
RESPONSE

WHAT CAN WE LEARN FROM THE FEDERAL APPROACH TO THE PROSECUTION OF JUVENILE CRIME?[†]

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INTRODUCTION

In a context of widespread concern over our bloated criminal justice system and growing awareness of the harm done to individuals and society by our excessive incarceration policies, any piece of the system that has remained infinitesimally small deserves some attention. In her article, *The Federal Juvenile System*,¹ Esther Hong highlights the success of the largely overlooked federal juvenile delinquency system in staying extremely small and suggests this system offers lessons for its bloated state and federal counterparts. Although I agree that the federal government's prosecution of minors under the Federal Juvenile Delinquency Act ("FJDA") offers some valuable lessons in how to design a system that is intended to be extremely small,² I am not convinced that those lessons translate readily into the broader systems-wide transformation of the carceral state that Hong suggests. Hong nicely demonstrates the usefulness of including internal and external checks on prosecutorial action for imposing constraints. She does not, however, account for the important differences in systems that motivate (or fail to motivate) the imposition of those constraints. Moreover, whether small numbers can be celebrated depends on where the unnumbered offenders go and how they are treated there. A process designed to defer, as the federal process for handling juvenile delinquency offenses is, is only as good at reducing the state's carceral reach as the system to which it defers.

Hong sets out what we can think of as a two-by-two grid of criminal systems sorted into state and federal rows and adult and juvenile columns. She powerfully notes that where three out of the four quadrants of the grid—federal adult, state adult, and state juvenile systems—have all manifested deep problems associated with excessive exercises of prosecutorial power and punitiveness (I'll call this the excessive punitiveness problem),³ the fourth quadrant—the federal juvenile quadrant—has avoided these problems to a striking extent. Moreover, she notes that, unlike the federal adult system that has been sharply criticized for its disruptive impact on its state adult counterparts (I'll call this the federalism problem), the federal juvenile system has avoided this disruptive effect on the state juvenile systems.⁴ These distinctions are true and important. But a fuller account of how and why the federal prosecution of minors has avoided these problems is necessary to properly consider the lessons that can be drawn from this success. After setting out the history and implementation of the state and federal approaches to minor offending with an emphasis on aspects most relevant to my analysis, I will turn to a consideration of the lessons Hong derives from the federal government's approach to juvenile delinquency. In closing, I

¹ See generally Esther K. Hong, *The Federal Juvenile System*, 102 B.U. L. REV. 2025 (2022).

² See Federal Juvenile Delinquency Act of 1938, Pub. L. No. 75-666, §§ 921-929, 52 Stat. 764, 764-66 (1938) (codified as amended at 18 U.S.C. §§ 5031-5043).

³ Hong, *supra* note 1, at 2031-42.

⁴ *Id.* at 2052-55.

will suggest, briefly, that the real lessons that can teach us how to reform our criminal legal system as a whole come not from the federal juvenile quadrant, but from the state juvenile quadrant, to which the federal system is designed to defer.

I. A BRIEF HISTORY OF MINOR OFFENDERS' TREATMENT IN STATE AND FEDERAL COURTS

Prior to the 20th Century, the common law governed both the federal and state approach to crimes committed by minors: with the exception of the protection afforded to children deemed too young to form criminal intent,⁵ minors were charged, tried, and punished alongside adults. A growing focus in the Progressive Era on the developmental distinctions between children and adults and the importance of intervening in a supportive manner when youth engaged in crime led states to create an entirely separate, welfare-focused juvenile justice system for children—beginning with Illinois's enactment of the Juvenile Court Act in 1899,⁶ and spreading rapidly throughout the states.⁷ As the Act's name makes clear, the change in approach to crime committed by minors led to the creation of new courts that brought with them a separate set of judges who were to assume a parent-like role, and other court personnel who were intended to develop child-specific expertise. Hearings were purposefully defined as civil rather than criminal, and a new set of terms was developed (adjudication rather than conviction; disposition rather than sentence) to try to capture the difference in approach. The Juvenile Court Act expressly identified the purpose of intervention as assisting young people rather than punishing them. Significantly, the system was grounded on the state's exercise of a distinct power—the “*parens patriae*” power—that was understood to apply uniquely to the states.⁸ The aspiration was for this new court to exercise parent-like power over youth who had gone astray.

