ARTICLES

A PREVENTION MODEL OF JUVENILE JUSTICE: THE PROMISE OF *KANSAS V. HENDRICKS* FOR CHILDREN

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I. INTRODUCTION

The United States currently has two systems for processing individuals who commit crime: the criminal justice system for adults and the juvenile justice system for children. Not long ago these systems differed significantly in virtually all respects, including their underlying principles, their procedures, and their dispositions. Most importantly, while punishment for adults was premised on retribution and deterrence, children were generally subject to diversion or short-term legal restraint which, at least in theory, emphasized rehabilitation.

Between the late 1960s and the present, however, the juvenile system's philosophy and structure have increasingly come to mimic the adult system. Spurred by courts and commentators worried about abuse and a public concerned about increasing juvenile crime rates, legislatures have narrowed juvenile court jurisdiction, nudged what is left of that jurisdiction toward a punishment orientation that often downplays treatment, and imposed adult criminal procedures and determinate sentences. In at least some states, the two systems seem on the verge of becoming one, and many advocate for just such a merger, albeit perhaps with special dispositional accommodations for children.[1]

This standard story about the recent past and near future of the two systems has become more complicated, however, because of the Supreme Court's 1997 decision in *Kansas v. Hendricks*.[2] In *Hendricks*, the Court held that the state could confine indefinitely a sex offender who had served his sentence, based solely on a showing of dangerousness caused by a "mental abnormality" that leads to difficulty in controlling behavior. Severe mental illness, of the type normally required for civil commitment, need not be proven as a predicate for this preventive detention.[3] With this holding the Court put its imprimatur on a new method of dealing with adult criminals, one grounded solely in forward-looking prevention and treatment rather than on backward-looking punishment for crimes committed. In other words, the Court sanctioned a system for adults—at least recidivist adults—very much like the one juveniles experienced three

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1. *See* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991); Robert O. Dawson, *The Future of Juvenile Justice: Is It Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136 (1990); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997).

2. 521 U.S. 346 (1997).

3. *Id.* at 360 ("Hendricks' diagnosis as a pedophile, which qualifies as a 'mental abnormality' under the Act, . . . plainly suffices for due process purposes.").

decades ago. We are in the somewhat ironic position of modifying the adult system in the direction of the old juvenile court at the same time the juvenile system is moving toward the adult punishment model.

Of course there are differences between a *Hendricks* regime and the traditional juvenile one. The sexual predator statute at issue in *Hendricks* appears to be aimed primarily at incapacitation,[4] while the original juvenile court was more attuned to rehabilitation, ideally with minimal associated confinement.[5] The term "sexual predator" conjures up a hardened, incorrigible criminal who is unable to control his actions, while juvenile delinquents, in common parlance, are maladjusted kids who can be straightened out with enough effort. But the fundamental premise of the Kansas sexual predator statute and the original version of the delinquency system is the same: prevention rather than punishment is the primary goal.

Hendricks has been roundly castigated by most commentators.[6] Even those who support the holding believe it should be read very narrowly.[7] This Article argues that, whatever may be the proper response to *Hendricks* in the adult context, the prevention model[8] it endorses is the correct one for juvenile justice. It argues further that this

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4. The statute at issue in *Hendricks* stated in its preamhle:

> In contrast to persons appropriate for civil commitment under [the general involuntary civil commitment statute], sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. . . . The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society."

KAN. STAT. ANN. § 59-29a01 (1997).

5. *See* HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 1-21 (1927) (describing rehabilitation and probation as "cardinal" aspects of the juvenile system); *see also* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977).

6. See *infra* text accompanying notes 53-58 for a summary of the criticisms.

7. *See* Alexander D. Brooks, *The Incapacitation by Civil Commitment of Pathologically Violent Sex Offenders*, *in* LAW, MENTAL HEALTH, AND MENTAL DISORDER 384 (Bruce D. Sales & Daniel W. Shuman eds., 1996); John Kip Cornwell, *Understanding the Role of the Police and Parens Patriae Powers in Involuntary Civil Commitment Before and After* Hendricks, 4 PSYCHOL. PUB. POL'Y & L. 377 (1998).

8. In public health, psychology, and other disciplines, the term "prevention" encompasses several types of intervention, depending on the status of the target and the timing of the intervention. In this Article, use of the term generally constitutes either secondary, or selective intervention (i.e., intervention designed to identify delinquency at an early stage to reduce its length and severity), and tertiary prevention, or treatment (i.e., intervention to reduce the degree of impairment that results from delinquency that has already occurred). Primary or universal preventive interventions target a population in which the disorder (e.g., delinquency) has not yet occurred.

model, which *Hendricks* recognized as a means of controlling those who have difficulty controlling themselves, justifies better than any other why a separate juvenile justice system should be maintained. While both the greater malleability of children and their lesser culpability may partially rationalize such a system, it is the greater undeterrability of youth that best explains why they should be treated differently than adults.

Conceptualizing the goal of the juvenile delinquency system in terms of prevention also has significant implications for the jurisdiction of the juvenile court, for the law of transfer to adult court, and for the types of interventions that should take place in the juvenile system. Juvenile court jurisdiction should be based on dangerousness, not culpability (although utilitarian concerns lead us to conclude that culpability should nonetheless play a significant role in determining the threshold for state intervention). Similarly, transfer of a juvenile to adult court should not be based on culpability, as it currently is in practice and increasingly in official doctrine as well, but rather reserved for those who are truly unamenable to treatment, a very narrow category of people. In addition, the penchant in the juvenile system for medical-model interventions should give way to ecological approaches that current social science research suggests are much more effective at prevention.

This Article proceeds as follows. Part II analyzes *Hendricks*'s reasoning in more detail and explains how it helps justify an independent juvenile delinquency system. Part III then describes how the prevention model affects juvenile court jurisdiction, in terms of who is subject to that system, who belongs in adult court, and who should be immune from any type of state intervention. Part IV provides an overview of the optimal ways in which prevention can be achieved for those who remain in the juvenile system, focusing on new developments in "risk management." The overarching goal is to demonstrate how *Hendricks* might breathe new life into a juvenile system that is in danger of sliding into oblivion.

II. THE CONCEPTUAL BASIS FOR A SEPARATE JUVENILE DELINQUENCY SYSTEM

A. A Typology of Systems

Variations in substantive criminal justice can be reduced to three basic forms: the retributive model, the preventive model, and some hybrid of the two.[9] The *retributive model* is focused on punishing blameworthy offenders for their acts. It is backward-looking and culpability oriented.

9. For an elaborate version of these variations, see Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19 (1987).

The *preventive model* is focused on preventing anti-social conduct. It is forward-looking and based on predictions of dangerousness. Under this model, culpability is irrelevant; a non-dangerous person who commits a culpable act is left alone, while a dangerous person who has yet to act on his or her propensities may not be. The *hybrid model* can take many forms, but two will be emphasized here. The first, the *retributive hybrid*, requires a culpable act for intervention and imposes a maximum sentence based on retributive principles, such as desert for the offense, but allows preventive concerns to dictate the nature and ultimate length of the sentence within the retributive range. A second form, the *preventive hybrid*, also requires a culpable act for intervention, but then focuses entirely on prevention in fashioning a disposition, with the result that sentences are indeterminate.

