

# TREATING JUVENILES LIKE JUVENILES: GETTING RID OF TRANSFER AND EXPANDED ADULT COURT JURISDICTION

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## I. INTRODUCTION

Between 1979 and 2000, every state enacted provisions that eased transfer of juveniles to adult court.<sup>1</sup> Numerous states increased the types of crimes that trigger transfer and most also lowered the age at which it could occur; thus, for instance, a majority of states passed laws permitting waiver of juvenile court jurisdiction for ten-year-olds charged with murder, and many other states created a presumption of transfer for juveniles older than twelve or thirteen who committed a serious or second felony.<sup>2</sup> A third of the states also enacted statutes authorizing prosecutorial waiver or “direct file,” while the number of jurisdictions that adopted “automatic” transfer regimes for designated crimes (rather than leaving that decision to the discretion of the juvenile court or the prosecutor) more than doubled to thirty-one.<sup>3</sup> Perhaps even more significant

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1. Gail B. Goodman, *Arrested Development: An Alternative to Juveniles Serving Life Without Parole in Colorado*, 78 U. COLO. L. REV. 1059, 1071–72 (2007).

2. ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 97 (2008).

3. Richard E. Redding & Barbara Mrozowski, *Adjudicatory and Dispositional Decision Making in Juvenile Justice*, in *JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT AND INTERVENTION* 232, 237 (Kirk Heilbrun et al. eds., 2005); *see also* PATRICK GRIFFIN ET AL., *OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS IN CRIMINAL COURTS: AN ANALYSIS OF STATE TRANSFER PROVISIONS* 2 (1998), available at <https://www.ncjrs.gov/pdffiles/172836.pdf>.

than these changes to transfer jurisdiction, thirteen states lowered the age at which juvenile court jurisdiction ends from eighteen to either fifteen or sixteen.<sup>4</sup> In New York State alone, this move led to the adult prosecution of over 45,000 youths aged sixteen and seventeen in 2010.<sup>5</sup>

As a result of this legislative flurry, transfers of juveniles to adult court shot up at least 70%,<sup>6</sup> and the number of juveniles under eighteen prosecuted as adults skyrocketed from somewhere between 10,000 and 15,000 a year to 250,000 a year.<sup>7</sup> While in the past several years some states have reduced the scope of transfer or have raised the age for criminal court jurisdiction,<sup>8</sup> the latter number has stayed fairly constant since 2000.<sup>9</sup> Furthermore, even those juveniles who remain in juvenile court can be subjected to “blended” sentencing, a dispositional type of transfer system that permits imposition of adult sentences on individuals convicted in juvenile court, either immediately after their conviction or when they reach eighteen.<sup>10</sup>

Borrowing heavily from a book I co-authored with Mark Fondacaro, *Juveniles at Risk: A Plea for Preventive Justice*, this Article argues that transfer should be abolished and that juvenile court jurisdiction should be expanded, not reduced.<sup>11</sup> Treating juvenile offenders like adult offenders wastes resources, damages juveniles, and decreases public safety.<sup>12</sup> Offenders under the age of

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4. Redding & Mrozowski, *supra* note 3, at 238.

5. Mosi Secret, *New York Judge Seeks New System for Juveniles*, N.Y. TIMES (Sept. 20, 2011), <http://www.nytimes.com/2011/09/21/nyregion/new-yorks-chief-judge-seeks-new-system-for-juvenile-defendants.html>.

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

7. Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 97 (2000). The pre-1979 estimate of juveniles tried as adults is based on the number of juveniles typically subject to judicial waiver—the primary or only means of authorizing adjudication of juveniles in adult court prior to 1979—over the past decade. See GRIFFIN ET AL., *supra* note 3, at 10 (estimating that judicial waiver hit a “historic peak” in 1994, with 13,100 juveniles transferred in that year).

8. Elizabeth S. Scott, Miller v. Alabama and (Past and) Future of Juvenile Crime Regulation, 31 LAW & INEQ. 535, 548–50 (2013) (reporting that Washington repealed its automatic transfer statute in 2009, that Connecticut raised the age of criminal court jurisdiction from sixteen to eighteen in 2007, and that Illinois repealed a provision mandating adult prosecution for fifteen-year-olds charged with selling drugs near a school or housing project in 2005).

9. See *id.* at 538–40. As late as 2007, the Office of Juvenile Justice and Delinquency Prevention estimated that approximately 247,000 people under eighteen were referred to criminal court in that year. GRIFFIN ET AL., *supra* note 3, at 21. Most of these individuals do not go to adult prisons initially. *Id.* at 25. For instance, in 2009, state prisons housed only 2,778 offenders under the age of eighteen. *Id.* In contrast, in many states, persons who commit a crime prior to turning eighteen are transferred from a juvenile correctional facility to an adult facility at age eighteen. See *infra* note 10.

10. See Jennifer Albaugh & Haley Wamstad, *Striking a Fair Balance: Extended Juvenile Jurisdiction in North Dakota*, 88 N.D. L. REV. 139, 152–57 (2012) (describing five types of blended sentencing regimes, four of which permit a juvenile court to send a juvenile to adult prison either initially or once the juvenile reaches eighteen if an extended sentence is determined to be warranted; at least twenty-four states have such provisions).

11. CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, *JUVENILES AT RISK: A PLEA FOR PREVENTIVE JUSTICE* (2011).

12. See *id.* at 77–80.

eighteen should never be tried in adult court or subjected to adult sentences. Nor should people who are convicted as juveniles be detained for their crimes past the age of twenty-five, except in extremely limited circumstances.

The most obvious objection to this admittedly radical proposal is that it is politically infeasible.<sup>13</sup> Moral panics, driven by media and politicians, have created a lucrative market for punitive policies, regardless of the crime rate.<sup>14</sup> Prosecutorial demand for more plea bargaining power, unhindered by lobbying groups that represent offenders, also increases demand for expansive transfer power.<sup>15</sup> Independent of political machinations, many legislatures and courts would likely resist the abolition of transfer and the accompanying limitation on dispositional jurisdiction on the ground that transfer and the sentences that go with it are necessary devices for assuring accountability, at least for the most serious crimes.<sup>16</sup> Even the most passionate advocates for a separate juvenile court likely believe that transfer must be maintained as a retributive safety valve.<sup>17</sup>

If juvenile justice is reconceptualized as a preventive mechanism rather than a punishment regime, however, transfer becomes much less alluring.<sup>18</sup> If the primary goal of juvenile justice is public safety, with retribution conceived as an important goal only to the extent that recognizing it is necessary to ensure systemic legitimacy, then maintaining an adult court option for juveniles becomes unnecessary and counterproductive.<sup>19</sup> As a political matter, a system that offers reduced recidivism is likely to be an attractive alternative to the long-term incarceration in adult prisons that is currently the fate of many juvenile offenders, especially if the system can also promise fiscal savings and effective treatment.<sup>20</sup> Together, crime reduction, taxpayer relief, and reformation (rather than exile) of juvenile offenders could well outweigh the desire to satisfy punitive retributive urges and any negative consequences that flow from ignoring them.<sup>21</sup>

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13. See William J. Stuntz, *The Pathological Politics of the Criminal Law*, 100 MICH. L. REV. 505, 510 (2002).

14. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807 (2003) (stating that the trend toward punitive juvenile justice reforms in the 1980s and 1990s “has features of what sociologists describe as a moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat”).

15. See Stuntz, *supra* note 13, at 510 (“[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones.”).

16. See generally Franklin E. Zimring, *The Punitive Necessity of Waiver*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 207, 210–11 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (discussing transfer in the context of the limitation of juvenile courts).

17. See, e.g., *id.* at 208 (“It is the limited capacity of the juvenile court to punish that leads to transfers as a universal exception to juvenile court jurisdiction in the United States.”).

18. See SLOBOGIN & FONDACARO, *supra* note 11, at 76–77.

19. See *id.*

20. See *id.* at 63–64.

21. See *id.* at 127.

Ironically, a major obstacle to this agenda is the diminished culpability rationale that progressive reformers have advanced as a way of *mitigating* today's punitive policies.<sup>22</sup> Based on common sense, developmental science, and neurobiological discoveries, the diminished culpability argument is that juveniles deserve more lenient sentences because they are psychosocially less mature and characterologically less developed than adults.<sup>23</sup> This concept has been remarkably successful at helping end the juvenile death penalty and mandatory life without parole sentences for juveniles.<sup>24</sup>

Unfortunately, however, the diminished culpability rationale is not likely to have a major impact on the much more prevalent practice of transferring mid and older adolescents to adult court, nor on the related legislative maneuver of expanding adult court jurisdiction. In fact, would-be reformers' conceptualization of juvenile offenders as less culpable versions of adults probably plays into the hands of those who want to maintain transfer and other policies that treat juveniles like adults. The diminished culpability rationale facilitates discounted sentences, but it also justifies carrying out those sentences in adult court, where culpability is king. Moreover, because the scientific evidence indicates that, from mid-adolescence onward, juveniles are not significantly different from adults in terms of the traditional culpability doctrine, the diminished culpability rationale does not require or justify sentences that are significantly shorter than adult sentences.<sup>25</sup> In light of the inordinate length of today's adult dispositional practices, juvenile dispositions can justifiably still be quite long even if the diminished culpability model ultimately wins the day.

In *Juveniles at Risk*, we contended that the best rationale for treating juveniles differently than adults is not their lesser culpability, but their lesser deterrability or, more precisely, the fact that criminal sanctions do not have the same deterrent effect on juveniles as they do on adults.<sup>26</sup> The lesser deterrability rationale has long sanctioned separate justice systems for people with mental disabilities on the theory that the prospect of criminal punishment is less likely to inhibit crimes by these types of individuals and that an alternative, prevention-oriented commitment regime is, therefore, necessary.<sup>27</sup> The same rationale can easily justify a juvenile justice system, because juveniles as a group are demonstrably less risk-averse and more impulsive than adults.<sup>28</sup> In contrast to the lesser culpability rationale, which is focused on

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22. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 2, at 124–26.

23. *Id.* at 118–48. Scott and Steinberg provide the single best exposition of this position, but they have many intellectual forbears. See *infra* notes 45–48 and accompanying text.