In the first decades of the 20th Century, no comparable change was made in the federal criminal justice system, and this caused concern among those focused

⁵ At common law, the “infancy defense” was applied to shield those under seven at the time of the alleged offense from being prosecuted and it recognized a rebuttable presumption against the prosecution of children between the ages of seven and fourteen. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510-11 (1984).

⁶ 1899 Ill. Laws 131.

⁷ See ROBERT M. MENNEL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825-1940, at 132 (1973) (reporting that ten states and District of Columbia had juvenile courts by 1909 and all but two states had separate juvenile courts by 1925).

⁸ See Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 282-83 (2020); see also NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON THE CHILD OFFENDER IN THE FEDERAL SYSTEM OF JUSTICE 151 (1931) [hereinafter WICKERSHAM REPORT] (describing *parens patriae* power as “so intimately a [s]tate function”).

on child well-being, most notably documented in the 1931 Wickersham Report.⁹ This report addressed, in considerable detail, the problems associated with the federal government's prosecution of federal crimes committed by minors, emphasizing the lack of expertise of the judges and other court personnel in working with youth, and the huge cross-country distances between children's communities and their place of confinement (generally in training schools). The primary recommendation of the report was for Congress to establish an official mechanism for referring cases against minors to their state juvenile courts, which was already occurring "by arrangement" in many districts.¹⁰ In making this recommendation, the report emphasized the special expertise of those distinct state juvenile court systems and the special parent-like role they were designed to fulfill.¹¹ The report considered and rejected proposals to create a separate federal juvenile court system, emphasizing the excessive and unnecessary costs that would be associated with an attempt to duplicate the states' resources and expertise, and the states' special responsibility to assume a parental role over their young citizens.¹²

Shortly following the publication of this report, Congress enacted two laws that addressed the prosecution of minors who violated federal laws. The first authorized federal prosecutors to "forego [the] prosecution" of minors where a state "can and will assume jurisdiction" over them.¹³ This law was in line with the Wickersham Report but stopped short of requiring deference to state prosecution.¹⁴ The second, in 1938, was the FJDA, which established the federal prosecutors' authority to pursue delinquency charges against minors who violated federal laws.¹⁵ It was this authority that created the fourth quadrant of the two-by-two grid. I stop short of describing it as a distinct fourth criminal justice "system," because that would misdescribe the changes introduced by the FJDA and overstate the extent to which, in Hong's words, "Congress disagreed"¹⁶ with the Wickersham recommendations. Although the FJDA did adopt some features of the state juvenile systems, including eliminating jury trials and creating the opportunity for judges to hold trials "at any time and place . . . , in chambers or otherwise,"¹⁷ the FJDA did not follow the path of the state reforms and establish a new set of courts, craft comprehensive policies, provide for new personnel, or otherwise anticipate the development of any special expertise. Under the FJDA, the cases were (and are) charged by the same

⁹ See generally WICKERSHAM REPORT, *supra* note 8.

¹⁰ *Id.* at 149.

¹¹ *Id.* at 151.

¹² *Id.* at 151-52.

¹³ 18 U.S.C. § 5001.

¹⁴ *Id.*

¹⁵ Federal Juvenile Delinquency Act of 1938, Pub. L. No. 75-666, §§ 921-929, 52 Stat. 764, 764-66 (1938) (codified as amended at 18 U.S.C. §§ 5031-5043).

¹⁶ Hong, *supra* note 1, at 2059.