Adult criminal justice has vacillated between the retributive and hybrid models, while the juvenile delinquency system began as a preventive regime and has since moved in the direction of the other models. Most modern reformers of both the adult and juvenile systems have advocated a purely retributive model or some version of it. Some reformers simply believe the retributive approach is the most effective way of implementing a "get-tough" attitude on crime. But many have also argued that a "just deserts" orientation based on the nature of the offense rather than the nature of the offender is the only just system, is better at reducing disparity and is more easily administered.[10] Reformers who would move the juvenile court in particular in this direction assert further that the retributive model is more likely to be accompanied by procedural protections than a rehabilitation-oriented system that sees adversarial rights as an obstacle to accomplishing what is "best" for the child.[11] Proponents of the preventive model and the hybrid models are more optimistic about the predictive and treatment capabilities of the criminal justice system. They also believe that the retributive model is more likely to lead to counterproductive, and even inhumane, sentences.[12]

It seems likely that the retributive model will be the predominant version of adult criminal justice in this country in the foreseeable

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10. The most conspicuous exposition of this stance is ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

11. *See, e.g.*, Feld, *supra* note 1, at 70 ("[Juvenile courts] provide delinquents with fewer and less adequate procedural safeguards than those available to criminal defendants . . . . [and] the juvenile court's deficiencies reflect a fundamental flaw in [the court's] conception.").

12. *See generally* SEYMOUR L. HALLECK, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE MENTALLY DISORDERED OFFENDER 191-99 (1987).

future.[13] We examine below whether there is any rationale for rejecting the retributive approach in the *juvenile* context. More specifically, this Section focuses on whether there is a justification for maintaining an independent juvenile delinquency system based on a preventive or hybrid model.

B. The Standard Arguments: Malleability and Diminished Responsibility

Two bases for a separate juvenile system have been advanced. The original juvenile court was grounded primarily on the utilitarian notion that children (used interchangeably here with adolescents and juveniles) are more treatable than adults, and thus should benefit from a more treatment-oriented system.[14] This assertion can be broken down into several different assumptions: (1) children are less set in their ways and thus easier to change than adults; (2) children are more likely than adults to change in the wrong direction if the two groups are confined together; and (3) in a world with limited funds, money is better spent intervening early, rather than late, in life. Each of these assumptions can be correct even if the other two are incorrect.

The second argument in favor of a separate juvenile court is based on culpability. Children, it is asserted, are less responsible for their actions because of cognitive and volitional developmental deficiencies and thus should receive special treatment.[15] Most who make this assertion today do not contend that any but the youngest children are completely unaccountable for their actions. Rather, the usual stance along these lines is that the moral and decision-making capacities of children between seven and eighteen are inferior, albeit decreasingly so, and this inferiority

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13. Probably the single best indicator of this trend is the tendency in the states to follow the lead of the federal government in adopting sentencing guidelines that focus entirely on culpability-related factors in determining sentence. *See generally* SENTENCING REFORM IN OVERCROWDED TIMES (Michael Tonry & Kathleey Hatlestad eds., 1997).

14. *See generally* JUVENILE JUSTICE PHILOSOPHY: READINGS, CASES AND COMMENTS 551 (Frederic L. Faust & Paul J. Brantingham eds., 1974) (explaining the juvenile court's assumption that "children were infinitely malleable, the best possible subjects for the new social sciences to work wonders upon"); Anna Louise Simpson, Comment, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CAL. L. REV. 984 (1976).

15. *See* Martin R. Gardner, *The Right of Juvenile Offenders To Be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182, 191 (1989) ("The juvenile court movement assumed that young people under an articulated statutory age (sometimes as high as 21 years of age) are incapable of rational decisionmaking and thus lack the capacity for moral accountability assumed by the punitive model.").

should be recognized through more lenient treatment in a separate system.[16]

The factual assumptions underlying these arguments may well be accurate. Indeed, this Article subscribes to at least the second and third propositions about treatability laid out above, as well as to the idea that, compared to adults, children as a class are not as psychologically developed in legally relevant ways. Neither argument, however, persuasively establishes that a preventive regime of juvenile system is justified.

This conclusion is most apparent with respect to the diminished responsibility rationale. The premise of this argument is the retribution-based notion that relative culpability matters, which is identical to the premise of the punishment-based adult system. At most this argument supports handling children similarly to adults who suffer from mental illness or retardation, are provoked into committing crime, or for some other reason deserve mitigation. The approach most consistent with the diminished responsibility rationale would be to try children in adult court and either acquit them on insanity/infancy grounds, convict them on lesser charges, or impose more lenient sentences.[17]

The malleability argument in favor of a separate juvenile system comes closer to supporting a preventive regime, but it is ultimately flawed as well. The assumption that children are more amenable to treatment than adults may support providing more treatment modalities and separate facilities for youth. But by itself, this rationale cannot support a separate juvenile regime, for reasons grounded in both the Constitution and in good policy.

O'Connor v. Donaldson[18] is the most important case in this regard. In *Donaldson*, the Supreme Court held that the government may not deprive people of liberty merely because they are mentally ill or because such deprivation might, through treatment or otherwise, improve their lifestyle.[19] Although the Court was coy about its rationale, it likely believed that the government has no business forcing treatment even on eminently treatable individuals if they are competent to make their own

16. *See, e.g.*, Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997).

17. This is precisely the regime many commentators who subscribe to the punishment model have proposed. *See* Feld, *supra* note 1.

18. 422 U.S. 563 (1975).

19. *See id.* at 575 ("A finding of 'mental illness' alone cannot justify a State's locking a person up against his will . . . . incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends.").

decisions and are not significantly harmful to themselves or others.[20] In any event, most courts and commentators have interpreted *Donaldson* to mean that a person may be subject to involuntary treatment only when one of two showings is made: the person either has committed a culpable act (which triggers some version of the retributive model) or is dangerous to self or others (the preventive model).[21]

In short, treatability by itself cannot be a *sufficient* basis for a regime of coerced intervention (although, as developed below, an argument can be made that it is a *necessary* factor under some coercive intervention regimes). The question thus remains: is there a good rationale for a separate juvenile delinquency system based on the preventive model?

C. A Different Argument: Undeterrability

There is a rationale for a separate, prevention-oriented juvenile system that is superior to both the diminished responsibility and greater malleability explanations. That rationale comes from an unlikely source: a case that deals not with children, but with adults.

1. *KANSAS V. HENDRICKS*

Two terms ago, the U.S. Supreme Court decided *Kansas v. Hendricks*.[22] The decision upheld long-term preventive confinement of sex offenders who have a mental abnormality that predisposes them to commit other offenses. *Hendricks* has deservedly received much attention.[23] At the least, it signals the Court's approval of a new type of preventive confinement. More radically, it may foreshadow the end of the (retributive) adult criminal justice system as the primary means of protecting society from crime.

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20. *See id.* ("Assuming . . . that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.").

21. *See, e.g.*, Colyar v. Third Judicial Dist. Court, 469 F. Supp. 424, 430-32 (D. Utah 1979) (construing *Donaldson* to require either mental illness and danger to others or mental illness, an immediate danger to self and an inability to make a rational decision about treatment); JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 97-98 (1992). A harbinger of *Donaldson* was *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 113 (W. Va. 1974), which struck down a statute permitting commitment of a mentally ill person found "in need of custody, care or treatment in a hospital."