24. See *infra* text accompanying notes 50–53.

25. See *infra* text accompanying notes 65–68.

26. SLOBOGIN & FONDACARO, *supra* note 11, at 44–48.

27. See, e.g., Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1233 (1974) (The mental condition of the “criminally insane . . . excludes them from the operation of the traditional punishment-deterrence system, because they are both unable to make autonomous decisions about their antisocial behavior and unaffected by the prospect of punishment.”).

28. See *infra* text accompanying notes 87–91.

punishing juveniles (albeit less harshly than adults), the lesser deterrability rationale is focused on preventing juveniles from reoffending. In terms of the purposes of punishment, a prevention-oriented juvenile justice system aims not at retribution or general deterrence, but at specific deterrence and rehabilitation. Incapacitation as incarceration also plays a role, but only as a last resort.

Because these purposes of a prevention-oriented approach to juvenile justice are so different from the primary purpose of the adult criminal justice system, they provide a much more solid conceptual and pragmatic justification for a separate juvenile justice system. More to the point of this Article, a prevention-oriented approach provides a strong basis for abolishing transfer and transfer-like policies. While desert-based punishment—even discounted punishment—requires adult-style sentences for the more serious crimes, prevention can be accomplished within the juvenile system, even for the most dangerous juvenile offenders. No link between adult criminal justice and juvenile justice is necessary.

Part II of this Article summarizes why, compared to the diminished culpability notion, a prevention-oriented system of juvenile justice is a much better fit with what we know about the causes of juvenile crime and how to reduce it.<sup>29</sup> Part III then explains why, if prevention is the goal of juvenile justice, transfer makes little sense.<sup>30</sup> Transfer is a poor general and specific deterrent, and is much more likely to do harm than good to both juvenile offenders and society at large. The only plausible reason to maintain transfer is to assure that offenders receive the punishment society thinks they deserve. But from a utilitarian, prevention perspective, transfer is probably not necessary, even as a means of assuaging retributive urges. Finally, Part IV of this Article explains how a preventive juvenile justice system that eschews transfer would work.<sup>31</sup> The main innovation of such a system is that dispositional jurisdiction would end at age twenty-five, regardless of the crime. Part IV of the Article also proffers one possible exception to this latter limitation—young offenders who are “dangerous beyond their control.”<sup>32</sup>

## II. CONCEPTUALIZING JUVENILE JUSTICE

In *Juveniles at Risk*, we described four models of juvenile justice.<sup>33</sup> 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.<sup>34</sup> On this view, the

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29. See *infra* Part II.

30. See *infra* Part III.

31. See *infra* Part IV.

32. See *infra* notes 197–203 and accompanying text.

33. SLOBOGIN & FONDACARO, *supra* note 11, at 6–7.

34. See *id.* at 6.

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.<sup>35</sup> The second model—which we called the “adult retribution” model—heads in the opposite direction.<sup>36</sup> In vogue among many state legislatures since the late 1970s, it assumes that many young people who commit crimes are fully accountable individuals who should usually be punished in the same fashion as adults.<sup>37</sup> This path leads to broad transfer-to-adult-court jurisdiction, adult-like sentences in juvenile court, or both.<sup>38</sup> The third option, which probably represents the consensus academic view as well as the practice in a number of jurisdictions, sits somewhere between the rehabilitative and adult retribution approaches.<sup>39</sup> It treats juveniles as neither innocent nor fully culpable, but rather, posits that their responsibility is diminished because of their youth.<sup>40</sup> “Under this ‘diminished retribution’ [or ‘diminished culpability’] model, dispositions are discounted proportionate to the juvenile’s degree of immaturity, either on an individual basis or categorically.”<sup>41</sup>

The fourth model, which is the one endorsed in *Juveniles at Risk*, we call “individual prevention.”<sup>42</sup>

Framed in terms of the traditional purposes of the criminal justice system, the focus of the individual prevention model is specific deterrence through treatment and, if necessary, incapacitation. Because of its focus on treatment, the individual prevention path is closely related to the rehabilitation vision. Unlike the rehabilitative model, however, this path avoids claiming that juveniles are excused because of their youth, retains the retributive models’ threshold requirement of a criminal act, and is narrowly focused on policies and procedures that promote recidivism-reduction rather than the broader goal of creating a well-socialized individual. The individual prevention model’s primary divergence from the two retributive models is its rejection of relative culpability as the basis for the duration and type of disposition. Instead of that metric, the prevention model favors assessments of risk that vary the intervention depending on the most effective, least restrictive means of curbing future crime.<sup>43</sup>

In *Juveniles at Risk*, we devoted considerable space to explaining why the individual prevention model is superior to the other three models.<sup>44</sup> Instead of

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35. *See id.* at 6–9.

36. *See id.* at 6.

37. *See id.*

38. *See id.* at 9–10.

39. *See id.* at 6.

40. *See id.*

41. *Id.*

42. *Id.*

43. *Id.* at 6–7.

44. *Id.* at 37–61.

restating all of those arguments here, this Article will focus on a comparison between the individual prevention model and the diminished retribution model.

### A. The Diminished Culpability Rationale

The diminished culpability model had its genesis as far back as 1980 with the promulgation of the American Bar Association's Juvenile Justice Standards.<sup>45</sup> A number of scholars, including Frank Zimring,<sup>46</sup> Barry Feld,<sup>47</sup> Elizabeth Scott, and Laurence Steinberg,<sup>48</sup> have endorsed a version of this model. Bolstered by developmental and neurobiological research over the past two decades, they have made the intuitively appealing argument that juveniles are less mature in legally relevant ways, including their relatively diminished capacity to deliberate, consider consequences, and resist peer pressure.<sup>49</sup>

This body of work has had considerable, and deserved, success at re-orienting the debate about juvenile justice, not just in academia, but in courts and legislatures as well. In *Roper v. Simmons*, the Supreme Court partially relied on the diminished retribution concept and Scott and Steinberg's work in holding that, under the Eighth Amendment's Cruel and Unusual Punishment Clause, juveniles are exempt from the death penalty.<sup>50</sup> The Court relied on similar reasoning in *Graham v. Florida*, which found unconstitutional life without parole sentences for juveniles who commit non-homicide crimes,<sup>51</sup> and

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45. INST. OF JUDICIAL ADMIN., AM. BAR ASS'N, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS 28, 34–35 (1980) [hereinafter ABA, JUVENILE JUSTICE STANDARDS], available at [www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/JJ\\_Standards\\_Juvenile\\_Delinquency\\_and\\_Sanctions.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/JJ_Standards_Juvenile_Delinquency_and_Sanctions.authcheckdam.pdf) (rejecting rehabilitation and incapacitation, and adopting “culpability” as the basis of sentencing in juvenile court).

46. See Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 271, 279–82 (Thomas Grisso & Robert G. Schwartz eds., 2000) (discussing possible ways in which juveniles are less responsible than adults); see generally FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* (1982) (arguing that because children think differently than adults, they should be treated differently than adults).

47. See Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 912 (1988) (arguing for a “youth discount” based on diminished responsibility).

48. See SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 2, at 122 (“[W]e conclude that a justice regime grounded in mitigation corresponds to the developmental reality of adolescence and thus is compatible with the law’s commitment to allocating punishment fairly on the basis of blameworthiness.”).

49. By linking these commentaries together, I do not mean to suggest that they all agree about the precise contours of the diminished retribution model. See, e.g., Franklin E. Zimring, *Two Views of the Project*, 91 HARV. L. REV. 1934, 1938 (1978) (reviewing the Juvenile Justice Standards Project and criticizing the ABA’s Standards punishment scheme noting, inter alia, that “the principles that lie behind the pattern of proportional limits are difficult to discern”).

50. See *Roper v. Simmons*, 543 U.S. 551, 569–73 (citing Laurence Steinberg & Elizabeth S. Scott’s earlier work on the relationship between developmental research and criminal culpability). The Court stated, “[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.” *Id.* at 551.

51. See *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010) (holding that juveniles who commit homicide should not be subject to the second most severe penalty because “[w]hether viewed as an attempt to express

in *Miller v. Alabama*, which struck down mandatory life without parole sentences for any crime committed by a juvenile.<sup>52</sup> The diminished culpability rationale may also help explain some of the recent legislative activity that has led to the reduction of transfer jurisdiction.<sup>53</sup>

Despite its theoretical attractiveness, however, the diminished culpability model has at least three serious drawbacks. First, in describing the lesser culpability of juveniles, the model stretches the implications of developmental research beyond what it will bear. Juveniles are less culpable than adults, but they are not as impaired in their judgment as advocates of the diminished retributive model seem to think.<sup>54</sup> Second, the diminished retribution model prevents the juvenile justice system from making optimal use of the many treatment innovations that have developed over the past two decades. The best way to reduce juvenile recidivism is through community-based programs that are an awkward fit in a system based on retributive punishment.<sup>55</sup> Third, the model's focus on culpability—the same metric that informs adult criminal justice—undermines the argument for a separate juvenile justice system and, most relevant to this Article, facilitates maintenance of a wide-ranging, but counterproductive transfer mechanism.<sup>56</sup>

The relative culpability of juveniles can be viewed from both a legal and empirical perspective. From the legal perspective, the Supreme Court's juvenile sentencing cases clearly hold that juveniles do not deserve the ultimate penalties available for adults—capital punishment and mandatory life without parole.<sup>57</sup> But the key question now is whether, as a matter of legal doctrine, the diminished capacity rationale will have any significant impact on other types of penalties. Chief Justice Roberts predicted in *Miller* that even life with parole and lesser sentences are now on the chopping block in the juvenile offender context.<sup>58</sup> Perhaps so. But the majority opinion in *Miller* focused on the inability of mandatory penalties to reflect individualized desert determinations, not on the absolute length of the sentence.<sup>59</sup> After recounting how juveniles

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the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult" (quoting *Roper*, 543 U.S. at 571) (internal quotation marks omitted)).

52. See *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

53. See Scott, *supra* note 8, at 552–53 (asserting that recent retrenchment on punitive policy is due to a growing tendency among lawmakers and the public to accept that young offenders are different from adults, although also acknowledging that lower juvenile crime rates, the costs of punitive juvenile justice, and the effectiveness of community-based treatments in reducing recidivism have also played a significant role).

54. See *infra* notes 65–67 and accompanying text.

55. See *infra* notes 73–74 and accompanying text.

56. See *infra* notes 76–86 and accompanying text.

57. *Miller*, 132 S. Ct. at 2474.

