Vanderbilt University

From the SelectedWorks of Christopher Slobogin

February 18, 2009

Juvenile Justice: The Fourth Option

Christopher Slobogin

Available at: https://works.bepress.com/christopher_slobogin/1/
JUVENILE JUSTICE: THE FOURTH OPTION

CHRISTOPHER SLOBOGIN & MARK R. FONDACARO

The current eclectic mix of solutions to the juvenile crime problem is insufficiently conceptualized and 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 them less blameworthy—is also misguided, because it tends to de-emphasize crime-reducing interventions, overstates the degree to which adolescent responsibility is diminished, and plays 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.

TABLE OF CONTENTS

INTRODUCTION ................................................................. 2
THE FOUR PATHS OF JUVENILE JUSTICE ......................... 8

* Slobogin is the Milton Underwood Professor of Law, Vanderbilt University Law School; Fondacaro is a Professor of Psychology at John Jay College of Criminal Justice. We would like to thank participants at workshops or conferences at Brooklyn Law School, Northwestern Law School, Ohio State Law School, the University of Texas Law School, Vanderbilt University Law School, and Washington University Law School for their comments on the ideas expressed in this paper or on antecedent papers.
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 youths in trouble as innocent and salvageable beings who must be kept away from adult criminals to enhance their chances of becoming productive citizens. On this 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, it posits that most young people who commit crime are fully accountable individuals who should be punished in the same fashion as adults. This path leads to broad transfer-to-adult-court jurisdiction, adult-like sentences in juvenile court, or both. The final option, probably representing the consensus academic view as well as the practice in a number of jurisdictions, sits somewhere in between.

1 See infra text accompanying notes 15-22.

2 See infra text accompanying notes 23-26.
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 youth.  

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 will 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. This path is closely related to the rehabilitation vision, but avoids claiming that juveniles are innocent or excused because of their youth, retains the retributive models’ 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, in favor of 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 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, 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 9 or 10 normally can form criminal intent and understand the wrongfulness of their actions in a shallow sense, pre-teen and teen offenders are less likely than adults--for a host of psychological and biological reasons--to consider the consequences of those actions or the prospect of punishment. Second, while juvenile offending, like adult offending, is in part the result of

---

3 See infra text accompanying notes 27-32.

4 See infra Part II.
“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 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 less culpable than adult criminals, and thus are not ideal candidates for adult retribution. At the same time, the conclusion that juveniles’ legally relevant capacities are relatively undeveloped does not necessarily support the diminished retribution model either. For instance, those capacities are still vastly superior to the capacities of many adult offenders, including those with mental disability, who rarely receive mitigation under current doctrine; 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 in mitigation for adults. Similarly, the empirical finding that offenders are heavily influenced by contextual factors, while perhaps useful as an explanatory matter, usually would not be given legally mitigating effect in the adult setting. Thus research provides only tenuous support for the diminished retribution model.

In contrast, the research on the psychology and context of juvenile offending is easily accommodated by the individual prevention model. In that sort of regime, once a juvenile is convicted for a criminal offense (based on the usual actus reus and mens rea elements) relative culpability is irrelevant. Thus, where juvenile offenders fit along the blameworthiness spectrum need not be determined for dispositional purposes. Instead, the research on the psychology and context of juvenile crime is integrated into post-conviction programs designed to reduce the antisocial effects of immaturity and environment.

---

5 See infra text accompanying notes 108-115.

6 Id.
The finding that juvenile crime is most effectively reduced through community interventions specifically aimed at antisocial conduct also fits comfortably with an individual prevention approach. Because the goal under that 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 endorse any program, including segregation, that could help the juvenile “improve.”\(^7\) And 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 applied retributive regime—adult or diminished—is more likely to increase recidivism than an individual prevention approach.

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 rehabilitative model cannot be sustained by the myth that adolescent offenders are innocent of crime. 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.\(^8\) 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.\(^9\)

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

\(^7\) See infra text accompanying note 22.

\(^8\) See infra text accompanying notes 100-03.

\(^9\) See infra text accompanying notes 36-39.
punishment meted out as a matter of desert, without endorsing the blunderbuss therapeutic approach associated with the rehabilitative model. It avoids making claims about adolescent criminals that are inconsistent with criminal law doctrine—that they are innocent (the rehabilitative claim) or deserving of significant mitigation (the diminished retribution claim)—without subjecting juveniles to adult-like punishment that is likely to exacerbate recidivism.

Nonetheless, a purely preventive system, or even one that, like that proposed here, requires a predicate criminal act, is anathema to many because of its association with indeterminate detention and a dehumanizing therapeutic state. That concern is well-founded in the adult setting, despite the Supreme Court’s decisions upholding precisely this sort of regime in the case of sexual predators.\(^\text{10}\) Sexual predator statutes can and have authorized indeterminate, life-long commitment for offenders who ordinarily would be subject to determinate punishment.\(^\text{11}\)

Yet it also should be recognized that the Court’s decisions upholding such statutes provide a solid legal basis for the individual prevention approach advanced here.\(^\text{12}\) More importantly, the negative implications of these decisions are mitigated substantially when applied to juvenile offenders. Given the durational limitation on juvenile court jurisdiction, long-term indeterminate confinement would not be possible. 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, in the juvenile context the individual prevention model is a good fit, conceptually and pragmatically. The debate over whether a retributive approach to adult criminal justice is preferable to one that focuses on utilitarian goals of incapacitation, specific

\(^{10}\) See, e.g., Kansas v. Hendricks, 521 U.S. 346 (1997), discussed infra text accompanying notes 118-29.

\(^{11}\) 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.”).

\(^{12}\) See infra text preceding note 130.
deterrence and rehabilitation has a long pedigree and is in somewhat of a stalemate today. 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. 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 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 significant enough 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 way 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 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 a mistake 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 of public attitudes suggest that this message will be perceived positively; at bottom, the public is more interested in rehabilitating juveniles than punishing them, so long as the rehabilitation is focused on reducing crime.

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

14 See infra note 159.
Part I of this article provides a more elaborate discussion of the four options for juvenile justice. Part II summarizes what we have learned about juvenile crime and methods of reducing it. Part III then explains why this research supports the individual prevention model of juvenile justice more strongly than competing models. Part IV addresses objections to the individual prevention model and reiterates some of its benefits.

I. 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. . . . 15

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.” 16 In the eyes of these progenitors, juvenile offenders were blameless, and the goal of the juvenile court was not to punish, but to help.

Under a rehabilitative model, then, the state is implementing its parens patriae power, not its police power. 17 Although no court, not even the one championed by Addams, consistently endorsed the youth-as-innocents concept, the rehabilitative model it spawned still heavily influences discussions of juvenile justice. The vision has both substantive and procedural implications, vestiges of which are visible

---

15 Jane Addams, My Friend Julia Lathrop 137 (1935).


today. The procedural implications have been discussed elsewhere. 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. Judge Lindsey thought the court should ask, for instance, “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?” 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. 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 into any moving train; . . . or who 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.”

