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Juvenile Justice: The Fourth Option

*Christopher Slobogin & Mark R. Fondacaro**

ABSTRACT: The current eclectic mix of solutions to the juvenile-crime problem is insufficiently conceptualized and too beholden to myths about youth, the crimes they commit, and effective means of responding to their problems. The dominant punitive approach to juvenile justice, modeled on the adult criminal justice system, either ignores or misapplies current knowledge about the causes of juvenile crime and the means of reducing it. But the rehabilitative vision that motivated the progenitors of the juvenile court errs in the other direction, by allowing the state to assert its police power even over those who are innocent of crime. The most popular compromise theory of juvenile justice—which claims that developmental differences between adolescents and adults make the former less blameworthy—is also misguided because it tends to de-emphasize crime-reducing interventions, overstate the degree to which adolescent responsibility is diminished, and play into the hands of those who would abolish the juvenile justice system, since it relies on the same metric—culpability—as the adult criminal justice system. This Article argues that, with some significant adjustments that take new knowledge about the psychological, social, and biological features of adolescence into account, the legal system should continue to maintain a separate juvenile court, but one that is single-mindedly focused on the prevention of criminal behavior rather than retributive punishment.

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I. INTRODUCTION

The usual story told about the juvenile justice system is that it must follow one of three paths. The "rehabilitation" path, which probably comes closest to the original motivation for establishing a separate court for juveniles, treats troubled youths as innocent and salvageable beings who must be kept away from adult criminals to enhance their chances of becoming productive citizens.[1] Under the rehabilitative view, the triggering act need not be criminal, disposition is designed to make the child a better person, and confinement meant as punishment is to be avoided. The second path—"adult retribution"—heads in the opposite direction. In vogue among many state legislatures in recent years, the adult-retribution approach posits that most young people who commit crime are fully accountable individuals who should be punished in the same fashion as adults.[2] This path leads to broad transfer-to-adult-court jurisdiction, adult-like sentences in juvenile court, or both. The third option, which probably represents the consensus academic view as well as the practice in a number of jurisdictions, sits somewhere in between the rehabilitative and adult-retribution approaches. It treats juveniles as neither innocent nor fully culpable, but rather posits that their responsibility is diminished because of their youth.[3] Under this "diminished-retribution" model, dispositions are discounted proportionate to the degree of immaturity, either on an individual basis or categorically.

This Article describes a fourth option for juvenile justice—what we call "individual prevention." Framed in terms of the traditional purposes of punishment, the focus of the individual-prevention model is specific deterrence through treatment and, if necessary, incapacitation. Because of its focus on treatment, this path is closely related to the rehabilitation vision. Unlike the rehabilitative model, however, the individual-prevention approach avoids claiming that juveniles are legally innocent or excused because of their youth, retains the retributive model's threshold requirement of a criminal act, and is single-mindedly focused on recidivism reduction rather than the broader goal of creating a well-socialized individual. Its primary divergence from the two retributive models is its rejection of relative culpability as the basis for the duration and type of disposition. Instead of that metric, the individual-prevention model favors assessments of risk that vary the intervention depending on the most effective, least restrictive means of curbing future crime.

This Article argues that the individual-prevention approach to juvenile justice is preferable to the other three because it fits best with our current

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1. *See infra* text accompanying notes 16–28 (discussing the rehabilitative model).
2. *See infra* text accompanying notes 29–34 (discussing the adult-retribution model).
3. *See infra* text accompanying notes 35–38 (discussing the diminished-retribution model).

knowledge about the causes and treatment of youthful offending, is the easiest to justify under current legal doctrine, and provides the most persuasive explanation for maintaining a separate juvenile justice system.

Consider first what we know about juveniles who commit crime. Recent research, described in more detail later in this Article,[4] can be summarized in terms of three important findings relating to the psychology, context, and treatment of juvenile offending. First, while juvenile offenders above the age of nine or ten normally can form criminal intent and understand the wrongfulness of their actions in a shallow sense, both pre-teen and teen offenders are less likely than adults—for a host of psychological and biological reasons—to consider the consequences of their actions or the prospect of punishment. Second, while juvenile offending, like adult offending, is in part the result of "internal" desires and beliefs, it is also particularly prone to the influence of context—peers, families, and neighborhoods. Third, following naturally from the second finding, the most successful way to reduce most juvenile offending is not incapacitation in a detention facility—a disposition that studies show is likely to increase recidivism—but rather intervention in the community specifically designed to ameliorate or eliminate the contextual risk factors (as well as psychological risk factors) associated with crime.

The first set of findings, on the psychology of juvenile offenders, indicates that adolescent—and even many pre-adolescent—offenders are not "innocent" as a legal matter, thus undercutting the key premise of the rehabilitative model. But it also suggests that youthful offenders are distinguishable from adult criminals from a psychological perspective, and thus are not ideal candidates for the adult-retribution approach. These two conclusions might seem to support the diminished-retribution model. But in fact they do not, because current criminal-law doctrine requires very serious impairment before culpability mitigation can occur. For instance, adult criminal offenders with a mental disability rarely receive reduced sentences, yet their legally relevant capacities are substantially more diminished than those of the typical teenager. Moreover, the most significant traits of adolescent immaturity are not compromised cognitive abilities, but rather impulsivity and a tendency to give into peer pressure—traits which seldom support a case for mitigation for adults.[5]

In contrast, the research on the psychology of juvenile crime strongly supports the premises of the individual-prevention model, which neither assumes juvenile offenders are innocent, nor attributes significance to gradations in culpability between adults and adolescents. As we explain later

4. *See infra* Part III (reviewing research on juvenile offenders and crime-prevention programs).

5. *See infra* text accompanying notes 135–56 (discussing typical mitigation factors for both adults and juveniles).

in this Article,[6] for prudential reasons an individual-prevention regime would require a conviction for a criminal act as a predicate for intervention, and thus would not treat the juvenile offender as blameless like the rehabilitation model does. At the same time, unlike the retributive models, the all-important dispositional decision in a prevention regime is focused on risk. Thus, neither the outcome in individual cases nor the operation of the system as a whole relies on the proposition that juveniles are fully culpable (as contemplated by the adult-retribution model) or the equally questionable proposition that they are substantially less culpable than adults (the premise of the diminished-retribution model).

A similar analysis applies to the second set of empirical findings, to the effect that contextual factors heavily influence juvenile offenders. While perhaps useful as an explanatory matter and thus sympathy-inducing, these types of research conclusions usually would not be given legally mitigating effect in the adult criminal justice setting.[7] Thus, once again science is ignored by the adult-retribution model, which considers the debilitating effects of context irrelevant, and provides only tenuous support for the diminished-retribution model, which requires that those effects be seriously compromising. In contrast, the findings regarding the ecological etiology of juvenile offending are of much more relevance in rehabilitation and individual-prevention regimes, and particularly so in the latter type of system, where they can be extremely helpful in devising instruments for assessing risk and in designing post-conviction programs that reduce the antisocial effects of immaturity and environment.

The third major research finding—that juvenile crime is most effectively reduced through community interventions specifically aimed at antisocial conduct—also fits more comfortably with an individual-prevention approach than with the other three approaches. Because the goal under the individual-prevention approach is public safety, these community-based programs should be the disposition of choice. This conclusion is not as clearly warranted, however, in a purely rehabilitative regime, which might accommodate any program, including segregation, that can help the juvenile "improve."[8] Endorsement of a community-based dispositional regime is even more difficult under the adult- and diminished-retribution models. Adult punishment is usually associated with some type of imprisonment. Even punishment that has been discounted due to juvenile immaturity is hard to square with community programs, at least when the crime committed is a felony. Thus, the research suggests that an honestly

6. *See infra* text accompanying notes 195–200 (explaining that the individual-prevention model requires a criminal act).

7. *See infra* text accompanying notes 150–51 (noting that in the adult criminal justice setting, contextual factors are rarely given mitigating weight).

8. *See infra* text accompanying notes 26–27 (describing the use of "reformatories" and other programs that are vestiges of the rehabilitative approach).

applied retributive regime—adult or diminished—cannot take full advantage of advances in reducing juvenile recidivism and, indeed, is likely to lead to higher levels of recidivism, given the finding that incarceration tends to exacerbate the reoffending rate.

The individual-prevention model is also the easiest to justify as a jurisprudential matter. The foregoing discussion should make clear why the legal justifications for the other three options are weak. The myth that adolescent offenders are legally innocent of crime cannot sustain the rehabilitative model. The only alternative rationale for that model—that youth are more amenable to treatment and therefore can be coercively rehabilitated any time they need treatment—probably runs afoul of constitutional restrictions on the state's *parens patriae* power.[9] The adult-retribution model is also on shaky ground, because it fails to take into account the immaturity of most adolescents. Finally, the diminished-responsibility model ascribes *too much* mitigating effect to juvenile immaturity. Fifteen-, sixteen-, and seventeen-year-olds, the age groups that commit most juvenile crime, are much closer to adults than pre-adolescents on the traditional measures of criminal desert.[10]

Compared to these rationales, the justification for the individual-prevention model—reduction of criminal recidivism—is more compelling. Because it is aimed at preventing crime, it more obviously benefits both youthful offenders and the public than punishment meted out as a matter of desert. But it does so without endorsing the blunderbuss therapeutic approach associated with the rehabilitative model.

Moreover, the Supreme Court has endorsed the individual-prevention rationale as a constitutional matter. In the 1997 decision of *Kansas v. Hendricks*,[11] the Court upheld, against a substantive due process challenge, sexual-predator statutes that permit post-sentence commitment, so long as they require proof that the offender is "dangerous beyond [his or her] control."[12] In other words, the Court held that individuals whose lack of volitional control makes them relatively undeterrable may be preventively detained if necessary to avoid recidivism. By analogy, one can argue that the same indicia of immaturity in juveniles that reduce culpability—impulsivity, attraction to risk, and peer-driven behavior—also decrease deterrability or responsiveness to social norms, and thus would permit preventive intervention, ideally designed to increase deterrability.

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9. *See infra* text accompanying notes 124–29 (discussing the constitutional restraints on the state's *parens patriae* power).

10. *See infra* text accompanying notes 51–53 (describing behavioral-science research on the development of juveniles' cognitive capacities).

11. Kansas v. Hendricks, 521 U.S. 346 (1997), discussed *infra* text accompanying notes 163–74.

12. *Hendricks*, 521 U.S. at 358.

Admittedly, a purely preventive system, or even one that, as proposed here, requires a predicate criminal act, is anathema to many because of its association with indeterminate detention and a dehumanizing therapeutic state. For instance, sexual-predator statutes can and have authorized indeterminate, life-long commitment for autonomous offenders who would ordinarily be subject to determinate punishment.[13] However, the potential abuses associated with an individual-prevention regime are mitigated substantially when applied to juvenile offenders. Given the durational limitation on juvenile-court jurisdiction, long-term indeterminate confinement would be rare. Nor would preventive intervention in the juvenile setting represent the insult to autonomy that a similar system in the adult context would, given the actual and perceived relative immaturity of juveniles.

In short, this Article argues that whatever its viability might be in the adult setting, the individual-prevention model is a good jurisprudential fit with the juvenile justice system. The debate over whether a retributive approach to adult criminal justice is preferable to one that focuses on utilitarian goals of incapacitation, specific deterrence, and rehabilitation has a long pedigree and is in somewhat of a stalemate today.[14] But in the special context of juvenile justice, the scale tips decidedly in favor of the latter agenda.

The final advantage of the individual-prevention model is that it is more likely to ensure the political future of a truly separate juvenile justice system, a goal that most observers of the system share. None of the other models explain as effectively why juvenile offenders should be handled differently than adult offenders. The adult-retribution model obviously pushes in the opposite direction, given its equation of juveniles with adults. While the rehabilitative model does offer something quite different from the adult criminal justice system, it blatantly fails to satisfy the public's or legislatures' appetite for assuring accountability for crimes or their desire for protection against dangerous individuals.

The diminished-retribution model appears to be a plausible compromise between the two. But, like the adult-retribution model, it too ultimately fails to draw a sufficient distinction between adolescent and adult offenders. Even if, contrary to the assertion of this Article, adolescents are less culpable than adults in a legally significant way, the most efficient method of recognizing that lesser culpability—and therefore a very tempting political option in an era of limited budgets and pressure to be tough on crime—is simply to try juveniles in adult court and reduce their sentence

13. Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 206 (1996) ("Not one person committed since 1975 has been discharged from a final sex offender commitment in Minnesota.").

14. For a summary of this debate, see generally Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17 (2003).

length proportionately. Under the diminished-responsibility model there is no need for both a juvenile and an adult system because both use the same metric: culpability. The diminished-responsibility model is understandably popular among juvenile advocates because it appears to avoid the harshness of the adult system, but it is flawed because it fails to distinguish juveniles sufficiently from adults.

A juvenile justice system focused on individual prevention, in contrast, is based on an entirely different construct than the criminal justice system. It is forward-looking rather than backward-looking. Its principal aim is reducing crime, not punishing it. The public and legislators can honestly be told that a separate juvenile justice system is necessary because its priorities are so dissimilar from the adult system. Moreover, surveys suggest that the public will perceive this message positively; at bottom, the public is more interested in rehabilitating juveniles than punishing them, so long as the rehabilitation is focused on reducing crime.[15] In a nutshell, the longevity of the juvenile justice system is more likely to be assured if its mission is framed in terms of prevention rather than treatment or punishment.

Part II of this Article provides a more elaborate discussion of the four options for juvenile justice. Part III summarizes what we have learned about juvenile crime and the methods for reducing it. Part IV then explains why this research supports the individual-prevention model of juvenile justice more strongly than competing models. Part V addresses objections to the individual-prevention model and reiterates some of its benefits.

II. THE FOUR PATHS OF JUVENILE JUSTICE

The history of the juvenile court provides exemplars of all four models of juvenile justice. The rehabilitative vision strongly informed the very first juvenile court, begun in the late nineteenth century in Chicago. Jane Addams, who helped establish the court, described its operation as follows:

> The child was brought before the judge with no one to prosecute him and with no one to defend him—the judge and all concerned were merely trying to find out what could be done on his behalf. The element of conflict was absolutely eliminated and with it, all notion of punishment . . . .[16]

Ben Lindsey, an early juvenile-court judge who wholeheartedly subscribed to this vision, opined that "our laws against crime were as inapplicable to children as they would be to idiots."[17] In the eyes of these progenitors, juvenile offenders were blameless, and the goal of the juvenile court was not to punish, but to help. As one commentator put it, the original juvenile-

15. *See infra* text accompanying notes 182–83, 208 (discussing the public's preference for reducing juvenile crime through the least-restrictive punishment).

16. JANE ADDAMS, MY FRIEND, JULIA LATHROP 96 (Univ. of Ill. Press 2004) (1935).

17. BEN LINDSEY & HARVEY J. O'HIGGINS, THE BEAST 133 (1910).

court movement "assumed that young people under an articulated statutory age (sometimes as high as 21 years of age) are incapable of rational decisionmaking and thus lack the capacity for moral accountability assumed by the punitive model."[18]

Under a pure rehabilitative model, then, the state is implementing its *parens patriae* power, not its police power.[19] Although no court—not even the one Addams championed—consistently endorsed the youth-as-innocents concept,[20] the rehabilitative model that court spawned still heavily influences discussions of juvenile justice. The vision has both substantive and procedural implications, vestiges of which are visible today. The procedural implications have been discussed elsewhere.[21] Here the focus is on the "subject matter jurisdiction" of the juvenile court.

The principal substantive implication of the rehabilitative model is that the grounds for intervention are quite wide-ranging. For instance, Judge Lindsey thought the court should ask, "Is the child . . . given to playing 'hookey' from school, or 'bumming' and running away, showing an entire lack of ambition or desire to work and settle down to regular habits?"[22] Julian Mack, another early juvenile-court judge, asked, "Why is it not the duty of the state, instead of asking merely whether a boy or girl has committed a special offense, to find out what he is, physically, mentally, morally . . . ?"[23] From these types of sentiments rose an expansion of juvenile-court jurisdiction beyond the law of (adult) crimes to include so-called "status offenses," such as truancy, disobedience, and incorrigibility. For example, one statute defined as "delinquent" any youth who

> knowingly associates with thieves, vicious or immoral persons; or, who, without just cause and without the consent of its parents or custodian, absents itself from its home or place of abode, or who is growing up in idleness or crime; . . . or who patronizes or visits any public pool room or bucket shop; or wanders about the streets in the night time without being on any lawful business or occupation; or who habitually wanders about any railroad yards or tracks or jumps or attempts to jump onto any moving train; . . . or who

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18. Martin R. Gardner, *The Right of Juvenile Offenders to Be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182, 191 (1989).

19. David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 13, 18 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter CHANGING BORDERS].

20. *See id.* at 18–19 ("[T]he idealized juvenile court that Addams and other leaders in the juvenile court movement spoke about so glowingly never actually existed.").

21. *See generally* Mark Fondacaro, Christopher Slobogin & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955 (2006) (proposing a procedural framework for the juvenile justice system).

22. ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 142 n.15 (2d ed. 1977) (internal quotation marks omitted).

23. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

> habitually uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct in any public place or about any school house.[24]

Reminiscent of vagrancy statutes the Supreme Court eventually declared unconstitutional,[25] these types of laws gave juvenile-court judges discretion to intervene in the lives of vast numbers of youth. And those interventions were sometimes quite intrusive. For instance, the "child-savers," as they have been called, believed that young offenders needed to be removed from their environment and detained in "reformatories." These institutions were meant to be "guarded sanctuaries, combining love and guidance with firmness and restraint," and were aimed at protecting their inmates from "idleness, indulgence, and luxuries through military drill, physical exercise, and constant supervision."[26] One still sees vestiges of the rehabilitative approach in residential programs that focus on "milieu treatment" (involving residents in day-to-day interaction through psychotherapeutic discussion) and "behavioral token programs" (where youths are rewarded for conforming to rules), as well as in counseling programs that combine individual psychotherapy with close supervision.[27]

Thus, the outline of the rehabilitative model is clear. Juveniles are to be excused and treated, not punished, for their antisocial behavior. That behavior does not need to amount to crime, because the primary goal is not to prevent future criminal behavior but to improve the psychological well-being and socialization of the child. As one commentator described it, the progenitors of the juvenile court viewed it as "a legal bridge between the troubled child and the agencies of amelioration."[28]

Most of the history of the juvenile court in the past half-century has consisted of backing away from the substantive implications of the rehabilitation vision. Much of the movement has been along the adult-retribution path. Even in the early days of the juvenile court, judges found ways to transfer to adult court those juveniles who committed serious crimes or appeared to be particularly dangerous.[29] The steadiest progression toward a harsher juvenile court, however, has been during the past thirty

24. Tanenhaus, *supra* note 19, at 40 n.17; *see also* Mack, *supra* note 23, at 107 (arguing that the State, instead of punishing children, should attempt to rehabilitate them).

25. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 361 (1983) (declaring unconstitutionally vague a California statute requiring vagrants to provide a peace officer with a "credible and reliable" identification); Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (declaring unconstitutionally vague a Jacksonville, Florida vagrancy ordinance).

26. PLATT, *supra* note 22, at 54.

27. DEP'T OF HEALTH & HUMAN SERVS., U.S. PUB. HEALTH SERV., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL 118 (2001) [hereinafter SURGEON GENERAL REPORT].

28. JUVENILE JUSTICE PHILOSOPHY: READINGS, CASES AND COMMENTS 552 (Frederic L. Faust & Paul J. Brantingham eds., 1974) (describing the "orthodox" view).

29. Tanenhaus, *supra* note 19, at 20–21.

years. Since 1979, most states have dramatically expanded transfer jurisdiction, both in terms of the age at which it attaches and the types of crimes that can trigger it. As a result, transfers of juveniles have increased by at least seventy percent.[30] Further, the number of states that permit automatic transfer (rather than leaving that decision to the discretion of the juvenile court) has more than doubled to thirty-one, and thirteen states have lowered the age at which juvenile-court jurisdiction ends to fifteen or sixteen.[31] For those juveniles who remain in juvenile court, roughly half of the states have adopted some version of "blended" sentencing, which permits imposition of adult sentences on juveniles, albeit with the option of suspending a portion of the sentence under certain circumstances.[32]

There appear to be two dominant reasons why the adult-retribution model has been so attractive during the last three decades. First, reformers believed that juvenile crime was increasing significantly (a perception that turned out to be inaccurate for most of that time period).[33] Second, advocates for a more punitive model assume that juvenile offenders are, in the words of one prosecutor, "criminals who happen to be young, not children who happen to be criminal."[34] On this view, juveniles who commit adult crimes should pay the same price adult offenders pay, at least when the crimes are serious.

Not all who believed youth should be held accountable for their crimes endorsed this adult-retribution stance, however. In the forefront of this group were the drafters of the American Bar Association's Juvenile Justice Standards, which were promulgated in 1980. Consistent with a retributive, just-deserts stance, the Standards recommended that juvenile-court dispositions be based on the offense, not the offender, and, for the same reason, they also rejected status offenses. Specifically, the Standards provided that "[s]anctions should be proportionate to the seriousness of the offense [and] fixed or determinate," and that "noncriminal misbehavior (status offenses or conduct that would not be a crime if committed by an

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30. Richard E. Redding, *Adult Punishment for Juvenile Offenders: Does It Reduce Crime?* [hereinafter Redding, *Adult Punishment*], *in* HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 375, 377 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006) [hereinafter HANDBOOK].

31. Richard E. Redding & Barbara Mrozoksi, *Adjudicatory and Dispositional Decision Making in Juvenile Justice*, *in* JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT AND INTERVENTION 232, 238 (Kirk Heilbrun, Naomi E. Sevin Goldstein & Richard E. Redding eds., 2005).

32. Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, *in* CHANGING BORDERS, *supra* note 19, at 145, 145–79.

33. Elisabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807–09 (2003).

34. Alfred S. Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POL'Y REV. 65, 66 (2000).

adult) should be removed from juvenile-court jurisdiction."[35] But the drafters of the Standards also believed that juveniles' relative immaturity required lesser punishment than that meted out to adults who committed the same crimes. Thus, according to the Standards, crimes requiring a twenty-year sentence in adult court might only necessitate a three-year sentence in juvenile court.[36]

More recent writers, supported by empirical findings that adolescents are more impulsive, less future-oriented, and more subject to peer influence than adults, have made an even more nuanced case for maintaining a separate juvenile system grounded on the assumption that youth who commit crime have diminished responsibility.[37] The standard conclusion of this view is that most youth who commit crimes before age eighteen should be tried and sentenced in juvenile court, with transfer limited to only the most serious, mature offenders. Although in the past two decades the diminished-retribution model has been less popular among legislatures than the adult-retribution vision, its influence is apparent in the large number of states that mete out relatively short determinate sentences for juvenile offenders who are not transferred to adult court.[38]

Throughout these developments, the individual-prevention model and the goal of recidivism reduction played a secondary, albeit influential, role. Judge Mack illustrated the subtle manner in which the *parens patriae* position approached the issue when he famously stated:

> The problem for determination by the judge is not, Has this boy or girl committed a specific wrong but, What is he, how has he become what he is, and what had best be done in his interest *and in the interest of the state* to save him from a downward career.[39]

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35. ABA, IJA–ABA JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH xvii–xix (Robert E. Shepherd, Jr. ed., 1996).

36. JOHN M. JUNKER, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS §§ 4.2(B)(2), 5.2(A)(2)(a) (1980) [hereinafter STANDARDS].

37. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 154–72 (1997) (discussing developmental influences on juveniles' criminal behavior); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 267 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter YOUTH ON TRIAL]. The latter chapter updates arguments from Franklin E. Zimring, *Background Paper*, *in* CONFRONTING YOUTH CRIME: TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS 27, 38–43 (1978).

38. Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 757 ("About one-third of the states now have determinate or mandatory minimum sentencing laws for juveniles, usually based on the offense and prior record.").

39. Mack, *supra* note 23, at 119–20 (emphasis added).

The drafters of the Juvenile Justice Standards, although focused on just deserts, also obliquely recognized that protection of the public is a legitimate goal of juvenile justice. The Standards do not specifically designate public safety as one of the purposes of juvenile-justice sanctions,[40] but their dispositional provisions do indicate that probation conditions should take into account "whether the juvenile presents a substantial danger to others."[41] And the most adult-like juvenile-justice reforms of recent times were driven in part by the specter of the soulless adolescent "superpredator" who, unless confined, would routinely harm others.[42]

Thus, as one would expect, every approach to juvenile justice voices the desire to reduce juvenile crime. But the central focus of these visions is elsewhere. The rehabilitative model hopes first and foremost to help the child, as Judge Mack's words indicate. The retributive models are, by definition, meant to punish for past acts, not prevent future ones, with the result that any achievement of the latter goal is an incidental effect of disposition. The individual-prevention vision, in contrast, has no other objective but to prevent future crime; helping the offender is an incidental goal, not a primary one, and interventions solely for the sake of exacting retribution are rejected.

Despite the general attractiveness of promoting public safety,[43] prevention has seldom been explicitly adopted as the principal vision of juvenile justice by any of those who advocate for a separate juvenile justice system, for at least two reasons. First, a regime modeled on individual

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40. STANDARDS, *supra* note 36, at § 1.1 ("[T]he purposes of the juvenile delinquency code should be . . . to forbid conduct that unjustifiably and without excuse inflicts or risks substantial harm to individual or public interests"; prevent conviction for "conduct that is without fault or culpability;" give fair notice, and "recognize the unique physical, psychological, and social features of young persons").

41. *Id.* at 160.

42. WILLIAM J. BENNETT, JOHN J. DIIULIO, JR. & JOHN P. WALTERS, BODY COUNT 27 (1996). The authors state:

> America is now home to thickening ranks of juvenile 'super-predators'—radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders[, and who] do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience.

Id.

43. Most state statutes explicitly recognize public safety as a goal of juvenile justice. *See, e.g.*, IDAHO CODE ANN. § 20-501 (2004) ("[T]he primary purpose of this act is to provide a continuum of programs which emphasize the juvenile offender's accountability for his actions while assisting him in the development of skills necessary to function effectively and positively in the community in a manner consistent with public safety."); VA. CODE ANN. § 16.1-227(1)–(4) (2001) (stating that the purpose of the juvenile justice system is "[t]o divert . . . , consistent with the protection of the public safety, those children who can be cared for or treated through alternative programs" and "[t]o protect the community against those acts of its citizens, both juveniles and adults, which are harmful to others and to reduce the incidence of delinquent behavior and to hold offenders accountable for their behavior").

prevention could lead to widespread abuse, both because our ability to assess risk is subject to error, and because, in theory at least, it contemplates intervention even against youth who have not committed any offense (even a status crime) if they are thought to pose enough of a risk. Second, a pure individual-prevention regime, like a rehabilitative one, does not formally pronounce that offenders are blameworthy, and thus may undermine the expressive or character-building function of the law.

Later in this Article, some refinements to the model are suggested that address these concerns. For present purposes, it should be emphasized that the substantive scope of an individual-prevention model is likely to be significantly different than the other three models. Compared to the retributive models, it is likely to be both broader in some respects and narrower in others. Pre-teen children who might not justly be subjected to significant punishment might nonetheless pose a risk and thus be in need of serious intervention in an individual-prevention regime (although confinement in a detention facility would be the last resort under the individual-prevention model, not the primary dispositional vehicle it is in a retributive scheme). At the same time, many adolescents who commit serious offenses might be subject to minimal intervention if they pose minimal risk, despite the harm they have caused or their relatively significant legal culpability. Furthermore, transfer to adult court would never occur in a prevention regime, because regardless of how "culpable" a juvenile offender might be, the juvenile justice system can always handle the risk he or she represents—in confined space if need be.[44]

Compared to the rehabilitative model, the scope of an individual-prevention regime would be narrower in a different sense. Although, as noted above, in theory a preventive regime does not require any triggering conduct, in fact, the conduct underlying many status offenses and other "immoral" behavior is seldom strong evidence of risk (which will usually require some type of crime),[45] and thus intervention will not be as likely in an individual-prevention model. Nor would the scope of intervention be as extensive as the rehabilitative model, since programs designed to "reform" and "educate" may go far beyond what is necessary to reduce crime, as the experience during the "child-saving" era illustrates.

Three examples should suffice to spell out these differences between the various approaches: Imagine a fifteen-year-old who kills his sleeping father after suffering years of his abuse, a seventeen-year-old gang member who commits his third car theft and is complicit in a murder, and a nine-

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44. A second reason transfer would not occur in a prevention regime is the empirical finding that placing juveniles with adults increases recidivism. *See infra* text accompanying note 98 (reviewing research concerning the effects of juvenile incarceration on recidivism).

45. In any event, the legality principle counsels that conduct that does not amount to crime cannot be the basis for coercive state action. *See infra* text accompanying notes 195–96 (discussing the principle of legality).

year-old who routinely tortures cats. A retributive regime—either adult or diminished—would probably assign significant punishment to the first two individuals, including incarceration (and perhaps even transfer to adult court), while at most it would administer a slap on the wrist to the third youth. In contrast, depending upon the outcome of risk assessment, a preventive regime might counsel minimal intervention in the first case, a community disposition aimed at restructuring peer relationships in the second case, and intensive family and individual counseling in the third case, assuming cruelty to animals is a crime and strongly indicates risk. Responses to these cases under a rehabilitative model would probably be similar to those under the individual-prevention approach, but with two variations: given the *parens patriae* premise, intervention under the rehabilitative model might be more wide-ranging—perhaps involving something akin to "reform school" in the first two cases—and it would probably take place in the third case even if cruelty to animals were not a crime under relevant state law or indicative of significant risk.

The distinctions between the four models can be fleshed out further by elaborating on the case involving the fifteen-year-old boy who killed his father. In an adult-retributive regime, the adjudicatory inquiry would probably take place after transfer to adult court and would focus on the manner in which the boy carried out the crime.[46] Did he plan the shooting and enjoy it, did he act impulsively, or did his behavior fit somewhere between those two poles? This retrospective judgment about the defendant's past mental state would provide the moral justification for both the imposition and the duration of punishment. Moreover, the nature of the disposition would probably be unidimensional—punitive confinement in an institutional setting—although treatment might be provided during the incarceration.

From the standpoint of the diminished-retribution model, the boy's age would be particularly relevant; at fifteen, he is near the age where most cognitive research draws the dividing line between adolescent immaturity and adult maturity. As with the adult-retributive model, information about the manner of the killing would also be relevant. If the boy were judged to be past the cognitive dividing line on the side of adult maturity or if he committed the crime in a malicious manner, he might be transferred to the adult system. If deemed immature, he might remain in the juvenile justice system, but the primary task of the legal decision maker would still be to fix blame based on a retrospective judgment about the boy's mental state at the time of the crime. This assessment of culpability would also be the most significant factor in determining the duration and location of the

46. *See* Jahnke v. State, 682 P.2d 991, 1010–11 (Wyo. 1984) (affirming the manslaughter conviction in adult court of a sixteen-year-old boy for killing his abusive father).

disposition, although, as with the adult-retribution model, treatment might be provided during the sentence.

The inquiry under the rehabilitation model would focus on the psychological well-being of the offender. For instance, experts might address whether the boy's reaction to his father's abuse has left him so psychologically traumatized that he is in need of long-term mental health care in a residential setting. If so, his rehabilitative regime might include initial stabilization on medication, followed by participation in group therapy sessions aimed at letting him know that his experiences of abuse are not unique, and, resources permitting, individual psychotherapy helping him work through any symptoms of post-traumatic-stress disorder. Once the state deemed him ready for release from the residential setting, it might send him to a transitional group home and then, finally, back to his family and community after therapists had resolved his mental-health problems.

Under an individual-prevention model, as under the rehabilitative approach, inquiry into mens rea would be minimal, merely assuring that the killing was not accidental or objectively justified. But in contrast to the rehabilitative approach and the retributive approaches, under the individual-prevention model the focus would be whether the boy posed a risk of further crime and, if so, how to prevent it. Experts would develop an individual risk-management plan based on an assessment of empirically identified risk factors at the individual level (does the boy have deficits in social cognitive skills that limit his ability to resolve conflicts or a substance-abuse problem that facilitates delinquent conduct?), the family level (to what extent is his mother available and capable of nurturing law-abiding attitudes?), and the community level (does he associate with delinquent peers who are likely to condone and encourage future delinquent conduct?).

As noted above, the state is less likely to confine the boy under the individual-prevention model than under the retributive models, and transfer would not be an option. While a rehabilitative approach might start with the most-restrictive setting and gradually move toward a return home, the individual-prevention model would rely on the least-restrictive intervention necessary to reduce risk. Only if evaluation of the boy indicated he posed an imminent risk of serious harm to others would he be confined, and the state would periodically review such confinement to determine whether it remained necessary as a means of reducing risk.

The rest of this Article explores which juvenile-justice path, or permutation thereof, is optimal, from both an empirical and a normative perspective. Part III lays out the relevant empirical material. Part IV then explores its legal implications.

III. JUVENILE CRIME AND METHODS OF REDUCING IT

The following review of the existing research on juvenile offenders and programs designed to curb their offending highlights only the most important findings. More elaborate treatment can be found elsewhere.[47] This Part begins by looking at individual psychological and contextual factors that might contribute to criminal offending. The research suggests that the biggest difference between adults and juveniles once they reach adolescence is their tendency toward reckless behavior.[48] It also suggests that juvenile crime is as much the result of ecology as it is of intrapsychic influences.[49] The discussion then briefly examines the implications of these findings for assessments of risk and ends with a description of some of the more promising programs designed to reduce recidivism.[50]

A. *PSYCHOLOGICAL FACTORS*

Behavioral-science research on delinquent behavior traditionally has focused on individual psychological factors, especially cognitive functions that are thought to have some bearing on judgments of juvenile responsibility. Most of this research suggests that, at a shallow level, cognitive capacities are operative at a surprisingly early age. Laurence Steinberg and Elisabeth Cauffman, among the most prominent researchers in this area, have declared that "[a]bsent some sort of mental illness or retardation . . . anyone who is nine can form criminal intent and appreciate the wrongfulness of an action."[51] Additionally, by around age ten or eleven, children have acquired the basic capacity to make "moral judgements [sic] based on intentions and motives," although this capacity continues to

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47. Much of this review is derived from Mark R. Fondacaro & Lauren G. Fasig, *Judging Juvenile Responsibility: A Social Ecological Perspective*, *in* HANDBOOK, *supra* note 30, at 355; *see also* SURGEON GENERAL REPORT, *supra* note 27, 41–152 (discussing the developmental risk factors for youth violence, as well as methods of preventing youth violence).

48. *See infra* Part III.A (discussing psychological factors).

49. *See infra* Part III.B (discussing contextual factors).

50. *See infra* Part III.C (discussing the implications of risk assessment).

51. Laurence Steinberg & Elisabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, *in* CHANGING BORDERS, *supra* note 19, at 379, 394.

develop up until the age of about seventeen.[52] By age sixteen, if not before, people have developed adult-like capacity to reason logically.[53]

At the same time, Steinberg and Cauffman found that there are significant differences between young adolescents and adults in terms of "psychosocial maturity." They evaluated the latter construct by measuring three broad categories of functioning: responsibility (the capacity to make a decision in an independent, self-reliant fashion), perspective (the capacity to place a decision within a broader temporal and interpersonal context), and temperance (the capacity to exercise self-restraint and to control one's impulses).[54] Their studies indicate that, compared to adults, adolescents as a group score significantly lower on measures of self-reliance, consideration of future consequences, and self-restraint.[55]

Other research confirms these three tendencies in ways that are relevant to juveniles' propensity to commit crimes. Corroborating the finding that juveniles are less self-reliant than older individuals are multiple studies, discussed further below, concluding that adolescents are more likely than adults to give in to bad peer influence.[56] The finding that adolescents focus on short-term consequences and rewards coincides with research indicating that youth are more sensation- and risk-seeking, value impulsivity and fun more than adults, and are less adept than older individuals at planning and thinking about the future.[57] The finding that juveniles find it

52. Nuno Ferreira, *Putting the Age of Criminal and Tort Liability into Context: A Dialogue Between Law and Psychology*, 16 INT'L J. CHILD. RTS. 29, 35, 36 (2008); *see also* LAWRENCE KOHLBERG, CHILD PSYCHOLOGY AND CHILD EDUCATION: A COGNITIVE-DEVELOPMENTAL VIEW 283 (1987) (stating that a "conventional" level of morality is reached between ages ten and twenty); Marie-Anne Suizzo, *The Social-Emotional and Cultural Contexts of Cognitive Development: Neo-Piagetian Perspectives*, 71 CHILD DEV. 846, 846 (2000) (noting that as children develop, they have a greater ability to "reflect on their emotions, consider others' perspectives, and inhibit or plan their actions").

53. Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, *in* YOUTH ON TRIAL, *supra* note 37, at 325, 330–31 [hereinafter Cauffman & Steinberg, *Researching Adolescents' Judgment*].

54. *See* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 251–52 (1996) (describing the three major "attributes most often associated with mature decision making"); *see also* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents Might Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741, 744–45 (2000) [hereinafter Cauffman & Steinberg, *(Im)maturity*] (describing "three categories of psychosocial factors").

55. Cauffman & Steinberg, *Researching Adolescents' Judgment*, *supra* note 53, at 331–33.

56. *See infra* text accompanying notes 74–80 (discussing the influence of peer groups on adolescent behavior).

57. *See* Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1, 29 (1991) ("Most results show that the levels of planning, realization, and cognitive structuring concerning the future increase as adolescents grow older."); Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 231 (1995). Scott et al. note:

relatively difficult to "manage" themselves is related to empirical work indicating that adolescents are more likely than adults to act on moods and fleeting desires than deliberate thought.[58] Thus, researchers speak of a "vulnerable 'time gap' during adolescence, during which risk-seeking drives overpower regulatory and modulating mechanisms."[59]

Research exploring neurobiological influences on child and adolescent development and behavior also supports the conclusion that there are significant differences between juvenile and adult decision-making. Studies utilizing recent advances in imaging technology indicate that adolescent brains are less well-developed than previously believed. In particular, the frontal lobe, which researchers have associated with the control of aggression and other impulses as well as with measures of cognitive functioning such as long-term planning and abstract thinking, undergoes significant change during adolescence and is the last part of the brain to develop.[60]

Other neurobiological evidence indicates that differences in the limbic system and subcortical regions of the brain between adolescents on the one hand, and pre-teens and adults on the other, correspond to heightened novelty-seeking and risk-taking behavior in the former group.[61] Steinberg

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> Compared to adults, adolescents appear to focus less on protection against losses than on opportunities for gains in making choices[,] ... seem to discount the future more[,] ... weigh more heavily the short-term consequences of decisions[,] ... [and find it harder] to contemplate the meaning of a consequence that will be realized 10 to 15 years in the future, because such a time span is not easily made relevant to adolescent experience.

Id.; *see also* Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764, 1774 (2008) (finding that sensation-seeking increases during early adolescence, peaks around age fourteen or fifteen, and then steadily declines).

58. Pravan Kambam & Christopher Thompson, *The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants*, 27 BEHAV. SCI. & L. 173, 175 (2009) ("[A]dolescents are particularly susceptible to the potentially deleterious effects of emotions on decision-making."); Reed Larson, Mihaly Csikszentmihalyi & Ronald Graef, *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 J. YOUTH & ADOLESCENCE 469, 488 (1980) (finding that adolescents are subject to more rapid and extreme mood swings than adults).

59. Kambam & Thompson, *supra* note 58, at 187.

60. *See generally* AM. BAR ASS'N, JUVENILE JUSTICE CTR., ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY (2004), *available at* http://www.abanet.org/crimjust/juvjus/Adolescence.pdf (discussing discoveries about differences between adolescent and adult brains). *See also* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861 (1999) (showing the net increase in "white matter" between ages four and twenty-two to be 12.4%); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999) (reporting "large group differences" between adults and adolescents in terms of frontal lobe maturation).

61. *See* Monique Ernst et al., *Amygdala and Nucleus Accumbens in Responses to Receipt and Omission of Gains in Adults and Adolescents*, 25 NEUROIMAGE 1279, 1289 (2005) (finding an "age-

suggests that these changes in the limbic system may promote sensation-seeking conduct in early and mid-adolescence at precisely the same time the prefrontal cortex region of the brain, which controls executive functions such as planning, regulation of emotions and impulses, and evaluations of risk, is maturing. This "temporal gap between the arousal of the socioemotional system, which is an early-adolescent development, and the full maturation of the cognitive control system, which occurs later, creates a period of heightened vulnerability to risk-taking during middle adolescence."[62]

In sum, the research on adolescent psychology does not suggest that adolescents lack capacity to formulate intent or are seriously compromised in their ability to recognize the wrongfulness of criminal behavior. But it does suggest that they are less risk-averse and are less likely to attend to the consequences of their actions, including criminal acts, than are adults.[63] Of course, both of these conclusions are generalizations. Some adolescents reach maturity much earlier than others, while some adults still demonstrate adolescent levels of risk-taking.[64] The fact remains, as one recent review of the literature indicated, that "impulsivity is a normative behavior during

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related pattern of regional brain activation [that] may explain the propensity for risk-taking and novelty-seeking behaviors in adolescents"); Adriana Galvan et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26 J. NEUROSCIENCE 6885, 6891 (2006) (suggesting that the adolescent's neural framework is similar to that which explains addiction, in that the prefrontal cortex is "'hijacked' by an impulsive subcortical system, which might render it unable to appropriately modulate decisions in the context of future consequences"); *see also* Brian Bower, *Teen Brains on Trial: The Science of Neural Development Tangles with the Juvenile Death Penalty*, 165 SCI. NEWS 299, 300 (2004), *available at* http://www.findarticles.com/p/articles/mi_m1200/is_19_165/ai_n6110300/?tag=content;col1 (describing brain research that suggests that, in order to obtain the same "motivational boost" that adults have to seek rewards, teens need the stimulus from risky behavior). *See generally* B.J. Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 70 (2008) (hypothesizing that the difference between adolescents on the one hand and preteens and adults on the other is an evolutionary response to the need for adolescents to leave the family and find a mate); Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 PHARMACOLOGY BIOCHEMISTRY & BEHAV. 212, 212 (2009) (correlating age with control of behavior).

62. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 466 (2009).

63. *See* Jennifer L. White et al., *Measuring Impulsivity and Examining Its Relationship to Delinquency*, 103 J. ABNORMAL PSYCHOL. 192, 202 (1994) (finding a "striking" relationship between "behavioral impulsivity" and delinquency, as well as a relationship between "cognitive impulsivity and delinquency, but one which was not independent of IQ").

64. *See* Cauffman & Steinberg, *(Im)maturity*, *supra* note 54, at 757 ("It is important to remember that responsibility, perspective, and temperance—the three components of maturity of judgment studied here—are more predictive of antisocial decision-making than chronological age alone. Indeed, psychosocially mature 13-year-olds demonstrate less antisocial decision-making than psychosocially immature adults.").

normal childhood development."[65] Echoing this view, another researcher has stated that "reckless behavior becomes virtually a normative characteristic of adolescent development."[66]

B. CONTEXTUAL FACTORS

Contextual influences can have profound effects on the development and continuance of delinquent behavior. These influences range from parents to peers, from schools to the broader community and the media. Although many of these factors are also associated with adult crime, their contribution to juvenile crime is both more proximate (as with family and school influences) and powerful (as with peer influences, and perhaps media and neighborhood effects as well). The significant impact of these factors on juveniles suggests that individual decision-making is only a partial precipitant of criminal behavior. More importantly, it reinforces the notion that juveniles who experience these factors may be compromised in their ability to obey the law and that attempts to improve that ability must take into account contextual factors.

Family factors are among the strongest predictors of risk for delinquent behavior.[67] Poor parental monitoring, including inadequate direct supervision, greatly increases the risk of delinquency.[68] Studies indicate that relational factors such as parent–child communication, the extent to which parents treat their children fairly or abusively,[69] emotional warmth, and parental involvement all have independent effects on the risk for delinquent behavior.[70] Parents' personal characteristics (e.g., antisocial behavior, substance abuse, psychopathology) also are related to increased risk for

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65. Charles W. Mathias, Dawn M. Marsh-Richard & Donald M. Dougherty, *Behavioral Measures of Impulsivity and the Law*, 26 BEHAV. SCI. & L. 691, 697 (2008).

66. June Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992).

67. Deborah Gorman-Smith et al., *A Developmental-Ecological Model of the Relation of Family Functioning to Patterns of Delinquency*, 16 J. QUANTITATIVE CRIMINOLOGY 169, 170 (2000) ("Family functioning has consistently been among the strongest predictors of risk for delinquent and criminal behavior.").

68. *Id.* at 170–71. *See generally* Robert D. Laird et al., *Parents' Monitoring-Relevant Knowledge and Adolescents' Delinquent Behavior: Evidence of Correlated Developmental Changes and Reciprocal Influences*, 74 CHILD DEV. 752, 765 (2003) (describing the benefits of proactive parenting).

69. ROLF LOEBER ET AL., U.S. DEP'T OF JUSTICE, CHILD DELINQUENCY: EARLY INTERVENTION AND PREVENTION 1-14 (2003), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/186162.pdf; Cathy Spatz Widom & Helen W. Wilson, *How Victims Become Offenders*, *in* CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS: PSYCHOLOGICAL SCIENCE AND THE LAW 255, 256–58 (Bette L. Bottoms, Cynthia J. Najdowski & Gail S. Goodman eds., 2009) (describing research showing a relationship between violence and both physical abuse and nonphysical abuse).

70. Gorman-Smith et al., *supra* note 67, at 187–88 (noting, however, that even children of "exceptionally functioning" families might be at slightly higher risk for minor chronic offending if they are from poorer neighborhoods).

delinquency,[71] as are higher rates of residential instability and paternal unemployment.[72] Finally, of course, parents influence their children's relationships by selecting the schools their children attend, the neighborhoods in which they live, and the extracurricular and other activities in which their children engage.[73]

Peer influence probably plays an even more important role in adolescent crime,[74] and indeed may be the strongest risk factor for delinquent behavior.[75] Adolescence is usually a period in which reliance on parents regarding issues of identity and acceptance lessens as reliance on the peer group increases. As a result, adolescents are more likely than adults to be influenced by others, both in terms of how they evaluate their own behavior and in the sense of conforming to what peers are doing.[76] Because a majority of delinquent adolescent behavior occurs in groups,[77] peer

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71. Benjamin B. Lahey et al., *Psychopathology in the Parents of Children with Conduct Disorder and Hyperactivity*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 163, 166–67 (1988) ("The present results strongly support previous findings . . . that children with [conduct disorders] are more likely than other clinic-referred children to have both mothers and fathers who qualify for the diagnosis of [antisocial personality disorder] and to have fathers who abuse substances.").

72. Gerald R. Patterson et al., *Predicting Risk for Early Police Arrest*, 8 J. QUANTITATIVE CRIMINOLOGY 335, 351 (1992) (finding that "social disadvantage makes a direct contribution" to arrest rates); Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 AM. J. SOC. 774, 781 (1989) (discussing how social disorganization and family disruption affect juvenile crime rates).

73. *See generally* Brenda K. Bryant, *The Neighborhood Walk: Sources of Support in Middle Childhood*, 50 MONOGRAPHS SOC'Y RES. CHILD DEV. 1 (1985) (discussing sources of support from the child's perspective, including his or her external environment).

74. Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 632 (2005) (showing the strong influence of peer behavior on juvenile risky behavior); Albert J. Reiss, Jr. & David P. Farrington, *Advancing Knowledge About Co-Offending: Results from a Prospective Longitudinal Survey of London Males*, 82 J. CRIM. L. & CRIMINOLOGY 360, 393 (1991) (finding that "the incidence of co-offending decreases with age").

75. J. DAVID HAWKINS ET AL., U.S. DEP'T OF JUSTICE, PREDICTORS OF YOUTH VIOLENCE 1, 5 (2000), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/179065.pdf (analyzing peer-related factors); Thomas J. Dishon et al., *Antisocial Boys and Their Friends in Early Adolescence: Relationship Characteristics, Quality, and Interactional Process*, 66 CHILD DEV. 139, 139–40 (1995) ("[C]hildren are attracted to those most like themselves (i.e., social choice), particularly with respect to aggressive behavior in middle childhood."); Laura V. Scaramella et al., *Evaluation of a Social Contextual Model of Delinquency: A Cross-Study Replication*, 73 CHILD DEV. 175, 189 (2002) (showing a relationship between deviant peer relationships and antisocial behavior in the community, but not in the home).

76. Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, *in* YOUTH ON TRIAL, *supra* note 37, at 371, 373 (discussing the role of peers in adolescent crime); *see* Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 614–15 (1979) (showing peer conformity between grades three and twelve peaks at grade nine); Scott et al., *supra* note 57, at 230 (explaining that "adolescents are believed to have a greater inclination to respond to peer influence than do adults").

77. Joan McCord & Kevin P. Conway, *Patterns of Juvenile Delinquency and Co-Offending*, *in* 10 ADVANCES IN CRIMINOLOGICAL THEORY: CRIME & SOCIAL ORGANIZATION 15, 16 (Elin J. Waring & David Weisburd eds., 2002); *see* Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a*

pressure to go along with the group can exert a powerful counterweight to the societal commands of the criminal law.[78] Peers may also exert more indirect influences through their impact on the approval-seeking motives of the at-risk child.[79] Indeed, Terrie Moffitt argues that adolescents prefer to mimic their antisocial peers because they appear to have attained adult status in many ways.[80]

Schools also provide an important context for adolescent behavior. Poor academic performance is related to the prevalence, onset, and seriousness of delinquency.[81] Additionally, minimal educational goals and poor motivation place children at risk for offending.[82] Other school characteristics that research has linked to antisocial behavior include poor student–teacher relations, the prevalence of norms that support antisocial behavior, poorly defined rules and expectations for conduct, and inadequate rule-enforcement behavior.[83]

All of the foregoing patterns of behavior develop in neighborhood contexts.[84] In general, research has consistently linked living in a high-poverty or low-socioeconomic-status neighborhood to delinquency.[85] Thus,

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Well-Known Secret, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981) ("The 'well-known secret' is this: adolescents commit crimes, as they live their lives, in groups.").

78. Berndt, *supra* note 76, at 615 ("[I]n both studies conformity to peers on antisocial behavior increased greatly between third and ninth grades, and then declined."); Scaramella et al., *supra* note 75, at 189.

79. LOEBER ET AL., *supra* note 69, at 7–8.

80. *See* Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 687–88 (1993) (noting that adolescents who want "to prove their maturity" are likely to emulate "life-course-persistents" (criminal perpetrators) because the latter's lifestyle resembles adulthood more than childhood).

81. Devon D. Brewer et al., *Preventing Serious, Violent, and Chronic Juvenile Offending: A Review of Evaluations and Selected Strategies in Childhood, Adolescence, and the Community*, *in* A SOURCEBOOK: SERIOUS, VIOLENT, & CHRONIC JUVENILE OFFENDERS 61, 64 (James C. Howell et al. eds., 1995); Margit Wiesner & M. Windle, *Assessing Covariates of Adolescent Delinquency*, 33 J. YOUTH & ADOLESCENCE 431, 439–40 (2004).

82. J. David Hawkins et al., *A Review of Predictors of Youth Violence*, *in* SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 106, 127–28 (Rolf Loeber & David P. Farrington eds., 1998) (noting studies that identify low commitment and attachment to school and low occupational expectations as predictors of youth violence).

83. Todd I. Herrenkohl et al., *School and Community Risk Factors and Interventions*, *in* CHILD DELINQUENTS: DEVELOPMENT, INTERVENTION, AND SERVICE NEEDS, at 211, 216–21 (Rolf Loeber & David Farrington eds., 2001) (discussing, *inter alia*, research showing correlations between student-teacher relations, and discipline and antisocial behavior). *See generally* Allison Ann Payne, *A Multilevel Analysis of the Relationships Among Communal School Organization, Student Bonding, and Delinquency*, 45 J. RES. CRIME & DELINQ. 429 (2008) (discussing the relationship between school organization, peer relationships and antisocial behavior).

84. *See generally* URIE BRONFENBRENNER, THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN (1979) (utilizing an "ecological systems" model as a framework for examining otherwise inextricable factors present in individuals' developmental environment).

85. LOEBER ET AL., *supra* note 69, at 8 (summarizing research concerning poverty and juvenile crime); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of*

one study found that impulsive boys in poor neighborhoods were at great risk for offending.[86] Yet it is also important to recognize, as Jeffrey Fagan has noted, that "social cohesion among individuals" can mitigate the effect of poverty.[87] Weak social controls and lack of community structure allow delinquent behavior to go on unchecked,[88] but strong social controls and parenting counter the risk for delinquent behavior even in the poorest urban neighborhoods.[89]

Exposure to media violence also may contribute to delinquent conduct. Although theory regarding how this effect occurs and the differences between its short-term and long-term impact is still developing, scientists investigating this topic have found clear evidence that exposure to media violence increases aggressive and violent behavior in juveniles.[90] Further, highly aggressive individuals show greater effects of exposure to media violence than less-aggressive individuals.[91] Research also has shown that children's perceptions of the violence as "lifelike" or "real" and their identification with aggressive characters are positively related to aggressive behavior.[92]

Collective Efficacy, 277 SCI. 919, 923 (1997) (noting that social cohesion and trust correlated robustly with reduced violence). *See generally* Carter Hay et al., *Compounded Risk: The Implications for Delinquency of Coming from a Poor Family that Lives in a Poor Community*, 36 J. YOUTH & ADOLESCENCE 593 (2007) (showing high correlation between poor neighborhoods, parental unemployment, and crime); Tama Leventhal & Jeanne Brooks-Gunn, *The Neighborhoods They Live In: The Effects of Neighborhood Residence on Child and Adolescent Outcomes*, 126 PSYCHOL. BULL. 309 (2000) (reviewing research on how a child's neighborhood affects his or her well-being).

86. Donald R. Lynam et al., *The Interaction Between Impulsivity and Neighborhood Context on Offending: The Effects of Impulsivity Are Stronger in Poorer Neighborhoods*, 109 J. ABNORMAL PSYCHOL. 563, 570 (2000).

87. Fagan, *supra* note 76, at 371, 375.

88. *See* ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 21 (1993) (finding that "changes that weaken social bonds will lead to more crime and deviance"); Delbert S. Elliot et al., *The Effects of Neighborhood Disadvantage on Adolescent Development*, 33 J. RES. CRIME & DELINQ. 389, 417–18 (1996) (finding that "aggression rates . . . [are] largely mediated by level and form of neighborhood organization"); Leventhal & Brooks-Gunn, *supra* note 85, at 319–20 (studying the link between neighborhood and behavioral patterns); Sampson et al., *supra* note 85, at 923 (noting that social cohesion and trust correlate with reduced violence).

89. Gorman-Smith et al., *supra* note 67, at 192 (stating that children in "exceptionally functioning" families "are less likely to show any pattern of delinquency and are most protected from (under-represented in) the most serious [neighborhood] patterns").