22. 521 U.S. 346 (1997).

23. For instance, an entire issue of *Psychology, Public Policy, and Law*, *see* 4 PSYCHOL. PUB. POL'Y & L. (1998), consisting of over 550 pages and 20 articles, is devoted to analysis of the case.

The United States has had sex offender legislation before. But those old statutes—called sex-psychopath or mentally-disordered sex offender laws—provided an *alternative* disposition for those who commit sex crimes. The Kansas statute at issue in *Hendricks* permits an *additional* disposition, after the person has served the sentence.[24] In other words, the Kansas statute permits confinement based on dangerousness alone, with no necessary connection to a particular criminal act.

One interpretation of *Hendricks*, which the majority itself seems to adopt, is that the holding merely applies accepted preventive detention doctrine to a new context. According to this view, *Hendricks* simply recognizes that civil commitment of the mentally ill, which has always been permitted, may include preventive confinement of sex offenders. The common law has long held that, under the state's police power, mentally ill people who are dangerous may be confined indeterminately,[25] a practice that the Supreme Court has refused to find unconstitutional on several occasions dating back to the 1970s.[26] Thus, this interpretation holds, *Hendricks* fits snugly within the tradition of protecting society through the commitment of people with mental illness who are likely to be violent in the future.

The problem with this interpretation is that the statute at issue in *Hendricks* does not represent "traditional" police power commitment, at least as that tradition has been reconstructed by theorists. Police power civil commitment, under the most widely accepted theory, permits the state to confine only those people who are "insane," that is, people who are so cognitively or volitionally impaired that they are incapable of obeying the criminal law. The state is justified in using a protective mechanism other than criminal punishment of past acts only for people for whom criminal punishment is meaningless. As the *Harvard Law Review* stated years ago:

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24. The statute contemplates commitment of sex offenders who are found not guilty by reason of insanity, those who are found incompetent to stand trial, and most importantly for present purposes, those who are convicted and scheduled for release. *See* KAN. STAT. ANN. § 59-29a03(a) (1997).

25. *See In re* Oakes, 8 Law Rep. 122, 124 (Mass. 1845) ("The right to restrain an insane person of his liberty, is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others.").

26. For instance, in *Jackson v. Indiana*, 406 U.S. 715, 736 (1972), the Court noted that the states "have traditionally exercised broad power to commit persons found to be mentally ill." Although it was willing to limit that power, in no way did the Court suggest it should be eliminated. *See id.* at 738. More recent cases standing for a similar proposition include *Foucha v. Louisiana*, 504 U.S. 71 (1992), and *Addington v. Texas*, 441 U.S. 418 (1979).

> By requiring a conviction before depriving persons who are not mentally ill of their liberty, the criminal law system relies on deterrence to reduce antisocial behavior. A state could argue that this punishment-deterrence approach fosters personal autonomy by allowing its citizens to choose whether to obey the law. . . . This justification would seem to provide a distinction between equally dangerous groups of mentally healthy and criminally insane individuals . . . . The latter group contains individuals whose mental condition 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.[27]

On its face, the statute at issue in *Hendricks* requires neither proof that its subjects are unable to make autonomous decisions nor proof that they are unaffected by the prospect of punishment. Instead, the statute authorizes confinement of any dangerous sex offender who suffers from a "mental abnormality" that "predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[28] This definition of mental abnormality hardly bespeaks insanity in the sense described by the *Harvard Law Review*.

Perhaps recognizing this fact, the *Hendricks* majority construed the Kansas statute to allow commitment only of people who suffer from a condition "that prevents them from exercising adequate control over their behavior."[29] At one point, going well beyond anything in the language or legislative history of the Act, the majority even read the law to limit confinement to those "who suffer from a volitional impairment rendering

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27. Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1232-33 (1974) (citations omitted); *see also* Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54, 59-62 (1982) (arguing that people with mental disorder generally have behavioral control, but noting that lack thereof could be a justification for commitment); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996); Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161, 182 (1995) ("[C]ognitive impairment of the ability to direct one's conduct through a process of practical reasoning . . . . renders one ineligible to participate in the rule-based criminal justice system and relegates one to the mental health component of the institution of social control.").

28. KAN. STAT. ANN. § 59-29a02(b) (1997).

29. 521 U.S. at 362.

them dangerous beyond their control."[30] This language does sound like insanity, at least under the volitional prong of the defense.[31] Although that prong has fallen into disfavor of late, it is still recognized by several states.[32]

The Court's interpretation of the Kansas law notwithstanding, the sex offenders committed under that statute and like statutes are not insane. Proof of this assertion is simple: people committed under these laws, including Hendricks himself, have been *convicted* on (and served time for) their sex offense charge, not excused on grounds of insanity. Indeed, a prosecutor, at least one in a pre-*Hendricks* regime,[33] would fight tooth-and-nail against an insanity claim in such cases, and would virtually always win. Moreover, as many have argued,[34] prosecutors *should* prevail in such cases. Although people who suffer from pedophilia like Hendricks may have strong antisocial urges, their cognitive capacities are generally intact and they exhibit much greater control of their actions than the severely mentally ill, as evidenced by their ability to exercise stealth and foresight in carrying out their acts.

Hendricks thus creates a new category of people who may be preventively detained for long periods of time: non-insane people who cannot "adequately" control their behavior. This category does not have to be (and will not be) limited to sex offenders. For instance, California has enacted generalized "mentally disordered prisoners" legislation allowing confinement of any offenders who have been convicted of and served sentences for serious crimes and are considered dangerous because

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30. *Id.* at 358.

31. The volitional prong of the defense, as encapsulated by the Model Penal Code, recognizes a defense when a person's mental disease or defect renders him or her substantially unable to conform behavior at the time of the offense to the requirements of the law. *See* MODEL PENAL CODE § 4.01 (1985).

32. *See generally* RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 526-27 (3d ed. 1999).

33. Interestingly enough, under a full-fledged *Hendricks*-type regime the prosecutor might have significant incentive to *assert* the insanity defense, to ensure long-term confinement.

34. *See, e.g.*, Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 263 (1998) ("Most arguments that facilely suggest that sexual impulses or desires, or any other kind, are necessarily uncontrollable are conceptually and empirically unsupported."); Schopp, *supra* note 27, at 190 ("Accepting the proposition that individuals cannot control these intrusive [sexual] urges and fantasies in the sense that they cannot simply decide not to experience such mental events does not entail that they cannot refrain from acting on these mental events."); Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 529-30 (1998) ("Because [sexual predators] can control their conduct, their repeated antisocial behavior should be subjected to criminal condemnation that holds them responsible for their actions.").

of a "mental disorder."[35] Thus *Hendricks* may signal a significant trend in criminal justice, away from the retributive model toward the preventive one.

2. HOW *HENDRICKS* JUSTIFIES A SEPARATE JUVENILE SYSTEM—THE DIMINISHED DETERRABILITY OF YOUTH

The new criminal paradigm authorized by *Hendricks* has been the target of substantial criticism, much of it well-founded. But it may have a silver lining. For *Hendricks* may provide the theoretical support that to date has been lacking for a separate juvenile system based on the preventive model. A good argument can be made that dangerous youthful offenders should constitute one of the subcategories of people who are eligible for the regime authorized by *Hendricks*. Furthermore, we believe that the criticisms levelled at *Hendricks*, whatever their merit in the adult context, are relatively toothless when *Hendricks* is applied to children.