Reminiscent of vagrancy statutes eventually declared unconstitutional by the Supreme Court, 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

---


20 Tanenhaus, supra note 17, at 40-41, n. 17. See also Julian W. Mack, The Juvenile Court, 23 HARV. L. REV. 104, 107 (1909) (“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 . . .?”).

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,” which were meant to be “guarded sanctuaries, combining love and guidance with firmness and restraint,” and aimed to protect their inmates “from idleness, indulgence, and luxuries through military drill, physical exercise, and constant supervision.”

Thus, the outline of the rehabilitative model is clear. Juveniles are to be excused, not punished, for their antisocial behavior. That behavior does not need to amount to crime, because the goal is not only to prevent future crime but also help juveniles avoid harm by removing them from disruptive influences and minimizing future divergence from socially acceptable conduct.

Most of the history of juvenile court in the past half-century has consisted of backing away from the substantive implications of the rehabilitation vision, toward a more retributive stance vis-a-vis juvenile offenders. Observers from all points in the political spectrum expressed concern about the failure of the rehabilitative approach to hold children clearly accountable for their actions, and much of the polity also felt that juvenile dispositions insufficiently protected the public. Indeed, even in the early days of the juvenile court, judges found ways to transfer to adult court juveniles who committed serious crimes or appeared to be particularly dangerous. Since that time there has been a more or less steady progression toward harsher juvenile court sanctions and toward more expansive transfer jurisdiction, both in terms of the age at which it attaches and the types of crimes that can trigger it. Aside from baseless fears that crime committed by juveniles was continually increasing, the predominant motivation for these reforms appeared to be, in the words of one of their proponents, that juvenile offenders “are criminals who happen to

22 Platt, supra note 19, at 54.

23 Tanenhaus, supra note 17, at 20-21.


be young, not children who happen to be criminal.’’26 In short, these reforms were based on a belief that juveniles who commit adult crimes, at least serious ones, should pay the same price adult offenders pay.

Not all who believed youth should be held accountable for their crimes endorse this adult retribution stance, however. In the forefront of this group were the drafters of the American Bar Association’s Juvenile Justice Standards. The Standards, promulgated in 1980, did recommend that juvenile court dispositions be based on the offense, not the offender, a position derived from retributive, just desert principles (and, for the same reason, the drafters rejected status offenses).27 But they also believed that juveniles’ relative immaturity required lesser punishment than that meted out to adults who commit the same crimes.28 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 based on the understanding that youth who commit crime have diminished responsibility.29 The standard conclusion of this view is that most youth who commit crime before


27 INSTITUTE OF JUDICIAL ADMINISTRATION—AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS xvii-xix (1980) (“Sanctions should be proportionate to the seriousness of the offense [and] fixed or determinate as declared by the court after a hearing . . . [and] noncriminal misbehavior (status offenses or conduct that would not be a crime if committed by an adult) should be removed from juvenile court jurisdiction”).

28 Id. at 152-53 (indicating, inter alia, that crimes which would result in a sentence of more than twenty years in adult court should not receive a sanction of more than 36 months in juvenile court).

18 should be tried and sentenced in juvenile court, with transfer limited to only the most serious, mature offenders.

All three visions of juvenile justice discussed to this point pay obeisance to public safety and prevention of recidivism. Judge Julian Mack, another early juvenile court judge, illustrated how the parens patriae position was at least partially cognizant of police power concerns 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.”30 The drafters of the Juvenile Justice Standards, although focused on just deserts, also recognized that protection of the public is a legitimate goal of juvenile justice.31 And the most punitive 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.32 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 a secondary, not a primary goal, and interventions solely for the sake of exacting retribution are rejected. Despite the general attractiveness of promoting public safety, 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

30 Mack, supra note 20, at 110 (emphasis added).

31 INSTITUTE OF JUDICIAL ADMINISTRATION, supra note 27, at 109 (providing that “the purpose of the juvenile correctional system is to reduce juvenile crime by maintaining the integrity of the substantive law proscribing certain behavior and by developing individual responsibility for lawful behavior.”)

32 WILLIAM J. BENNETT, JOHN J. DIULLIO, JR., & JOHN P. WALTERS, BODY COUNT 27 (1996) (“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”).
reasons. First, a regime modeled on individual prevention could lead to widespread abuse, both because our ability to assess risk, which such a system requires, is subject to error, and because, in theory at least, it contemplates intervention even against youth who have not committed any offense, if they are thought to pose enough of a risk. Second, as with the rehabilitative model, a pure individual prevention regime 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 and narrower. Pre-teen children who might not be just subjects of significant punishment might nonetheless be thought to pose a risk and thus 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, because regardless of how “culpable” a juvenile offender might be, the risk he or she represents can always be handled within the juvenile justice system, in confined space if need be.\(^{33}\)

Compared to the rehabilitative model, the scope of an individual prevention regime would be narrower in a different sense. Because the conduct underlying many status offenses and other “immoral” behavior is often not a valid risk factor (and, in any event, for reasons explored below,\(^ {34}\) should not authorize coercive state action unless it also constitutes a crime), intervention will not be as likely in an individual prevention model. Nor would the scope of intervention be as extensive, since programs designed to “reform” and

\(^{33}\) 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 notes 77-78.

\(^{34}\) See infra text accompanying notes 149-53.
“educate” may go far beyond what is necessary to reduce crime. Three examples should suffice to spell out these differences between the various approaches. Imagine a 15 year-old who kills his sleeping father after suffering years of his abuse, a 17 year-old gang member who has just committed his third car theft and is complicit in a murder, and a 9 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 (with the second youth perhaps transferred to adult court), while it would administer at most a slap on the wrist to the third youth. In contrast, depending upon the outcome of risk assessment, a preventive regime might well 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. 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, for instance—and it would take place in the third case even if cruelty to animals were not a crime under relevant state law.

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

II. Juvenile Crime and Methods of Reducing It

The brief review below 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.35 The discussion looks first at individual psychological factors, then at contextual ones, and ends with a description of some of the more promising treatment programs.

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 by the end of the first decade of life, if not before, people are able to reason logically and understand society’s rules. Additionally, by around age ten or eleven, children have acquired the basic capacity to make moral judgments based on intentions and motives, although this capacity continues to develop up until the age of about seventeen. By at least early adolescence, fundamental social norms have been internalized and respect for the law has developed. Thus, Laurence Steinberg and Elisabeth Caffman, among the most prominent researchers in this area, have declared that “absent some sort of mental illness or retardation . . . anyone who is nine can form criminal intent and appreciate the wrongfulness of an action.”

At the same time, Steinberg and Caffman suggest that there are significant differences between young adolescents and adults in terms of “psychosocial maturity,” which they argue should be measured using three broad categories: 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-

---

36 Elizabeth Caffman & Laurence Steinberg, Researching Adolescents’ Judgment and Culpability, in YOUTH ON TRIAL, supra note 29, at 329.


38 See LAWRENCE KOHLBERG, CHILD PSYCHOLOGY AND CHILD EDUCATION—A COGNITIVE-DEVELOPMENTAL VIEW 259 (1987) (“conventional” level of morality is reached between ages 10 and 20).