90. Craig A. Anderson et al., *The Influence of Media Violence on Youth*, 4 PSYCHOL. SCI. PUB. INT. 81, 81 (2003).

91. Brad J. Bushman, *Moderating Role of Trait Aggressiveness in the Effects of Violent Media on Aggression*, 69 J. PERSONALITY & SOC. PSYCHOL. 950, 959 (1995).

92. L. Rowell Huesmann et al., *Longitudinal Relations Between Children's Exposure to TV Violence and Their Aggressive and Violent Behavior in Young Adulthood: 1977–1999*, 39 DEVELOPMENTAL PSYCHOL. 201, 215 (2003) ("In this 15-year longitudinal study of 329 youth, we found that children's TV-violence viewing between ages 6 and 9, children's identification with aggressive same-sex TV characters, and children's perceptions that TV violence is realistic were significantly correlated with their adult aggression.").

Finally, age-based minority social status, with the dependence and restrictions that this status brings, is correlated with antisocial behavior. This status differential has two implications. First, adolescent autonomy is more restricted than that of adults because adolescents have less freedom to engage in "socially acceptable" outlets for risky behavior, such as legal gambling, drinking, and risky financial investments. Lacking these legal outlets, adolescents may engage in unacceptable behavior. Second, minors are less integrated into the prosocial responsibilities, roles, and relationships of adulthood.[93] This reduced "stake in life" may lead them to feel they have less to lose than adults. Specifically, the "informal" costs of sanctions—stigma, the negative effects on employability and marriage, and isolation from mainstream institutions—may be weakened for adolescents.[94]

C. *IMPLICATIONS FOR RISK ASSESSMENT*

The type of research described above has made social scientists more confident in their ability to ascertain which youth are most likely to re-offend. To aid in that effort, they have developed risk-assessment instruments that assist service providers in determining whether a given offender poses a low, moderate, or high risk of re-offending. Some of these instruments provide evaluators with quantified probability estimates, while others focus more on structuring the inquiry around the most pertinent individual, family, and community risk factors.

Many of these instruments have undergone fairly rigorous scientific testing to determine their reliability and validity. For instance, the *Early Assessment Risk List* and the *Structured Assessment of Violence Risk in Youth* are structured risk-assessment instruments that can provide relatively precise estimations of risk and that purport to be able to distinguish between high-risk youth and those who pose a much lower risk.[95] Other instruments that can aid in this endeavor are the *Youth Level of Service/Case Management Inventory*; the *Hare Psychopathy Checklist-Youth*; and the *Risk, Sophistication-Maturity, and Treatment Amenability Inventory*.[96]

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93. SAMPSON & LAUB, *supra* note 88, at 21 (stating that "changes that strengthen social bonds to society in adulthood will lead to less crime and deviance").

94. Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 LAW & SOC'Y REV. 545, 561–66 (1986).

95. *See* LEENA AUGIMERI ET AL., EARLY ASSESSMENT RISK LIST FOR BOYS: EARL-20B, VERSION 2 (2001); RANDY BORUM ET AL., MANUAL FOR THE STRUCTURED ASSESSMENT OF VIOLENCE RISK IN YOUTH ("SAVRY") 5 (2007) (explaining that the SAVRY assesses adolescents' risk for violence by analyzing twenty-four items that commonly lead to adult violence).

96. ROBERT HOGE & DANIEL ANDREWS, THE YOUTH LEVEL OF SERVICE/CASE MANAGEMENT INVENTORY MANUAL (2006) (analyzing juveniles' risk factors in an effort to determine targets for treatment among adult offenders); John F. Edens et al., *Youth Psychopathy and Criminal Recidivism: A Meta-Analysis of the Psychopathy Checklist Measures*, 31 LAW & HUM. BEHAV. 53, 55–56 (2007). *See generally* Anne-Marie R. Leistico & Randall T. Salekin, *Testing the Reliability and Validity of the Risk, Sophistication-Maturity, and Treatment Amenability Instrument (RST-i): An*

These types of structured protocols improve on the seat-of-the-pants clinical-prediction process that has often resulted in high false positive rates (erroneous predictions that a person will reoffend).[97] To the extent that a definitive prediction needs to be made—for instance, as to whether a juvenile poses the type of risk that warrants confinement or requires continued confinement—these prediction methodologies can significantly facilitate it. As the next Section makes clear, however, confinement and the up-or-down decision it entails should normally not be necessary if the goal is recidivism reduction.

D. *REDUCING DELINQUENT BEHAVIOR*

Three preliminary points about interventions designed to reduce juvenile offending are crucial. First, researchers overwhelmingly find that imprisonment is less effective at reducing recidivism than most alternative programs. Lipsey and Cullen's recent comprehensive meta-review of the empirical studies concluded that incarceration actually tends to increase recidivism rather than reduce it.[98] Along the same lines, these researchers concluded that "interventions that embodied 'therapeutic' philosophies, such as counseling and skills training, were more effective than those based on strategies of control or coercion—surveillance, deterrence, and discipline."[99] These findings make sense if offending is in some non-trivial respect due to context; if so, coercive interventions that take place in detention are not likely to address root causes of crime or generalize to the "real world" facing offenders once they are released.

Assessment Tool for Juvenile Offenders, 2 INT'L J. FORENSIC MENTAL HEALTH 101 (2003), *available at* http://www.iafmhs.org/files/Leistico.pdf (studying the reliability of the RST-i in juvenile males).

97. *See* CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 101–08 (2007) [hereinafter SLOBOGIN, PROVING THE UNPROVABLE] (describing prediction methodologies and their relative advantages).

98. Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L & SOC. SCI. 297, 302–06 (2008); *see also* Donna Bishop et al., *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?*, 42 CRIME & DELINQ. 171, 183 (1996) (finding "transfer actually aggravated short-term recidivism"); BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 4–6 (2006), *available at* http://www.cfjj.org/Pdf/116-JPI008-DOD_Report.pdf (reporting studies finding that commitment to youth facilities (1) vastly increases the chances of recidivism—more so than membership in a gang, carrying a weapon, or a poor parental relationship; (2) promotes "peer deviancy training;" (3) and impedes the aging-out process that normally diminishes criminal behavior); Redding, *Adult Punishment*, *in* HANDBOOK, *supra* note 30, at 375, 389 ("The available evidence, while not definitive, strongly suggests that transferring juveniles to the criminal court increases the recidivism rate.").

99. Mark W. Lipsey, *The Primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Review*, 4 VICTIMS & OFFENDERS, 124, 143 (2009).

A second, equally important finding of meta-review research is that the treatments most likely to work in terms of reducing recidivism have three attributes: (1) they are applied primarily to high-risk (i.e., relatively dangerous) individuals; (2) they target treatment of criminogenic factors (e.g., antisocial attitudes or peer relationships, criminal role models, lack of prosocial skill development) rather than vague personal or emotional problems (e.g., poor self-esteem); and (3) they focus on developing skills that offenders are capable of applying rather than on adopting "nondirective" approaches.[100] All three of these attributes suggest that treatment programs are least likely to be effective at reducing recidivism if they aim merely at improving the self-concept of the youth or in some other vague way are designed to "help," as might occur under a pure rehabilitative model. Intervention is most likely to be successful if its goal is straightforward reduction of identified precipitants of recidivism among the most dangerous offenders.

The third preliminary point about intervention strategies is that they vary widely not only in terms of content, but with respect to scope. Social scientists divide prevention programs into three types: primary programs (which attempt to prevent a disorder from occurring), secondary programs (which attempt to identify and treat a disorder as early as possible to reduce length and severity), and tertiary programs (which attempt to reduce the dysfunction created by a disorder that has already occurred).[101] Primary interventions in the juvenile context seek to change individual and environmental risk factors through life-skill training, promotion of good classroom behavior, and improvement of child–parent bonds in *all* children and families through school- and community-wide programs.[102] Secondary prevention programs are more selective and are aimed at children who pose an enhanced risk of delinquency, typically those with high-risk characteristics and backgrounds but who have not yet engaged in seriously delinquent behavior.[103] Finally, tertiary programs are targeted at individuals who have engaged in seriously delinquent behavior.[104]

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100. Don A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 369, 376, 379 (1990). *See generally* Mark W. Lipsey, *Juvenile Delinquency Treatment: A Meta-Analytic Inquiry into the Variability of Effects*, *in* META-ANALYSIS FOR EXPLANATION 83 (Thomas D. Cook et al. eds., 1992) (analyzing the measured effects of various delinquency treatments).

101. *See generally* William M. Bolman, *Toward Realizing the Prevention of Mental Illness*, *in* 1 PROGRESS IN COMMUNITY MENTAL HEALTH 203, 208 (L. Bellack & H.H. Barten eds., 1969) ("From the standpoint of the community, these distinctions are equivalent to reducing incidence, prevalence and extent of disability respectively."). These concepts are redefined in the juvenile context in SURGEON GENERAL REPORT, *supra* note 27, at 105–19.

102. SURGEON GENERAL REPORT, *supra* note 27, at 105–06.

103. *Id.* at 111.

104. *Id.* at 114.

A further distinction between the rehabilitation model and the individual-prevention model is that the former model is more likely to call for juvenile-court involvement if any of these programs could be effective, whereas the individual-prevention approach will usually only be triggered by strong risk factors of the type that are dealt with through tertiary intervention programs.[105] Thus, the rehabilitation model is more likely than any of the other models to target non-offenders, and, in particular, pre-adolescents. However, even the tertiary programs that are the focus of individual prevention could target a (small) number of very young children, since evidence suggests that some of society's more chronic offenders are "early starters." These young offenders are most likely to become "life-course persistent" offenders, whereas those who start offending later in life often desist when they reach their twenties.[106]

With these points in mind, consider some of the more prominent successful tertiary-intervention programs. Functional Family Therapy (FFT) is one promising intervention strategy for at-risk youth. FFT, which targets youth between ages eleven and eighteen, is rooted in family-systems theory and principles of behavioral change.[107] It focuses on altering family-based risk factors that are associated with delinquent behavior, including parental maltreatment, poor parental supervision, and inadequate family communication, relying on contingency contracts between parent and child to modify maladaptive and delinquent behavior.[108] When this relatively short-term intervention program is competently delivered (typically involving between eight and fifteen sessions), studies indicate that felony recidivism rates decrease by nearly forty percent, and that a net benefit of over $10 is realized for every dollar spent on the program, by avoiding the costs typically associated with crime.[109]

Multisystemic Therapy (MST) has also been effective at reducing recidivism risk and has been particularly successful at decreasing rates of

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105. *See supra* text accompanying notes 42–46 (discussing the two models' different intervention approaches).

106. *See generally* Moffitt, *supra* note 80, at 676 (contrasting "life-course persistent" offenders with "adolescent-limited" offenders). "Life-course persistent" offenders are persons that "engag[e] in antisocial behavior of one sort or another at every stage of life." *Id.* "Adolescent-limited" offenders are persons with "crime careers of shorter duration." *Id.*

107. James F. Alexander & Bruce V. Parsons, *Short-Term Behavioral Intervention with Delinquent Families: Impact on Family Process and Recidivism*, 81 J. ABNORMAL PSYCHOL. 219, 219–25 (1973).

108. *See* James F. Alexander et al., *Family-Based Interventions with Older, At-Risk Youth: From Promise to Proof to Practice*, 21 J. PRIMARY PREVENTION 185, 193–97 (2000) (describing components of the program).

109. WASH. STATE INST. FOR PUB. POLICY, OUTCOME EVALUATION OF WASHINGTON STATE'S RESEARCH-BASED PROGRAMS FOR JUVENILE OFFENDERS 1 (2004), *available at* http://www.wsipp.wa.gov/rptfiles/04-01-1201-ES.pdf. *See generally* Nancy G. Guerra et al., *What Works: Best Practices with Juvenile Offenders*, *in* TREATING THE JUVENILE OFFENDER 79 (Robert D. Hoge et al. eds., 2008) (discussing effective juvenile offender treatment programs, including FFT).

secure detention and out-of-home placement in chronic, violent juvenile offenders.[110] MST involves a primarily family-based intervention that changes how juveniles function in various settings associated with antisocial conduct, including home, school, peer, and neighborhood environments. Therapists are assigned small caseloads (four to six families) so they can work intensively with offenders and their families over a relatively short period of time (approximately four months). The therapist delivers services in the juvenile's home and other natural settings, such as the offender's school or neighborhood, to increase the chances that behavioral change will endure and generalize across settings.[111]

A study with a four-year follow-up period demonstrated that recidivism rates among serious juvenile offenders who completed MST are substantially lower (22.1%) than the recidivism rates of a comparison group of serious offenders who completed individual therapy (71.4%).[112] Moreover, a follow-up study almost fourteen years later revealed that these positive effects were durable—the MST group had fifty-seven percent fewer arrests in comparison to the individual therapy group.[113] Recent effectiveness studies have indicated that the potency of MST may be significantly diluted when therapists do not adhere closely to the prescribed training model.[114] However, when properly implemented, MST can be both clinically and cost effective. By minimizing recidivism, reducing costly out-of-home placements by forty-seven to sixty-four percent, and improving overall family functioning and the mental health of serious juvenile offenders, MST results in a "benefit-to-cost ratio of $28.33 for every dollar spent."[115]

Unlike MST, where juvenile offenders are treated in their home with their parents, Multidimensional Treatment Foster Care (MTFC) involves working with foster parents and biological parents to facilitate the return of juvenile offenders who have been removed from their family of origin. MTFC, which involves intensive intervention ranging up to seven months,

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110. SCOTT W. HENGGELER ET AL., MULTISYSTEMIC TREATMENT OF ANTISOCIAL BEHAVIOR IN CHILDREN AND ADOLESCENTS 237–52 (1998).

111. *Id.*

112. Charles M. Borduin et al., *Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence*, 63 J. CONSULTING & CLINICAL PSYCHOL. 569, 573 (1995).

113. Cindy M. Schaeffer & Charles M. Borduin, *Long-Term Follow-Up to a Randomized Clinical Trial of Multisystemic Therapy with Serious and Violent Juvenile Offenders*, 73 J. CONSULTING & CLINICAL PSYCHOL. 445, 448 (2005).

114. Scott W. Henggeler et al., *Multisystemic Therapy with Violent and Chronic Juvenile Offenders and Their Families: The Role of Treatment Fidelity in Successful Dissemination*, 65 J. CONSULTING & CLINICAL PSYCHOL. 821, 829 (1997).

115. MST Servs., Cost Effectiveness, http://www.mstservices.com/cost_effectiveness.php (last visited Oct. 22, 2009); *see* Ctr. for the Study & Prevention of Violence, University of Colorado-Boulder, Blueprints for Violence Prevention, http://www.colorado.edu/cspv/blueprints/modelprograms/MST.html (last visited Oct. 22, 2009) ("[A] recent policy report concluded that MST was the most cost-effective of a wide range of intervention programs aimed at serious juvenile offenders.").

shares many of the same assumptions about the causes and consequences of human behavior with MST, including the importance of family and peer influences.[116] A comparison of youngsters assigned to MTFC with a group of offenders assigned to group homes found that those receiving MTFC were more likely to return to live with their relatives, were subject to fewer criminal referrals, and experienced fewer than half the contacts with police and the courts.[117]

A conservative depiction of the research is that intervention strategies have improved to the point that modern multisystemic approaches aimed at risk management can reduce the risk of recidivism from between forty and eighty percent to between twenty and fifty percent.[118] These programs also represent an estimated net savings to taxpayers of between $7000 and $18,000 per child in lieu of more traditional placements.[119] Overall, a fair appraisal of state-of-the-art intervention strategies suggests that ecologically oriented, cognitive-behavioral interventions aimed at the multiple life contexts in which juveniles exist (family, peer, school, neighborhood) can be both clinically and cost effective. As a result, several states make use of these types of programs in their juvenile justice system, albeit often within a retributive framework rather than a rehabilitative or prevention-oriented system.[120]

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116. Patricia Chamberlain & John B. Reid, *Comparison of Two Community Alternatives to Incarceration for Chronic Juvenile Offenders*, 66 J. CONSULTING & CLINICAL PSYCHOL. 624, 624–25 (1998).

117. *Id.* at 630.

118. Borduin et al., *supra* note 112, at 573 (indicating that after four years the recidivism rate for those who successfully completed MST was 22.1% and for those who dropped out of MST was 46.6%); OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, No. 09-27, REDIRECTION SAVES $36.4 MILLION AND AVOIDS $5.2 MILLION IN RECOMMITMENT AND PRISON COSTS 2–3 (2009) [hereinafter OFFICE OF PROGRAM POLICY ANALYSIS] (comparing youthful offenders handled through a community-based, family-centered program to youthful offenders with similar criminal history handled through alternative, primary residential programs, and finding that the probability of arrest for the former group was twenty-five percent less for any violation, forty-six percent less for any felony, and forty-eight percent less for violent felonies); Schaeffer & Bourduin, *supra* note 113, at 448 (indicating that over thirteen years the recidivism rate for those who completed MST was fifty percent, compared to eighty-one percent for those who did not).

119. HENGGELER ET AL., *supra* note 110, at 252; MST Servs., Multisystemic Therapy: Clinical Outcome and Cost Savings, http://www.mstservices.com/outcomes_1a.pdf (last visited Oct. 22, 2009); *see also* OFFICE OF PROGRAM POLICY ANALYSIS, *supra* note 118, at 3 (finding that a community-based program saved the state $36.4 million in residential costs and $5.2 million in recommitment and prison costs).

120. For instance, thirty-one states have MST teams in one or more jurisdictions. *See* MST Services, Licensed Teams by Location, http://mstservices.com/licensed_teams_by_location.php (last visited Oct. 22, 2009).

IV. THE IMPLICATIONS OF SCIENCE FOR JUVENILE JUSTICE

The empirical information presented in Part III establishes that juveniles are less capable of mature judgment, impulse control and foresight than adults, and that community-based interventions designed to reduce criminal behavior can reduce recidivism more effectively than imprisonment. One could draw a number of conclusions about the legal implications of these findings. Using the categorizations introduced earlier, this Part argues that these empirical facts most directly bolster the individual-prevention vision of juvenile justice, while they provide only a modicum of support for the rehabilitation and retribution visions.