The basis for the first assertion is that children, compared to adults, appear to be much less capable of controlling their criminal behavior. In other words, children are less deterrable than adults. Thus, like sex offenders, they can be subject to a preventive regime.

The evidence of this diminished deterrability among children comes from many sources. The focus here will be on the literature regarding risk perception and preference, temporal perspective, the effects of peer influence, and what might be called "stake-in-life" research. All four bodies of research suggest that the average adolescent, typically defined as a youth up to eighteen, differs from the average adult in ways that diminish willingness to pay attention to the criminal law.

Common stereotypes about adolescents portray them as risk takers—more willing to take risks than adults and more likely to believe that they will avoid the negative consequences of risky behavior. Developmental psychology research supports this perception. Not only do adolescents prefer to engage in risky or sensation-seeking behavior,[36] but, perhaps just as important, they may have different perceptions of risk itself. For example, adolescents appear to be unaware of some risks of

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35. CAL. PENAL CODE §§ 2960-2981 (West 1999) (permitting commitment of people who have a severe mental disorder that is not in remission or cannot be kept in remission without treatment and who represent a substantial danger of physical harm to others).

36. *See* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 260 (1996) ("The few extant comparisons of adults and adolescents suggest that thrill seeking and disinhibition (as assessed via measures of sensation seeking) may be higher during adolescence than adulthood.") (citations omitted).

which adults are aware, and to calculate the probability of positive and negative consequences differently than adults.[37]

The theoretical implications of these differences in risk perception for deterrence policies are relatively clear. Deterrence is premised on the ability of the individual to assess the benefits of engaging in criminal behavior versus the expected costs of punishment. Adolescents appear to calculate the risks of getting caught and punished differently than adults; that is, they do not assess the certainty of punishment in the same way adults would, or indeed as they themselves would once they become adults. Keane and his colleagues assert that adolescents who are risk-takers are more resistant to social control and less susceptible to deterrence.[38] If adolescents as a class are more likely than adults to be risk-takers, then this assessment applies to the entire age group.

Issues of risk perception are closely related to those of temporal perspective, sometimes described as future orientation. Generally, adolescents tend to focus more on short-term consequences and less on the long-term impact of a decision or behavior.[39] This focus on the immediate makes some intuitive sense: adolescents have had less experience with long-term consequences due to their age and they may be uncertain about what the future holds for them. This foreshortened time perspective may lead adolescents to discount the severity of punishment in a deterrence framework, particularly if it is linked to extended time

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

38. *See* Carl Keane et al., *Deterrence and Amplification of Juvenile Delinquency by Police Contact: The Importance of Gender and Risk-Orientation*, 29 BRIT. J. CRIMINOLOGY 336, 338 (1989) ("We suggest that those adolescents who are risk-takers will be more resistant to familial and formal control . . . .").

39. *See* Scott et al., *supra* note 37, at 231 ("In general, adolescents seem to discount the future more than adults and to weigh more heavily the short-term consequences of decisions—both risks and benefits—a response that in some settings contributes to risky behavior.") (citation omitted).

periods of social control or incarceration. Long-term punishments may not trigger the same aversion in a fourteen or fifteen year-old as they do in a twenty-four year-old.[40]

Peer influence can also affect deterrability. Adolescence is usually described as a period in which childhood reliance on parents lessens as reliance on the peer group increases regarding issues of identity and acceptance. As a result, adolescents are more likely than adults to be influenced by others, both in terms of how they evaluate their own behavior and in the sense of conforming to what peers are doing.[41] Because a majority of delinquent adolescent behavior occurs in groups,[42] peer pressure may exert a powerful counterweight to the societal commands of the criminal law. Indeed, Moffitt argues that adolescents prefer to mimic their antisocial peers because they appear to have attained adult status in many ways.[43]

Professors Stafford and Warr also argue that peer involvement affects perceptions of the certainty and severity of sanctions.[44] For example, the presence of multiple peers during delinquent behavior may heighten a juvenile's sense of anonymity and his or her sense of invulnerability to sanction from the justice system. Because some form of delinquent activity is a part of development for most adolescents[45] and occurs without legal consequence relatively frequently,[46] peers may also provide

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40. *See id.* ("It may be harder for an adolescent than for an adult to contemplate the meaning of a consequence that will be realized 10 to 15 years in the future, because such a time span is not easily made relevant to adolescent experience.").

41. *See* Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 615 (1979) (showing peak peer conformity at grade 9 between grades 3 and 12); Scott et al., *supra* note 37, at 230.

42. *See* Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981) ("The 'well-known secret' is this: adolescents commit crimes, as they live their lives, in groups.").

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

44. *See* Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 J. RES. CRIME & DELINQ. 123, 132 (1993) ("[A]n intelligent offender might be tempted to draw stronger conclusions about the certainty and severity of punishment from the cumulative experiences of friends than from his or her own relatively narrow life experiences.").

45. *See, e.g.*, Moffitt, *supra* note 43, at 675 (concluding that participation in delinquency is "a normal part of teen life").

46. Huizinga and Elliott concluded that only 24% of juveniles who committed offenses for which they could have been arrested were in fact arrested. *See* David Huizinga & Delbert S. Elliott, *Juvenile Offenders: Prevalence, Offender Incidence, and Arrest Rates by Race*, 33 CRIME & DELINQ. 206, 208-09 (1987). Another commentator

"indirect" experience that punishment is neither certain nor swift in most circumstances.

A final consideration in gauging relative deterrability is that an adolescent's position in society is different from that of an adult. Referred to as the "maturity gap,"[47] this difference stems from the fact that, although adolescents have often reached biological maturity, they have not yet been ascribed the traditional mantle of social responsibility and authority conveyed by adult status and roles. This status differential has two implications. First, adolescent autonomy is more restricted than that of adults, with less freedom to engage in "socially acceptable" outlets for risky behavior such as legal gambling, drinking, and risky financial investments. Second, minors are less integrated into the prosocial responsibilities, roles, and relationships of adulthood.[48]

This reduced "stake in life," like adolescents' attitude toward risk and their foreshortened temporal perspective, may lead them to feel they have less to lose than adults. Specifically, the "informal" costs and sanctions associated with deterrence may be weakened. Informal costs (as opposed to the formal costs of deterrence such as imprisonment) can be described in terms of commitment, attachment, and stigma.[49] Commitment costs relate to a person's stake in conformity and future achievement. Attachment costs occur through a loss of relationships in the social network. The stigma of arrest and prosecution may damage a person's reputation in the community. Deterrence works better if it raises the risks of incurring these informal costs. If adolescents have less stake in the future and relationships, with fewer formal social roles to risk, then the deterrent effects of these informal costs are diminished. Stated another way, adolescents have had less exposure to the external constraints that create internal controls.

This analysis of developmental concepts suggests that a criminal justice system based primarily on deterrence is not as well suited to respond to adolescent offenders as it is to adult offenders. Bolstering this conclusion is the well-documented fact that criminal behavior peaks during mid- to late adolescence and then begins to decline without further

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concluded, based on a review of self-report studies of juveniles, that "[t]here is considerable undetected delinquency, and police apprehension is low, probably less than 10 percent." CLEMENS BARTOLLAS, JUVENILE DELINQUENCY 46 (4th ed. 1997).