39 Laurence Steinberg & Elisabeth Caffman, A Developmental Perspective on Jurisdictional Boundary, in CHANGING BORDERS, supra note 17, at 394.
restrain and control one’s impulses.\textsuperscript{40} 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.\textsuperscript{41}

Other research confirms these tendencies. Specifically, there is a considerable amount of empirical data showing that adolescents demonstrate a greater proclivity for risky behavior and inaccurate estimates of risk likelihood, foreshortened time perspective, and feelings of reduced social responsibility. As summarized by Steinberg and Cauffman, these studies indicate that “thrill seeking and disinhibition (as assessed via measures of sensation seeking) may be higher during adolescence than adulthood.”\textsuperscript{42} Further, adolescents appear to calculate the risks of getting caught and punished differently than adults; that is, they do not assess the possibility of punishment in the same way adults would.\textsuperscript{43} Because adolescents tend to focus more on short-term consequences of a decision or behavior, long-term

\textsuperscript{40} See Laurence Steinberg & Elizabeth Cauffman, \textit{Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making}, 20 LAW \& HUM. BEHAV. 249, 260 (1996).

\textsuperscript{41} Steinberg & Cauffman, \textit{supra} note 39, at 397.

\textsuperscript{42} See Steinberg & Cauffman, \textit{supra} note 40, at 260 (“The few extant comparisons of adults and adolescents suggest that thrill seeking and disinhibition (as assessed via measures of sensation seeking) may be higher during adolescence than adulthood.”).

\textsuperscript{43} See Catherine C. Lewis, \textit{How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications}, 52 CHILD DEV. 538, 542 (1981) (“Differences in decision approach among the three grade-level groups (seventh-eighth, tenth, and twelfth) include increases, with grade-level, in mention of the risks and future consequences of decisions ....”); Elizabeth S. Scott et al., \textit{Evaluating Adolescent Decision Making in Legal Contexts}, 19 LAW \& HUM. BEHAV. 221, 231 (1995) (“Compared to adults, adolescents appear to focus less on protection against losses than on opportunities for gains in making choices. Adolescents appear to weigh the negative consequences of not engaging in risky behaviors more heavily than adults ....”); William Gardner & Janna Herman, \textit{Developmental Change in Decision Making: Use of Multiplicative Strategies and Sensitivity to Losses} 8 (1991) (paper presented at the 1991 Biennial Meeting of the Society for Research in Child Development, Seattle, Wash.) (“Given the presumption that adults are, on average, risk averse, the finding that young children are generally risk seeking is striking and poses the question of what induces the shift.”).
punishments may not trigger the same aversion in a fourteen or fifteen year-old as they do in a thirty year-old.\textsuperscript{44}

The conclusion that there are significant differences between juvenile and adult decision-making is also indirectly supported by research exploring neurobiological influences on child and adolescent development and behavior. Studies utilizing recent advances in imaging technology indicate that adolescent brains are less well-developed than previously believed. In particular, the frontal lobe, which has been 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.\textsuperscript{45} Other neurobiological evidence indicates that changes in the limbic system around puberty correspond to novelty-seeking and risk-taking behavior.\textsuperscript{46}

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

\textsuperscript{44} See Scott et al., supra note 43, at 231 (“In general, adolescents seem to discount the future more than adults and to weigh more heavily the short-term consequences of decisions - both risks and benefits - a response that in some settings contributes to risky behavior.”); id. (“It may be harder for an adolescent than for an adult 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.”).

\textsuperscript{45} See generally AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE CENTER, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY, available at www.abanet.org/crimjust/juven/Adolescence.pdf (2004); Jay Giedd et al., 

\textit{Brain Development During Childhood and Adolescence: A Longitudinal MRI Study}, 2 NATURE NEUROSCIENCE 861, 861 (1999) (showing net increase in “white matter” between ages 4 and 22 to be 12.4%); Elizabeth R. Sowell et al., \textit{In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions}, 2 NATURE NEUROSCI. 859, 860 (1999) (reporting “large group differences” between adults and adolescents in terms of frontal lobe maturation).

\textsuperscript{46} Ronald E. Dahl, Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence, 6 CNS Spectrum 1 (2001); Brian Bower, Teen Brains on Trial: The Science of Neural Development Tangles with the Juvenile Death Penalty, 165 Sciences News Online at 3-4, available at www.findarticles.com/p/articles/mi_m1200/is_19_165/ai_n6110300/pg_2?tag=artBody;col1 (2004) (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).
of criminal behavior. But it does suggest that they are less risk averse and less likely to attend to the consequences of their actions, including criminal acts. As one recent review of the literature indicated, “It is common knowledge that impulsivity is a normative behavior during normal childhood development.”

**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. The significant impact of these factors suggests that individual decision-making is only a partial precipitant of criminal behavior. More importantly, it reinforces the notion that juveniles’ capacity to obey the law is compromised and that attempts to increase that capacity must take into account contextual factors.

*Family* factors are among the strongest predictors of risk for delinquent behavior. Poor parental monitoring, including inadequate direct supervision, greatly increases the risk of delinquency. Relational factors such as parent-child communication, the extent to which parents treat their children fairly, emotional warmth, and parental involvement all have been

---

47 See Jennifer White et al., *The Measurement of Impulsivity and Its Relationship to Delinquency*, 103 J. ABNORMAL PSYCHOLOGY 192, 202 (1994) (finding “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).  


49 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.”).  


found to have independent effects on the risk for delinquent behavior.\(^{52}\) Personal characteristics of the parents themselves (e.g., antisocial behavior, substance abuse, psychopathology) also are related to increased risk for delinquency,\(^{53}\) as are higher rates of residential instability and paternal unemployment.\(^{54}\) Of course, parents also 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.\(^{55}\)

Peer influence probably plays an even more important role in adolescent crime,\(^{56}\) and indeed may be the strongest risk factor for delinquent behavior.\(^{57}\) Adolescence is usually described as a period in

\(^{52}\) Gorman-Smith et al., supra note 49, at 187-88 (noting, however, that even children of “exceptionally functioning” families might be at slightly higher risk for minor chronic offending if from poorer neighborhoods).

\(^{53}\) Benjamin B. Lahey et al., *Psychopathology in the Parents of Children with Conduct Disorder and Hyperactivity*, 27 J. AM. ACAD. CHILD & ADOL. 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.”).


\(^{55}\) Brenda Bryant, The Neighborhood Walk: A Study of Sources of Support in Middle School Children From the Child’s Perspective, 50 (3 Serial No. 210), MONOGRAPHS SOC’Y RESEARCH CHILD DEV. (1985).

\(^{56}\) 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. & CRIMINOL. 360, 393 (1991) (finding that “the incidence of co-offending decreases with age”).

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

**Schools** also provide an important context for adolescent behavior. Poor academic performance is related to the prevalence, onset, and seriousness of delinquency. Additionally, low school


60 Berndt., supra note 58, at 615 (“in both studies conformity to peers on antisocial behavior increased greatly between third and ninth grades, and then declined.”); Scaramella et al., supra note 57, at 189.