Recall that the rehabilitation model of juvenile justice is based on the assumption that juveniles are innocents who should not be subject to punishment, but rather should receive treatment for significant emotional and behavioral problems. The retribution models instead hold that youths are accountable for their actions and thus should be punished for their crimes, although under the diminished-retribution model punishment could be mitigated because juveniles are assumed to be less culpable than adult offenders to a legally relevant extent. The individual-prevention vision, in contrast, is focused on prevention of crime. It is premised on the assumption that juvenile offenders are relatively unaffected by the prospect of criminal sanctions and thus should not be subject to backward-looking punishment but rather are best handled through forward-looking interventions. At the same time, these interventions should be aimed at reducing (and are usually triggered by) criminal acts and thus are narrower in scope than those that occur under the rehabilitation model.

This Part will first show why the rehabilitation model is flawed. It will then do the same for the retribution models, focusing primarily on the diminished-retribution variant, which has gained considerable support among policymakers. Finally, it will present the positive case for the individual-prevention model, from both theoretical and pragmatic perspectives. The theoretical case for that model relies in part on *Kansas v. Hendricks*,[121] a much-maligned Supreme Court decision upholding sexual-predator statutes, but one which adopts a rationale for state intervention that is very useful in justifying a separate juvenile justice system and suggesting how it might function. The pragmatic case for the individual-prevention model is based on a comparison of the retributive and preventive approaches to antisocial conduct. While both systems can be subject to abuse, the latter type of regime, with some important modifications, is much more likely to achieve optimal results without compromising core values.

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121. Kansas v. Hendricks, 521 U.S. 346 (1997).

A. *THE OVERBREADTH OF THE REHABILITATION VISION*

As noted in Part II, the original juvenile court was grounded on the twin tenets that youth who commit crimes are not responsible for them and, in any event, can benefit immensely from therapeutic state intervention. The first assumption is incorrect for all but the youngest offenders. The second assumption cannot, by itself, justify a deprivation of liberty; a system that relied on treatability alone as the basis for coercive intervention would grant far too much power to the state and is not sufficiently related to the state's police-power goals. Although most modern observers of the juvenile justice system probably agree with these points, it is worth fleshing them out to provide context for the rest of the discussion.

In adult court, conviction is warranted if an individual commits a criminal act with the requisite mental state (e.g., purpose, recklessness, or negligence) and is unable to proffer a justification, such as self defense, or an excusing condition, such as insanity, that causes a substantial lack of capacity to appreciate the wrongfulness of one's actions. These bare criteria are doubtlessly met by all but the youngest offenders. It turns out that the old common-law rule—that courts cannot hold children under seven responsible for their crimes, that children over fourteen usually should be held responsible, and that those offenders aged seven through thirteen may or may not cross that threshold[122]—comes close to reflecting the empirically correct view of children's legally relevant mental capacities. At their youngest, children either do not intend to harm or, if they do, do not appreciate its wrongfulness. But, as Part III indicated, while children from seven through adolescence are not as mature as adults, most of this group (and certainly its oldest half) can easily form the requisite mens rea (intent) for a crime and are fully aware that their criminal acts are illegal.

More will be said on this score in the discussion of the diminished-retribution model, which depends upon the allegation that juveniles are not as culpable as adults. For now, the point need merely be made that youth older than ten are usually legally "responsible" for their actions. This group, which encompasses almost all youth who commit offenses, possesses the minimum capacities necessary for criminal liability. If the rehabilitation vision of juvenile justice is justifiable, it is not because juveniles are "innocent" of crime, but rather because, despite their culpability, their greater treatability warrants a separate system for them. Indeed, despite their youths-as-innocent polemic, those who developed the juvenile court were probably motivated primarily by their perception that youth are unusually malleable and vulnerable, and thus are both more treatable and in need of isolation from adults.[123]

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122. WAYNE R. LAFAVE, CRIMINAL LAW 485–86 (4th ed. 2003).

123. *See generally* FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 35–38 (2005) (discussing the "diversionary" and "interventionist" motivations for juvenile justice); Frederic L.

Whether children are more "treatable" than adults is not clear. But even if that assertion is true, alone it cannot legitimize a system that can result in imprisonment. The rationale of *O'Connor v. Donaldson*,[124] a 1975 Supreme Court decision, establishes an important, if somewhat vague, constitutional threshold for state intervention of this sort. In *Donaldson*, the Court held that the government may not commit people to a mental hospital merely because they are mentally ill or because such deprivation might "raise [their] living standards."[125] Elsewhere the Court stated: "[T]here is . . . no constitutional basis for confining [people with mental illness] involuntarily if they are dangerous to no one and can live safely in freedom."[126] Applied to juveniles, this language would not permit a deprivation of liberty—even one involving a "treatment facility" rather than a jail or prison—merely because it can benefit troubled youth. Instead, this most coercive of state actions may only occur if juveniles pose a danger to others (in which case the state's police power is triggered) or are in an unsafe situation (in which case the state's *parens patriae* authority is implicated).

Of course, many juveniles who do not pose a risk to others might be unable to "live safely in freedom," an endlessly manipulable phrase. And there is no doubt that government owes a special duty to children because of their vulnerable status. The Supreme Court clearly endorsed this proposition in *Pierce v. Society of Sisters*[127] when it stated, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty . . . to recognize and prepare him for additional obligations."[128]

However, as numerous cases in both the adult and juvenile civil-commitment context establish, short of seriously self-harming actions such as suicide or a failure to take care of basic needs, the *parens patriae* power does not justify a deprivation of liberty, if only because such a deprivation is more likely to hurt than help.[129] Exercise of this power is best carried out

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Faust & Paul J. Brantingham, *Part I—Models of Juvenile Justice—Introduction and Overview, in* JUVENILE JUSTICE PHILOSOPHY: READINGS, CASES AND COMMENTS 3 (Frederic L. Faust & Paul J. Brantingham eds., 2d ed. 1979) (explaining the juvenile court's assumption that "children were infinitely malleable, the best possible subjects for the new social sciences to work wonders upon").

124. O'Connor v. Donaldson, 422 U.S. 563 (1975).

125. *Id.* at 575.

126. *Id.*

127. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

128. *Id.* at 535.

129. In *Parham v. J.R.*, 442 U.S. 584 (1979), the Supreme Court held that even when parents are willing to commit their children a neutral factfinder must find, at least, that the child needs treatment in a hospital. The Court did not specifically decide whether "need for treatment" is a permissible criterion for commitment. But other courts, in both the adult and juvenile contexts, have rejected that standard to the extent it permits hospitalization on a bare diagnosis. *See, e.g.*, Johnson v. Solomon, 484 F. Supp. 278, 287 (D. Md. 1979) (requiring danger to self or others before commitment of juveniles); Matter of Commitment of N.N., 679 A.2d

through other mechanisms, including the primary-prevention programs described earlier, dependency courts, compulsory-education laws (the subject of *Pierce*), welfare rules, and the like. While the absence of these alternatives at the turn of the twentieth century may explain why the original juvenile court eagerly sought the *parens patriae* authority, their existence today means the juvenile court can focus on manifesting the state's police power.

In short, the conceptual flaw in the rehabilitation vision is that it seeks to obtain treatment for both troublesome youth and youth who are merely troubled. That mixture of purpose explains much of the history of the juvenile court, which has bounced back and forth from wide-open jurisdiction to a focus on adult-type crimes. It is also reflected in the strange insistence among many commentators that juvenile justice remains a manifestation of the state's *parens patriae* authority, when in practice it is often anything but. We need to stop thinking of the juvenile court as an appendage of the welfare state and aim it toward the goal of dealing with juvenile crime.

B. THE MISPLACED FOCUS OF THE RETRIBUTIVE MODELS

The retributive models, in their pure form, avoid this conceptual conflation. Leaving *parens patriae* matters to other legal systems, these models are meant to implement the state's police power by punishing juveniles who harm others. Treatment of juvenile offenders is not necessarily ignored, but it is not necessary to, and in a sense is a distraction from, assigning culpability and assuring accountability for one's offenses. This latter fact ends up being the primary problem with the retributive approach. Its focus on backward-looking attributions of blame blinds it to the benefits of a forward-looking prevention approach, while making dangerously tempting the abolition of the juvenile court.

The latter tendency is most obvious if one subscribes to the adult-retributive vision of juvenile justice. Under that model, juveniles who commit crime are considered no less guilty than adults who commit the same offense. Thus, they should receive the same punishment. If they do

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1174, 1187 (N.J. 1996) (requiring clear and convincing evidence of mental illness, need for inpatient treatment, and "danger to the minor herself or to others, which may include the substantial likelihood of significant developmental harm if that treatment is not provided" for commitment of minors under fourteen); Boggs v. N.Y. City Health & Hosp. Corp., 132 A.D.2d 340, 362 (N.Y. App. Div. 1987) ("It is well-established in this state that a person may be involuntarily confined for care and treatment, where his or her mental illness manifests itself in neglect or refusal to care for themselves to such an extent that there is presented 'serious harm' to their own well-being."); State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109, 123 (W. Va. 1974) (holding that involuntary hospitalization is permitted only "when it can be demonstrated that an individual has a self-destructive urge and will be violent towards himself, or alternatively that he is so mentally retarded or mentally ill that by sheer inactivity he will permit himself to die either of starvation or lack of care").

not, then the system is not really an adult-retribution system, but some sort of hybrid (about which more will be said below). Under a pure adult-retribution model, a separate juvenile justice system is pointless, except as a way of keeping young offenders away from older ones.

The diminished-retribution vision is meant to redress that problem. Pointing to the research on differential maturity and judgment canvassed in Part III, the proponents of this vision argue that a separate juvenile justice system is necessary as a means of recognizing the diminished blameworthiness of juveniles. Championed by the drafters of the Juvenile Justice Standards,[130] Franklin Zimring,[131] and most recently by Elizabeth Scott and Laurence Steinberg,[132] this view has even influenced the Supreme Court. In its decision in *Roper v. Simmons*, exempting individuals under eighteen from the death penalty, the Court pointed to psychological and neurological research suggesting that juveniles are immature and concluded that, compared to adult offenders, juveniles who offend demonstrate "lesser culpability."[133]

The diminished-retribution model does concededly support the holding in *Roper*, because execution should be reserved for the worst of the worst and no youth under eighteen, regardless of how egregious the killing, fits into that class of individuals.[134] But as long as traditional culpability notions are in place, the diminished-responsibility rationale cannot justify an entirely separate juvenile justice system for all crimes and all sentences. Even juveniles as young as nine or ten can be culpable under today's criminal-law standards, and most juvenile offenders over thirteen probably do not deserve any mitigation under those standards. While mid-adolescents are not as mature as adults, their lack of maturity does not mitigate their culpability as that concept is typically defined in non-capital cases.

Advocates of the diminished-retribution model often analogize the immaturity of juveniles to the impairment caused by mental illness.[135] But

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130. *See generally* STANDARDS, *supra* note 36 (discussing the diminished blameworthiness of juveniles and proposing a separate juvenile justice system).

131. *See generally* Zimring, *in* YOUTH ON TRIAL, *supra* note 37, at 271 (arguing that immaturity should be a mitigating factor for juvenile offenders).

132. *See also* Redding, *Adult Punishment*, *supra* note 30, at 389 ("Punishment that is proportional to the offender's culpability should be at the heart of the justice system."). *See generally* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE (2008) (advocating a separate juvenile justice system based on a diminished culpability rationale).

133. Roper v. Simmons, 543 U.S. 551, 571 (2005).

134. *Id.* at 568 ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'").

135. *See, e.g.*, FRANKLIN E. ZIMRING, CONFRONTING YOUTH CRIME: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS 80–81 (1978) (analogizing the diminished responsibility of adolescents to the "partial responsibility" of people with mental disability who receive "mitigations of punishment").

adolescents who are not themselves suffering from mental disability are rarely as impaired as people with schizophrenia and like disorders, which involve delusions, hallucinations, and other significant cognitive and volitional disturbances. Moreover, even people with fairly serious mental disabilities are convicted when they commit crime, and those who are convicted usually do not even obtain a reduction in sentence.

Consider, for instance, practice under the Federal Sentencing Guidelines, which apply in all federal cases and are the model for many state sentencing systems. Although the Guidelines do permit a downward departure from the typical sentence upon proof of "significantly reduced mental capacity" not resulting from "voluntary use of drugs or other intoxicants,"[136] the Sentencing Commission's policy statement also declares that "mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted."[137] As a leading federal case put it, the mental disability must be "extraordinary" or "atypical" to warrant a downward departure.[138] Thus, federal courts have rarely granted departures from the Guidelines for mental disability, and when they have, the defendant's mental state has come close to meriting a successful insanity plea.[139] Even when a downward departure for mental disability is granted, it often amounts to only a few years and seldom approximates the huge discounts contemplated by diminished-retribution advocates. Recall, for instance, the Juvenile Justice Standards' recommendation that a juvenile who committed a crime that would require a twenty-year sentence for an adult be sentenced to only three years.[140]

In the states as well, mental illness often turns out to be a very weak mitigator. One review of common law and modern state practice concludes, for instance, that mental disability short of insanity rarely results in a

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136. U. S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2008).

137. *Id.* § 5H1.3.

138. United States v. Maldonado-Montalvao, 356 F.3d 65, 74 (1st Cir. 2003).

139. Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 447 (1995); *see also* Ellen Fels Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 298 (1989) ("Even though courts and legislatures generally consider mental disorders to be a mitigating factor, many death row inmates are mentally ill."); *Developments in the Law: The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1133 (2008) (stating that courts "have imposed prison sentences beyond what the Guidelines recommend on some mentally ill offenders they view as dangerous or in need of treatment instead of supplementing Guidelines sentences as necessary with civil commitment").

140. *See, e.g.*, United States v. Mata-Vasquez, 111 F. App'x 986, 988 (10th Cir. 2004) (allowing a "four-level" reduction, based on IQ of fifty-one and other impairments, reducing sentence by six to twelve months); United States v. Cotto, 793 F. Supp. 64, 65–68 (E.D.N.Y. 1992) (allowing a "four-level" reduction, based on low IQ and drug use, that reduced the sentence from thirty-seven months to twenty-four months).

sentence reduction.[141] Although such a stance may seem unduly harsh, note that a more lenient position would mean that a significant number of "ordinary" offenders would be entitled to a sentence reduction, including offenders suffering from depression, impulse disorders, mild mental retardation, and perhaps even psychopathy and other types of personality disorders.[142]

Consistent with this reasoning, courts rarely consider immaturity a mitigating circumstance. Most courts, including every court that has addressed the issue since *Roper*, have held that even a sentence of life without parole is not barred by the level of immaturity associated with an offender below age eighteen, at least when the crime is a serious one.[143] Additionally, a number of courts have rejected the argument that mandatory and prosecutorial transfer schemes are unconstitutional because they deprive youth of the opportunity to prove their immaturity.[144]

Perhaps the biggest disappointment for advocates of the diminished-responsibility model has been the courts' almost uniform rejection of immaturity arguments based on the research indicating that adolescent brains are less developed than adult brains. The most recent survey of the

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141. NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES AND GUIDELINES 404 (2d ed. 2007) ("At common law those with severe mental impairments could be excused from guilt altogether, but offenders with lesser impairments would usually be subject to the same punishments as mentally sound offenders" while modern statutes require that mental illness "'significantly reduced the defendant's culpability for the offense.'") (quoting N.C. GEN. STAT. § 15A-1340.16(e)(4) (2007)); *see also* John Q. La Fond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 VILL. L. REV. 71, 102–03 (1994) (noting that offenders found guilty but mentally ill often receive *longer* sentences than those found simply guilty).

142. *See generally* CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 80–83 (2006) [hereinafter SLOBOGIN, MINDING JUSTICE] (noting that mitigation based on less-severe mental disorders could potentially "swallow up the death penalty").

143. *See, e.g.*, State v. Eggers, 160 P.3d 1230, 1247–49 (Ariz. Ct. App. 2007) (depublished); State v. Craig, 944 So. 2d 660, 662–64 (La. Ct. App. 2006), *cert. denied*, 128 S. Ct. 714 (2007) (upholding defendant's sentence under the state and federal constitutions); Commonwealth v. Wilson, 911 A.2d 942, 946 (Pa. Super. Ct. 2006) (affirming the denial of Wilson's petition for relief); State v. Pittman, 647 S.E.2d 144, 163–64 (S.C. 2007) (finding that defendant's sentence did not violate the U.S. Constitution); State v. Rideout, 933 A.2d 706, 713–20 (Vt. 2007) (upholding juvenile defendant's sentence). *See generally* Hillary J. Massey, Note, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. Rev. 1083 (2006) (describing similar cases). *But see In re* Nunez, 93 Cal. Rptr. 3d 242, 264 (Cal. Ct. App. 2009) (holding that a child of fourteen convicted of a non-violent kidnapping cannot be sentenced to life without parole). As this Article was going to press, the Supreme Court was slated to hear arguments in two cases involving this issue and was expected to hand down its decision by the end of the 2009–2010 Term. *See* Graham v. Florida and Sullivan v. Florida, 129 S. Ct. 2157 (2009) (granting writs of certiorari).

144. *See generally* Manduley v. Superior Ct., 41 P.3d 3 (Cal. 2002) (upholding a California statute that allows prosecutors to charge minors in criminal court rather than juvenile court); State v. Behl, 564 N.W.2d 560 (Minn. 1997) (upholding the conviction of a juvenile who was tried as an adult under Minnesota's automatic-certification statute).

case law concluded that "contrary to many predictions, adolescent brain science has had little meaningful impact . . . in the courts," even at the sentencing stage.[145] This judicial nonchalance toward the new neurological findings, however unexpected amongst juvenile-justice advocates, is perfectly consistent with the observation made above that intentional conduct that is not the result of significant mental impairment is generally seen as fully culpable; as the survey author notes, as far as the courts are concerned, brain-based arguments are doctrinally "irrelevant," "ha[ve] been foreclosed by legislatures," or clash with observation and common sense.[146] The courts' bottom-line sentiment with respect to the argument that immaturity of judgment should be factored into culpability assessments was captured by the Connecticut Supreme Court, when it stated that, taken to "its logical conclusion," the argument would "require this Court to rewrite the entire Penal Code, crimes and defenses, to necessitate consideration of the age of young offenders for the ultimate purpose of defining their culpability . . . ."[147]

One can plausibly argue, of course, that despite its likely massive impact, a more generous mitigation scheme is precisely the dispositional calculus justice systems should have. Perhaps lesser forms of adult disability as well as adolescent immaturity should routinely result in sentence reductions. Further, just as offenders with mental disability can be diverted post-conviction into a separate system (consisting of mental hospitals or psychiatric units on prison wards), an advocate of the diminished-responsibility vision can argue that juveniles should be handled in a system or in units that keep them separated from adults, at least at the dispositional stage. In essence, Professors Scott and Steinberg, who have developed the best defense of the diminished-responsibility position, endorse this view. They assert that young people who offend are entitled to mitigation not only because of diminished judgment, but also because they are more vulnerable to coercive influences and peer influence and because their character is undeveloped, in a state of flux, and very likely will change as they reach adulthood.[148] Further, they contend that this mitigation should take place in a system separate from the adult criminal justice system.[149]

There is no dispute that adolescents not only are less capable of deliberate decision-making, but also are more peer-driven and unformed in character than adults. But to accord these latter two differences any more mitigating weight than the first would, again, be a radical departure from traditional understandings of culpability. Typically, coercion short of duress

145. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. (forthcoming 2009) (manuscript at 66, on file with authors).