58. *Id.* at 2482 (Roberts, C.J., dissenting) (“The principle behind today’s decision seems to be only that because juveniles are different from adults, they must be sentenced differently. . . . Unless confined, the only stopping point for the Court’s analysis would be never permitting juvenile offenders to be tried as adults.”).

59. *Id.* at 2466 (majority opinion).



are different from adults in terms of culpability, deterrability, characterological stability, and reformability, Justice Kagan emphasized that it is “the mandatory penalty schemes at issue here” that “prevent the sentencer from taking account of these central considerations.”<sup>60</sup> She also relied heavily on *Graham*’s equation of life without parole sentences and the death penalty, noting, as had *Graham*, that both types of sentences are “irrevocable.”<sup>61</sup>

Based on these pronouncements, one could easily conclude that, even if the Court became more activist in its Eighth Amendment jurisprudence (which many Court observers believe is extremely unlikely<sup>62</sup>), it will focus on dispositional rigidity rather than on sentence duration in determining whether a disposition is cruel and unusual. Thus, for instance, the Court is more likely to strike down statutes that impose a mandatory twenty-year sentence on every adolescent armed robber over thirteen than to reject a thirty-year sentence imposed on a fourteen-year-old armed robber after due consideration of blameworthiness, treatability, and other factors. If that is the case, then as a legal matter, the diminished culpability rationale is not likely to require deep discounts in maximum sentences for juveniles. Worthwhile noting in this regard is that *Simmons*, *Graham*, *Miller* and *Jackson*, the litigants in the Supreme Court’s four juvenile cases, were, or are likely to be, resentenced to multiple-decade prison terms despite their Eighth Amendment victories,<sup>63</sup> and that several states have vowed to continue to impose very hefty sentences on juveniles, despite the Court’s decisions.<sup>64</sup>

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60. *Id.*

61. *Id.*

62. John Stinneford, *The Illusory Eighth Amendment 2* (forthcoming 2013). As Professor Stinneford has noted about Eighth Amendment analysis, “outside [of the juvenile sentencing cases] the Court has effectively abandoned judicial review of legislatively authorized punishments.” *Id.*

63. *State of Missouri v. Christopher Simmons*, MO. DEATH ROW (Dec. 11, 2008), <http://missouri-deathrow.com/2008/12/state-of-missouri-v-christopher-simmons/>. *Simmons* was resentenced to life without parole. *Id.* *Graham* was resentenced to twenty-five years. Jeff Kuerth, *Life Without Parole Becomes 25 Years for Terence Graham, Subject of U.S. Supreme Court Case*, ORLANDO SENTINEL (Feb. 24, 2012), available at [http://articles.orlandosentinel.com/2012-02-24/features/os-life-without-parole-terrance-graham-20120224-12\\_1-terrance-graham-resentencing-parole12](http://articles.orlandosentinel.com/2012-02-24/features/os-life-without-parole-terrance-graham-20120224-12_1-terrance-graham-resentencing-parole12). *Jackson* and *Miller* have not been resentenced, but could be sentenced to forty years or life. See *Jackson v. Norris*, 2013 Ark. 175 (2013).

64. The Supreme Court of Pennsylvania, sitting in the state with the most juveniles serving life without parole, has indicated that the appropriate sentence for juveniles convicted of first-degree murder is either life with parole or life without parole, to be determined after a hearing examining the individualized factors identified in *Miller*. See, e.g., *Pennsylvania v. Batts*, 66 A.3d 286, 297 (Pa. 2013). Nebraska passed a law requiring a forty-year minimum sentence for juveniles convicted of first-degree murder. Associated Press, *Lawmakers Advance Juvenile Sentencing Bill*, WWT NEWS (Apr. 11, 2013, 11:58 AM), <http://www.wwt.com/home/headlines/lawmakers-Advance-Juvenile-Sentencing-Bill20254-6961.html>; Lloyd Dunkelberger, *Juvenile Sentencing Bill Passes Senate Criminal Justice Committee*, TALLAHASSEE LEDGER (Apr. 8, 2013, 11:58 AM), <http://www.theledger.com/article/20130408/politics/304085037> (containing a report of a juvenile sentencing bill in Florida that would impose a fifty-year minimum for murders and a fifty-year maximum for non-murders); Billy Gun, *Court Ruling Prompts State to Review Juvenile Sentencing Laws*, THE ADVOCATE (Apr. 12, 2013), <http://theadvocate.com/news/5543798-123/court-ruling-prompts-state-to> (describing a Louisiana bill that would require juvenile offenders sentenced to life to serve a minimum of fifty years before parole eligibility). The governor of Iowa announced after *Miller* that all offenders serving life without parole who committed their crimes while juveniles will now be eligible for parole in sixty years. Natalie Williams,

Even if the courts were to take a more explicitly empirical perspective, they are unlikely to conclude that deep mitigation is justified on the basis of youth. Research measuring youthful capacities indicates that mid and late adolescents, the juveniles who commit the bulk of the offending, possess a fairly high degree of cognitive maturity.<sup>65</sup> Laurence Steinberg and Elizabeth Cauffman, the preeminent researchers in this area, state that under most circumstances the “vast majority of individuals below the age of thirteen lack certain intellectual and psychosocial capabilities that need to be present in order to hold someone fully accountable for his or her actions.”<sup>66</sup> But their research also indicates that, while fourteen through sixteen-year-olds are more impulsive, less risk-averse, more prone to peer influence, and less formed characterologically than adults, their judgments regarding antisocial conduct are not significantly different (in absolute terms) from those of young adults.<sup>67</sup> Furthermore, Steinberg and Cauffman found that seventeen-year-olds generally “possess the intellectual and psychosocial capacities that permit the exercise of good judgment, even under difficult circumstances.”<sup>68</sup>

These findings have significant and discouraging implications for efforts to mitigate punitive juvenile justice policies. The commentary to the American Bar Association Juvenile Justice Standards, which adopts the diminished responsibility approach, suggests that a juvenile who commits a crime that would warrant a twenty-year sentence if committed by an adult should receive a sentence of only three years.<sup>69</sup> If empirical information is any guide, that is wishful thinking from a desert perspective. Nothing in the developmental literature comes close to suggesting that a sixteen-year-old who commits a serious felony is only one-sixth as culpable as a twenty-one-year-old adult who commits the same crime. Even Barry Feld, another advocate of the diminished culpability model, has suggested only a 40% to 50% discount for a sixteen-

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*Juvenile Life Sentence Without Parole Debate*, IOWA STATE DAILY.COM (Apr. 9, 2013, 4:15 PM), [http://www.iowastatedaily.com/news/article\\_d566e930-9bd4-11e2-a631-001a4bcf887a.html](http://www.iowastatedaily.com/news/article_d566e930-9bd4-11e2-a631-001a4bcf887a.html). In Delaware, *Miller* offenders are now to receive sentences of twenty-five years to life. S.B. 9, 147th Gen. Assemb. (Del. 2013), available at <http://legis.delaware.gov/lis/lis147.nsf/vwLegislation/SB+9?Opendocument>. In Massachusetts, a “reform” law makes juveniles convicted of second-degree murder eligible for parole after fifteen years. *An Act to Reform the Juvenile Justice System (H52)*, PROGRESSIVE MASS., <http://www.progressivemass.com/an-act-to-reform-the-juvenile-justice-system-page/> (last visited Oct. 16, 2013).

65. Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFERS OF ADOLESCENTS TO ADULT COURT*, *supra* note 16, at 379, 395 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

66. *Id.* at 398. They also suggest, however, that even pre-teens might have full capacity for accountability when the consequences of their actions are clear and peer pressure is not involved. *Id.*

67. See Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 *BEHAV. SCI. & L.* 741, 752, 756 (2000) (including a table showing the composite measure of capacity to make good (non-antisocial) decisions, on a one to five scale, to be 2.86 for eighth graders, 2.77 for tenth graders, 2.94 for twelfth graders, and 3.1 for young adults). The composite differences between adolescents and adults were highly statistically significant (at the 0.001 level) but nonetheless remain small in absolute terms (less than 0.35 on a five-point scale), especially given the size of the sample (1015 individuals). *Id.*

68. Steinberg & Cauffman, *supra* note 65, at 398–99.

69. ABA, *JUVENILE JUSTICE STANDARDS*, *supra* note 45, at 39–40.

year-old offender, and presumably a smaller one still for a seventeen-year-old.<sup>70</sup> Furthermore, his discounts appear to be based not on empirical assessments, but rather, on simply dividing the period between thirteen and eighteen into thirds, with fourteen-year-olds receiving between a 66% to 75% discount, sixteen-year-olds receiving a 40% to 50% discount and eighteen-year-olds treated like adults.<sup>71</sup> Feld comes closer to describing the import of developmental research when he states that, “[w]hile 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.”<sup>72</sup>

A second set of empirical findings that is hard to reconcile with the diminished responsibility rationale has to do with the best methods of reducing recidivism. Research has repeatedly shown that non-coercive sanctions are better than prisons at reducing juvenile recidivism.<sup>73</sup> Multi-Systemic Therapy (MST) and other community-based programs outperform treatment programs that take place in detention facilities because they attack key risk factors—such as family and peer dynamics, substance abuse, and poor school performance—in the systems in which they occur, and because they avoid the criminological effects of incarceration.<sup>74</sup> But, because an effective MST regimen usually takes only about four months, it would be inappropriately lenient for virtually any felony if the primary focus of a juvenile disposition were punishment proportionate to desert.<sup>75</sup> And if a juvenile is transferred to adult court, programs like MST are probably out of the question, even if they existed in the adult setting, given the transferring authority’s finding that these juveniles have committed more serious crimes.

These observations lead to the third problem with the diminished responsibility rationale. If juvenile dispositions are to be measured in terms of the same metric employed in adult court—culpability—why maintain a separate juvenile system? As Barry Feld has argued, the diminished responsibility of

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70. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 118 (1997).

71. *Id.* Note that if discounts were to be determined solely on empirical information, sixteen-year-olds would “deserve” more of a discount than fourteen-year-olds, since they are (slightly) more likely to lack capacity to avoid antisocial decisions. See *supra* note 67 (recounting composite measures of capacity to make good decisions).