61 Loeber et al., supra note 51, at 7-8.


commitment, low educational goals, and poor motivation place children at risk for offending.\(^6^4\) Other school characteristics that have been linked to antisocial behavior include low levels of teacher satisfaction, poor student-teacher relations, the prevalence of norms that support antisocial behavior, poorly defined rules and expectations for conduct, and inadequate rule enforcement behavior.\(^6^5\)

All of the foregoing patterns of behavior develop in neighborhood contexts.\(^6^6\) In general, living in a high poverty or low-socio-economic status neighborhood has consistently been linked to delinquency.\(^6^7\) Thus, one study found that impulsive boys in poor neighborhoods were at great risk for offending but that impulsivity posed little risk for delinquency for boys in better-off neighborhoods.\(^6^8\) Yet it is also important to recognize, as Jeffrey Fagan has noted, that “[s]ocial cohesion among individuals” can mitigate the effect of poverty.\(^6^9\) Weak social controls and lack of community structure (disorganization) allow delinquent behavior to go on unchecked,\(^7^0\) but strong social controls and parenting counter


\(^6^8\) Donald R. Lynam et al., *The Interaction Between Impulsivity and Neighborhood Context on Offending: The Effects of Impulsivity are Stronger in Poorer Neighborhoods*, 109(4) J. ABNORMAL PSYCHOLOGY 563, 570 (2000).


\(^7^0\) See ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* 21 (1993); Neighborhoods and Violence Crime; Delbert S. Elliot et al., *The Effects of Neighborhood Disadvantage*
the risk for delinquent behavior even in the poorest urban neighborhoods.\textsuperscript{71}

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 produced “unequivocal evidence that media violence increases the likelihood of aggressive and violent behavior in both immediate and long-term contexts.”\textsuperscript{72} Further, highly aggressive individuals show greater effects of exposure to media violence than less aggressive individuals.\textsuperscript{73} Research also has shown that children’s perceptions of the violence as “lifelike” or “real” and their identification with aggressive characters is positively related to aggressive behavior.\textsuperscript{74}

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, with less freedom to engage in “socially acceptable” outlets for risky behavior such as legal gambling, drinking, and risky financial investments. Second, minors are less integrated into the prosocial responsibilities,
roles, and relationships of adulthood. 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.

_Treating Delinquent Behavior and Preventing Recidivism_

Two preliminary points about interventions designed to reduce juvenile offending are crucial. First, the overwhelming finding of researchers is that incarceration in prison or jail is less effective at reducing recidivism than most alternative programs. As Lipsey and Cullen’s recent comprehensive meta-review of the empirical studies concluded, “research does not show that the aversive experience of receiving correctional sanctions greatly inhibits subsequent criminal behavior. Moreover, a significant portion of the evidence points in the opposite direction—such sanctions may increase the likelihood of recidivism.” A second finding of the meta-review was 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.” These findings make sense if offending is in some non-

75 _Sampson & Laub, supra_ note 70, at 21 (stating that “changes that strengthen social bonds to society in adulthood will lead to less crime and deviance”).


trivial respect due to context; if so, coercive interventions that take
place in detention are not likely to address root causes of crime.

With these points in mind, consider some of the more
prominent successful intervention programs. Among the most
innovative are those aimed at developing effective social information
processing. Based on a number of pioneering studies, 79 Kenneth
Dodge and his colleagues developed the Fast Track Program, an
intervention aimed at preventing serious conduct problems in school-
age children and adolescents. 80 The Program targeted children who
began their antisocial behavior when they were very young---so called
“life-course persistent” or “early starters.” 81 High-risk children were
identified through screening in kindergarten and participated in a
number of programs, including child social skills groups, parent
training groups, and parent-child sharing that promoted positive
parent-child relationships. During a second, adolescence phase of the
intervention, researchers targeted peer relations, academic
performance, social skills and identity issues, and family/adolescent
relations. Evaluation of the intervention revealed that by the end of
third grade, teachers reported significant reductions in aggressive
behavior in the classroom; by the end of grades 4 and 5, significant
intervention effects were noted among high risk children both with
respect to improvements in their social competence and reductions in
their involvement with deviant peers and delinquent behavior. 82 By
grade 9, the evidence indicated that it was the highest risk children
who were most positively responsive to the intervention, resulting in
the prevention of 75% of potential conduct disorder cases. 83

79 See Nicki R. Crick & Kenneth A. Dodge, A Review and Reformulation
of Social Information-Processing Mechanism’s in Children’s Social Adjustment,
117 PSYCHOLOGICAL BULL. 74 (1994); Michael J. Chandler, Egocentrism and
Antisocial Behavior: The Assessment and Training of Social Perspective-Taking
Skills, 9 DEV. PSYCHOLOGY 326 (1973); GEORGE SPIVACK ET AL., THE PROBLEM-
SOLVING APPROACH TO SOLVING REAL LIFE PROBLEMS (1976).

80 Nancy M. Slough et al., Preventing Serious Conduct Problems In
School-Age Youth: The Fast Track Program, 15 COGNITIVE & BEHAV. PRACTICE 3
(2008).

81 See generally Moffitt, supra note 62, at 676 (contrasting “life-course
persistent offenders” with “adolescent-limited offenders”).

82 Slough, supra note 80, at 8-9.

83 Id. at 9.
A second intervention strategy for at risk youth, developed by James Alexander and Bruce Parsons, is rooted in family systems theory and principles of behavioral change. Dubbed Functional Family Therapy (FFT), this program focuses on changing family-based risk and protective factors that are associated with delinquent behavior, including clarity of family communication, reciprocity in family relations, and contingency contracts between parent and child aimed at modifying maladaptive and delinquent behavior. When this relatively short term intervention program is competently delivered, felony recidivism rates have been shown to decrease by nearly 40 percent and a net benefit of over $10 is realized for every dollar spent on the program due to avoidance of costs typically associated with crime.

Another highly successful program, Multisystemic Therapy (MST), was developed by Scott Henggeler and his colleagues. Aimed at reducing recidivism risk and decreasing rates of secure detention and out-of-home placement in chronic, violent juvenile offenders, MST involves a primarily family-based intervention that changes how juveniles function in various settings, 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.

---


88 Id.
Empirical studies have demonstrated that long-term recidivism rates among serious juvenile offenders who completed MST are substantially lower (22.1%) than the recidivism rates among a comparison group of serious offenders who completed individual therapy (71.4%). Moreover, a follow-up study almost 14 years later revealed that these positive effects were durable--the MST group had 57% fewer arrests in comparison to the individual therapy group. 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. However, when properly implemented, MST can be both clinically and cost effective, resulting in a benefit-to-cost ratio of $28.33 per dollar spent on MST.