146. *Id.* at 25.

147. State v. Heinemann, 920 A.2d 278, 297 (Conn. 2007).

148. SCOTT & STEINBERG, *supra* note 132, at 131–39.

149. *Id.*

is not a defense and seldom leads to a reduction in sentence unless it involves a serious threat of violence to the offender;[150] even then the sentence reduction is not particularly significant.[151] Allegations that a person has a "good" character is not a defense at trial unless the defendant is claiming that he or she is not the type of person who would commit a crime;[152] in the typical juvenile case, that element is usually conceded by the defense. More generalized claims of good character provide mitigation only at sentencing and, for reasons suggested above, they rarely mitigate culpability even there, at least at the federal level.[153] The examples of character mitigation proffered by Professors Scott and Steinberg (for instance, mitigation based on reputation, restitution, and remorse[154]) are different in kind from the type of mitigation that an immaturity argument posits.

In any event, acceptance of the proposition that evidence of immaturity should have the vastly expanded impact on legal accountability rules that Professors Scott and Steinberg imagine would not provide a reason to try juveniles separately.[155] Rather, it would merely support a system in which juvenile offenders are adjudicated in adult court and then shunted into a different dispositional system. Indeed, that is the approach that Barry Feld, a prominent advocate for the diminished-responsibility approach, has candidly admitted probably makes as much sense from that perspective. As he concedes, "While younger offenders may be less criminally responsible than more mature violators, they do not differ as inherently or fundamentally as the legal dichotomy between juvenile and criminal courts suggest."[156]

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150. U.S. SENTENCING GUIDELINES MANUAL § 5K2.12 (2008) (permitting a reduction in sentence for "coercion and incomplete duress," but "ordinarily" only when the coercion results from a physical threat to person or property).

151. *See, e.g.*, United States v. Lopez, 264 F.3d 527, 530–31 (5th Cir. 2001) (discussing how the trial court was willing to depart downward on the basis of duress *and* "extraordinary family responsibilities" from 135 to 108 months).

152. *See* FED. R. EVID. 404(a)(1) (permitting evidence of character only to show that the person "acted in conformity therewith on a particular occasion" and then only under limited circumstances).

153. The U.S. Sentencing Guidelines provide that "prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," and that "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range." U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.11–12 (2008).

154. SCOTT & STEINBERG, *supra* note 132, at 118–28.

155. Scott and Steinberg make a second argument for a separate juvenile court based on research indicating that many youth are not competent to stand trial in adult court. *Id.* at 149–80.

156. Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Juvenile Violence*, 24 CRIME & JUST. 189, 245 (1998).

Finally, it is not clear that those who endorse the diminished-responsibility vision are really willing to adhere to it, even at the dispositional stage. This last conundrum for the diminished-retribution model arises because, under an honest application of that approach, juveniles must serve whatever sentence their blameworthiness indicates they should receive, regardless of whether treatment or any other phenomenon (including growing older and more mature) changes the likelihood they will reoffend. On the one hand, those who insist on this just-deserts regime are willing to permit results that would be unpalatable to many: premature release of juveniles who may pose a grave risk and, more commonly, overlong confinement of those who could be safely released or put on probationary status. On the other hand, those who are comfortable with taking into account juvenile offenders' risk potential in fashioning dispositions are, in effect, abandoning the premise of the diminished-retribution model and are instead moving toward the individual-prevention vision of juvenile justice.

For instance, Professors Scott and Steinberg assert that "punishment calibration should be based on the seriousness of the offense" and "the culpability of the offender,"[157] but they also state that "the case for a separate mitigation-based justice system for the adjudication and disposition of juveniles rests not only on proportionality, but also on evidence that such a system is the best means to minimize the social cost of youth crime."[158] They devote an entire chapter to a description of research suggesting the worth of community-based programs and the criminogenic effects of detention,[159] thus appearing to endorse these types of dispositions despite their potential conflict with culpability principles. While they state that "in hard cases, fairness should trump social welfare,"[160] they are willing to dispense with proportionality analysis altogether in the case of "severely antisocial youths" who, while representing only a small portion of juvenile offenders,[161] commit a disproportionate amount of juvenile crime.[162] In short, the system they are proposing seems to be less a retributive regime than a preventive one. It is now time to take a closer look at the latter model.

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157. SCOTT & STEINBERG, *supra* note 132, at 231.

158. *Id.* at 147–48.

159. *Id.* at 181–222.

160. *Id.* at 234.

161. *Id.* at 249.

162. MICHAEL SCHUMACHER & GWEN A. KURZ, THE 8% SOLUTION: PREVENTING SERIOUS, REPEAT JUVENILE CRIME 5 (1999) (exploring the ramifications of a study finding that 8% of first-time juvenile offenders commit roughly fifty percent of repeat offenses); *see also* DAVID P. FARRINGTON ET AL., UNDERSTANDING AND CONTROLLING CRIME: TOWARD A NEW RESEARCH STRATEGY 50–51 (1986) (describing research finding that roughly five to eight percent of chronic offenders commit over fifty percent of juvenile crime); MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 88–89 (1972) (reporting research indicating that roughly five to six percent of chronic offenders commit over fifty percent of juvenile crime).

C. The Theoretical Basis for Individual Prevention–Relative Undeterrability

A regime explicitly based on individual prevention is a controversial concept. Although its focus on the police-power goal of preventing harm to others avoids the open-endedness of a rehabilitative, *parens patriae* regime, it is still associated with images of the "therapeutic state," endless confinement, and totalitarian abuses. Nonetheless, a well-conceptualized individual-prevention model is, in the juvenile context, theoretically more justifiable and practically more attractive than any of the other models.

The theoretical piece relies in large part on *Kansas v. Hendricks.*[163] In *Hendricks,* the U.S. Supreme Court upheld a statute that permitted preventive detention of sex offenders who are shown to have a "mental abnormality" that predisposes them to commit acts of sexual violence. The Court also held that, because the state's objective in establishing such preventive schemes is not retribution or general deterrence, but rehabilitation and incapacitation—individual-prevention goals—it is not engaging in punishment despite the significant deprivation of liberty involved.[164] While on the surface seemingly far afield from the topic of this Article, this decision, once dissected, provides a provocative prism through which to view juvenile justice.

Hendricks marked an important shift in the jurisprudence of preventive detention. For some time, most theorists subscribed to the notion that the only individuals who may be subjected to long-term intervention for the purpose of prevention, as opposed to punishment, are those who are seriously mentally ill (i.e., those suffering from psychotic symptoms). Two grounds were advanced for this view. First, given their distorted perceptions of the world, people with serious mental illness are oblivious to the dictates of the criminal law. When people are literally undeterrable by criminal sanctions, society may protect itself through preventive action.[165] Second, we express our respect for the principle of individual autonomy by generally refusing to confine a person, even one who is dangerous, until he or she has chosen to commit an antisocial act. But preventive confinement of

163. Kansas v. Hendricks, 521 U.S. 346 (1997). Parts of this analysis are drawn from earlier work. *See* Christopher Slobogin et al., *A Prevention Model of Juvenile Justice: The Promise of* Kansas v. Hendricks *for Children,* 1999 WIS. L. REV. 185, 192–204 (discussing the "rationale for a separate, prevention-oriented juvenile system that is superior to both the diminished responsibility and greater malleability explanations").

164. *Hendricks,* 521 U.S. at 361–62.

165. Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil–Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws,* 7 J. CONTEMP. LEGAL ISSUES 69, 85 (1996) ("'[C]ivil' deprivation of liberty is permissible only as a gap-filler, to solve problems the criminal process cannot address.").

dangerous people who are insane does not denigrate their autonomy, because they are presumed to have none when seriously symptomatic.[166]

In *Hendricks*, the Supreme Court implicitly rejected these limitations on preventive detention. Instead, it put its imprimatur on a system that applies to a category of people (sex offenders) who are not seriously mentally ill (they are usually said to have "personality disorders"[167]), are more deterrable than the latter group (they usually plan their crimes and try to avoid apprehension[168]), and are viewed as autonomous (as indicated by the fact that they are virtually never found insane[169]). So long as the individuals detained under these so-called sexual-predator statutes are "dangerous beyond their control," their detention on dangerousness grounds is permissible.[170] Further, in *Kansas v. Crane*, the Court made clear that the "dangerous beyond control" language does not require undeterrability or equate to what insanity doctrine sometimes calls an "irresistible impulse." As the Court explained in *Crane*:

> [In *Hendricks*,] we did not give to the phrase "lack of control" a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, "inability to control behavior" will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this . . . must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.[171]

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166. Janus, *supra* note 13, at 211 ("The principle of criminal interstitiality would allow civil commitment . . . only if the individual's mental disorder rendered him or her unamenable to criminal prosecution.").

167. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL 686–87 (4th ed., rev. 2000) (placing the "paraphilias" in Axis II, which describes personality disorders, as compared to Axis I, which includes, *inter alia*, the psychoses).

168. *See* Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 524 (1998). Winick notes:

> People diagnosed with pedophilia do not molest children in the presence of police officers or in other situations presenting a high likelihood of apprehension. Rather, they act with stealth, deception, and premeditation in an effort to avoid detection. This is purposeful, planned, and goal-directed conduct, not spontaneous and uncontrollable action or action that is substantially beyond the individual's ability to avoid.

Id.

169. *Id.* at 525 (stating that paraphilias "neither render individuals incompetent to engage in rational decision making nor make them unable to resist their strong desires to molest children or otherwise to act out sexually").

170. *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

171. Kansas v. Crane, 534 U.S. 407, 413 (2002).

Courts that have interpreted this language routinely permit commitment not only of sex offenders with "serious mental illness," such as psychosis, but also of those diagnosed with some sort of personality disorder.[172] Thus, while *Hendricks* and *Crane* do limit the state's authority to detain preventively by requiring that those detained be less deterrable than the "typical recidivist" in the "ordinary case," they also established that the state may confine people for what they might do rather than what they have done even when they are not disordered in the sense required for exculpation.

Hendricks did suggest a few other limitations on this preventive power. First, the state must attempt rehabilitation of those who are preventively confined.[173] Second, implicit in this first requirement is the idea that the state must make good-faith efforts to limit the confinement in any way it can (including treatment). Third, the state must periodically review the status of individuals so confined and release them if they are no longer dangerous.[174]

With these caveats, *Hendricks* makes clear that, as a constitutional matter, a system based on individual-prevention goals can exist separately from the criminal justice system and from a prevention system for people with serious mental illness. *Hendricks* makes inadequate control of behavior—what this Article will call "relative undeterrability"—the principal determinant of whether a preventive system (i.e., a system based on dangerousness) is justified in a particular case. The question addressed here is whether juvenile offenders are suited for such a system.

The answer, in short, is yes. The assumption of relative undeterrability that is required for the individual-prevention model is a much better fit with what we know about juvenile offenders than the assumptions associated with the other models. Under the rehabilitation model juveniles are innocent; under the adult-retribution model juveniles are as culpable as adults; and under the diminished-retribution model adolescents have difficulty appreciating the wrongfulness of their criminal acts or are coerced into criminal activity to a legally relevant extent. None of these images of juveniles reflect reality. Much closer to the truth is the assumption underlying the individual-prevention model: juveniles are less likely than

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172. W. Lawrence Fitch, *Sex Offender Commitment in the United States: Legislative and Policy Concerns*, 989 ANNALS N.Y. ACAD. SCI. 489, 494 (2003) (stating that only twelve percent of those committed are diagnosed with a "serious mental illness," and the rest have personality disorders like paraphilia and antisocial personality disorder).

173. *Hendricks*, 521 U.S. at 368–69. The court stated:

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; . . . *recommended treatment if such is possible*, and *permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired*, we cannot say that it acted with punitive intent.

Id. (emphasis added).

174. *Id.*

older offenders to be affected by the prospect of punishment or have the capacity to conform their behavior to the requirements of the law. As indicated in Part III, compared to older individuals, adolescents are less risk-averse, more prone to give into peer pressure, less likely to have a stake in life, more present-oriented, less likely to have perspective, and more likely to rush to judgment. All of these traits tend to produce offenders for whom the deterrent force of the criminal law is likely to be, literally, an afterthought.

Of course, *Hendricks* requires individualized determinations of inadequate control before government intervention may take place, whereas the prevention regime proposed here governs an *entire group* of offenders, many of whom have little difficulty controlling their behavior (or experience such difficulty due to a completely different etiology than is associated with committable sex offenders). But juveniles as a whole are much more likely than adults to feature the relevant attributes. As noted in Part III, "impulsivity is a normative behavior during normal childhood development."[175] Professors Scott and Steinberg provide additional persuasive justifications for a categorical approach: the difficulty of differentiating between those who are compromised and those who are not, and the fact that the law routinely treats juveniles as a category in other contexts.[176] But whereas their category is based on the faulty assumption that adolescents' responsibility is diminished to a legally significant extent, this Article relies on a more accurate generalization about juveniles' relative undeterrability.

Ironically, given the common perception that it represents a triumph for the diminished-responsibility position, *Roper* provides less support for that view than it does for the view that juveniles are less deterrable than the "ordinary recidivist." In exempting juveniles from the death penalty, *Roper* not only relied on its finding that juveniles are less culpable, but also on its conclusion that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[177] And while the lesser culpability of juveniles is, under current law, only sufficiently mitigating to avoid the worst punishments (and, as noted earlier, does not even allow juveniles who commit violent crimes to evade life-without-parole[178]), the lesser deterrability of juveniles is not offense or sentence specific; indeed, if the Court is right in its suggestion that even the death penalty does not have "a significant or even measurable

175. *See supra* Part III.A (discussing the psychological factors that have some bearing on judgments of juvenile responsibility).

176. SCOTT & STEINBERG, *supra* note 132, at 140–41.

177. Roper v. Simmons, 543 U.S. 551, 571 (2005).

178. *See* Massey, *supra* note 143, at 1089–91 (describing how a significant majority of states still have life-without-parole sentences for juveniles).

deterrent effect on juveniles,"[179] juveniles are presumably relatively less likely to be deterred by *any* specific criminal punishment.

As the *Roper* Court noted, deterrability is very closely related to culpability. If adolescents tend to act impulsively or with little thought, they can be seen as both less deterrable and less culpable. But to the extent that culpability and deterrability do intermingle, again it is the latter concept that best describes the import of what is known about juveniles. Consider the following example offered by Professor Scott, one that she believes illustrates a situation involving diminished culpability:

> A youth hangs out with his buddies on the street. Someone suggests holding up a nearby convenience store. The boy has mixed feelings about the proposal, but cannot think of ways to extricate himself—although perhaps a more mature person might develop a strategy. The possibility that one of his friends has a gun, and the consequences of that fact, may not occur to him. He goes along with the plan partly because he fears rejection by his friends—a consequence that he attaches to a decision not to participate—and that carries substantial weight in his calculus. Also, the excitement of the holdup and the possibility of getting some of the money are attractive. These considerations weigh more heavily in his decision than the cost of possible apprehension by the police or the long-term costs to his future life of conviction of a serious crime.[180]

The boy in this scenario clearly demonstrates, as Professor Scott puts it, "immaturity of judgment."[181] But the symptoms of this immaturity—the "mixed feelings," the inability to come up with options, the vulnerability to peer pressure, and the urge for excitement—most obviously compromise the boy's capacity or willingness to obey the law, not his capacity to formulate intent or appreciate the wrongfulness of his actions. In this typical juvenile-crime scenario, the case for diminished deterrability is much stronger than the case for diminished culpability.

Compared to diminished-retribution theory, the relative-undeterrability rationale offers two conceptual advantages in making the case for a juvenile justice system. First, the relative-undeterrability rationale is now officially recognized doctrine. Before *Hendricks*, one could have well concluded that, similar to the law's rejection of the principle underlying the diminished-responsibility model, any difference between adults and juveniles in terms of deterrability should have no legal implications. After all, just as the empirical findings indicate that most teens meet the minimum culpability threshold, none of the research on deterrability suggests that any but the youngest

179. *Roper*, 543 U.S. at 571.

180. Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Development Psychology*, *in* YOUTH ON TRIAL, *supra* note 37, at 291, 306.

181. *Id.*; *see also* SCOTT & STEINBERG, *supra* note 132, at 132–33.

children are so volitionally impaired that they are analogous to those found insane as a result of irresistible impulses. In other words, juveniles are less deterrable, not undeterrable. But, in contrast to the judicial and legislative refusal to broaden significantly the scope of diminished responsibility, *Hendricks*, *Crane*, and the lower court case law construing these cases legitimize a more expansive type of preventive regime, one that can easily apply to juveniles.

The second way in which allegiance to an individual-prevention model can make the case for a separate system of juvenile justice more convincing is political rather than theoretical. To say that we need such a system because juveniles do not deserve as much punishment as adults is only weakly persuasive, because, though it coincides with popular views about youth, it admits that adjudications of juvenile offenders are to use the same metric courts apply to adults. The diminished-responsibility model is thus easily characterized as merely a softer version of adult court, a view that smoothes the path for mechanisms, like transfer and blended sentences,[182] that treat the large number of juveniles who commit adult-like crimes as adults. In contrast, to say that we need a separate juvenile system because the greater impulsivity and heedlessness of youth requires that we focus on prevention not only resonates with common intuition but also is clearly built on something other than the (adult) punishment model, and thus more strongly suggests that juveniles need a different type of intervention altogether. The latter view also coincides more closely with what the public wants and expects from the juvenile justice system. As Scott and Steinberg's own study indicated, "Adult punishment and long incarceration are approved, for the most part, only as a means to protect the public from violent young criminals; however, if other more lenient sanctions are effective, they are favored over incarceration."[183]

That the Supreme Court has endorsed a version of the individual-prevention model or that this model may be better than competing models at justifying a separate juvenile justice system rhetorically does not necessarily mean, of course, that the prevention model is the best approach to the problem of juvenile offending. In fact, as detailed below, the preventive approach as it currently operates in the adult setting is seriously flawed. But an individual-prevention model in the juvenile setting is much preferable to its primary competitor, the diminished-retribution model. Once a few adjustments are made, the individual-prevention regime better promotes and reconciles the most important state and individual interests

182. Transfer statutes permit trial of juvenile offenders as adults, while blended sentences allow courts to impose adult-type sentences on juveniles who reach majority. Transfer of juveniles increased seventy percent between 1985 and 2000. Redding, *Adult Punishment*, *supra* note 30, at 377. At least twenty states have blended sentencing laws. Redding & Howell, *supra* note 32, at 151.