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

73. Mark W. Lipsey, *The Primary Factors that Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS 124, 143 (2009) (“[I]nterventions that embodied ‘therapeutic’ philosophies” are “more effective than those based on strategies of control or coercion—surveillance, deterrence, and discipline.”).

74. See SLOBOGIN & FONDACARO, *supra* note 11, at 31–35 (describing Functional Family Therapy, Multisystemic Therapy, Multidimensional Treatment Foster Care, and the Fast Track Program).

75. *Id.* at 137. A number of effective programs that take place within facilities are also relatively short-term (ranging up to ten weeks). See Sean C. McGarvey, *Juvenile Justice and Mental Health: Innovation in the Laboratory of Human Behavior*, 3 JURIMETRICS J. 97, 108–09 (2012) (describing three cognitive behavior therapy programs).

juveniles can be accommodated through sentencing discounts.<sup>76</sup> In other words, a diminished capacity rationale for juvenile punishment can lead to the conclusion that *all* juveniles should be tried in adult court, a result that very few juvenile advocates desire (and one that even Feld has repudiated in later writing).<sup>77</sup>

Advocates of the diminished culpability model may object that I have unfairly characterized their position. Elizabeth Scott and Laurence Steinberg, for instance, have clearly argued that reduction of recidivism ought to be an objective of juvenile justice, and have posited that programs like MST ought to be part of every juvenile justice system.<sup>78</sup> Thus, they 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.”<sup>79</sup> In other words, Scott and Steinberg are willing to contemplate a hybrid regime that endorses both retributive and preventive goals.<sup>80</sup>

For them, however, retributive goals are still paramount. For instance, Scott and Steinberg state that punishment calibration should be based on the “seriousness of the offense and the culpability of the offender.”<sup>81</sup> In a later work, Scott and Steinberg repeat that, “under the developmental model, dispositions may vary somewhat on the basis of preventive factors, but the range should be limited to avoid unfairness”; thus, “[w]ithin a limited range, youths who commit similar crimes will receive sanctions of similar duration, and none will be subject to dispositions that exceed what is fairly deserved on the basis of the youth’s culpability and the seriousness of the offense.”<sup>82</sup> For Scott and Steinberg, a juvenile who commits a serious crime should receive a serious sentence, even if such a disposition might increase the risk of recidivism.<sup>83</sup> Most relevant to the subject of this Article, juveniles who commit

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76. Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 389 (1999) (“A graduated age-culpability sentencing scheme in an integrated criminal justice system avoids the inconsistencies associated with the binary either-juvenile-or-adult drama currently played out in judicial waiver proceedings and in prosecutorial charging decisions and introduces proportionality to the sentences imposed on the many youths currently tried as adults.”).

77. Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution That Failed?*, 34 N. KY. L. REV. 189, 255–56 (2007) (“[T]he primary virtue of juvenile courts is simply that they are not the criminal justice system. Regardless of their ability to help or rehabilitate juveniles, they do less harm than when states process children in the adult criminal justice system.” (footnote omitted)).

78. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 2, at 211–20 (describing “promising research on programs” like MST and stating “it makes sense to include research-based programs as a key component of the legal response to juvenile crime”).

79. *Id.* at 144–48.

80. *Id.*

81. *Id.* at 231.

82. Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 87–93 (2010).

83. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 2, at 95 (“[A]n important element of fairness is that similar cases be treated similarly; thus, we are not sanguine about a regime in which one armed robber is sent to a correctional institution (the deserved punishment), while another receives a community sanction based on judicial judgments about their relative risk and potential for rehabilitation.”).

the most serious crimes would have to be sent to adult court, because only adult-length imprisonment metes out the punishment these juveniles deserve.<sup>84</sup>

For crimes at the other end of the spectrum, in contrast, a desert-based approach of the type Scott and Steinberg advocate dictates leniency or no punishment at all. That result is unfortunate from a crime-control perspective. In particular, the group of juveniles who have come to be known as “life-course persistent offenders[ ]”—juveniles who begin committing offenses, usually minor ones, before adolescence—may require serious intervention if the goal is to forestall further offenses.<sup>85</sup>

Finally, for crimes in the middle—the vast majority of juvenile misbehavior—the impact of the diminished culpability model is ambiguous. If, for instance, the crime is drug distribution or burglary—crimes that might result in a several-year sentence in adult court—is a non-prison sentence permitted?<sup>86</sup> Perhaps, one might argue, a prolonged community-based disposition can have as much “punitive bite” as a shorter prison term. But research asking people about their retributive instincts indicates that once the “deserved” term extends beyond two years or so, no type of intermediate sanction is perceived to be of equivalent harshness as imprisonment.<sup>87</sup> So, again, the diminished culpability model is in some tension with the types of non-incarcerative treatment programs Scott and Steinberg say they favor. In short, dispositions based on proportionate desert must be abandoned if prevention is going to be taken seriously as a goal of juvenile justice.

### *B. The Individual Prevention Rationale*

A juvenile justice system based on the goal of individual prevention is not focused on desert and thus avoids the pitfalls of the diminished culpability approach. At the same time, it encounters other problems familiar to anyone who has perused the literature on theories of punishment. The individual prevention model more easily accommodates empirical findings about the differences between youth and adults and the best methods of reducing recidivism. But it also raises concerns about abuses of discretion that can occur

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84. *Id.* at 243–44 (stating that youth who have previously been convicted of murder, attempted murder, armed robbery, rape, aggravated assault, or kidnapping would be eligible for transfer if their current charge is a violent felony).

85. See Terrie E. Moffitt, *Life-Course-Persistent and Adolescence-Limited Antisocial Behavior: A 10-Year Research Review and a Research Agenda*, in *CAUSES OF CONDUCT DISORDER AND JUVENILE DELINQUENCY* 49, 49 (Benjamin B. Lahey et al. eds., 2003) (stating that youth who routinely offend at an early age are more likely to continue offending past majority).

86. Despite the fact that the vast majority of juveniles sentenced as adults are convicted of non-homicides, the average sentence for transferred juveniles is still nine years. Kevin J. Strom & Steven K. Smith, *Juvenile Felony Defendants in Criminal Courts*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 1–2 (Sept. 1998), <http://www.bjs.gov/content/pub/pdf/jfdcc.pdf>.

87. Robert E. Harlow, John M. Darley & Paul H. Robinson, *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 *J. QUANTITATIVE CRIMINOLOGY* 71, 86 (1995).

in connection with determining levels of risk. Those concerns in part explain the continued attractiveness of the diminished culpability model, which sets relatively determinate minimum and maximum time limits on disposition. With a few tweaks, however, the individual prevention model can avoid its most pressing defects and provide a superior theoretical basis for a separate juvenile system.

The case for the individual prevention model is explicitly based on science—in particular, the robust empirical conclusion that juveniles are much more reckless than adults.<sup>88</sup> That finding not only supports the conclusion that they are less culpable than adults, but also verifies that they are less deterrable. The Supreme Court itself has recognized this fact in cases such as *Roper*, *Graham*, and *Miller*. As Justice Kennedy stated in both *Roper* and *Graham*, “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.”<sup>89</sup> In *Miller*, Justice Kagan repeated this conclusion, referring to youths’ “transient rashness, proclivity for risk, and inability to assess consequences” and “their immaturity, recklessness and impetuosity” in explaining not only their “lessened . . . ‘moral culpability,’” but also noted their failure to “consider potential punishment.”<sup>90</sup>

The fact that juveniles are less deterrable than adults provides the justification for handling juvenile offenders in a system separate from the adult criminal justice system, just as people with mental disability, considered undeterrable because of their mental impairments, are subject to civil commitment, rather than criminal punishment.<sup>91</sup> Of course, the typical juvenile offender is not as impaired as the typical person subject to civil commitment. But the claim here is not that juveniles are excused for their behavior; it is that they are not as responsive to the dictates of criminal law as are adults, and thus can justifiably be subject to a separate system of justice. The Supreme Court endorsed an analogous proposition in *Kansas v. Hendricks*, which upheld preventive commitment of adult sex offenders who are not psychotic, but who are less deterrable than the “ordinary recidivist.”<sup>92</sup>

For reasons already suggested, once prevention is accepted as the primary goal of juvenile justice, community dispositions in lieu of incarceration are easily justifiable if they are effective at reducing recidivism. Indeed, if community dispositions are superior in this regard, a strong argument can be

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88. See SLOBOGIN & FONDACARO, *supra* note 11, at 20–23 (summarizing research).

89. *Miller v. Alabama*, 132 S. Ct. 2455, 2464–65 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010); *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

90. *Miller*, 132 S. Ct. at 2464–65.

91. See *supra* note 27.

92. *Kansas v. Hendricks*, 521 U.S. 346, 346 (1997) (“This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”). The “ordinary recidivist” distinction comes from Justice Scalia’s opinion in *Kansas v. Crane*, 534 U.S. 407, 420 (2002) (“Ordinary recidivists *choose* to reoffend and are therefore amenable to deterrence through the criminal law; those subject to civil commitment under the [sexually violent predator law], because their mental illness is an affliction and not a choice, are unlikely to be deterred.”).

made that the Constitution requires such dispositions on the ground that they are the least drastic means of achieving the government's objective—prevention.<sup>93</sup> Moreover, any detention that does take place must be governed by the same least-drastring-means principle, meaning that periodic review is needed to ensure that the detained individual represents a high risk and to guarantee that treatment is being provided to reduce that risk.<sup>94</sup>

The criticisms of the individual prevention model come in three varieties. The first—that preventive dispositions are insufficient as a deterrent—is taken up in the next section.<sup>95</sup> The second is that a prevention-oriented regime is “unfair,” both because it can result in disparate sentences for the same offense and because it might sanction people more or less than they deserve, thus diluting their accountability and diminishing public support for the law.<sup>96</sup> The third criticism is that, even if such a system can be considered fair in the abstract, it is impossible to implement without significant abuse.<sup>97</sup>

The latter two criticisms—which reflect a larger and centuries-old debate between retributive and utilitarian punishment theorists—raise complicated issues that cannot be satisfactorily covered in full here, so only a few points will be highlighted. First, as we argued in *Juveniles at Risk*, a plausible case can be made that a system that looks at an offender's history and character, as a preventive regime does, is much more likely to achieve fair results—that is, results that reflect an appropriate disposition of an individual's case—than one that focuses solely on the accused's offense.<sup>98</sup> James Whitman recently put this point well when he stated that “there are as many kinds of justice as there are offenders,” a tenet he claims was understood and approved both by the pre-modern common law judges who shaped the substantive criminal law and by adherents of the “modern penalism” that informed the drafters of the first edition of the Model Penal Code.<sup>99</sup> It is likely that much of the public today feels the same way.<sup>100</sup> If these observations have validity, a juvenile justice

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93. See SLOBOGIN & FONDACARO, *supra* note 11, at 80–83; see also Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 357 (2003) (arguing, based on Supreme Court case law and substantive due process doctrine, that the State may not simply “warehouse” individuals who are subject to preventive detention, but must instead provide meaningful treatment).