¹⁷ 18 U.S.C. § 5032.

prosecutorial office before the same federal judges in the same federal courts as the adult cases are.¹⁸

Under these two federal laws together, federal prosecutors had authority to decide which cases involving minors got deferred to state courts, and whether the cases retained in federal court were tried as delinquency cases or adult criminal cases.¹⁹ In the years following the enactment of these laws, the number of minors tried as juvenile delinquents in federal court ranged from 600 to over 1,000 per year.²⁰ At the time of this response, I have not found data that indicates how many additional minors were tried as adults during this period, nor how many minors, potentially tried in federal court, were deferred for state prosecution.

It was not until 1974 that Congress amended the FJDA to make explicit and near-absolute federal prosecutors' obligation to defer the prosecutions of minors who violated federal laws to state juvenile courts.²¹ Reflecting the view set out previously in the Wickersham Report that the state juvenile justice systems had the needed expertise that the federal system lacked to properly respond to juvenile offending,²² the 1974 amendments provided that the federal government could only prosecute cases in which "the Attorney General, after investigation, certifies . . . that . . . the juvenile court or other appropriate court of a State does not have . . . or refuses to assume jurisdiction over [the] juvenile . . . [or that] the State does not have available programs and services adequate for the needs of the juveniles."²³ In addition, the 1974 amendments took away the Attorney General's unbridled discretion to charge minors as adults, replacing it with an authority to exercise this discretion only for 16- and 17-year-olds charged with offenses carrying a maximum penalty of death or imprisonment for ten years or more.²⁴ After the 1974 amendments went into effect, the numbers of youth charged as juvenile delinquents in federal court steadily decreased to roughly seventy cases a year by 1980.²⁵

¹⁸ *Id.*

¹⁹ See Hong, *supra* note 1, at 2059-60.

²⁰ ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS—1949, at 101 (1949); ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS—1952, at 96 (1952); ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS—1953, at 114 (1953).

²¹ See generally Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 18 U.S.C. §§ 5032-5043).

²² See WICKERSHAM REPORT, *supra* note 8, at 151-52.

²³ Juvenile Justice and Delinquency Prevention Act § 502.

²⁴ *Id.*

²⁵ ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS—1976, at 346 (1976); ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS—1977, at 254 (1977); ADMIN. OFF. OF THE U.S. CTS., ANNUAL

The changes to the Act introduced in 1974 are stark, and I agree with Hong's surmise that "the reforms to the federal juvenile system in 1974 likely served as the point at which the federal juvenile system and federal criminal system diverged,"²⁶ or at least, I would say, the point at which the paths diverged more clearly. But we may not agree about what the parting of ways reflects. In my view, it reflects not a diminished interest in prosecuting minors for crimes, but rather an increased commitment to deferring to the states to do so.

Evidence that the federal approach to juvenile crime—near absolute deference to state prosecution—was cemented by these 1974 amendments can be found in the federal government's resistance to backtracking and expanding its federal juvenile delinquency caseload, even when there was considerable political pressure for the federal government to prosecute young people and Congress increased its authority to do so.²⁷ In 1984, in response to a dramatic shift in attitude about juvenile crime inspired by a growing fear of violent youth and the panic over the perceived (and since-refuted) rise of the so-called "super-predator[]" youth,²⁸ Congress added to the FJDA a third, potentially capacious, ground on which a case against a minor could be certified to proceed as a federal case: violent crimes and serious drug offenses so long as there was a substantial federal interest in pursuing the case.²⁹ The Committee Report supporting this change reflects Congress's continuing commitment to deference to the states' prosecution of juvenile offenders,³⁰ but it is clear that Congress intended to take a step back from that deference. The fact that the number of federal prosecutions of minors remained quite low—peaking at only 217 in 1990—despite the 1984 expansion of jurisdiction and the calls, quoted by Hong, for more aggressive federal prosecution of minor offenders,³¹ is strong support for Hong's claim that the procedural checks built into the FJDA played an important role in keeping the numbers low.