183. SCOTT & STEINBERG, *supra* note 132, at 281.

that come into play when a juvenile has caused or is likely to cause harm to others.

V. OBJECTIONS TO AND BENEFITS OF THE PREVENTION MODEL

The pure prevention model approved in *Hendricks* is simple to outline. The state is authorized to act when an offender poses a significant enough risk to others to warrant intervention. The intervention (not "punishment," since the goal is to prevent acts in the future, not rectify past wrongs) is individualized and should be no more restrictive of liberty than necessary to achieve the prevention aim.

Individual-prevention regimes have given rise to six essential complaints. Such a regime, it is said: (1) relies on suspect risk assessments and risk-management techniques; (2) is highly prone to abuse by government officials; (3) tends to dehumanize its subjects; (4) ignores the universal urge to punish, which undermines norms and creates disrespect for the law; (5) fails to produce a sufficient deterrent effect; and (6) is costly. Each of these objections is weighty. Many of them diminish in strength, however, when one looks at analogous problems with retributive approaches. More importantly, however persuasive these objections are in the adult context, in the juvenile setting they lack the same force. Nonetheless, addressing these objections helps flesh out some crucial legal limitations that must be in place for the preventive approach to be consistent with society's moral values and legal principles. Additionally, evaluating these criticisms helps further clarify the practical benefits of the individual-prevention model.

A. *EVALUATING RISK*

The objection most frequently lodged against any regime based on prevention is that we are not sufficiently adept at evaluating or managing risk to justify deprivations of liberty. The common wisdom since the early 1970s, accepted even by courts that enthusiastically endorse risk assessment, is that predictions are wrong at least as often as they are right.[184] And when it comes to treatment programs, many still adhere to Robert Martinson's famous conclusion in 1974 that "nothing works."[185]

There are several responses to these concerns, which have been detailed elsewhere in works examining the legitimacy of preventive

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184. *See* Barefoot v. Estelle, 463 U.S. 880, 920–23 (1983) (discussing the unreliability of long-term predictions of future criminal behavior).

185. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 48–50 (1974). According to Francis Allen, Martinson's conclusion—that most offender treatment programs had a negligible impact on recidivism reduction—had "an immediate and widespread impact." FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 57 (1981).

detention as a general matter.[186] At the outset, it is important to acknowledge that both prediction science—in particular, actuarial-based risk-assessment instruments—and intervention modalities—in particular, community-based treatments—have improved immensely over the past couple of decades. Many of these developments were discussed in Part III.[187]

More importantly, while predictive judgments will admittedly always be suspect even if these advances continue, opponents of prevention regimes seldom recognize the possibility that those judgments are no less accurate than the retrospective assessments necessary to implement the primary alternative to prevention—waiting until a criminal act has occurred and punishing it based on its relative culpability. Mens rea concepts—the primary means of grading responsibility for crime—are notoriously difficult to define and apply. Legislatures and courts have yet to develop a neutral or coherent doctrine of blameworthiness that approaches the transparency of actuarial-based instruments used in risk assessment, nor have they devised a non-arbitrary hierarchy of punishments.[188] These findings mean that the actual time spent in prison can vary enormously depending on the particular legislative and judicial agents making the decisions.

Even if agreement can be reached as to the proper "desert" for a given crime in the abstract, the inscrutability of past mental states means that judges and juries at best can only guess how blameworthy a person is or whether a particular punishment is deserved. Culpability determinations depend on the ability of the fact finder to divine whether a crime was premeditated or simply intentional, reckless or merely negligent. These terms are not self-defining, and even the defendant him- or herself may not be able to describe the precise thoughts and beliefs that preceded the crime.[189] The assumption that one's degree of culpability can be proven beyond a reasonable doubt is a legal fiction, necessary to obscure the fact that sentence-differentials measuring in the decades depend on mere guesses. This jurisprudential sloppiness is exacerbated if one is led to conclude, based on the research reported in Part III about the extent to which criminal conduct is attributable to ecological factors, that the law's

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186. Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 130–57 (2005); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 6–11 (2003).

187. *See supra* text accompanying notes 98–120 (discussing different types of intervention and treatment programs and their effects on recidivism rates).

188. The best effort in this regard to date comes from Paul Robinson, who describes the high level of agreement among students regarding just deserts in Paul H. Robinson, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007). But he also notes that there is disagreement about the rank order of even the core crimes, that punishment using this methodology will depend upon a majority vote, and that the absolute punishment will still vary substantially depending on the maximum penalty (e.g., the death penalty versus fifteen years) that one is willing to countenance. *Id.* at 37–38.

189. *See* SLOBOGIN, PROVING THE UNPROVABLE, *supra* note 97, at 40–48 (describing the difficulties associated with ascertaining mental state at the time of the offense).

method of measuring culpability is skewed by its focus on endogenous causes.

A third reason that the imprecision associated with risk assessment should not doom an individual-prevention regime has to do with how we respond to the inevitable errors that occur. Again comparing the prevention and retributive approaches, mistakes about risk are, at least in theory, much easier to correct than mistakes about culpability. As *Hendricks* held, preventive interventions must be justified through periodic review at which the state shows the individual continues to pose the requisite risk. In contrast, periodic review is inconsistent with the notion of punishing a person for past conduct.

Finally, the cost of any error that does occur may not be as great in a preventive regime as it is in a regime focused on retribution. The latter system demands punishment, which usually involves some type of confinement (and, when it does not, begins to look much more like a preventive regime). A preventive system, in contrast, does not require confinement but can often, as the description of community-based-intervention programs in Part III suggested, achieve its aims through some less-restrictive means.

Indeed, to be constitutionally legitimate, preventive regimes must achieve their preventive aim using the least-drastic means available. This conclusion follows from the Supreme Court's decision in *Jackson v. Indiana*, which required that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[190] This language places two limitations on preventive interventions by the state. First, the nature of the government's intervention must bear a reasonable relation to the harm contemplated. For instance, as already noted, most individuals who pose a risk do not require long-term institutionalization, especially when the harm posed is toward the less-serious end of the spectrum. Second, the duration of the intervention must be reasonably related to the harm predicted. Discharge is required when the individual no longer poses a danger, and treatment is required if it will shorten the duration of confinement. While *Hendricks* did not address the first limitation, recall that the Court explicitly adopted the second set of restrictions in that case.[191]

Admittedly, dispositions under the type of sexual-predator statutes approved in *Hendricks*, which tend to amount to long-term incarceration in prison-like settings, do not always follow these dictates. But long-term detentions are much less likely to occur in the juvenile setting, not only because community interventions can often be successful with this group,

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190. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

191. Kansas v. Hendricks, 521 U.S. 346, 368 (1997). For further discussion of these three limitations, see SLOBOGIN, MINDING JUSTICE, *supra* note 142, at 111–15.

but because the duration of any detention that does occur will be inherently curtailed by the limitations of juvenile-court dispositional jurisdiction (which typically ends no later than age twenty-five).[192] Note also that, given the criminogenic effects of confinement with adults and the de-emphasis of culpability as a basis for intervention, even the most serious juvenile offenders would never be transferred to adult court in a prevention regime. Thus, de facto life sentences of the type that may occur under a *Hendricks* statute are not possible under a system that is devoted to dealing solely with young people. Just as importantly, confinement that *does* occur in such a regime will bear a direct relationship to its usefulness as a public-safety measure, as compared to confinement in a retributive regime, which is at best fortuitously related to public safety and thus can lead to either premature release or unnecessary restraint.

The conclusion that difficulties in measuring and treating risk do not preclude preventive interventions does not mean, of course, that such interventions are permissible upon any showing of risk. There should be both qualitative and quantitative restrictions on the government's efforts to prove the requisite level of offender dangerousness and, if intervention occurs, on how long that intervention may last. For instance, risk assessments should rely on structured clinical-assessment instruments or actuarial devices of the type discussed in Part III, and interventions should be proportionate to risk. The nature of these limitations has been discussed at length elsewhere.[193]

B. ABUSES OF DISCRETION

Even if fears about the uncertainty connected with risk assessment and management can be allayed, or at least put in perspective through comparison with the vagaries of culpability assessment and punishment, an individual-prevention approach remains vulnerable to the criticism that it expands the opportunities for government officials to misuse their power. In particular, clarification is necessary with respect to: (1) the type of predicted harm that authorizes preventive intervention (only crimes, or any behavior that might be called antisocial?); (2) the type of act, if any, that triggers it (only serious crime, any antisocial act, or the presence of biological or environmental "static" risk factors as well?); and (3) the criteria for

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192. Typically juvenile court dispositional jurisdiction ends at age twenty-one, although in some states it extends to age twenty-five. Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* CHANGING BORDERS, *supra* note 19, at 45, 51. The differential between age and dispositional jurisdiction also allows prolonged detention of those rare offenders who are at very high risk for violent offenses. *See infra* text accompanying notes 204–05 (discussing the indeterminate nature of preventive schemes).

193. *See* SLOBOGIN, MINDING JUSTICE, *supra* note 142, at 141–50 (developing the proportionality and consistency principles as limits on risk assessment); SLOBOGIN, PROVING THE UNPROVABLE, *supra* note 97, at 109–29 (describing evidentiary limitations on prediction testimony).

determining when the state must release an individual from its control (since any offender probably poses some degree of risk, regardless of the duration or type of intervention).

The first question can be answered relatively easily. Interventions designed to reduce harm to others should be aimed only at preventing harms that are defined as such by the substantive criminal law. Allowing interventions simply to prevent vaguely described or minor antisocial acts would give government officials carte blanche to round up undesirables who are only trivially risky and would move too far in the direction of the discredited status-offense orientation of the rehabilitation model. By approving preventive detention only for the "particularly dangerous," *Hendricks* may have endorsed this limitation when confinement is sought.[194] We would expand this limitation to all forms of coercive intervention.

The second question, which *Hendricks* did not address, requires a more elaborate answer. Although earlier discussion indicated that a tertiary-prevention approach of the type we propose will generally be triggered by a serious antisocial act, as a theoretical matter a preventive regime does not require proof of such an act. The logic discussed earlier would permit the state to protect itself from undeterrable people without having to wait for any particular conduct.

However, the principle of legality—one of the most venerable principles of law—imposes a side constraint that requires modification of this aspect of the preventive approach. The legality principle, which the Supreme Court has endorsed as a matter of due process, dictates that any law depriving individuals of liberty or property must give potential violators and government officials adequate notice of the circumstances under which it operates.[195] A vague law both chills innocent behavior by citizens and increases the potential for abuse by officials.[196] Thus, in retributive systems, inchoate-offense doctrines like attempt try to cabin government power by demanding evidence that even the most evil-intentioned actor committed some sort of corroborative conduct before conviction may occur. Similarly, an individual-prevention regime should require evidence of triggering conduct as a curb on government power.

There are at least three other reasons, besides limiting official power, to require an antisocial act as a predicate for preventive intervention. First, proof of such an act reduces the potential for mistake by providing evidence

194. *Hendricks*, 521 U.S. at 368–69.

195. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

196. *See generally* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) (describing the rationales for the legality principle and suggesting the reduction of constraints on courts' ability to restructure penal law).

useful to the risk determination.[197] Second, absent proof of an act, intervention is likely to appear unfair, both to the offender (thus possibly undermining cooperation with and efficacy of treatment) and to society (thereby undermining the legitimacy and potency of the system as a whole). Finally, this requirement would make clear to would-be offenders the precise point at which the state can intervene, which provides the notice that the legality principle demands.

Application of the legality principle and these other considerations to a prevention-oriented juvenile justice system necessitates some sort of threshold act before intervention may take place. Under the rehabilitative model, the triggering event could be a so-called "status offense," such as "incorrigibility," or conduct that would not be a crime if committed by an adult, such as running away, truancy, or violating a curfew.[198] Under a pure prevention theory, these types of acts would only authorize intervention if they were significant risk factors indicative of criminality, which is unlikely to be the case.[199] But even if the necessary relation between these acts and risk existed, legality-related concerns about excessive government power should impose greater limitations in a prevention regime (as they limit retributivism, which in its pure form would penalize evil thoughts). Low intervention thresholds might be permissible if juveniles were really treated like innocents and the interventions were trivial, as is the case in many primary- or secondary-prevention programs. But when serious restrictions on freedom are possible, even if part of a community-based program, interventions should be prohibited unless the state can show that the individual has committed an act that would be criminal if committed by an adult.[200] This position, which is also consistent with the individual-prevention model's rejection of *parens patriae* as the basis for intervention by the juvenile justice system, imposes a significant brake on state power at the front-end of the preventive intervention process.

Corrupt or discriminatory decisions can also occur at the dispositional stage, especially during periodic review. Here too there must be restrictions on the government's efforts to continue intervention. First, the legality limitation must apply here as well. This means that, at least when they lead

197. JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 71 (1981).

198. DEAN J. CHAMPION & G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS: TRENDS AND IMPLICATIONS FOR CRIMINAL JUSTICE 6 (1991).

199. For instance, the Structured Assessment of Violence Risk in Youth ("SAVRY") is composed of twenty-four risk factors and six protective factors, none of which focus specifically on running away, truancy, or curfew violations. *See* BORUM ET AL., *supra* note 95, at 19–55 (explaining the evaluation criteria for each factor).

200. Similarly, some acts that are clearly risk factors, such as associating with a gang, should not, by themselves, authorize tertiary interventions because the adult system would forbid criminalizing them on constitutional grounds. *Cf.* Chicago v. Morales, 527 U.S. 41 (1999) (striking down an ordinance criminalizing the failure of a gang member or an associate of a gang member to disperse after a police order to do so).

to continued confinement, risk assessments should be based on structured clinical-assessment instruments or actuarial devices, because they rely on criteria that are relatively clear and transparent. Additionally, interventions should be proportionate to the offender's degree of risk, meaning that the government must demonstrate increasingly stronger proof of risk as the intervention continues.

Even with these limitations, mistakes and abuse are likely to occur, which may make a retributive regime, with its determinate sentences and similar sentences for similar crimes, more attractive to some. But these desert-based limitations at the back-end are effectively nullified by discretionary actions at the beginning of the process, where prosecutors are granted extremely broad discretion that is not subject to judicial or any other type of monitoring.[201] This uncabined authority of the prosecutor can produce wildly disparate dispositional results.[202] Thus, the potential for abuse is, unfortunately, non-trivial in both types of systems.

Moreover, it is worth questioning whether the goal of equal sentences for equal offenses, usually seen as a great benefit of the retributive approach, makes sense. In fact, the desert visited by a particular term of imprisonment for, say, robbery may vary from robber to robber, depending on the conditions of imprisonment and the nature of the robber.[203] A system that stresses consistency based on risk is probably more equitable than one based on culpability, particularly given the malleable nature of the latter concept.

C. *DEHUMANIZATION*

A third objection to prevention regimes—one which the Court implicitly rejected in *Hendricks* but which nonetheless should be given serious consideration—is that they undermine the autonomy premise upon which the criminal justice system is built. Whether or not our actions are determined, the argument goes, it is morally and practically important to treat people as if they are responsible moral agents.[204] Preventive regimes limited to the incapacitation of those with extreme cognitive or volitional impairment do not threaten this imperative because they preventively

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201. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

202. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 41 (2007) ("[C]ontinuing the same approach to prosecution without consideration of broader notions of fairness will continue to produce the same results—inequitable treatment of victims and defendants in the criminal justice system.").

203. *Cf.* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 186 (2009) (making this argument).

204. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 28–53, 180–83 (1968) (explaining that, for example, if people are not thought to be moral agents, it is unjust and absurd to allow punishment to turn on whether excusing conditions are present).

confine only those who have been adjudged legally non-responsible. But preventive schemes like those endorsed in *Hendricks* send a different message. The more categories of people that are confined based on future rather than past acts, the greater the insult to the moral claim that individuals control their fate and conduct.

This dehumanization concern is difficult to evaluate because it is so abstract. It seems most potent when the government creates two systems of liberty deprivation for those who commit antisocial acts—one designed to punish and the other designed to preventively detain—and then chooses the latter option. In this "two-track" situation, exemplified by sexual-predator systems that co-exist with the criminal process, preventive detention palpably signals that the person is different, a harmful "predator" rather than a rational actor who has chosen to commit culpable harm. Research suggests that this type of stigmatization may even have criminogenic consequences.[205]

The dehumanization objection is less powerful, however, when there is only one track, entirely devoted to the prevention goal, as under the juvenile system proposed here. In such a setting, all offenders are evaluated along a continuum of risk, thereby avoiding the explicit and offensive "dangerous being" label that characterizes the separate sexual-predator regime. Moreover, in contrast to the latter regime, intervention based on dangerousness in a single-track system would, if earlier prescriptions are followed, occur immediately after proof that the individual caused harm. In this way, the individual-prevention system resembles punishment based on desert, even if in fact it is forward-looking in focus.

In any event, the argument that a *Hendricks* regime would undermine society's presumption of individual autonomy loses much of its force in the juvenile setting. As discussed above, while most children can justly be held legally responsible for their criminal actions, the research suggests that on the autonomy scale they fall somewhere between adults with severe mental illness and non-mentally ill adults. More importantly, the perception that children are less autonomous than adults is widespread. Thus, treatment of children as relatively non-autonomous does not significantly undercut society's belief in the concept of "free will" or dilute its ability to condemn adult offenders.

205. John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 705–07 (1992) (reprinting Vernon L. Quinsey, Review of the Washington State Special Commitment Center Program for Sexually Violent Predators (Feb. 1992) (unpublished manuscript)) (reporting that residents of sexual predator programs "perceive the law to be arbitrary and excessive," and have more disciplinary violations than they did in prison because of, *inter alia*, "[r]esident bitterness concerning the indeterminate nature of their confinement and its imposition at the end of their sentence").