MST targets youngsters who are able to stay in their homes with their biological or legal parents. For those youngsters who do not have parents who are willing, able, or available to work with them in their own home, an alternative multisystems-oriented intervention has been developed—Multidimensional Treatment Foster Care (MTFC). MTFC shares many of the same assumptions about the causes and consequences of human behavior with MST, including the importance of family and peer influences. However, in contrast to MST, which intervenes with delinquent youngsters and attempts to prevent the need for home removal, MTFC therapists work with foster parents and biological parents who have lost custody of their children work in an effort to facilitate the youngsters’ eventual transition back


90 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 PSYCHOLOGY 445, 448 (2005).


to their family of origin. 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.\(^{94}\)

A conservative depiction of the research is that intervention strategies have improved to the point that modern multisystemic interventions aimed at risk management can reduce recidivism risk from around 70-80% percent to 20-50%.\(^{95}\) These programs also represent an estimated net savings to taxpayers of between $7,000 and $18,000 per child in lieu of more traditional placements.\(^{96}\) 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.

### III. The Implications of Science for Juvenile Justice

The empirical information presented in Part II establishes that juveniles are less capable of mature judgment, impulse control and foresight than adults, and that community-based interventions designed to reduce criminal tendencies can work, and do so more effectively than detention in jail or prison. One could draw a number of conclusions about the legal implications of these findings. Using the categorizations introduced earlier, this part of the article 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.

---

94 Id at 630.

95 Borduin, supra note 89, 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%); Schaeffer & Bourduin, supra note 90, at 448 (indicating that over 13 years recidivism rate for those who completed MST was 50%, compared to 81% for those who did not).

96 Henggeler et al., supra note 91, at 130; Marsha Swenson & Melanie Duncan, Multisystemic Therapy: Clinical Outcome and Cost Savings 1, 2 available at www.mstservices.com/outcomes_1a.pdf.
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 be subject to 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 punishment would be mitigated under the diminished retribution model, which assumes that juveniles are less culpable than adult offenders to a legally relevant extent. The individual prevention vision is, in contrast, 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 criminal recidivism 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, 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.

The Overbreadth of the Rehabilitation Vision

As noted in Part I, 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. But the first assumption is incorrect for all but the youngest offenders, and the second cannot, by itself, justify a deprivation of liberty. Furthermore, even if treatability alone could be

---

a justification for coercive intervention, such a standard 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 doubtless met by all but the youngest offenders. It turns out that the old common law rule—that children under seven cannot be held responsible for their crimes but that children over that age can be—comes close to reflecting the empirically correct view of children’s mental capacities. At their youngest, children either do not intend to harm or, if they do, do not appreciate its wrongfulness. But, as Part II indicated, while children from seven through mid-adolescence are certainly 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, as the diminished retribution model itself recognizes, 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 the 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; in fact, despite their youths-as-innocent polemic, those who developed the juvenile court were probably motivated even more by their perception that youth are unusually malleable and vulnerable, and thus are both more treatable and in need of isolation from adults.

99 See generally JUVENILE JUSTICE PHILOSOPHY: READINGS, CASES AND COMMENTS 551 (Frederic L. Faust & Paul J. Brantingham eds., 1974) (explaining
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 detention in jail or prison. The rationale of *O'Connor v. Donaldson*, 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.” 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.” 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 are not 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. But the parens patriae power rarely justifies a deprivation of liberty, if only because such a deprivation is more likely to hurt than help. Thus, exercise of this power is best carried out through other mechanisms, including dependency courts, compulsory education laws, welfare rules, and the like. While the absence of these alternatives at the turn of the

---

100 *422 U.S. 563 (1975).*

101 See id. at 575.

102 Id.

103 See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“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.”).
The twentieth century may explain why the parens patriae authority was eagerly sought by the original juvenile court, 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 between 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.

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, they are meant to implement the state’s police power through 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 don’t, 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.

The diminished retribution vision is meant to redress that problem. Pointing to the research on differential maturity and judgment canvassed in Part II, 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, Franklin Zimring and most recently by Elizabeth Scott and Laurence Steinberg, this view has even influenced the Supreme Court. In its decision in *Roper v. Simmons* exempting individuals under 18 from the death penalty, the Court pointed to the psychological and neurological research suggesting that juveniles are immature in concluding that, compared to adult offenders, juveniles who offend demonstrate “lesser culpability.”

The diminished retribution model concededly does support the holding in *Simmons*, because execution should be reserved for the worst of the worst, and no youth under 18, regardless of how egregious the killing, fits into that class of individuals. 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. While they are not as mature as adults, their lack of maturity does nothing to mitigate their culpability under criminal law doctrine as it exists today.

Advocates of the diminished retribution model often analogize the immaturity of juveniles to the impairment caused by mental illness. But 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 disability 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

---

104 American Bar Ass’n, Standards, Standards Relating to Juvenile Delinquency and Sanctions (1980).


106 ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE: ADOLESCENT DEVELOPMENT AND THE REGULATION OF YOUTH CRIME* (2008). See also Redding, *supra* note 77, at 389 (“Punishment that is proportional to the offender’s culpability should be at the heart of the justice system.”).

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,”108 the Sentencing Commission’s policy statement also declares that mental and emotional conditions are not “ordinarily relevant” in determining whether a sentence should be outside the Guidelines’ ranges.109 In practice, as Michael Perlin and Keri Gould found in their study of federal cases, “[d]epartures from the Guidelines based on mental disability have been few, and more often than not, have come in cases in which a defendant’s mental state more closely approximates that of a potentially successful insanity plea.”110 In the states as well, mental illness often turns out to be an aggravator rather than a mitigator.111

The courts are surely sometimes too severe in such cases. But before mental disability short of psychosis can be considered a mitigator in a retributive system it should result in substantial difficulty in appreciating the wrongfulness of one’s crimes or substantial irrationality—in other words, it should cause impairment akin to that demanded by the most liberal insanity formulations in existence today.112 Otherwise, huge numbers of “ordinary” offenders would be entitled to a sentence reduction, among them offenders


109 Id. § 5H1.3.


suffering from depression, impulse disorders, mild mental retardation, and even psychopathy and other types of personality disorders. Consistent with this reasoning, many courts have held that youth is never a dispositive mitigator at sentencing.\footnote{U.S. v. Jackson, 547 F.3d 786 (7th Cir. 2008) (\textit{Gall} does not require district courts to always weigh youth as a mitigating factor in sentencing); Lashley v. State, 895 N.E.2d 740 (Ind. App. 2008) (although a defendant’s youth can be a mitigating factor under certain circumstances, it is not necessarily a significant mitigator). 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. See, e.g., Manduley v. Sup.Ct. San Diego Cty., 27 Cal.4th 537 (Cal.Sup.Ct. 2002); State v. Behl, 564 N.W.2d 560 (Minn. 1997).}

One can plausibly argue, of course, that despite its likely massive impact, a more generous mitigation scheme is precisely the dispositional calculus we should have. Perhaps lesser forms of adult disability, and therefore 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 of psychiatric units or special therapy programs 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 and situational variables, but because their character is undeveloped, in a state of flux, and very likely will change as they reach adulthood; they further contend that this mitigation should take place in a system separate from the adult criminal justice system.\footnote{SCOTT & STEINBERG, supra note 106, at 131-39.}