94. *Hendricks*, 521 U.S. at 364 (requiring periodic review and release if the individual is “safe to be at large”).

95. See *infra* Part III.

96. See SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 2, at 89 (“Open ended indeterminacy, whether based on risk assessment or diagnosis, is unsatisfactory because it poses a substantial risk of unfairness that inevitably threatens the legitimacy of any regime aimed solely at prevention.”).

97. *Id.* (expressing concern about the imprecision of risk assessment).

98. SLOBOGIN & FONDACARO, *supra* note 11, at 54 (“[T]he 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.”).

99. James Whitman, *The Failure of Retributivism in the American Common Law* 29, 39 (unpublished manuscript) (on file with author).

100. Cf. Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 34 (2000) (concluding, based on responses to vignettes of various crimes, that while offense seriousness

system that bases disposition solely on the actus reus and mens rea of the offense will almost always result in injustice.

Even if we rely on blame for a specific offense as the metric of fairness, however, the goal of justice—in the sense of consistent results—is unlikely to be achieved. Accurate calibrations of blame, based on often indecipherable mental phenomena at the time of the act, are usually difficult, and often impossible.<sup>101</sup> Prosecutorial charging discretion, jury decision-making discretion, and judicial sentencing discretion make a mockery of the idea that the same crime triggers the same time.<sup>102</sup> In contrast, a preventive regime can, as discussed further below, at least rely on concrete probability estimates and evidence-based risk management techniques in trying to treat similar levels of risk equally.<sup>103</sup>

The complaint that a preventive regime does not hold offenders responsible for their conduct (or character) is also off-base. First, offenders in a preventive regime would still be held accountable because they would be found guilty and receive a sentence, which for very serious crimes would usually involve, under classic risk management principles, a period of detention before resorting to community-based programs.<sup>104</sup> Just as importantly, in a system properly focused on risk management, offenders are constantly reminded that

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“explained the largest amount of variation in sentencing preferences . . . when respondents were asked in a separate question what was the purpose of the sentence they assigned, . . . the goal of just deserts ranked fourth behind special deterrence, boundary setting, and rehabilitation as a ‘very important’ reason for choosing the sentence” (quoting Joseph E. Jacoby & Christopher S. Dunn, National Survey on Punishment for Criminal Offenses: Executive Summary, Presented at the National Conference on Punishment for Criminal Offenses (Nov. 9–10, 1987)).

101. See CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 42–48 (2007) (cataloguing the difficulties in assessing past mental states).

102. Even in the death penalty context, where concern about reliability is at its height, vast disparities in charging practices have been documented within the same state. See, e.g., Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17, 36–37 (2009) (describing studies in Florida, Delaware, Missouri, and Maryland). For a discussion on jury decision-making, see NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW 134, 166, 248 (1995) (reporting studies of laypeople showing significant disagreement about the *mens rea* for homicide, the application of felony murder rules and the scope of the self-defense doctrine). For a discussion on the persistence of judicial sentencing disparities even under guidelines systems, see Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1683–84 (2012) (“[T]he guideline range—assumed by many to be identical for similar offenders convicted of similar offenses—can be, and is, calculated very differently for any number of reasons, including happenstance, lack of clarity in the guidelines, different interpretations of the guidelines, different views of the evidence, and varying prosecutorial practices.” (footnotes omitted)).

103. See SLOBOGIN & FONDACARO, *supra* note 11, at 68–76, 83–92 (discussing risk assessment and risk management).

104. The analogue to civil commitment fits here as well: Typically, people who are subject to involuntary commitment are hospitalized until they are stabilized and a community-based placement, granted on conditional grounds, can be arranged. See Amy Allbright et al., *Outpatient Civil Commitment Laws: An Overview*, 26 MENTAL & PHYSICAL DISABILITY L. REP. 179, 179–81 (2002) (summarizing state laws authorizing outpatient commitment).



they are responsible for their actions and that they have significant control over the nature and duration of the State's control over them.<sup>105</sup>

Moving to the practical complaints against a preventive regime, the most common are that the risk assessments and treatment programs necessary to make a risk management system work are untrustworthy and that the resulting uncertainty will lead to improper detentions, ineffective rehabilitation, and perhaps even a regime allowing intervention before any serious crime is committed.<sup>106</sup> In *Juveniles at Risk*, we dealt with these objections at length.<sup>107</sup>

Only a few observations will be made here.

First, for legality and legitimacy reasons, no juvenile disposition should take place in the absence of a conviction for a statutorily defined crime. That crime might consist, however, of conduct that ordinarily would not lead to conviction of an adult. For instance, torturing animals or bullying might be sufficient grounds for intervention, given the association of these types of acts with risk.<sup>108</sup> However, the aforementioned least-drastic-means principle generally would prohibit any type of detention in this or any other situation unless the government could prove a substantial probability that the detention is necessary to prevent a serious crime (in *Juveniles at Risk* we suggested a 50% threshold, as demonstrated by actuarial assessments<sup>109</sup>). Otherwise, intervention would have to take place in the community. The latter principle answers Scott and Steinberg's complaint that, in a preventive regime, a pre-adolescent who is arrested for a minor crime but who has multiple risk factors "might be a candidate for correctional interventions that extend for as long as he is under juvenile court jurisdiction."<sup>110</sup> Although some sort of long-term intervention for a life-course persistent offender might sometimes be necessary, multi-year *detention* of individuals who commit only minor crimes could not occur in a properly administered preventive regime.

Scott and Steinberg make the related claim that "risk assessment is far from an exact science and will always rely on the subjective judgments of justice system decision-makers," which, in turn, "may well result in greater disparities in the treatment of white and minority youths."<sup>111</sup> But risk assessment is no longer the "subjective" enterprise imagined by Scott and Steinberg. As we point out in *Juveniles at Risk*, professionals conducting evaluations of risk today can rely on a number of actuarial and structured

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105. See SLOBOGIN & FONDACARO, *supra* note 11, at 58–59 (discussing how risk management regimes enhance accountability).

106. See generally BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (1999) (arguing that the rehabilitative premise of the juvenile justice system is fatally flawed and that integrating the juvenile justice system with the adult system, constrained by sentencing guidelines, will reduce the impact of bias).

107. See SLOBOGIN & FONDACARO, *supra* note 11.

108. *Id.* at 66.

109. *Id.* at 68–69.

110. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 2, at 90.

111. *Id.* at 90–91.

professional judgment instruments to structure their inquiries.<sup>112</sup> Although we agree that risk assessment is not an “exact science,” these instruments reduce the inevitable influence of bias because they set out clear decision-making criteria and produce a concrete probability estimate that sets a baseline for the ultimate conclusion of risk.<sup>113</sup> Modern risk evaluation may even be better at bias reduction than desert-based schemes that rely on amorphous mental states and inconsistent culpability rules; even with the advent of determinate sentencing, racial and other disparities have proliferated,<sup>114</sup> and transfer decisions, despite their explicit or implicit focus on “objective” offense characteristics, have exacerbated that situation.<sup>115</sup>

A further curb on abuses of discretion in a preventive regime is that, as already noted, interventions in such a regime—whether they take place in detention or in the community—would be subject to continuous review.<sup>116</sup> In short, mistakes are correctable in a system based on prevention.<sup>117</sup> In a desert-based regime, in contrast, once culpability is determined, it is immutable.<sup>118</sup>

Finally, analogous to desert proportionality, risk proportionality would require proof of increasingly greater risk in order to prolong the intervention.<sup>119</sup> Based both on risk proportionality reasoning and concerns about abuse, we proposed in *Juveniles at Risk* that even those who are considered high risk should be released by the end of juvenile court jurisdiction.<sup>120</sup> More concretely, for reasons developed below, we proposed that the endpoint of dispositional jurisdiction should normally be set at age twenty-five.<sup>121</sup>

As a major component of our proposal, *Juveniles at Risk* argued that, in a preventive regime, transfer is neither legitimate nor necessary.<sup>122</sup> Transfer would not be legitimate because culpability would no longer be the basis for disposition; thus, juvenile offenders could not be sentenced to long-term sentences in adult prison simply on desert grounds.<sup>123</sup> Transfer would not be necessary because dangerous youth can be handled in the juvenile justice

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112. SLOBOGIN & FONDACARO, *supra* note 11, at 74.

113. For a general treatment of these instruments and their accuracy, see Christopher Slobogin, *Risk Assessment*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 196 (Joan Petersilia & Kevin R. Reitz eds., 2012).

114. Baron-Evans & Stith, *supra* note 102, at 1683 (“The new, harsher rules [under the federal sentencing guidelines] had a disproportionate impact on black offenders, and some of these rules were not necessary to satisfy the legitimate purposes of sentencing.”).

115. DAVID L. MYERS, BOYS AMONG MEN: TRYING AND SENTENCING JUVENILES AS ADULTS 127 (2005) (“Older, male, nonwhite, and poor juveniles from urban areas continue to represent the majority of waived adolescents.”).

116. *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997).

117. SLOBOGIN & FONDACARO, *supra* note 11, at 63–64.

118. *See id.*

119. *Id.* at 68–69.

120. *Id.* at 65–66.

121. *See infra* Part IV.

122. SLOBOGIN & FONDACARO, *supra* note 11, at 79–80.

123. *Id.*

system; adult dispositions are not needed to protect the public.<sup>124</sup> The added advantage of this position is that it would eradicate an institution that does affirmative harm to juveniles but does little to enhance public safety. Before describing how a system without transfer would work, a brief exegesis on transfer's cost is useful.