47. Moffitt, *supra* note 43, at 674.

48. *See* ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 21 (1993) (stating that "changes that strengthen social bonds to society in adulthood will lead to less crime and deviance").

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

intervention.[50] Studies of delinquency also report that most delinquent behavior is not planned, but rather a spur-of-the-moment decision.[51] All of this evidence supports the proposition that children are less deterrable than adults.

This is not to suggest that children should be excused for their criminal conduct. Like adult sex offenders, most children who commit criminal acts intend them and understand that others consider their actions to be wrong. Furthermore, like most adult sex offenders, most children are able to control their conduct in the minimal sense of being able to choose between options; adolescent offenders generally are capable of acting in a lawful manner at the time of the offense and decide not to do so.[52] But, also like many sex offenders, children are relatively unaffected by the prospect of punishment compared to most adults. Although the etiology of this undeterrability is quite different in the two cases, both juvenile and sex offenders are thus eligible for the preventive regime contemplated by *Hendricks*.

3. WHY *HENDRICKS* MAKES MORE SENSE FOR CHILDREN THAN FOR ADULTS

That the preventive regime authorized by *Hendricks* may be applicable to children as well as some categories of adults does not mean it should be adopted. As noted earlier, such a regime can be criticized on a number of grounds. These can be reduced to three essential complaints.

First, the *Hendricks* regime undermines the autonomy premise upon which the criminal justice system and our entire society is built. Whether or not our actions are determined, it is morally and practically important

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50. *See, e.g.*, Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552 (1983); Edward P. Mulvey & John F. LaRosa, Jr., *Delinquency Cessation and Adolescent Development*, 56 AM. J. ORTHOPSYCHIATRY 212 (1986).

51. *See* JAMES F. SHORT, JR. & FRED L. STRODTBECK, GROUP PROCESS AND GANG DELINQUENCY 248-65 (1965); MARVIN E. WOLFGANG ET AL., FROM BOY TO MAN, FROM DELINQUENCY TO CRIME 125 (1987). *See generally* Charles W. Thomas & Donna M. Bishop, *The Effect of Formal and Informal Sanctions on Delinquency: A Longitudinal Comparison of Labeling and Deterrence Theories*, 75 J. CRIM. L. & CRIMINOLOGY 1222, 1244 (1984) (stating that "the ability of formal or informal sanctions to modify delinquency, involvement, self-conceptions, or perceptions of risk in the fashion predicted by either deterrence theory or labeling theory finds little or no support in our analysis").

52. *See* Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 52-55 (1998).

to treat people as if they are responsible moral agents.[53] Dangerousness statutes limited to the incapacitation of those with extreme cognitive or volitional impairment do not threaten this imperative because they preventively confine only those who have been adjudged legally non-responsible. But preventive schemes like those endorsed in *Hendricks* send a different message. The more categories of people that are confined based on what they might do rather than what they have done, the greater the insult to the moral claim that individuals control their fate and actions. On a more practical level, the criminal justice system begins to "lose[ ] its ability to claim that offenders deserve the sentences they get. . . . [and thus] dilutes its ability to induce personal shame and to instigate social condemnation."[54]

A second reason to distrust a *Hendricks* regime is the familiar charge that the predictions upon which such a system rests are inherently unreliable.[55] While the culpability assessments required by a retributive system are difficult, at least the underlying behavior is an objective fact that can be proven and allows the inference of mental state. A predictive judgment does just the opposite: It relies in large part on speculation about present and future mental state to figure out whether antisocial behavior will occur. That task seems harder as a conceptual matter, and has proven quite difficult in practice.

Difficulties of prediction might not be particularly bothersome if the intervention based on such a prediction were relatively unintrusive. However, the typical response to someone labeled a sexual predator is incarceration. Furthermore, because the "mental abnormality" that leads to commitment is very resistant to change, a person found to be a sexual predator will have a hard time shaking off the label. Consequently,

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53. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 28-53, 180-83 (1968).

54. Paul H. Robinson, *A Failure of Moral Conviction?*, 117 PUB. INTEREST 40, 44 (1994). For a more extended discussion of these points, see Christopher Slobogin, *Dangerousness as a Criterion in the Criminal Process*, *in* LAW, MENTAL HEALTH, AND MENTAL DISORDER *supra* note 7, at 360, 362-73.

55. The most recent research, using the most refined methodology and examining the best prediction techniques, suggests that the false positive rate will be between 40 and 50% among groups of persons charged with crime. *See* Deidre Klassen & William A. O'Connor, *A Prospective Study of Predictors of Violence in Adult Male Mental Health Admissions*, 12 LAW & HUM. BEHAV. 143, 152 (1988) (40%); Charles W. Lidz et al., *The Accuracy of Predictions of Violence to Others*, 269 JAMA 1007, 1007 (1993) (45%); Diana Sepejak et al., *Clinical Predictions of Dangerousness: Two-Year Follow-up of 408 Pre-Trial Forensic Cases*, 11 BULL. AM. ACAD. PSYCHIATRY & L. 171 (1983) (43%). Note, however, that for certain populations (e.g., multiple offenders) that rate might drop precipitously and that persistent methodological problems with all of these studies may exaggerate the false positive rate. *See* Slobogin, *supra* note 54, at 372-73.

commitment under these statutes is prolonged, perhaps even permanent.[56]

Contrary to the Court's insinuation in *Hendricks*, the breadth of a dangerousness standard is not substantially minimized by adding a requirement that the subject be "unable to control adequately" the antisocial behavior. To many laypeople and even many judges, the latter phrase might encompass anyone who commits a crime, or at least anyone who commits two crimes. When one puts this broad construction of volitional impairment together with the recent push toward making incapacitation the most important goal of the criminal justice system,[57] the potential for abuse becomes significant.

A third reason to be reticent about a *Hendricks* regime is that all but the least ambitious versions of it would probably be enormously expensive. For instance, the State of Illinois estimated that implementing a sexual predator statute in that state would cost more than one billion dollars over a ten-year period.[58] The key policy question about such expenditures is not whether they improve public safety through incapacitation or rehabilitation of sex offenders; surely they buy some added protection. But compared to what? The central concern ought to be whether the amount of money spent on such programs diverts support from other more effective preventive mechanisms. The assertion that they do is best captured by a popular bumper sticker: Build more schools, not more prisons.

The arguments against a *Hendricks* regime are substantial. When applied in the juvenile context, however, the persuasiveness of each is significantly diminished. For example, the argument that a *Hendricks* regime would undermine society's presumption of individual autonomy loses virtually all of its force in the juvenile setting. While most children can justly be held criminally responsible for their criminal actions, the

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56. *See* NATIONAL ASS'N OF STATE MENTAL HEALTH PROGRAM DIRS., *Survey of the States: Laws/Legislation for the Commitment of Sex Offenders*, *in* SEXUAL PREDATOR LEGISLATION TOOL KIT (1997) ("Very few committed offenders are released (657 offenders currently committed nationally, fewer than 10 discharged in the last 12 months)."); Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 205-06 (1996) (stating that not one of 75 sex offenders committed to Minnesota's program since 1975 has been released entirely, although six are on conditional release).

57. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 3 (1995) ("Incapacitation now serves as the principal justification for imprisonment in American criminal justice: offenders are imprisoned in the United States to restrain them physically from offending again while they are confined.").

58. *See* John Q. La Fond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POL'Y & L. 468, 500 (1998).

research already reported, as well as other research on youths' judgmental capacities, suggests that on the autonomy scale children fall somewhere between adults with severe mental illness and non-mentally ill adults.[59] More importantly, there is a widespread *perception* that children are less autonomous than adults. Thus, treatment of children as relatively non-autonomous does not significantly undercut society's belief in free will or dilute its ability to socially condemn adult offenders.

A similar response can be made to the argument that a *Hendricks* regime rests on inherently unreliable predictions. A system that has jurisdiction only over children, as is true with current juvenile courts, is not vulnerable to the long-term abuse that will inevitably afflict a *Hendricks* regime. A "junior model" of that regime will not avoid erroneous interventions, but because intervention within the juvenile system is inherently time-limited, de facto life sentences of the type that could routinely occur under a *Hendricks* statute are not possible. Additionally, as will be discussed below, the juvenile system should be oriented toward risk management and rehabilitation rather than mere incapacitation, which should significantly curtail deprivations of liberty, erroneous or not.

As to the third, fiscal criticism of the *Hendricks* model, nothing can be said if one believes attempts to rehabilitate offenders are a waste of money. If, on the other hand, rehabilitative efforts can work, as is argued here,[60] they are best directed at people in their early years, for at least two reasons. First, the overall crime rate will be reduced because individuals will end their antisocial conduct earlier. Second, individuals will be crime-free for a longer period of time, allowing more productive lives on other fronts. A third intuitively appealing reason for such a position—that children are less set in their ways than adults and thus easier to rehabilitate—is based on an unproven empirical assumption. However, there is some indirect support for that assumption;[61] at least, there is little doubt that adolescents are more treatable than the average offender committed under sexual predator laws authorized by

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59. For the best overall treatment of children's maturity as it relates to criminal responsibility, see Scott & Grisso, *supra* note 16.

60. *See infra* Part IV.B.

61. Two reviews of the literature suggest that early childhood intervention is effective both in terms of reducing recidivism and in terms of cost-effectiveness, although no direct comparisons with adult programs were made. *See* Hirokazu Yoshikawa, *Prevention as Cumulative Protection: Effects of Early Family Support and Education on Chronic Delinquency and Its Risks*, 115 PSYCHOL. BULL. 28 (1994); Edward Zigler et al., *Early Childhood Intervention: A Promising Preventative for Juvenile Delinquency*, 47 AM. PSYCHOLOGIST 997, 1002 (1992).

Hendricks.[62] If these assertions are true then, as the bumper-sticker slogan suggests, a juvenile preventive system is much more cost-effective than an adult one.

D. Summary

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

As may have been gathered, a *Hendricks*-type preventive system in the juvenile setting is identical, at least in broad outline, to the system contemplated by many of those who created the juvenile court. Intervention under such a regime would be rehabilitation-oriented and aimed at preventing recidivism. We do not claim to be inventing a new juvenile system, but merely providing a stronger conceptual basis for its existence.

At the same time, specific aspects of a preventive model based on the relative undeterrability rationale are worth elaboration. Adoption of a *Hendricks* regime for children has implications for both juvenile court jurisdiction and juvenile dispositions that differ not just from a punishment-oriented system, but also from some of the traditional forms of juvenile justice. The rest of this Article explores these implications.

III. JUVENILE COURT JURISDICTION UNDER A PREVENTIVE REGIME

Who should be subject to a separate juvenile system based on a *Hendricks* prevention rationale? Traditionally, jurisdiction of the juvenile court ended at age eighteen, with children close to that age (i.e., ages fifteen through seventeen) transferred to adult court if they were considered unamenable to treatment. More recently, some states have lowered the maximum age for act jurisdiction and the minimum age for

62. As Dr. Wettstein points out, many of those committed as sexual predators will be the least treatable offenders who likely failed to participate or benefit from early attempts at treatment and will have persistently and pervasively denied their sexual offending during their years in prison. *See* Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597, 616-17 (1992).

transfer eligibility, and the transfer decision now is focused more on culpability than treatability.[63] In a *Hendricks* regime, act and transfer jurisdiction would revert to the more traditional approaches. Additionally, dangerousness would become an explicit criterion for intervention. At the same time, concerns about our ability to implement such a system might significantly modify the purely preventive regime contemplated by *Hendricks*.

A. The Age Requirement

If relative undeterrability is the rationale for a special regime for children, the age of eligibility for that regime should end when relative undeterrability does. Of course, the various traits and circumstances associated with a significant degree of undeterrability do not disappear suddenly at a particular age and will vary in strength at different ages for different people. The research is ambiguous as to when these characteristics change for most people. At this point in time, all that can be said is that the traditional cut-off of eighteen would not be inconsistent with research regarding risk perception, temporal perspective, the effects of peer pressure, or one's stake in life. Dispositional age, on the other hand, might extend well beyond eighteen, depending upon the perceived efficacy of treatment. That issue is addressed later in this Article.

B. The Act Requirement

The statute upheld in *Hendricks* did not require a recent antisocial act as a basis for preventive jurisdiction. Such a requirement would presumably have defeated the purpose of the law, because sex offenders who have been in prison are unlikely to have committed any sex offenses there. At the same time, everyone committed under the Kansas law must at least have been charged with a sex offense at some point, either to trigger their current sentence or in connection with an incompetency or insanity finding.[64] Whether the *Hendricks* Court would have permitted preventive detention of someone never charged with a sex offense is unclear.

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63. For a review of developments in juvenile court jurisdiction within the last two decades, see Mark Soler, *Juvenile Justice in the Next Century: Programs or Politics?*, A.B.A. CRIM. JUST., Winter 1996, at 27.

64. *See* KAN. STAT. ANN. § 59-29a03(a) (1997) (applying commitment procedures to sex offenders who have completed their sentence, or those charged with sex offenses who were found incompetent to stand trial, not guilty by reason of insanity or not guilty because of mental disease or defect).

As a theoretical matter, a purely preventive regime does not require proof of an act. The logic discussed earlier would permit the state to protect itself from truly undeterrable people without having to wait for any particular conduct. Consistent with this logic, most states do not require proof of an overt act in connection with the civil commitment of people with mental illness.[65]

As noted earlier, however, sex offenders are not as undeterrable as those with severe mental illness. Nor are children. The research described earlier merely suggests children are less likely to be affected by the prospect of criminal punishment, not that they are oblivious to it. Thus, the state should not have the authority to forego entirely a threshold act requirement; using the terminology described earlier in this Article, the juvenile system should be a preventive hybrid that requires proof of a culpable act, rather than purely preventive. This approach would make clear to would-be juvenile miscreants the precise point at which the state intervenes, a message at least some of them will hear despite youth's relative lack of attention to such rules.

There are at least two other reasons to require an act as a predicate for preventive intervention. First, proof of an antisocial act reduces the potential for mistake by providing evidence useful to the dangerousness determination.[66] Second, absent proof of an act, intervention is likely to appear unfair, both to the juvenile, thus possibly undermining cooperation with and efficacy of treatment,[67] and to society, thereby undermining the legitimacy and potency of the system as a whole.[68] Accordingly, even a youth who is likely to commit crime and can be successfully "treated" should not be subject to juvenile court jurisdiction without proof of an act the state has identified as a crime.