Note, however, that to reach this point one has to depart radically from traditional understandings of culpability; unless the scope of mens rea, character and affirmative defense doctrines are expanded substantially, typical adolescent immaturity isn’t enough of an impairment to warrant a reduction in sentence.\footnote{The narrow scope of mens rea and affirmative defenses such as self-defense has already been discussed. See supra text accompanying note 98. Character evidence is not a defense at trial; at most it provides mitigation at sentencing and, as indicated above, it rarely mitigates even there. The examples of }
were, there is still no reason to try juveniles separately, as opposed to adjudicating them in adult court and then shunting them into a different dispositional system (an approach that one prominent advocate for the diminished responsibility approach has candidly admitted probably makes as much sense from a diminished responsibility perspective\textsuperscript{116}). 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 disposition–probably most of those who claim to adopt a diminished retribution view\textsuperscript{117}–are in character mitigation that are proffered by Professor Scott (e.g., mitigation based on reputation, restitution, and remorse), see Scott & Steinberg, supra note 25, at 828 n. 119, are different in kind from the type of mitigation that an immaturity argument posits. See State v. Heinemann, 920 A.2d 278, 297 (Conn. 2007) (taken to “its logical conclusion” the argument that immaturity should be recognized as a defense to crime 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.”).

\textsuperscript{116} Barry C. Feld, Juvenile and Criminal Justice Systems’ Responses to Juvenile Violence, 24 CRIME & JUSTICE 189, 245 (1998) (“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.”).

\textsuperscript{117} For instance, Scott and Steinberg state that “punishment calibration should be based on the seriousness of the offense” and “the culpability of the offender,” SCOTT & STEINBERG, supra note 106, at 231 but 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.” Id. at 147-48. They devote an entire chapter to describing research suggesting the worth of community-based programs and the criminogenic effects of detention, id. at 181-222, thus appearing to endorse the former approach despite its potential conflict with
effect abandoning the premise of that model, and instead moving toward the individual prevention vision of juvenile justice, to which we now turn.

The Theoretical Basis for Individual Prevention—Relative Undeterrability and the Biopsychosocial Vulnerabilities of Youth

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. There 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. While on the surface seemingly far afield from juvenile justice, this decision, once dissected, provides a provocative prism through which to view it.

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 proportionality principles, and are willing to dispense with proportionality analysis altogether in the case of “severely antisocial youths” who, they say, represent a small portion of juvenile offenders, id. at 249, yet who also commit a disproportionate amount of the crime.


119 521 U.S. at 361-62.
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 undeterred by criminal sanctions, society may protect itself through preventive action. 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 dangerous people who are insane does not denigrate their autonomy, because they are presumed to have none.

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”), are more deterred than the latter group (they usually plan their crimes and try to avoid apprehension), and are viewed as autonomous (as indicated by the fact that they are virtually never found insane). So long as the individuals detained under these so-

120 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) (“‘civil’ deprivation of liberty is permissible only as a gap-filler, to solve problems the criminal process cannot address”).

121 Eric S. Janus, Preventing Sexual Violence: Setting Principles Constitutional Boundaries on Sex Offender Commitments, 72 IN. L. J. 157, 212 (1996) (“The principle of criminal interstitiality would allow civil commitment . . . only if the individual’s mental disorder rendered him or her unamenable to criminal prosecution.”).

122 See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL, 340-41 (4th ed. Text- Revised 2000) (placing the “paraphilias” in Axis II, which describes personality disorders, as compared to Axis I, which includes, inter alia, the psychoses).

123 See Bruce J. Winick, Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis, 4 PSYCHOLOGY, PUB. POL. & L. 505, 524 (1998) (“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.”).

124 Id. at 525 (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.”).
called sexual predator statutes are “dangerous beyond their control,” their detention on dangerousness grounds is permissible, the Court decided. Further, in the later case of 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.

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. 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. Second, implicit in this first

---

125 521 U.S. at 358.


127 W. LAWRENCE FITCH, SEX OFFENDER COMMITMENT IN THE UNITED STATES: LEGISLATIVE AND POLICY CONCERNS (Robert Prentky et al., eds., 2003) (only 12% of those committed are diagnosed with a “serious mental illness,” the rest have personality disorders like paraphilia and antisocial personality disorder).

128 521 U.S. at 368 (“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
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.\textsuperscript{129}

With these caveats, \textit{Hendricks} makes clear that, as a constitutional matter, a system based on individual prevention goals can exist separately from the criminal justice system \textit{and} separately from a prevention system for people with serious mental illness. The decision makes inadequate control of behavior—what this article will call “relative undeterrability”—the principal determinant of whether a preventive system is justified in a particular instance. 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 or consequences of their criminal acts 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 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 II, 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, \textit{Hendricks} requires individualized determinations of inadequate control before government intervention may take place, \textit{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.”} (emphasis added).

\textsuperscript{129} Id.
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 II, “impulsivity is a normative behavior during normal childhood development.” 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. 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 v. Simmons provides less support for that view than it does for the view that juveniles are less deterriable than the “ordinary recidivist.” In exempting juveniles from the death penalty, Simmons 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.” And while the lesser culpability of juveniles is, under current law, only sufficiently mitigating to avoid the worst punishments (and, according to recent lower court cases, does not even allow juveniles to evade life without parole), the lesser deterriability of juveniles is not offense or sentence specific: indeed, if the Court is right in its suggestion that the death penalty

---

130 See supra text accompanying note 48. See also June Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REV. 339, 344 (1992) (“reckless behavior becomes virtually a normative characteristic of adolescent development”).

131 SCOTT & STEINBERG, supra note 106, at 140-41.

132 543 U.S. at 571.

does not have “a significant or even measurable deterrent effect on juveniles,” juveniles are presumably relatively less likely to be deterred by any specific criminal punishment.

As the Simmons 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.

The boy in this scenario clearly can be said to demonstrate, as Professor Scott puts it, “immaturity of judgment.” 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.

134 543 U.S. at 571.

135 Elizabeth Scott, Criminal Responsibility in Adolescence: Lessons from Development Psychology, in Youth on Trial, supra note 29, at 306.

136 Id. See also Scott & Steinberg, supra note 106, at 132.
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 children are so volitionally impaired that they are analogous to those found insane as a result of an irresistible impulse; in short, 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 caselaw construing these cases legitimize a more expansive type of preventive regime, one that can easily be applied 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 we apply to adults. The diminished responsibility model is thus easily characterized as merely a softer version of adult court, and smooths the path for mechanisms, like transfer and blended sentences,\[^{137}\] that treat the large number of juveniles who commit adult-like crimes like 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, “[a]dult

\[^{137}\] Transfer statutes permit trial of juvenile offenders as adults, while blended sentences allow adult-type sentences to be imposed on juveniles who reach majority. Transfer of juveniles increased 70% between 1985 and 2000. Redding, \textit{supra} note 77, at 377. At least 20 states have blended sentencing laws. Redding & Howell, \textit{supra} note 24, at 151.
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."