### III. THE TRAVESTY OF TRANSFER

Research carried out over the past two decades provides good evidence that transferring juvenile offenders to adult court is not easily justifiable on utilitarian grounds. Transfer is not an effective method of promoting either general or specific deterrence.<sup>125</sup> It is also not a good way to ensure juvenile offenders receive treatment.<sup>126</sup> Transfer obviously does permit prolonged incapacitation, but because that incapacitation is not based on individualized risk assessments and tends to detain offenders beyond the point at which they would naturally desist, it over-incarcerates as a preventive mechanism.<sup>127</sup> That leaves satisfying society's retributive instincts as the primary justification for transfer. Some preliminary research suggests that, as a utilitarian matter, transfer fails on this score as well.<sup>128</sup> Only the belief that juvenile dispositions do not give serious juvenile offenders what they deserve, combined with a desire to make sure they receive that punishment regardless of cost, can support the continued existence of transfer.

#### A. General Deterrence

Research that looks at the general deterrent effect of transfer, as compared to the deterrent effect of keeping an offender in juvenile court, is fairly consistent. Only one major study has found a significant deterrent effect associated with transfer. Steven Levitt's examination of national juvenile crime statistics between 1978 and 1993 concluded that crime among youth reaching the age of criminal responsibility (eighteen) significantly decreased in those states in which an appreciable difference existed between juvenile and adult sentences, but not in those states that tended to sentence juveniles in a similar fashion whether they ended up in juvenile or adult court.<sup>129</sup> However, Levitt's study appears to have conflated the effects of deterrence and incapacitation; those states with stiffer penalties in adult court detained youth longer, and thus reduced the potential for re-offending.<sup>130</sup> Virtually every other study on general

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124. *Id.*

125. *See infra* text accompanying notes 127–38.

126. *See infra* text accompanying notes 139–49.

127. *See infra* text accompanying notes 152–67.

128. *See infra* text accompanying notes 171–76.

129. Steven D. Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1156, 1162–68 (1998).

130. *See* David S. Lee & Justin McCrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence*, BERKELEY PROGRAM IN LAW & ECON., U.C. BERKELEY 7 (July 31, 2009), *available at*

deterrence has found that transfer did not lower juvenile crime rates, decreased them only marginally, or actually increased them.<sup>131</sup> Richard Redding has concluded that “[t]he bulk of the evidence suggests that transfer laws, at least as currently implemented and publicized, have little or no general deterrent effect in preventing serious juvenile crime.”<sup>132</sup>

One could nonetheless justifiably wonder whether deterrent power would be lost vis-à-vis imprisonment in the adult system if, as we suggest, the juvenile system became more oriented toward community-based treatment like MST. Several considerations should allay such concerns. As noted earlier, in the prevention-oriented system we propose, detention would be an option for those convicted of serious crimes, and repeat offenders would be more likely to be detained because of their elevated risk.<sup>133</sup> Those aspects of the regime, combined with the relative undeterrability of youth, their obliviousness to *any* sanctions that await them,<sup>134</sup> and the fact that even today many transferred youth are not detained for extremely long periods,<sup>135</sup> suggest that the little general deterrent effect transfer brings would not be significantly diminished if it were eliminated.

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[http://emlab.berkeley.edu/~jmccrary/lee\\_and\\_mccrary2009.pdf](http://emlab.berkeley.edu/~jmccrary/lee_and_mccrary2009.pdf) (noting that “the use of annual data [as in Levitt’s paper] has the potential to conflate deterrence and incapacitation effects”).

131. See Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN 1, 2–3 (June 2010), available at <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf> (canvassing five studies, all of which showed little or no deterrent effect of transfer, and the Levitt study); see also Jacob Cohn & Hugo M. Mialon, *The Impact of Juvenile Transfer Laws on Juvenile Crime* 1 (Mar. 6, 2011), available at <http://ssrn.com/abstract=1606002> (“We find that each of the tougher juvenile transfer laws is positively correlated with juvenile crime in at least one category, while the weaker juvenile transfer law (the reverse waiver) is negatively correlated with juvenile crime in several categories.”); Lee & McCrary, *supra* note 130, at 33–34 (finding “small deterrence effects” associated with transfer, consistent with “impatient or even myopic behavior”); Justin McCrary & Sarath Sanga, *Youth Offenders and the Deterrence Effect of Prison* 12 (Aug. 3, 2011), available at <http://ssrn.com/abstract=1980326> (stating that “the results from each data set either point toward little to no deterrence, or yield estimates that are too noisy to draw meaningful inference”).

132. Redding, *Juvenile Transfer Laws: Ineffective Deterrent to Delinquency*, *supra* note 131, at 3. These findings are also consistent with research on deterrence in the adult criminal justice context, which suggests that increasing sentences has little effect on crime. Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 28 (2006) (summarizing the results of three National Academy of Sciences panel investigations by stating “[i]maginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects”).

133. Cf. JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 71 (1980) (“If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each prior criminal act.”).

134. For instance, most studies find that juveniles either are unaware of or do not care about the heightened sanctions that accompany transfer. See Redding, *Juvenile Transfer Laws: Ineffective Deterrent to Delinquency*, *supra* note 131, at 3 (summarizing four studies reporting results of interviews of juveniles about their knowledge of transfer laws).

135. See HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT* 106–16 (2006). Ninety-five percent of juveniles who are transferred to adult court are released before their twenty-fifth birthday. Redding, *Juvenile Transfer Laws: Ineffective Deterrent to Delinquency*, *supra* note 131, at 1–2.

### B. Specific Deterrence

Transfer does even worse as a specific deterrence mechanism. Transfer to adult court is generally associated with higher re-arrest rates than the re-arrest rates of those offenders who stay in juvenile court. Summarizing six studies that controlled numerous variables such as offense severity, prior offenses, and age, Redding's review concludes that "[a]ll of the studies found higher recidivism rates among offenders who had been transferred to criminal court, compared with those who were retained in the juvenile system."<sup>136</sup> He bluntly concludes "transfer substantially increases recidivism."<sup>137</sup> A more recent study comparing transferred and non-transferred youth in Arizona, matched on more variables than previous studies, found that, while transferred youth who committed property crimes were more likely to recidivate upon release, those who committed violent crimes were less likely to reoffend.<sup>138</sup> The latter finding is diminished, however, by the fact that the follow-up period for the study was four years, during most of which the youth who were transferred and convicted for crimes against the person were, presumably, in prison.<sup>139</sup>

The fact that transfer is not an effective means of generating specific deterrence is not surprising. Research confirms the intuition that the stigmatizing effect of the "felon" label, the sense of injustice that an adolescent feels at being tried as an adult, the "education" about crime provided by adult prisoners, and the brutalizing effect of prison life can all contribute to a continued life of crime.<sup>140</sup> Perhaps an even more important explanation for the specific deterrence effects that researchers have found, however, lies in the fact that treatment options in the juvenile systems are almost always superior to those found in the adult criminal system.<sup>141</sup>

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136. See Redding, *Juvenile Transfer Laws: Ineffective Deterrent to Delinquency*, *supra* note 131, at 6.

137. *Id.* Two of these six studies did find that transfer reduced recidivism among drug offenders, and a third study found lower recidivism rates among transferred property offenders. *See id.* But other studies in the same jurisdictions contradicted those results. *See id.*; see also Angela McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System*, 32 AM. J. PREVENTIVE MED. S7 (2007) (discussing whether transfer aids in reducing violence among incarcerated and released juveniles).

138. EDWARD P. MULVEY & CAROL A. SCHUBERT, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN—TRANSFER OF JUVENILES TO ADULT COURT: EFFECTS OF A BROAD POLICY IN ONE COURT 13 (Dec. 2012), available at <http://www.ojjdp.gov/pubs/232932.pdf>.

139. *Id.* at 9.

140. Redding, *Juvenile Transfer Laws: Ineffective Deterrent to Delinquency*, *supra* note 131, at 7–8 (summarizing research findings on these four points).

141. U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN—JUVENILE JUSTICE: A CENTURY OF CHANGE 2 (Dec. 1999), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf>.

### C. Rehabilitation

Given the traditional rehabilitative focus of the juvenile court, it stands to reason that the juvenile court system will have more to offer than the adult system in terms of treatment.<sup>142</sup> In fact, both objective observers and youths themselves believe that adult facilities are less treatment-oriented and more security-focused than juvenile facilities.<sup>143</sup> Even those adult systems that make an effort at providing rehabilitative services are not likely to provide the relatively short-term, community-based programs that are often the most effective means of reducing recidivism in juvenile offenders.<sup>144</sup> Yet under automatic transfer laws, even first-time offenders who have never had the benefit of the juvenile system's superior resources can be sent to adult prisons.<sup>145</sup>

A more subtle disadvantage of transfer in connection with the rehabilitative goal is that it undermines efforts to pressure courts and legislatures into making treatment options in the juvenile system even better. As it stands today, in many cases the transfer decision depends in large part on economics, or as the transfer provisions at issue in *Kent v. United States* put it, "the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the Juvenile Court."<sup>146</sup> A majority of state transfer statutes explicitly provide, consistent with this provision, that one factor to consider in determining whether transfer should occur is whether treatment programs are available within the jurisdiction.<sup>147</sup> Yet in many states, the programs are simply not there.

Unfortunately, therefore, *Kent*'s language is often dispositive in transfer decision-making. Numerous decisions make clear that courts have transferred a juvenile to adult court solely because of a lack of accessible programs.<sup>148</sup> For instance, one court waived juvenile court jurisdiction for a fourteen-year-old because the State's experts testified that the state lacked adequate facilities to deal with a fourteen-year-old homicide offender.<sup>149</sup> Another court transferred a

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142. *See id.*

143. *See* Donna Bishop & Charles Frazier, *Consequences of Transfer*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFERS OF ADOLESCENTS TO ADULT COURT*, *supra* note 16, at 227, 254–57, 259–60 (reporting their own research and studies conducted by others that compare juvenile correctional facilities that are treatment-oriented favorably to custody-oriented adult facilities on both objective and subjective grounds).

144. As noted earlier, *see supra* text accompanying notes 72–74, programs like Multi-Systemic Therapy usually last around four months, which is not likely to be considered sufficient for people convicted of felonies and sentenced to an adult disposition, even if it is tacked on to an initial short period of detention.

145. Brandi Grissom, *Report: Hundreds of Youths in Adult Prisons*, TEX. TRIB. (Mar. 24, 2011), <http://www.texastribune.org/2011/03/24/report-hundreds-of-youths-in-adult-prisons/>.