The most difficult question in this regard concerns the types of acts that justify intervention. Traditionally, juvenile court jurisdiction encompassed conduct that was not criminal if committed by adults, such

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65. REISNER ET AL., *supra* note 32, at 679.

66. The mantra of prediction research, still well-accepted, is that the best predictor of future acts is past acts. *See* JOHN MONAHAN, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 71 (1981). The "anamnestic" approach to prediction also benefits from detailed information about past criminal acts. *See infra* note 100.

67. *Cf.* BRUCE J. WINICK, THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT 328-37 (1997) (arguing that voluntary treatment is more likely to be efficacious than coerced treatment).

68. *See* Paul Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY, 693, 707 (1993) (A society "that imposes criminal liability on persons that the community regards as not sufficiently blameworthy risks destroying [the] motive to adhere to the laws . . .").

as truancy, incorrigibility and the like.[69] The fact that these acts do not necessarily cause a high degree of harm or offense is irrelevant in a preventive regime; rather, their usefulness as predictors of antisocial behavior should weigh heavily in determining whether they can be prerequisites for intervention. Recent research suggests that some types of low-level antisocial activity, particularly if repeated at an early age, can be good predictors for later, more serious antisocial activity.[70] If so, intervention might be justified in such cases. Again, however, intervention should not be equated with some sort of confinement. As developed below, physical incapacitation should be reserved for only a narrow category of cases in which there is a high degree of certainty that violent crime will thereby by prevented.

C. The Dangerousness Requirement

While *Hendricks* is not clear as to whether proof of an act is required, it explicitly requires proof of dangerousness. Such proof is notoriously difficult to obtain, particularly if dangerousness is conceptualized as a dichotomous decision (i.e., likely to recidivate versus not likely to recidivate).[71] Moreover, because the science of prediction is so new, specifying the criteria that justify a finding of dangerousness sufficiently objectively to permit meaningful review is impossible in many cases.

The individual cost of this uncertainty is greatest when the person found dangerous is deprived of liberty.[72] Accordingly, we proffer two proposals about how the preventive philosophy should be implemented when the State wants to confine a juvenile. First, physical confinement ought to occur only if the State provides proof beyond a reasonable doubt

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69. *See* FREDERICK B. SUSSMANN & FREDERIC S. BAUM, LAW OF JUVENILE DELINQUENCY 12 (3d ed 1968) (listing offenses such as "habitually truant," "incorrigible," "begging," visiting gaming places, and using vile language in a public place).

70. *See* Moffitt, *supra* note 43, at 678 (stating that life-course-persistent offenders are far more likely "adolescent-limited" offenders to have a long history of troublesome childhood behavior, such as behavioral problems in school).

71. Once a decision is made to intervene based on a prediction of dangerousness, however, dichotomous decisionmaking should be minimized in favor of a risk management approach. *See infra* Part IV.

72. In this context, we make no distinction between prisons, jails, "reform schools," and other institutions that restrain freedom on a 24-hour basis. While there are clearly differences in degree among these institutions, they all significantly restrict freedom and separate the person from his or her community. *See generally* J. Herbie DiFonzo, *Deprived of "Fatal Liberty": The Rhetoric of Child Saving and the Reality of Juvenile Incarceration*, 26 U. TOL. L. REV. 855 (1995).

that the juvenile will commit a serious crime if not incarcerated.[73] Second, the maximum length of the confinement should not exceed a set period (say, two years) or the duration of juvenile court jurisdiction, whichever is shortest.

The reasonable doubt proposal is, on its face, inconsistent with Supreme Court doctrine. While it tracks the requirements of the statute upheld in *Hendricks*,[74] it appears to run counter to both *Addington v. Texas*[75] and *Jones v. United States*.[76] *Addington* held that civil commitment is permissible on mere clear and convincing proof,[77] and *Jones* held that commitment of those found insane need not meet even the latter level of proof.[78] *Jones* also held that predictions of nonviolent behavior are sufficient cause for commitment.[79]

Upon closer inspection, however, these decisions can be distinguished from the juvenile context. The *Jones* standard of proof holding is clearly inapplicable to the juvenile setting, for the same reason it is inapplicable in civil commitment. If there is any rationale for distinguishing *Jones* from *Addington* and permitting a lower standard of proof for insanity acquittals than for those subjected to civil commitment, it is that the State's interest in presuming its citizens are autonomous actors, which offsets its interest in public safety in the civil commitment context, does not exist in the post-acquittal context, given the finding of insanity.[80] In this regard, the juvenile justice system is more like civil

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73. A similar proposal has been made in connection with civil commitment of those with mental illness. *See* Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, J. CONTEMP. LEGAL ISSUES (forthcoming 1999).

74. *See* KAN. STAT. ANN. § 59-29a07(a) (1997) (requiring proof beyond a reasonable doubt that the individual is a sexually violent predator).

75. 441 U.S. 418 (1979).

76. 463 U.S. 354 (1983).

77. *See* 441 U.S. at 432-33.

78. *Jones* upheld automatic commitment of a person found insane immediately following the verdict, *see* 463 U.S. at 363-66, and strongly implied that, at subsequent review hearings, the burden may be placed on the *acquittee* to prove nondangerousness by a preponderance of the evidence. *See* James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 972 (1986).

79. *See* 463 U.S. at 365 ("This Court never has held that 'violence,' however that term might be defined, is a prerequisite for a constitutional commitment.").

80. *See* Warren J. Ingber, Note, *Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U. L. REV. 281, 301-02, 309 (1982). The Court's explanation in *Jones* for the differing standards of proof in civil and criminal commitment was that proof of a criminal act at trial reduced the risk that a subsequent finding of dangerousness in connection with criminal commitment would be wrong. *See* 463 U.S. at 363-66. That analysis is seriously flawed, for a number of reasons. *See* Ellis, *supra* note 78, at 969-75.

commitment: it must presume the autonomy of its subjects. Thus, *Addington* sets the minimum standard of proof threshold for the juvenile system. Yet even *Addington*'s clear and convincing standard is insufficient in the latter context, because the detention associated with civil commitment is likely to be *much* shorter than juvenile detention.[81] Given the significantly greater liberty interest involved, preventive incapacitation in the juvenile system should require proof beyond a reasonable doubt.

For similar reasons, *Jones*'s second holding, concerning the propriety of commitment based on a nonviolent act, is also irrelevant in the juvenile context. The Supreme Court itself has recognized that *Jones* has limited applicability in situations that do not involve people with mental illness. As Justice O'Connor's concurrence in *Foucha v. Louisiana*[82] suggested, the State should not be able to confine non-mentally ill people on dangerousness grounds "where the only evidence of dangerousness is that the acquittee committed a nonviolent or relatively minor crime."[83] In other words, where the pure preventive model is not applicable, confinement should be limited to those likely to commit violent or other serious crimes, because only then does the intervention fit the risk.