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 does not necessarily mean, of course, that the individual 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 that come into play when a juvenile has caused or is likely to cause harm to others.

IV. 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, because of the juvenile’s antisocial actions, he or she 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.

Proposals to adopt this sort of regime have given rise to several objections, which can be boiled 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 norm and creates disrespect for the law; (5) fails to produce 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

138 SCOTT & STEINBERG, supra note 106, at 281.
lack the same force. Nonetheless, addressing them 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 and at the same time helps to clarify its practical benefits.

**Evaluating Risk**

The objection most frequently lodged against any regime based on prevention is that we are not sufficiently adept at evaluating risk or at managing it 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.\(^{139}\) And when it comes to treatment programs, many still adhere to Robert Martinson’s famous conclusion in 1974 that “nothing works.”\(^{140}\)

There are several responses to these concerns, which have been detailed elsewhere in work examining the legitimacy of preventive detention as a general matter.\(^{141}\) 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.\(^{142}\) More importantly,

---


\(^{140}\) Robert Martinson, What Works?-Questions and Answers about Prison Reform, 35 The Public Interest 22 (1974).


\(^{142}\) Improvements in treatment regimes were described in Part II, *infra* text accompanying notes 74-93. With respect to risk assessment, a number of instruments have been developed specifically for the juvenile context. For instance, the *Structured Assessment of Violence Risk in Youth* and the *Early Assessment Risk List* are structured professional judgment risk assessment instruments that can provide relatively precise estimations of risk. *See* Randy Borum et al., *MANUAL FOR THE STRUCTURED ASSESSMENT OF VIOLENCE RISK IN YOUTH (SAVRY)* (2007); Leena Augimeri et al., *Early Assessment Risk List for Boys: Earl-20b, Version 2* (2001). 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 Amenity Inventory*. Robert Hoge & Daniel Andrews, *The Youth Level of Service/Case Management Inventory Manual* (2006); John F. Edens et al., *Youth Psychopathy and Criminal Recidivism: A Meta-Analysis of the Psychopathy Checklist Measures*, 31 L. & HUM. BEHAV. 53
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. Even if they did, 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. This jurisprudential sloppiness is exacerbated if one is led to conclude, based on the research reported in Part II about the extent to which criminal conduct is attributable to ecological factors, that the law’s 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 explained in more detail below, preventive interventions must continually be justified through periodic review. In contrast, periodic review is inconsistent with the notion of punishing a person for past conduct.

---

\[143\] The best effort in this regard to date comes from Paul Robinson, who describes the high level of agreement regarding just deserts found in a number of students 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 even among the core crimes, that punishment will also depend upon a majority vote, and that the absolute punishment will still vary substantially depending on the maximum penalty (e.g., the death penalty v. 15 years) that one is willing to countenance, id. at 37-38 , which means that the actual time spend in prison can vary enormously depending on the legislative and judicial decisionmakers.
Finally, the cost of an error 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 Part II explained, 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.”¹⁴⁴ This language places three 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, in particular 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. Third, to ensure these requirements are met, the individual is entitled to periodic review, at which the state must show the individual continues to pose the requisite risk. While *Hendricks* did not have occasion to address the first limitation, recall that the latter two limitations were explicitly adopted in that case.¹⁴⁵

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 interventions in the community can often be successful with this group but because the duration of any detention that does occur will be inherently curtailed by the


¹⁴⁵ 521 U.S. at 368. For further discussion of these three limitations, see *Minding Justice*, supra note 112, at 111-115.
limitations of juvenile court jurisdiction. 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 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 and interventions should be proportionate to risk. The nature of these limitations have been discussed at length elsewhere.

**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 both the type of predicted harm that authorizes preventive detention (only crimes, or any

---


behavior that might be called antisocial?), and 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?).

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 intervention 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.

The second question, which Hendricks did not address, requires a more elaborate answer. As a theoretical matter, a preventive regime does not require proof of 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, civil or criminal, that deprives individuals of liberty or property must be sufficiently clear that it gives potential violators and government officials sufficient notice of the circumstances under which it operates. A vague law both chills innocent behavior by citizens and increases the potential for abuse by officials. 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

---

148 521 U.S. at 368.

149 See Connally v. General Construction 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.”).

individual prevention regime should require triggering conduct as a curb on government power.

There are at least three other reasons, besides limiting official power, for an act requirement as a predicate for preventive intervention. First, proof of an antisocial act reduces the potential for mistake by providing evidence useful to the dangerousness determination. 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 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 truancy or “incorrigibility.” That type of low threshold might be permissible if juveniles were really treated like innocents and interventions were trivial. But when serious restrictions on freedom are possible, intervention should be prohibited unless the state can show that the individual has committed a criminal act identified by statute. This position is also consistent with the individual prevention model’s rejection of parens patriae as a basis for intervention by the juvenile justice system.

Corrupt or discriminatory decisions can occur not only at the front-end of the intervention process but also during the dispositional stage, especially during periodic review. A retributive regime avoids this particular problem, because individuals serve their sentence regardless of the risk they present and offenders who commit the same crime serve roughly the same sentence. But these limitations on discretionary decision making at the back-end are effectively nullified by discretionary actions taken at the front-end in a punishment regime. At this initial stage, prosecutors are granted extremely broad discretion in making charging decisions, a practice that can produce wildly disparate results and is not subject to judicial or any other type

---

of monitoring (unlike decision-making based on risk assessment, which is relatively transparent to the extent it relies on structured clinical judgment or actuarial instruments).

It is also 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. A system that stresses consistency based on risk rather than culpability may be more equitable, particularly given the malleable nature of the latter concept.

**Dehumanization**

A third objection to prevention regimes—one which was 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 and our entire society are 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. Preventive regimes limited to the incapacitation of those with extreme cognitive or volitional impairment do not threaten this imperative because they preventively 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 what they might do rather than what they have done, the greater the insult to the moral claim that individuals control their fate and actions.

---

152 Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("so 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.").

153 See supra note 142.


This dehumanization concern is difficult to evaluate because it is so abstract. It seems to be most potent when the government creates two systems of liberty deprivation for those who commit antisocial conduct—one designed to punish and the second designed to preventively detain—and then chooses the latter option. In this “two-track” situation, exemplified by the sexual predator systems that co-exist with the adult 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.  

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 dangerousness, 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, and thus 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, there is a widespread perception that children are less autonomous than adults. 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.

