each of which shared demographic, social and cultural commonalities and the concentration of risk factors for delinquency and crime problems among juveniles were comparable. (Fagan 1996, p. 85)⁷ Both states had similar applicable statutes. However, in New York, the juvenile offenders' cases originated in criminal court, whereas, in New Jersey, the juveniles' cases originated in juvenile court. In conjunction with Fagan's study, Fagan controlled for incarceration duration. (Fagan,1996, p. 95). While Fagan concluded that, while there were no recidivism differences in juveniles who burgled and were housed in a juvenile or an adult facility, 76% of juveniles tried for robbery in criminal court reoffended versus 67% in juvenile court. Moreover, a higher proportion (56% vs. 41%) of juveniles tried in criminal court were reincarcerated and reoffended sooner after their release. (Fagan, 1996, p.95).

A study published by the OJJDP (Snyder, 2000), which analyzed data from South Carolina, Utah, and Pennsylvania, sought to ascertain the impact of new legislation that excludes additional offenders from the juvenile court jurisdiction (thus placing more juvenile offenders in the adult (criminal) courts' jurisdiction). The objective of the study was to create a study that fully controlled for case and offender seriousness because "it remains unclear whether the reason harsher sanctions are more likely and reoffending is higher among transfers is because these juveniles are more serious offenders." (Snyder, 2000, p. 7). After reviewing the data and the bases upon which juvenile court judges transfer cases to criminal courts, the OJJDP concluded that:

Researchers, policymakers, and others who make use of research results must

⁷ Fagan reaffirmed his findings in a more expansive study published in 2008 (Fagan 2008).

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keep in mind that groups of waived and nonwaived juveniles differ in many respects. Simple comparisons are likely to be misleading and, thus, are inappropriate. Careful matching of waived and nonwaived juveniles on multiple characteristics, although often difficult, is virtually a prerequisite to any such comparisons. The studies presented in this Summary find that certain characteristics of the waiver incident (e.g., weapon use, victim injury, age of the offender, and nature of the court history) are important variables in transfer decision-making. Researchers should include such characteristics as matching variables when attempting to compare juvenile and criminal court processing of juvenile offenders and their case outcomes.

(Snyder, 2000, p.40-41).

Accordingly, to improve the efficacy of studies in this area, the OJJDP study proposed that the aforementioned additional statistical controls must be addressed in studies relating to juvenile recidivism arising from juvenile prosecution in criminal courts.

In 2000, Donna Bishop, a Northeastern University researcher, conducted a study in which she and others also concluded that juveniles processed in the criminal court system had higher rates of recidivism. Bishop compared 2,738 juvenile offenders transferred to criminal court for processing with a matched sample of juvenile offenders processed in the juvenile courts. Bishop discovered that juveniles tried as adults were (1) more likely to be incarcerated (2) incarcerated longer than those tried in the juvenile courts and (3) had, within two years, a higher recidivism rate, reoffended earlier and committed more subsequent offenses. In conjunction with this analysis, Bishop also noted that, unlike adult facilities, staff in the juvenile facilities was far more attentive to building and strengthening ties to family and other social networks that would be influential on release. (Bishop, 2000, p. 36). Furthermore, as recommended by the OJJDP (Snyder, 2000), Bishop's approach took steps to ensure the equivalence of groups under comparison addressing earlier findings that judges typically engaged in selection

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bias with the worst offenders being sent to criminal court and thus, as a group, more likely, in any event, to reoffend. (Bishop, 2000, p. 34).

David Myers, a researcher at Indiana University in Pennsylvania conducted a study comparing recidivism of juveniles offenders tried in the juvenile courts versus the criminal courts. (Myers, 2003). Like Bishop, and consistent with recommendations by the OJJDP (Snyder, 2000), Myers, acknowledged the issue of selective transfer to criminal court of the most violent offenders certified by the juvenile court as “being no longer amenable to treatment in the juvenile system.” (Myers, 2003, p. 83). To address this issue, Myers made a statistical effort to control for variables that might influence the decision to transfer and the future offending behavior by the transferred juvenile. (Myers, 2003, p. 83). In Pennsylvania, 494 offenders comprised the cohort of which 16% were transferred to criminal court. In addition to statistically addressing selection bias, Myers statistically addressed the harsher penalties against offenders based upon: older offenders at referral, race, location, family and school situations of the juveniles, weapon type, prior offense history and incarceration. Myers concluded that juveniles tried in the criminal court system were more likely to reoffend and that those convicted were found to have a significant influence on time to rearrest. (Myers, 2003, p. 93). However, Myers determined that youths incarcerated for longer periods of time had a decreased risk of rearrest over youths not incarcerated or incarcerated for shorter periods of time. In the end, Myers concluded that “legislative waiver laws (such as the one enacted in Pennsylvania) can realistically be expected to have little or no deterrent utility” to recidivism. (p. 94).