Before turning to the lessons Hong draws from the FJDA's provisions and their implementation, I return to the state juvenile justice systems, whose changes in law and policy over the years are important to an understanding of the interrelationship between state and federal systems. In the same period during which the 1974 amendments to the FJDA were enacted, a procedural revolution occurred in the state juvenile courts, driven by a series of Supreme Court decisions that recognized the scope and limits of children's due process

REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS—1978, at 242 (1978); ADMIN. OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS—1982, at 134 (1982).

²⁶ Hong, *supra* note 1, at 2060.

²⁷ See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

²⁸ See Hong, *supra* note 1, at 2053-54.

²⁹ See 18 U.S.C. § 5032.

³⁰ See S. REP. NO. 98-225, at 389 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3529.

³¹ See Hong, *supra* note 1, at 2054-55.

rights in those courts.³² Next, and more important for the story here, came the tough-on-crime backlash in state juvenile courts. When the FJDA was amended in 1984 to expand the reach of federal law enforcement to juvenile felonies involving drugs and violence, a parallel movement was occurring in the states.³³ Most significantly, transfer laws were amended to make it easier—and in some cases mandatory—to prosecute more youth, at younger ages, as adults.³⁴ Furthermore, many states introduced blended sentences, allowing juvenile courts to impose severe sentences in the adult system for offenses committed by minors.³⁵ In some instances, the transfer laws and sentencing schemes enacted in states imposed far more severe consequences on juveniles than they would face if prosecuted in the federal system. In such contexts, a federal approach that kept its caseload small may have facilitated rather than diminished a punitive approach to juvenile crime.

There is an important subsequent chapter in the state juvenile justice story that does not have a legislative parallel in the federal juvenile story: inspired in part by a series of Supreme Court cases applying developmental psychology and brain science in the Eighth Amendment context,³⁶ many states in recent years have made tremendous strides in reducing incarceration and other punitive responses to youth crime.³⁷ The state juvenile justice systems were originally created with the intent of helping children grow up, and a century later, we are finally figuring out how to do this.³⁸ Put another way, the states may finally be establishing themselves as the experts entitled to the deference required by both state and federal law. After considering the lessons Hong draws from her study of the federal juvenile quadrant, I will briefly consider what lessons this new-found expertise in the state juvenile systems can offer to the criminal legal system as a whole.

II. THE FJDA'S LESSONS

Hong identifies two lessons from the FJDA that she suggests provide insights that could help address the problems manifest in the other three quadrants. Again, the two problems she has identified are, first, what I am calling the

³² The leading case was *In re Gault*, 387 U.S. 1 (1967), in which the Court held that youth tried in juvenile courts had a due process right to notice, council, and other criminal procedural rights. *Id.* at 39.

³³ See Shelly S. Schaefer & Christopher Uggen, *Blended Sentencing Laws and the Punitive Turn in Juvenile Justice*, 41 LAW & SOC. INQUIRY 435, 435-36 (2016).

³⁴ See THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 19-25 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

³⁵ See Schaefer & Uggen, *supra* note 33, at 436.

³⁶ For a discussion of this line of Supreme Court cases, beginning with *Roper v. Simmons*, 543 U.S. 551 (2005), see Emily Buss, *Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 U. CHI. L. REV. 843, 852-55 (2022).

³⁷ Buss, *supra* note 36, at 855-64.

³⁸ *Id.* at 862-63.

federalism problem—that is, the problem of the federal criminal justice system’s too great influence over the prosecution of adults³⁹—and, second, the excessive punitiveness problem, which she notes has plagued all three other quadrants—federal adult, state adult, and state juvenile.⁴⁰ These two problems are clearly deeply entangled, for the overbearing, disruptive impact of federal prosecutorial power has as a primary effect the creation of a more excessively punitive system. Because Hong applies different lessons to these two problems, I will address them separately, recognizing that this simplifies her analysis somewhat. For the federalism problem, Hong offers the FJDA lesson of a comprehensive and exacting certification process.⁴¹ For the excessive punitiveness problem, Hong offers the FJDA lessons of low sentences and exacting requirements for transferring cases to adult court.⁴²