D. SOCIETAL NEED FOR DESERT

Related to the dehumanization objection is the concern that a system aimed at prevention pays insufficient homage to society's need to express its repugnance toward offenders, which is said to have a variety of bad consequences. These critics correctly note that a preventive system would not always impose the "punishment" demanded by just-desert principles. In some cases, it could impose a sanction that, when viewed from the desert perspective, is too lenient, thus allegedly failing to vindicate the interest of either the victim or society in expressing outrage at the harm done. In other cases, the intervention may appear disproportionately long from a retributive perspective. If these instances multiply, the argument goes, there could be an increase in vigilante justice, a weakening of norms regarding antisocial behavior, and even a burgeoning belief that individuals are not responsible for their actions—all developments that might make citizens less compliant with societal prohibitions.[206]

These latter claims are speculative even when applied in the adult context.[207] If the preventive approach is limited to the juvenile setting where, as just noted, the public is not as concerned about desert,[208] the claims seem even less salient, particularly when, as would occur in the type of regime proposed here, a statement of accountability is made in connection with adjudication, some intervention takes place after adjudication, multiple offenses are subject to greater intervention, and the overall goal of prevention is made clear to the public. With these characteristics in place, a preventive juvenile system should provide enough

206. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 471–77 (1997) (discussing how a criminal justice system based on just-desert principles creates shared norms).

207. Christopher Slobogin, *Is Justice Just Us?: Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315, 326–27 (1996).

208. *See supra* text accompanying notes 182–83 (discussing how the public favors more lenient sanctions for non-violent juvenile offenders); *see also* BARRY KRISBERG & SUSAN MARCHIONNA, NAT'L COUNCIL ON CRIME AND DELINQUENCY, ATTITUDES OF US VOTERS TOWARD YOUTH CRIME AND THE JUSTICE SYSTEM 3, 5 (2007), *available at* http://www.nccd-crc.org/nccd/pubs/zogby_feb07.pdf (presenting a poll finding that eighty-nine percent of the respondents believe that rehabilitation and treatment services can prevent future criminal acts by youth; sixty-nine percent do not think that incarcerating youth in adult facilities has a deterrent effect on youth; and eighty-one percent believe crime costs will be less in the future if money is spent on rehabilitative and treatment services now); SCOTT & STEINBERG, *supra* note 132, at 279 ("Our survey suggests that Americans are concerned about youth crime and want to reduce its incidence but are ready to support effective rehabilitative programs as a means of accomplishing that end—and indeed favor this response over imposing more punishment through longer sentences."). As a leading criminological researcher stated, "I have found very few policy makers unwilling to at least listen to the empirical research when you frame it within the context of public protection." E.J. Latessa, *The Challenge of Change: Correctional Programs and Evidence-Based Practices*, 3 CRIMINOLOGY & PUB. POL. 547, 549 (2004), *available at* http://www.uc.edu/CCJR/Articles/Evidence_Based_Practices.pdf.

of a bow to desert to avoid the hypothesized harms of ignoring it. Support for that conclusion comes from the apparent absence of these harms (e.g., vigilante justice) in the many jurisdictions that administer or used to administer preventive-style juvenile justice systems.

It must be admitted, however, that in rare instances a particularly serious case will cause significant tension in a system based on risk rather than desert. For instance, the case of Willie Bosket, a fifteen-year-old who killed two subway passengers in the course of a robbery, occasioned an uproar in New York when it was handled through the juvenile court system, which at that time had exclusive jurisdiction over such crimes.[209] But the response to Bosket's disposition also makes clear why a desert-based system can badly malfunction. Within two weeks of Bosket's sentence, the legislature rewrote state law to permit transfer of juveniles as young as thirteen if they committed a serious crime.[210] From a crime-prevention perspective, the better approach would be to keep someone like Bosket in the juvenile system, but recognize that such an individual should be subject to detention as long as he or she poses a high risk of committing serious crime. That detention could last a number of years (at least up to seven, depending on the differential between act and dispositional jurisdiction of the juvenile court), and could even extend beyond the end of typical juvenile-court jurisdiction if the individual poses a particularly high risk. If the public is informed that this type of indeterminate confinement is the likely disposition in many of the most serious cases, it will be less inclined to demand wholesale counterproductive changes of the type associated with Bosket's case.

Eventually, a possible reconciliation of desert and risk principles may come from work attempting to ascertain the extent to which the public is willing to equate non-incarcerative interventions with prison time in terms of desert.[211] Conceivably, for instance, six months of MST could have as much "punitive bite" as a month of prison in the public's mind. This work is still in its nascent stages, however. And even if desert can be associated with alternative sanctions, in many cases it will likely require far more intervention than is necessary in order to complete an effective preventive program. If so, it makes little sense, at least from a utilitarian perspective, to extend the intervention simply because some segment of the public will be bothered by a shorter, less "punitive" disposition, unless and until more solid

209. *See* FOX BUTTERFIELD, ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE 226–27 (1995) (describing how public outcry over Bosket's case led to the passage of New York's Juvenile Offender Act of 1978).

210. *Id.*

211. *See* Robert Harlow et al., *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 J. QUANTITATIVE CRIMINOLOGY 71, 89 (1995) (offering evidence that citizens may find alternative punishments appropriate depending on the circumstances).

evidence exists that failing to take these sentiments into account will lead to vigilantism and other types of noncompliance.[212]

E. DETERRENCE

The first version of the deterrence argument against the individual-prevention model is simple: because intervention for prevention purposes is, by definition, not punishment and, as suggested above, tends to rely on dispositional vehicles other than confinement, it will fail to deter juveniles from antisocial behavior. This objection has some merit. Certainly, if there were no consequences to a criminal act, general deterrence would be lacking. Furthermore, it is probably the case, as authorities have reported anecdotally, that the relatively "softer" penalties in the juvenile justice system reduce young offenders' concern about getting caught.[213] But assuming some type of coercive intervention will take place after a crime occurs and that this intervention becomes more onerous for repeat offenders—both characteristics of an individual-prevention system—a general deterrent effect similar to that which can be expected from a robust punishment regime is likely.

This perhaps counterintuitive conclusion derives from the extensive literature showing that even adult criminals are not affected by legislative increases or decreases in sentences.[214] Whether because they are not aware of sentencing differentials, are governed by (im)moral rather than legal considerations, do not believe they will be caught, or simply ignore their best interests due to social, situational, and chemical influences, most criminals "are undeterred by harsher punishments."[215] If that is true for most adults, then it is certainly true for juveniles, who are less likely to be deterred by any type of punishment. In other words, as long as there is some form of liberty-restricting intervention after an antisocial act, a prevention-oriented juvenile justice system will probably generate as much general deterrence as is possible in most cases. Corroborating this assertion is research on inner-city youths that suggests that peer behavior and mores have a much more powerful influence on potential juvenile offenders than

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212. *Cf.* Adam J. Kolber, *How to Improve Empirical Desert*, BROOK. L. REV. (forthcoming 2010) (manuscript at 19–21) *available at* http://ssrn.com/abstract=1457381 (noting that empirical-desert advocates have yet to demonstrate the value of the compliance induced by empirical desert relative to the value of other consequentialist goals).

213. Barry Glassner et al., *A Note on the Deterrent Effect of Juvenile vs. Adult Jurisdiction*, 31 SOC. PROBS. 219, 220–21 (1983) (recounting interviews with juveniles who said they were less likely to commit crime after age sixteen, when they could be treated as adults).

214. *See generally* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUDS. 173 (2004) (concluding that the manipulation of criminal-law rules will generally be ineffective at achieving heightened deterrent effects).

215. David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 AM. L. & ECON. REV. 295, 297 (2002); Robinson & Darley, *supra* note 214, at 204.

does the threat of legal sanctions,[216] as well as research finding that, contrary to their statements, youth in adult prison are not deterred by it.[217]

But the deterrence argument can be recharacterized in terms that overlap to some extent with the dehumanization objection. As Henry Hart put it, a preventive regime might defeat deterrence in the sense that it "would undermine the foundation of a free society's effort to build up each individual's sense of responsibility as a guide and a stimulus to the constructive development of his capacity for effectual and fruitful decision."[218] Others have echoed this view.[219]

This assertion about the character-building function of punishment is no more convincing, however. Consistent with our discussion of the contextual nature of crime in Part III, research shows that families, peers, churches, schools, and other institutions are the usual mechanisms through which citizens are taught the difference between right and wrong. As Tom Tyler states in his summary of this literature, "People are reluctant to commit criminal acts for which their family and friends would sanction them[;] individuals look to their social groups for information about appropriate conduct."[220]

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216. Wanda D. Foglia, *Perceptual Deterrence and the Mediating Effect of Internalized Norms Among Inner-City Teenagers*, 34 J. RES. CRIME & DELINQ. 414, 433, 435 (1997) (finding that the threat of formal sanctions "means little to young people from economically depressed urban neighborhoods" and that "the behavior of peers has the strongest association with law-breaking").

217. Anne L. Schneider & Laurie Ervin, *Specific Deterrence, Rational Choice, and Decision Heuristics: Applications in Juvenile Justice*, 71 SOC. SCI. Q. 585, 598 (1990) ("The results from this study show that juvenile offenders in six different cities in the United States did not reduce their propensity to commit crimes as a function of their perceptions of the certainty or severity of punishment."). The most substantial study concluding that harsher sanctions do have a significant effect on juvenile offending is based on finding a twenty-three percent increase in crime by eighteen-year-olds in states with a relatively harsh juvenile system and a relatively lenient adult system. Steven D. Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1156, 1175 (1998). Putting aside the unlikelihood that a juvenile justice system could be appreciably harsher than an adult system (the author doesn't indicate the criteria used to assign these categories), the observed increase in crime rate could easily be due to the criminogenic effects of detention in harsher juvenile regimes, rather than the result of a calculation by eighteen-year-olds that their penalty (in adult court) will be relatively more lenient now that they are subject to adult jurisdiction. *Cf.* David S. Lee & Justin McCrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence*, 34 (Princeton Working Paper No. 550, 2009), *available at* http://www.irs.princeton.edu/pubs/pdfs/550.pdf (finding "small deterrence effects of prison" on juvenile offenders subject to adult court jurisdiction and suggesting that Levitt's methodology conflated deterrence and incapacitation effects).

218. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 410 (1958).

219. *See, e.g.*, Paul H. Robinson, *A Failure of Moral Conviction?*, 117 PUB. INT. 40, 44 (1994) (suggesting that if a preventive approach were adopted, criminal justice might begin to "lose[] its ability to claim that offenders deserve the sentences they get[, which might dilute] its ability to induce personal shame and to instigate social condemnation").

220. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 24 (2d ed. 2006); *see also* Robert Meier & Weldon Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42

Moreover, as one of us has argued in other work, if the goal is to inculcate sound practical judgment in the individual offender, punishment through a judicial or jury verdict of "guilty" is a "blunt instrument for doing so."[221] An individualized-prevention regime has a much better chance of developing good judgment:

> [R]isk management, properly conducted, explores the causes of antisocial behavior and continually stresses the offender's ability to change that behavior through cognitive restructuring, avoidance of risky behavior (such as drinking or fraternizing with gang members), and adjusting relationships. As modern rehabilitative efforts routinely demonstrate, a regime based on prediction does not have to insult the notion that past choices have consequences and that the offender is responsible and held accountable for them. There *is* a difference in message, however. The punishment model says to the offender: "You have done something bad, for which you must pay." The prevention model says: "You have done something harmful, which you must not let happen again."[222]

Arguably, the latter message is much preferable to the former, especially when dealing with juveniles, many of whom have been "punished" enough by their environment.

Perhaps, though, the process of punishment itself builds character. There is anecdotal evidence supporting the view that doing one's time instills dignity and allows the released offender to re-enter society with a guilt-free conscience.[223] Yet there is also anecdotal evidence supporting the view that risk-management programs can instill a greater sense of worth.[224] Because these latter programs are premised on the idea that time of release depends upon the offender's willingness to achieve specific treatment goals, they may enhance individual responsibility and energize those with the

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AM. SOC. REV. 292, 302 (1977) (noting that social institutions outweigh criminal law as an influence on conduct).

221. SLOBOGIN, MINDING JUSTICE, *supra* note 142, at 163.

222. *Id.* at 156–57.

223. WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 132–35 (1992); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 194–98 (1980).

224. BERT USEEM ET AL., INST. FOR SOC. RESEARCH, UNIV. OF N.M., SENTENCING MATTERS, BUT DOES GOOD TIME MATTER MORE? 3 (1996) (noting that corrections officials have stated that "prisons are safer, more orderly, and more productive when inmates participate in programs"); Connie Stivers Ireland & JoAnn Prause, *Discretionary Parole Release: Length of Imprisonment, Percent of Sentence Served, and Recidivism*, 28 J. CRIME & JUST. 27, 44 (2005) ("[D]iscretionary parole release is the best mechanism by which rehabilitation can be meaningfully achieved, as mandatory releasees are given an automatic release date and therefore have no system incentives to seek programs and treatment to facilitate change.").

potential to be law-abiding.[225] There is insufficient research comparing the two regimes to do anything but speculate on these points. At least, there is no clear evidence that retributive punishment is better at "building character" than a risk-management regime.

F. Cost

Even if one accepts prevention as the primary goal of juvenile justice, a final reason to be reticent about an individual-prevention regime is that all but the least ambitious versions of it could be enormously expensive. For instance, the State of Illinois estimated that implementing a sexual-predator statute in that state would cost more than one-billion dollars over a ten-year period.[226] The key policy question about such expenditures is not whether they improve public safety; surely they buy some added protection. But compared to what? The concern is that the amount of money spent on such programs diverts support from other more effective preventive mechanisms (to wit, punishment under a retributive model).

That seems unlikely in the juvenile setting. As recounted in Part III, compared to prison, community-intervention programs for juveniles are not only better at reducing recidivism but are less costly.[227] The Surgeon General's Report on Youth Violence echoed these claims, concluding after a review of the relevant research through 2000 that preventive programs "cost less over the long run than mandatory sentences and other get-tough approaches."[228]

Even if expenditures are the same on a per capita basis, rehabilitation of juveniles is likely to be more cost-effective than rehabilitation of adults for at least two reasons. First, if juvenile rehabilitation works, the overall crime rate will be reduced more significantly because individuals will end their antisocial conduct earlier. Second, individuals will be crime-free for a longer period of time, allowing more productive lives on other fronts.

A third, intuitively appealing reason—that children are less set in their ways than adults and thus easier to rehabilitate—is based on an unproven empirical assumption. But there is little doubt that adolescents are more treatable than the average offender committed under the sexual-predator

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225. *See, e.g.*, Nora V. Demleitner, *Good Conduct Time: How Much and for Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 U. FLA. L. REV. 777, 782–96 (2009) (noting that good-time credits can dramatically increase inmate participation in rehabilitation programs, provide them incentives to cooperate with prison authorities, and give prisoners reason to believe they control their fate at least to some extent, thus enhancing their "ability to operate as independent actors").

226. *See* John Q. La Fond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POL'Y & L. 468, 500 (1998) (estimating that implementation of a sexual-predator statute would increase the prison population, costing $1,007,719,300 over ten years).

227. *See supra* text accompanying note 115 (explaining that if MST is implemented properly, the result is a benefit-to-cost ratio of $28.33 for each dollar spent).

228. SURGEON GENERAL REPORT, *supra* note 27, at 119–21.

laws authorized by *Hendricks*,[229] providing still another distinction between those laws and the prevention-oriented juvenile justice system proposed here. If states are willing to spend money on treatment and preventive intervention, they should make sure to spend a disproportionate amount of it in the juvenile justice system.

VI. CONCLUSION

The new police-power paradigm contemplated by *Hendricks*, although suspect in its application to adults, provides a coherent and defensible justification for a preventive juvenile justice system. Because children are less deterrable than adults, they can be subject to preventive intervention. Because the juvenile court has limited jurisdiction, because children are perceived as less autonomous than adults, and because the treatment of youth is relatively cost-effective, a preventive system applied to juveniles does not have the serious shortcomings associated with its application in the adult context.

This individual-prevention model of juvenile justice is preferable to the rehabilitative and retributive models that have dominated discussion of the juvenile justice system throughout the past century. The rehabilitative model is based on untenable assumptions about juvenile offenders' innocence and the scope of government power to socialize youth, and the adult-retribution model is a recipe for exacerbating juvenile recidivism. The diminished-retribution model, while superior to these two models, rests on assumptions about juvenile capacities that are inconsistent with current criminal-law doctrine, and in any event does not provide a persuasive theoretical basis for a segregated juvenile justice system that takes full advantage of the new recidivism-reducing community interventions.

In the spirit of compromise, one could nonetheless construct a system that reconciles all four of these options. The rehabilitative model could govern disposition of children through age ten or some other pre-adolescent age. The diminished-retribution model could apply to youth from that threshold through seventeen or eighteen (or twenty or twenty-five, depending upon the ultimate correlations between age and immaturity), with the stipulation that older offenders could be transferred to adult court if sufficiently mature and their crimes sufficiently serious. Within the range set by diminished-retribution principles, the ultimate duration of intervention for those teenagers who remained in the juvenile justice system could, in line with individual-prevention goals, depend solely on risk assessment.

229. *See generally* G.C.N. Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOL. 802 (1995) (showing modest treatment effects of sex-offender treatment programs).

This hybrid framework is similar in concept to the system that exists in a number of jurisdictions today.[230] But the arguments presented in this Article push against such a hybrid. Very young children should not be the subject of juvenile-court jurisdiction unless they have committed serious antisocial conduct and represent a high risk. At the same time, an emphasis on prevention should lead to the elimination, not just the reduction, of transfer jurisdiction and "blended" sentencing for older youth.[231] Finally, once convicted of a (non-accidental, non-justified) offense, juvenile offenders of all ages should be subject to juvenile-court intervention only if it is consistent with risk-management principles. They should not receive a sentence even partially based on retributive notions, because if such sentences achieve public safety and recidivism-reduction goals, they do so only serendipitously, while offering too much of a temptation to fold juvenile justice into the adult criminal justice system.

The myths surrounding juvenile offenders need to be dispelled. Legal principles developed for the adult criminal system need to be rethought when applied to juveniles. Prevention of recidivism, not vaguely defined "rehabilitation" and not culpability-based punishment, should be the rallying cry to advocates of a separate regime for more youthful offenders. The end result will be a more effective, just, and conceptually coherent juvenile justice system.

230. Daniel Filler & Austin Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 954 (2006) ("Across the nation, in every state, local courts are creating new juvenile tribunals that explicitly seek to treat and rehabilitate juvenile offenders.").

231. Redding & Howell, *supra* note 32, at 146.