146. *Kent v. United States*, 383 U.S. 541, 567 (1966) (appendix to the decision).

147. Kirk Heilbrun et al., *A National Survey of U.S. Statutes on Juvenile Transfer: Implications for Policy and Practice*, 15 BEHAV. SCI. & L. 125, 128–43 (1997) (listing over twenty-five states that use *Kent*'s language on this issue); *see also* IND. CODE ANN. § 31-6-2-1.5 (West 1997) (providing that transfer may occur if the court determines that the juvenile "is beyond rehabilitation under the juvenile justice system").

148. *See, e.g., State v. Simpson*, 836 S.W.2d 75, 82 (Mo. Ct. App. 1992).

149. *Id.*

youth who became violent when he consumed alcohol because the jurisdiction offered no substance abuse program.<sup>150</sup> In perhaps the most egregious case (thankfully, now mooted by the Supreme Court's decision in *Roper*), the court rejected the argument that "the state has an obligation not to execute a juvenile who is deemed to be amenable to treatment but for whom the state offers no appropriate treatment program."<sup>151</sup> Courts also routinely refuse to consider a juvenile offender treatable when the only pertinent programs are in another jurisdiction.<sup>152</sup>

These types of decisions led us to conclude in *Juveniles at Risk* that "[i]f transfer were eliminated, courts would have to confront the problems caused by the current paucity of treatment programs and might become more willing to force legislatures to [treat] them."<sup>153</sup> This impetus is necessary. According to one estimate, only 15,000 juvenile offenders per year participate in MST and similar regimes; despite the success of these programs, states have been unwilling to scale them up.<sup>154</sup> From a crime-prevention perspective, that failure is shortsighted.

#### D. Incapacitation

Long sentences imposed by adult courts clearly have a more significant incapacitative impact than shorter juvenile sentences. But a proper utilitarian analysis of incapacitative effects must take into account the extent to which incarceration in adult prison is necessary to protect the public. There are several reasons to believe that, on this score, the cost of transfer is greater than the benefit.

First, under the transfer laws of most states, the majority of juveniles who are transferred are not assessed for risk.<sup>155</sup> Transfer is often automatically or implicitly triggered by the nature of the offense, which may or may not bear a relationship to dangerousness; particularly when transfer occurs after a first offense, justifying transfer on incapacitation grounds will rarely make sense, even when the offense is a serious one.<sup>156</sup>

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150. *In re R.M.*, 648 S.W.2d 406, 408 (Tex. App.—San Antonio 1983, no writ); *see also* Commonwealth v. Cessna, 537 A.2d 834, 839 (Pa. 1988) (determining that the juvenile did not show that there was a juvenile facility that would accept him).

151. *Stanford v. Commonwealth*, 734 S.W.2d 781, 792 (Ky. 1987).

152. *See, e.g.*, *P.K.M. v. State*, 780 P.2d 395, 399 (Alaska Ct. App. 1989) (finding no obligation to look beyond state borders); *Dillard v. State*, 623 P.2d 1294, 1297 (Idaho 1981) (holding transfer permissible because contract with California to provide juvenile treatment had expired and there were no placement contracts with other states).

153. SLOBOGIN & FONDACARO, *supra* note 11, at 80.

154. Scott W. Henggeler & Sonja K. Schoenwald, *Evidence-Based Interventions for Juvenile Offenders and Juvenile Justice Policies that Support Them*, 25 SOC. POL'Y REP. 1, 8 (2011), available at [http://www.jmcgvlpd.mtfc.com/2011\\_EB\\_interventions\\_for\\_juv\\_offenders.pdf](http://www.jmcgvlpd.mtfc.com/2011_EB_interventions_for_juv_offenders.pdf).

155. *See, e.g.*, ARIZ. JUV. CT. R. P. 34 (2013).

156. *Cf.* Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, *Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and*

If, instead, transfer is based on an individualized assessment of amenability to treatment—which is supposed to happen in most states with respect to at least some types of juvenile offenders—some assessment of risk is more likely.<sup>157</sup> But even in this situation, the transfer decision is often focused on factors other than the precise issue of dangerousness, including age, the seriousness of the offense, the success of past treatment attempts, the maturity of the juvenile, and the availability of treatment programs in juvenile court.<sup>158</sup> As a result, many juveniles who are transferred are probably at low risk for committing a serious crime.<sup>159</sup> A system that incarcerates such people in adult prisons is not an optimal incapacitative mechanism.

Second, most people who offend during their adolescent years naturally stop offending sometime in their twenties, even when they are not incarcerated.<sup>160</sup> Young adults find jobs, get married, and, in general, acquire “stakes in life” that militate against a life of crime.<sup>161</sup> Neurobiological and developmental research confirms that a person’s impulsivity and susceptibility to peer influence significantly diminishes in the early to mid-twenties.<sup>162</sup> Thus, if the goal is public safety, prolonged incarceration of people who commit crimes as adolescents is excessive.<sup>163</sup>

Prolonged incarceration is also counterproductive. As the research on deterrence implies, prison is criminogenic.<sup>164</sup> Transfer may keep a troublesome youth off the streets, but it increases the probability that youth will turn to crime

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*Violence*, 32 LAW & HUM. BEHAV. 46, 61 (2008) (finding that less than one percent of inmates sentenced to life in federal prison for homicide perpetrated an assault causing even moderate injuries, none of the prisoners caused a life-threatening injury or assaulted a member of the prison staff, and none committed another homicide while incarcerated).

157. See Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 317–27 (1999) (describing the factors courts have relied upon in making transfer decisions and analyzing their relationship to the amenability to treatment and dangerousness issue).

158. See *id.*

159. Cf. DAVID BRANDT, DELINQUENCY, DEVELOPMENT, AND SOCIAL POLICY 77–78 (2006) (stating that 79% of transfers in Florida involved property offenses); Jeffrey J. Shook, *Contesting Childhood in the US Justice System: The Transfer of Juveniles to Adult Criminal Court*, 12 CHILDHOOD 461, 466 (2005) (stating that 40% of those transferred committed property crimes); Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 794 (2000) (stating that 46% to 55% of transferred cases involved property offenses).

160. Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993) (reporting research finding that “[t]he majority of criminal offenders are teenagers; by the early 20s, the number of active offenders decreases by over 50%, and by age 28, almost 85% of former delinquents desist from offending”).

161. See SLOBOGIN & FONDACARO, *supra* note 11, at 26–27 (describing research showing that “escape from risk-inducing environments is more difficult for dependent children than for adults,” that “adolescents have less freedom to engage in ‘socially acceptable’ outlets for risk behavior,” and that the reduced stakes in life of adolescents “may lead them to feel they have less to lose than adults”).

162. See *id.* at 20–26 (summarizing the developmental and neurobiological literature on the differences between juveniles and adults).

163. *Id.*

164. See Lee & McCrary, *supra* note 130, at 7.



once back on the streets.<sup>165</sup> Also important is the fact that adolescents in adult prisons are highly likely to be the victims of crime themselves, a fact which must be weighed on the cost side of the ledger.<sup>166</sup> In short, the safety of both the public and of juvenile offenders would be enhanced by moving from detention-heavy policies to those that focus on community-based corrections.<sup>167</sup>

Finally, as I will emphasize below, if incapacitation is necessary, the juvenile system is capable of carrying it out.<sup>168</sup> The persistently violent offender probably needs to be detained behind bars, but those bars do not need to be provided by the adult system.<sup>169</sup> Juvenile detention facilities are also criminogenic, but not nearly as much as adult prisons.<sup>170</sup>

### *E. Retribution*

The foregoing discussion suggests that retribution is the strongest, and perhaps the only, justification for transfer. The argument in this vein is that certain crimes demand prolonged punishment, which only the adult system can provide. If retribution is defined solely from a deontological perspective and desert is based solely on the offense (rather than the whole person), this argument is persuasive. For reasons already suggested, a sixteen-year-old who commits murder, attempted murder, aggravated rape, armed robbery, a major drug distribution offense, or any other offense that would warrant a sentence of ten years or longer if committed by an adult, will generally have to be transferred to adult court if a retributively appropriate sentence is to be imposed, even assuming a robust discount for youth and juvenile dispositional jurisdiction ending at twenty-one, rather than eighteen.<sup>171</sup>

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165. See McCrary & Sanga, *supra* note 131, at 9–12.

166. See MULVEY & SCHUBERT, *supra* note 138, at 4–5 (summarizing research on victimization, including one study that found that juveniles in adult prisons are five times more likely to be sexually assaulted and almost twice as likely to be attacked with a weapon or beaten by staff than juveniles housed in juvenile facilities).

167. One empirically-based analysis comes to the conclusion that even detention in *juvenile* facilities is “dangerous,” “ineffective,” “unnecessary,” “obsolete,” “wasteful,” and “inadequate,” and recommends that correctional placements for juvenile offenders should be significantly reduced. Richard A. Mendel, *No Place for Kids: The Case for Redacting Juvenile Incarceration*, ANNIE E. CASEY FOUND. 2–4 (2011), available at [http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ\\_NoPlaceForKids\\_Full.pdf](http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf). The report also analyzes data from states that have reduced detention of juveniles within their juvenile justice systems in recent years and concludes that “[s]ubstantially reducing juvenile incarceration rates has not proven to be a catalyst for more youth crime.” *Id.* at 27.

168. See *infra* Part III.E.

169. See *infra* Part III.E.

170. Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 NOTRE DAME J. L., ETHICS & PUB. POL’Y 1, 28 (2002) (“There is a consistent pattern of higher offending among adolescents punished as adults compared to adolescents punished as juveniles.”); see generally Randi Hjalmarsson, *Juvenile Jails: A Path to the Straight and Narrow or to Hardened Criminality?*, 52 J. L. & ECON. 779 (2009) (describing a study that detention in juvenile facilities is more effective at “detering” juvenile crime than transfer to adult prison).

171. See *supra* text accompanying notes 69–72.

Retribution does not have to be defined in deontological terms, however.<sup>172</sup> A consequentialist approach to desert analysis might look to the effects of failing to adhere to the “morally correct” punishment from a desert perspective.<sup>173</sup> What will be the real-world impact of a system that does not give juvenile offenders their retributive due?