What much, but not all, of Hong’s discussion of the FJDA lessons has in common is a recognition that imposing substantive and procedural constraints on prosecutorial conduct can curb exercises of prosecutorial power. Perhaps this is not a surprising conclusion, but I agree with Hong’s suggestion that, in a world of capacious prosecutorial power, demonstrations of effective constraints are always useful. What I am less convinced of is the usefulness of the FJDA’s example in motivating larger reforms.

A. *The First Lesson: The FJDA’s Certification Process*

In both the adult and juvenile systems, many offenses are both state and federal crimes.⁴³ As Hong well documents, federal prosecutors’ decisions to charge adults with federal crimes often take law enforcement power away from the states and disrupt the effectiveness of those state systems. This heavy federal prosecutorial presence generally exacerbates the punitiveness of the system, which is a primary reason scholars and policymakers are concerned about the scope of federal prosecutorial reach. As Hong emphasizes, the federal government’s approach in the juvenile system avoids these problems of dominance and disruption of the state systems. The extremely small number of federal prosecutions clearly leaves the states free to pursue their own response to juvenile crime and to handle nearly all juvenile prosecutions.⁴⁴ But a key difference between the *state* systems’ treatment of juvenile and adult offenders

³⁹ Hong, *supra* note 1, at 2031-33.

⁴⁰ *Id.* at 2033-37.

⁴¹ *Id.* at 2061-63.

⁴² *Id.* at 2063-65.

⁴³ For the most part—juvenile delinquency jurisdiction in both federal and state systems is defined not by a distinct set of crimes but rather by a distinct approach to the commission of the same crimes by minors rather than adults. To the extent many acts violate both state and federal laws, this is equally true for minors and for adults.

⁴⁴ I assume that there are very few cases the federal government would consider prosecuting that the state would think unworthy of prosecution.

limits the relevance of any learning from the federal government's deference in the juvenile context.

Hong highlights the certification process required by the FJDA before the federal government can prosecute a case involving a minor.⁴⁵ This provision of the FJDA not only requires the prosecution to certify that certain limited conditions are met (the state is unable or unwilling to prosecute or is without the necessary resources to meet the youth's needs, or the crime is in certain classes of felonies),⁴⁶ but it also requires that high-level Justice Department officials sign off on the certification.⁴⁷ Hong suggests that both the substantive criteria and the heightened process have helped ensure the extremely high level of deference to state authorities, manifested by the extremely low number of cases charged by the federal government.⁴⁸ She calls for similar constraints to be imposed on the adult federal system to compel similar deference to adult state systems.⁴⁹

It is true that these aspects of the federal juvenile system differ in substance and process from the adult system. For adults, the standards set for charging a case in federal court are more generous, and, as Hong emphasizes, there is no process of certification that requires the involvement of high level Justice Department officials and the review of a judge.⁵⁰ For adults, the decision whether or not the case is appropriate for federal court is made by line prosecutors, applying a discretionary standard not subject to judicial review.⁵¹ Imposing a higher substantive standard as well as a heightened review process can be expected to act as an important brake. As Hong points out, even the cost in time and human resources can deter federal action, and where those human resources are employed to meet a higher substantive standard, that will surely help to keep numbers down.

What Hong does not highlight, however, is the underlying motivation that led Congress to include these effective brakes in its approach to juvenile offending and the uniqueness of the states' approach to juvenile (but not adult) offending that created this motivation. The legislative history of the FJDA and its amendments make clear that Congress's decision to defer to the state juvenile justice systems was grounded on its understanding of the state systems' special expertise in responding to juvenile offending.⁵² There are no equivalent specialized systems developed for adults in the states. The criminal justice system for adults is the same, in all principled respects, in the state and federal

⁴⁵ See Hong, *supra* note 1, at 2061-63 (citing 18 U.S.C. § 5032).