---

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 note, correctly, that a preventive system would not always impose the “punishment” demanded by just desert principles. It could well impose a sanction that, when viewed from the desert perspective, is too lenient, thus supposedly failing to vindicate either the interest of either the victim or society in expressing its 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, we could see an increase in vigilante justice, a weakening of norms regarding antisocial behavior, and even a burgeoning belief that we are not responsible for our actions, all developments that might make citizens less compliant with societal prohibitions.\footnote{157}{Paul H. Robinson & John M. Darley, The Utility of Desert, 91 NW. U. L. REV. 453, 471-77 (1997).}

These latter claims are speculative even when applied in the adult context.\footnote{158}{Christopher Slobogin, Is Justice Just Us?: Using Social Science to Inform the Criminal Law, 87 J. CRIM. L. & CRIMINOL. 315, 326-27 (1996).} If the preventive approach is limited to the juvenile setting where, as just noted, the public is not as concerned about desert,\footnote{159}{See supra text accompanying note 135. See also SCOTT & STEINBERG, supra note 103, at 279-81 (“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.”); Barry Krisberg & Susan Marchionna, National council on Crime and Delinquency, attitudes of U.S. Voters Toward Youth Crime and the Justice System (2007) available at www.nccd-crc.org/nccd/pubs/zogby_feb07.pdf (poll finding that 91% of the respondents believe that future criminal acts by youth can be prevented by rehabilitation and treatment services; 68% do not think that incarcerating youth in adult facilities has a deterrent effect on youth; and 80% believe crime costs will be less in the future if money is spent on rehabilitative and treatment services now). 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 CRIMINOL. & PUB. POL. 547, 549 (2004).} they 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 conviction, some intervention takes place after conviction, 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 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 is also worth noting that even some adult sentencing regimes that purport to be desert-based are willing to contemplate non-prison dispositions for low-risk felons.\textsuperscript{160}

\textit{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 plausibility to it. 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.\textsuperscript{161} 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.

\textsuperscript{160} The American Law Institute’s mammoth project to revise its sentencing provisions is currently considering a proposal so permitting. See ALI Council Draft, Penal Code: Sentencing, Council Draft No. 2, Section 6B.09(3). 39-40 (2008) (sentencing commissions can construct presumptive guidelines that permit low risk felons to avoid prison entirely, assuming a non-prison term is not too lenient under desert principles).

\textsuperscript{161} Barry Glassner et al., \textit{A Note on the Deterrent Effect of Juvenile v. Adult Jurisdiction}, 31 SOCIAL PROBS. 31 219, 220-21 (1983) (recounting interviews with juveniles who said they were less likely to commit crime after age 16, when they could be treated as adults).
This perhaps counterintuitive conclusion derives from the extensive literature showing that even adult criminals are not affected by legislative increases or decreases in sentences.\(^{162}\) Whether because they are not aware of the sentencing differential, are governed by (im)moral rather than legal considerations, do not believe they’ll be caught, or simply ignore their best interests due to social, situational and chemical influences, most criminals “are undeterred by harsher punishments.”\(^{163}\) If that is true for most adults, than 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 it is possible to get. 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 does the threat of legal sanctions,\(^{164}\) as well as research finding that, contrary to their statements, youth are not deterred by prison,\(^{165}\) and are less likely to forswear crime than juveniles confined in juvenile facilities.\(^{166}\)

---


\(^{166}\) Lawrence Sherman, *Defiance Deterrence and Irrelevance: A Theory of the Criminal Sanction*, 39(4) J. RESEARCH IN CRIME & DELINQ. 445 (1993). The most substantial study concluding that harsher sanctions do have a significant effect on juvenile offending is based on finding a 23% increase in crime by 18 year-olds in states with a relatively harsh juvenile system and a relatively lenient adult system. Steve Levitt, *Juvenile Crime and Punishment*, 106(6) J. POLITICAL ECON. 1158 (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, *supra* note 74, rather than the result of a calculation by 18 year-olds that that their penalty (in adult court) will be relatively more lenient now that they are subject to adult jurisdiction.
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.”167 Others have echoed this view.168

This assertion about the character-building function of punishment is no more convincing, however. Research shows that families, peers, churches, schools and other institutions are much more effective than the criminal law at teaching citizens the difference between right and wrong.169 And 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 is a “blunt instrument for doing so.”170 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. 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


168 See, e.g., Paul H. Robinson, A Failure of Moral Conviction? 117 PUBLIC INTEREST 40, 44 (1994) (if a preventive approach were adopted, criminal justice might being 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.”)


170 SLOBOGIN, supra note 112, at 163.
pay.” The prevention model says: “You have done something harmful, which you must not let happen again.”

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. This claim is that doing one’s time instills dignity and allows the released offender to re-enter society with a guilt-free conscience. That process compares favorably, it is argued, to an indeterminate disposition, which can be demoralizing and breed cynicism.

There is anecdotal evidence supporting the latter view. Yet there is also anecdotal evidence supporting the view that risk management programs can instill a greater sense of worth. Because these 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 potential to be law-abiding. There is insufficient research comparing the two regimes to do anything but speculate on these points.

171 Id.


173 Connie Stivers Ireland and JoAnn Prause, Discretionary Parole Release: Length of Imprisonment, Percent of Sentence Served, and Recidivism, 28 J. CRIME & JUSTICE 27 (2005) (“discretionary 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”); Bert Useem et al., Institute for Social Research - University of New Mexico, Sentencing Matters, But Does Good Time Matter More? 6 (June 1996) (noting that corrections officials have stated that “prisons are safer, more orderly, and more productive when inmates participate in programs”).

174 See, e.g., Nora V. Demleitner, Good Conduct Time: How Much and For Whom?: The Unprincipled Approach of the Model Penal Code: Sentencing, ___ U.Fla.L.Rev. ___ (2009) (noting that good time credits can dramatically increase participation in rehabilitation programs, provide 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.”).
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. The key policy question about such expenditures is not whether they improve public safety through incapacitation or rehabilitation; 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.

That seems unlikely in the juvenile setting. As recounted in Part II, compared to prison, community intervention programs for juveniles are not only better at reducing recidivism but less costly. And rehabilitation of juveniles is likely to be more cost-effective than rehabilitation of adults even if expenditures are the same on a per capita basis, 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 laws authorized by Hendricks, providing still another distinction between those laws and the prevention-oriented juvenile justice system proposed here. If we are willing to spend money on treatment and preventive intervention, we should make sure to spend a disproportionate amount of it in the juvenile justice system.


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.

Although the individual prevention approach to juvenile justice is preferable to other approaches, it could be reconciled with them. For instance, one can imagine a system that reconciles all four options discussed in this article. The rehabilitative model, based on an assumption of innocence and the super-malleability of children, could govern disposition of children through age 10. The diminished retribution model could apply to youth from that threshold through 17 or 18 (or 20 or 25, 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. But disposition of those teenagers who remained in the juvenile justice system would be governed solely by prevention-oriented risk assessments.

This latter, hybrid framework is similar in concept to the system that exists in a number of jurisdictions today. But the arguments presented in this article push against such a hybrid. An emphasis on prevention should lead to the elimination, not just the reduction, of transfer jurisdiction and “blended” sentencing. Juvenile offenders should not receive sentences even partially based on retributive principles because if they achieve public safety and treatment goals they do so only serendipitously, while offering too much of a temptation to fold juvenile justice into the adult criminal justice system.

---

177 Daniel Filler, *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.”).

178 Redding & Howell, *supra* note 24, at 146.
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. The end result will be a more effective, just and conceptually coherent juvenile justice system.