One hypothesis is that people upset with punishment that is perceived to be lenient will be more prone to take matters into their own hands or in some other way express disdain for the legal system. For instance, Paul Robinson, who has developed the concept of “empirical desert,” has argued that if punishment routinely fails to track empirically-derived lay views on deserved punishment, the result might be more noncompliance with the law in general, because people will lose respect for a government that is substantively unjust.<sup>174</sup> He and his colleagues have conducted research that purports to support that position.<sup>175</sup> My own research, however, indicates that even when punishment represents a truly radical departure from lay norms, the hypothesized generalized non-compliance effects do not occur or occur only trivially.<sup>176</sup> Furthermore, to the extent such noncompliance effects do occur, they are at least as likely when punishment departs from utilitarian precepts as from retributive ones.<sup>177</sup>

More importantly, no research along these lines has been carried out in connection with juvenile justice.<sup>178</sup> Even if punishments that diverge from desert do have general non-compliance effects when they are imposed on adults, the same divergence in the juvenile context might not have the same impact. A survey conducted by Scott and Steinberg found, for instance, that “[a]dult 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.”<sup>179</sup> This finding suggests not only that retribution is not as important in the juvenile context as in the adult context, but also that the public supports transfer largely as a means of protecting its members. Accordingly, if

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172. See PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 144 (2008).

173. See *id.*

174. See *id.* (“[A] distribution of liability that deviates from community perceptions of just desert undermines the system’s moral credibility and therefore its crime control effectiveness.”).

175. See Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1999–2007 (2010) (reporting studies that purport to find a diminishment in both willingness to comply with the law and willingness to cooperate with authorities in those who are exposed to “unjust” punishment scenarios).

176. Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 101–08 (2013) (reporting studies that suggest “the relationship between compliance and satisfaction with the substance of the criminal law is complicated and difficult to predict, and that any relationship that does exist is not likely to be very strong”).

177. *Id.* at 102–03 (reporting a study suggesting that “while failing to adhere to desert might cause some noncompliance, failing to adhere to utilitarian goals could cause even more noncompliance”).

178. See *id.*

179. SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 2, at 281.

a juvenile justice system can protect society as effectively as the adult system, transfer is not needed from the empirical desert point of view.

#### IV. CONCLUSION: A JUVENILE SYSTEM WITHOUT TRANSFER

A juvenile justice system without transfer could be structured in several ways. In *Juveniles at Risk*, we proposed that act jurisdiction end at age eighteen, while dispositional jurisdiction would extend to twenty-five.<sup>180</sup> Both of these age thresholds are somewhat arbitrary.<sup>181</sup> But both are based on past practices in a number of states.<sup>182</sup> More importantly, both coincide with empirical research that indicates that (1) after age seventeen, non-mentally disordered people tend to possess the capacities demanded by any account of criminal culpability;<sup>183</sup> and (2) through age twenty-four, the brain is still maturing and character is still forming so that interventions are most likely to have significant effect up to that point.<sup>184</sup>

Under this regime, a seventeen-year-old who commits a crime could be subject to juvenile court jurisdiction for up to eight years, while offenders who are younger at the time of their crimes might be under that jurisdiction for a longer period of time.<sup>185</sup> However, most juveniles—even those who commit serious crimes—would not be subject to *detention* for anywhere near the full length of juvenile court jurisdiction, because most treatment regimes can be completed more quickly,<sup>186</sup> because desistance will often occur well before twenty-five,<sup>187</sup> and because program personnel would know that even detention in juvenile facilities is criminogenic and thus should be as short-lived as possible.<sup>188</sup>

Given this outcome, a deontological retributivist would probably be unhappy with most dispositions of serious offenders in the proposed regime. Whether the same conclusion would be reached by a consequentialist retributivist—one who weighs the delegitimizing impact of failing to punish an

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180. See SLOBOGIN & FONDACARO, *supra* note 11, at 79–80.

181. See *id.*

182. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE SYSTEM STRUCTURE AND PROCESS, STATISTICAL BRIEFING BOOK (2006), available at [http://ojjdp.ncjrs.org/ojstatbb/structure\\_process/qa04106.asp?qaDate=2004](http://ojjdp.ncjrs.org/ojstatbb/structure_process/qa04106.asp?qaDate=2004). Most states end juvenile court jurisdiction at age twenty-one; about eight extend it beyond that age. *Id.*

183. See *supra* text accompanying notes 65–67.

184. See Diana Fishbein et al., *Deficits in Behavioral Inhibition Predict Treatment Engagement in Prison Inmates*, 33 LAW & HUM. BEHAV. 419, 429 (2009) (explaining that the development of the prefrontal cortex, which is the part of the brain most closely associated with control and executive functioning, “remain[s] underdeveloped relative to other brain regions until about age 25”); Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”*, 64 AM. PSYCHOLOGIST 583, 592 (2007) (comparing psychosocial development of adolescents and adults in their mid-twenties).

185. See SLOBOGIN & FONDACARO, *supra* note 11, at 79–80.

186. See *supra* text accompanying notes 73–75.

187. See *supra* note 160.

188. See *supra* text accompanying notes 133–39.

offender as harshly as “society” wants against the benefits of avoiding transfer—is not clear. Legitimacy costs will be highest when an adolescent commits a horrific crime and the prosecutor has to concede that, even if convicted and sentenced to the extent the law will allow, at most, the offender will spend eight to ten years in detention.

A well-known example of this phenomenon is the case of Willie Bosket. During an eight-day period in 1978, when he was fifteen years old, Bosket committed or tried to commit five armed robberies in or around the New York City subway system, in the course of which two individuals were killed and a third wounded.<sup>189</sup> Sentenced to only five years in juvenile court, his case created such an outcry in New York that Governor Carey, who had previously been opposed to increasing transfer jurisdiction, called a special session of the legislature to consider juvenile justice reform.<sup>190</sup> The result was a law that lowered adult jurisdiction to fifteen and permitted prosecution of youths as young as thirteen if charged with murder.<sup>191</sup> Proving to some observers the wisdom of this legislative change, within four months of his release from juvenile court jurisdiction in 1983, Bosket assaulted and robbed a man.<sup>192</sup> While serving the resulting sentence during the next ten years, he committed a number of other assaults against court officials and prison guards and also committed arson.<sup>193</sup> Today, serving a prison term of twenty-five years to life, Bosket is housed in a special plexiglass-lined cell with four video cameras trained on him at all times.<sup>194</sup> Visitors may only talk to him through a window in the cell.<sup>195</sup>

In light of the New York legislature’s immediate response to Bosket, one might conclude that the proposed regime would not survive its first Bosket-type case. Ideally, however, politicians would resist the idea that thirteen-to-seventeen-year-old murderers should be sentenced to life terms simply because a vocal portion of the citizenry demands it. They could try to allay the fears of those worried about public safety by citing the research that identifies more effective, less costly crime-prevention measures. And they might be able to combat retribution-driven concerns by asking the public to focus on the offender’s full life story. In Bosket’s case, for instance, had public authorities disclosed not only Bosket’s offenses, but also emphasized that he had begun offending at age nine, soon after his father was put in prison for life on a

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189. See FOX BUTTERFIELD, *ALL GOD’S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE* 213–15 (1995) (giving a full account of the Bosket case and his crimes).

190. *Id.* at 226–27.

191. See N.Y. PENAL LAW § 10.00(18) (McKinney 2009).

192. See Fox Butterfield, *Jailed “Monster” Gets More Prison Time for Stabbing a Guard*, N.Y. TIMES (Apr. 20, 1989), available at <http://www.nytimes.com/1989/04/20/nyregion/jailed-monster-gets-more-prison-time-for-stabbing-a-guard.html>.

193. *Id.*

194. See John Eligon, *Two Decades in Solitary*, N.Y. TIMES (Sept. 22, 2008), available at [http://www.nytimes.com/2008/09/23/nyregion/23inmate.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/09/23/nyregion/23inmate.html?pagewanted=all&_r=0).

195. *Id.*

murder conviction, that his mother had nothing to do with him from an early age, and that he was in and out of reformatories that did little but warehouse him, the public's vengeful urges might have been assuaged.<sup>196</sup>

If that seems pollyannish and a more robust legislative response is thought to be needed, a juvenile justice system without transfer could include a dispositional safety valve, which would permit preventive confinement to continue past age twenty-five for those offenders who (like Bosket?) are “dangerous beyond their control.”<sup>197</sup> The latter language comes from *Kansas v. Hendricks* and was the Court's way of describing a narrow subset of adult offenders who may be detained beyond their sentence on risk grounds without violating substantive due process.<sup>198</sup> Only a few offenders would qualify for such detention, however.<sup>199</sup> As the Court put it in a later case, to permit this type of preventive detention “there must be proof of serious difficulty in controlling behavior. . . . sufficient to distinguish the dangerous . . . 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.”<sup>200</sup>

While this safety valve might seem to be transfer in disguise, it is different from transfer in two essential ways. First, the decision to confine for a longer period of time does not occur at the front end, before it can be known whether treatment and the aging process will minimize the person's risk, but only after the offender has demonstrated he is dangerous beyond control.<sup>201</sup> Second, the disposition remains indeterminate, which means that release before the “deserved” length of punishment is always a possibility.<sup>202</sup> As the Supreme Court stated in *Graham*, “[a] State is not required to guarantee eventual freedom” to juveniles, but it must provide “some meaningful opportunity for release based on demonstrated maturity and rehabilitation.”<sup>203</sup>

The proposal, then, is to create a juvenile justice system that permits exercise of juvenile court jurisdiction until age twenty-five and authorizes preventive detention beyond that age for those who are dangerous beyond their control. Yet to be answered is whether such a system would satisfy modern retributive urges sufficiently to inhibit populist actions—either against particular juvenile offenders or against the State—that stem from a perceived failure to exact sufficient punishment. But given the known disadvantages of transfer, experimentation with such a system is preferable to continuing to try

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196. See BUTTERFIELD, *supra* note 189, at 135–49, 176–78 (describing Bosket's early years and from ages eight to eleven).

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

198. *See id.*

199. *See id.*

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

201. *See Hendricks*, 521 U.S. at 357.

202. *See Crane*, 534 U.S. at 413.

203. *Graham v. Florida*, 130 S. Ct. 2011, 2016 (2010).

juvenile offenders as adults simply to placate a deontological demand for justice.