⁴⁶ 18 U.S.C. § 5032.

⁴⁷ See *id.*; U.S. Dep't of Just., Just. Manual § 9-8.110 (2020).

⁴⁸ See Hong, *supra* note 1, at 2065.

⁴⁹ *Id.* at 2070-72.

⁵⁰ See *id.* at 2063, 2070-71 (“[The certification process] create hurdles in the federal juvenile system that are not expressly required in the federal criminal system.”).

⁵¹ See *id.* at 2033-34, 2074-77.

⁵² See *supra* Part I.

systems, sharing a basic structure, mode of operation, and goals. As a result, unlike in the juvenile system, where federal prosecutors, in deferring, are deferring to specialized experts in a distinct system that they cannot offer, federal prosecutors of adult offenders likely see themselves as more highly equipped and competent than their state counterparts to do the same job.⁵³

None of this is to say that a demanding process that required a high-level official to certify, in every case, that a high standard of special federal interest was met could not dramatically reduce the numbers of federal prosecutions brought against adults. Rather, it is to say that Congress is unlikely to be motivated to impose these requirements where the justifications underlying the FJDA's deference to states are missing. The obstacle preventing Congress from taking steps to shrink the scope of federal prosecutions is not their lack of legislative tools or ability to use them. The examples Hong offers of certification processes included in laws targeting certain federal crimes illustrates this point.⁵⁴ Rather, Congress lacks the will to use the tools it has because it is not committed to shrinking the federal prosecutorial reach.

B. *The Second Lesson: The FJDA's Less Punitive Response to Juvenile Offending*

In setting out the virtues of the FJDA system, Hong includes under the category of lesser punitiveness both lower sentences for juvenile delinquency offenses and exacting substantive and procedural standards for transfer of juveniles to adult court.⁵⁵ Both of these facets, Hong concludes, help to keep the numbers of federal prosecutions very low.⁵⁶ Hong attributes this effect to two things: The first, repeating the certification story, is that a more substantive and procedurally exacting system discourages prosecution.⁵⁷ The second is that, where punitive options are not available, federal prosecutors will be less eager to step in.⁵⁸ The first reason, focused on the transfer issue, offers useful specifics for any legislator, court, or policymaker looking for ways to decrease the use of transfer. States are, in fact, taking steps to reduce the use of transfer, much in line with what Hong champions: eliminating automatic transfer, taking away prosecutorial transfer, and requiring judges to assess a range of conditions.⁵⁹

⁵³ Intriguingly, Hong notes that, in its consideration of the adult criminal justice system, Congress treats federal prosecutors as the primary experts. *See* Hong, *supra* note 1, at 2039-40 ("Federal legislators often value federal prosecutors' opinions over the findings of other experts, such as criminologists, economists, and social scientists, because prosecutors have on-the-ground experience in criminal law.").

⁵⁴ *See id.* at 2070-71.

⁵⁵ *Id.* at 2060-65.

⁵⁶ *Id.* at 2065.

⁵⁷ *Id.* at 2063.

⁵⁸ *Id.* at 2065.

⁵⁹ *See Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., <http://www.jjgps.org/jurisdictional-boundaries> [<https://perma.cc/367C-EBNH>] (last visited

This practical offer of tools that appear to work in constraining prosecutors and involving courts is a welcome addition for those engaged in these reforms.

It is less clear what Hong is suggesting states can learn from her linkage of the FJDA's lower punitiveness and federal prosecutors' disinterest in taking the cases. Of course, if states, inspired by the FJDA, lower their own sentences, they would, indeed, be reducing the punitiveness of their systems, but that states a tautology. As Hong suggests, federal prosecutors' decisions not to pursue cases with relatively low sentences are likely motivated, in part, by the availability of serious sentences and more readily available transfer in the states, that is, by the more punitive approach available in the states.⁶⁰ Conversely, if states move in a more lenient direction, this may just have the effect, as it has in the past, of encouraging federal prosecutors to get more involved.⁶¹ Perhaps Hong is suggesting that the federal systems' sentencing ceilings demonstrate that significantly lowering sentences is politically possible, but the rest of her analysis (particularly her noting of prosecutors' resistance to pursuing cases applying those sentences) seems to undermine that view.