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While Myers concluded that criminal court prosecution and confinement of juveniles negatively impacted recidivism, he acknowledged other factors (which were not controlled for in his study) that could affect recidivism including: (1) juveniles might receive more effective treatment services in the juvenile correction system; (2) youths confined to adult prisons may learn from other adult criminals; (3) youths processed through the criminal court system are “labeled” which may affect their ability to reintegrate into society upon release; (4) youths may perceive they were treated unjustly by being processed through the criminal courts; (5) youths’ personal identities may be more altered; and (6) violent youths tried in criminal courts typically experience harsher punishment in adult court. (p.95-96).

Consistent with the aforementioned studies, the Task Force on Community Preventative Services (2007) engaged in a study that evaluated and concluded as follows:

The Task Force evaluated the evidence on effectiveness of policies facilitating the transfer of juveniles from juvenile to adult justice systems to reduce violence. The Task Force found evidence of harm associated with strengthened juvenile transfer policies. Available evidence indicates that juveniles who experience the adult justice system, on average, commits more subsequent violent crime following release than juveniles retained in the juvenile justice system. Further, evidence that juveniles in the general population are deterred from violent crime by strengthened juvenile transfer policies is insufficient. As a means of reducing juvenile violence, strengthened juvenile transfer policies are counterproductive. The Task Force, therefore, recommends against policies facilitating the transfer of juveniles from juvenile to adult criminal justice systems for the purpose of reducing violence.

Task Force, 2007, p.32 (S5).

Likewise, mental health and legal experts have adapted these findings and have concluded that “available evidence indicates that use of transfer laws and strengthened transfer policies is counterproductive for the purpose of reducing juvenile violence and

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enhancing public safety.” (Drogin, 2007 (p.409)).

c. New Developments

Recent developments in brain science and a U.S. Supreme Court Decision have opened a whole new avenue of discussion on the issue of trying juveniles in adult courts. (Soltis, 2008). Recent brain science developments “challenge[] social science theories that teenagers are more likely to become hardened criminals if tried and incarcerated in the adult juvenile system.” (Soltis, 2008, p. 2). The brain science suggests that teenagers’ brains make them more prone to risky, impulsive behavior than adults because an adolescent’s brain undergoes several document changes that may account for behavior during adolescence.

First, a developing brain prunes unused connections, a process that continues until about age 16....Another key change during the this time is increased connections between emotional centers of the brain and its prefrontal region, the part that can dampen impulsive or emotional thoughts and actions. Finally, myelin, a layer of fats and proteins, coats and insulates nerve fibers....[I]ike insulation added to electrical wire, it allows more information to be transferred to the brain at a faster rate.

(Soltis, 2008, p. 3).

Thus, because adolescents brains and resulting actions, reactions and thought processes differ from that of adults, this difference lends credence to arguments that adolescents should not be treated as adults when prosecuted as juvenile offenders.

In another dramatic development acknowledging the differences between adult and children’s static versus developing characters, in 2005, the U.S. Supreme Court’s rendered a decision in *Roper v. Simmons*. *Roper*, which raised the issue as to whether it is constitutional for States to execute minors, held that persons under the age of 18 may not be executed. In the decision, Justice Kennedy wrote that “it is less supportable to

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conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”

While the new “brain science” is being utilized by attorneys to defend their juvenile clients in criminal prosecutions, it may also serve as a further justification to keep juvenile cases in juvenile courts. Furthermore, it may also constitute yet another explanation as to why juveniles prosecuted in criminal courts and incarcerated in adult prisons (or with all violent juvenile offenders sent to a juvenile prison by the criminal courts), are more impacted by the adult treatment and have a greater tendency to reoffend. This is certainly an issue for future inquiry and study.

Conclusion

While, over the past thirty years, there has been a consistent movement away from rehabilitation and toward prosecuting more juvenile offenders in criminal courts, researchers are hopeful that this arc is reversing noting that, recently, there have been changes in juvenile correctional programs which (1) require juveniles convicted as adults to be incarcerated in separate facilities from adults and (2) the creation of special programs for juveniles convicted as adults and the funding of community based interventions and supervision of juvenile offenders. (Hammond, 2007, p. 27).⁸

Given the multitude of studies (1) connecting higher recidivism rates with criminal prosecution of juvenile offenders, (2) demonstrating that the risk of criminal

⁸ While at least twenty-eight states compel qualifying juveniles to register as sex offenders (Hammond, 2007, p.16), last year, Nebraska, Utah and Vermont changed their laws to reduce penalties for teenagers who engage in “sexting” and 14 additional states are considering legislation that would treat young people who engage in sexting differently from adult pornographers and sexual predators. In March, 2010, the first federal appellate court opinion in a sexting case “recognized that the prosecutor had gone too far in trying to enforce adult moral standards” against adolescents. (Lewin, 2010).

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prosecution fails to effect overall juvenile violent crime rates, and (3) the new “brain science” data, it is imperative for States in this Country to look to adopt new approaches to fighting juvenile crime which, among other steps, should include the termination or limitation of so-called “waiver” and “transfer” statutes which guarantee or mandate, respectively, that certain juveniles must or shall be prosecuted in criminal courts and incarcerated in criminal facilities.

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