C. *The Third Lesson: The Agility of Small Systems to Innovate*

Hong mentions a third promising development in the federal government's approach to juvenile offenders, though she ties this development less tightly to a lesson. She offers the example of the steps President Obama took, by Executive Order, to ban solitary confinement of minors, and notes that "the ban of solitary confinement against youth under federal jurisdiction (which only impacted a handful of youth), led to national media attention on solitary confinement, as well as momentary changes for adults."⁶² The national attention likely supported states' moving in the same direction, as many now are.⁶³

As Hong herself notes, the number of youth affected by President Obama's Executive Order was miniscule. This fact highlights a different value of an extremely small system: it allows for innovation and bold moves in the direction of progress at minimal administrative cost, which in turn can inspire the larger, more cumbersome systems to follow suit. Here, the small size is not the end but

Oct. 25, 2022) (reporting that, in recent years, some states that previously had statutes providing for mandatory waiver for certain offenses eliminated mandatory waiver, some that previously had statutes providing for presumptive waiver for certain offenses eliminated presumptive waiver, and some reduced the number of offenses for which their courts have the discretion to waive juveniles to adult court).

⁶⁰ Hong, *supra* note 1, at 2067-69.

⁶¹ *Id.* at 2068-69.

⁶² *Id.* at 2078 (footnote omitted).

⁶³ See Anne Teigen, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement*, NAT'L CONF. OF STATE LEGISLATURES (July 8, 2022), <https://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx> [https://perma.cc/N8C7-NP2R] (noting seven states have recently passed laws limiting or prohibiting use of solitary confinement in juvenile detention facilities).

the means. The small size, whatever the cause, allows for innovations in reform worthy of duplication.

CONCLUSION

The FJDA was built upon an understanding that the federal government lacked expertise in dealing with youthful offenders. Its solution was not to develop that expertise, but to defer to the states, which were committed to developing that expertise in their specialized juvenile justice systems. It is fair to question how truly expert these state systems have been, with their long history of meager resources, unfettered judicial discretion, lack of procedural protections, and, perhaps most important, their decades of ignorance about how to actually help youthful offenders grow up successfully.⁶⁴

But in recent decades, true expertise has developed, and many states have engaged in massive reforms to reflect that expertise.⁶⁵ These reforms have dramatically reduced systems' reliance on incarceration and related punitive constraints in response to juvenile offending, motivated by a more sophisticated understanding of adolescent development and a better understanding of how the system can respond to offending in ways that enhance rather than impair youthful offenders' development. As these reforms demonstrate success in reducing both costs and crime, they have begun to be extended to some adult offenders.⁶⁶

In this way, the lessons of the expert state juvenile justice systems have begun to be applied in the other quadrants of the system. I have argued elsewhere that a full application of these lessons learned can take us a long way toward systems-wide prison abolition.⁶⁷ If recent lessons from the juvenile justice systems can motivate reforms in the adult systems, then Hong's lessons from the FJDA will serve legislatures well in achieving these reforms.

⁶⁴ See Buss, *supra* note 36, at 850-51.

⁶⁵ *Id.* at 855-64.

⁶⁶ See *id.* at 875-79 (describing "raise-the-age" movement that promotes extending juvenile court jurisdiction into mid-twenties and describing some state-level reforms that have taken steps in this direction); Hong, *supra* note 8, at 313-19 (discussing reforms in adult criminal legal systems that qualify as exercises of state's *parens patriae* power rather than police power).

⁶⁷ See Buss, *supra* note 36, at 887-90.