An added justification for requiring proof of serious future criminal activity beyond a reasonable doubt in the juvenile context is the likelihood that the recidivism of children who are institutionalized will be much higher than that of children who are not.[84] The State's interest in preventing crime would hardly be met by increasing its likelihood, yet that may well be the result of relaxed proof requirements. At the same time, in cases where confinement is not sought, the proof of

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81. The advent of antipsychotic medication in the 1950s has drastically shortened the average commitment to a matter of weeks. The average length of stay in the hospital for the majority of patients was under 90 days even in the 1970s, before the advent of better drugs and managed care shortened the stay even more, to less than a month. *See* REISNER ET AL., *supra* note 32, at 778.

82. 504 U.S. 71 (1992).

83. *Id.* at 88 (O'Connor, J., concurring). Justice O'Connor's concurring vote was necessary to reach the result in *Foucha*.

84. A review of research (much of it admittedly methodologically flawed) suggests that deterrence-based interventions for juveniles not only do not reduce recidivism but may have iatrogenic effects of increasing recidivism by almost 30% over sinnilarly situated comparison groups. *See* Mark W. Lipsey, *Juvenile Delinquency Treatment: A Meta-Analytic Inquiry into the Variability of Effects*, *in* META-ANALYSIS FOR EXPLANATION: A CASEBOOK 83, 124 (Thomas Cook ed., 1992); *see also* John M. Rector, *Foreword* to DONNA MARTIN HAMPARIAN ET AL., THE VIOLENT FEW: A STUDY OF DANGEROUS JUVENILE OFFENDERS at xvii (1978); LYLE W. SHANNON, U.S. DEP'T OF JUSTICE, ASSESSING THE RELATIONSHIP OF ADULT CRIMINAL CAREERS TO JUVENILE CAREERS: A SUMMARY 15 (1982), *reported in* BARTOLLAS, *supra* note 46, at 41-43.

dangerousness required can be considerably less, both in terms of the standard of proof and the type of antisocial conduct predicted.

The second proposed limitation on institutionalization—a set duration for confinement—stems from at least three considerations. First, of course, it minimizes the harm caused by an erroneous prediction. Second, a time limit known to the offender avoids the demoralization that can occur in an indeterminate regime.[85] Third, such a limit can have a positive therapeutic effect because it gives the juvenile a specific behavioral goal to achieve (that is, no antisocial activity within the specified period in order to obtain release).[86]

Recall that the *Hendricks* majority found dangerousness alone to be an insufficient justification for commitment; some sort of volitional dysfunction must also be present. While children as a class exhibit such dysfunction, requiring proof of it in individual cases would be a meaningless limitation. If proof of dangerousness is difficult, proof of volitional dysfunction is nearly impossible. Indeed, many have argued that even proving the extreme disability encompassed by the volitional prong of the insanity defense (often colloquialized as the irresistible impulse doctrine) is an incoherent exercise, and in any event is not feasible scientifically.[87] If so, it is futile to carry out the task demanded by a *Hendricks* regime: the identification of *non*-insane juveniles who nonetheless have compromised volition.

Even if the "semi-irresistible" impulse apparently contemplated by *Hendricks* can be addressed meaningfully, individualized assessments of volitionality would be counterproductive because they would destroy the coherence of an independent juvenile justice system; children who are similar in terms of rehabilitative needs will nonetheless end up in different systems because of perceived differences in behavioral controls. Those who advocate a separate juvenile court predicated on the greater immaturity or malleability of children base that argument on the traits of

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85. *See* VON HIRSCH, *supra* note 10, at 31 (speaking of the "agonies of uncertainty" and concluding that "[n]ot surprisingly, many prisoners regard the indeterminate sentence as perhaps the worst feature of prison existence").

86. This is a well-known method of behavior management that harnesses principles of psychology to reduce risk. *See* WINICK, *supra* note 67, at ch. 4.

87. *See, e.g.*, ROBERT F. SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY 174 (1991) ("In short, volitional clauses . . . provide unsatisfactory NGRI standards because they are either unnecessary and irrelevant or they are vacuous."); Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 197 (1983) (stating "the exculpation of pyromaniacs [and other individuals with so-called impulse disorders] would be out of touch with commonly shared moral intuitions"); Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1595-99 (1994) (stating that most claims that lack of control is exculpatory are conceptually and empirically unsupported).

children as a class, despite evidence that individuals within that class can be as mature or as unchangeable as adults. Along the same lines, a showing, such as we attempt in this Article, that children as a group are less deterrable than adults should satisfy the reduced-volition component of *Hendricks*.

In sum, given experts' lack of knowledge about human behavior and criminal conduct, the regime envisioned in *Hendricks* requires modification when applied to the juvenile context. Proof of volitional dysfunction should not be a threshold requirement. On the other hand, proof that a crime has been committed should be required. Furthermore, if confinement is sought, proof of dangerousness should meet the reasonable doubt standard, and any confinement that results should not be prolonged. If a culpable act is not proven, or if such an act is proven but dangerousness cannot be, no intervention of any sort should take place. In practice, commission of most serious and many minor crimes will probably lead to some sort of intervention. But, if the limitations advocated above are adopted, incapacitative intervention should be rare,[88] and in any event should be of relatively short duration.

D. The Relevance of Treatability

A final issue that could relevant to juvenile court jurisdiction in a preventive scheme is the rehabilitative potential of the child. In our view, the State need not make a showing of treatability to justify preventive intervention against a dangerous youth. However, the State does owe appropriate resources to a juvenile who is treatable. Furthermore, even if the State can demonstrate that, despite appropriate treatment, a youth continues to engage in antisocial behavior, the juvenile should generally stay within the juvenile system, contrary to the current tendency to transfer such youth to adult court.

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88. A possibly relevant statistic here is that 5-6% of chronic offenders commit over 50% of juvenile crime. *See* DAVID P. FARRINGTON ET AL., UNDERSTANDING AND CONTROLLING CRIME 50-51 (1986); MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 88 (1972).

A fair inquiry at this point is whether proof of dangerousness beyond a reasonable doubt is possible; one might conclude that confinement under our proposal would be *extremely* rare, because such proof is so difficult to come by. For the argument that proof of dangerousness beyond a reasonable doubt is not impossible for certain groups of chronic offenders, as well as some suggestions for procedural protections in connection with dangerousness predictions, see Slobogin, *supra* note 54, at 366-70. In a nutshell, the argument is that methodological flaws in prediction research have led to underestimations of our predictive accuracy. At the same time theoretical and actuarial research suggests that a class of high-offending individuals can be identified.

1. TREATABILITY AND TREATMENT AS THRESHOLD REQUIREMENTS

One of the arguments made against the statute at issue in *Hendricks* was that it did not premise confinement on treatability. The Supreme Court apparently rejected this contention, stating at one point that "incapacitation [alone] may be a legitimate end of the civil law"[89] and at another that "we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others."[90] Bruce Winick has contended that, because the Court believed Hendricks was receiving some sort of treatment, these statements are dicta.[91] It seems more likely, however, that the Court meant to approve purely incapacitative confinement. As the majority stated, "it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed."[92]

However, the Court did leave open the issue of whether the State must provide treatment to those who *are* treatable.[93] The best argument for such an obligation flows from the idea that deprivation of a fundamental right such as liberty must take place in the least drastic way possible.[94] Under this theory, treatment that reduces the scope of the State's intervention should be forthcoming. Although the Supreme Court has apparently rejected least restrictive alternative analysis in deciding *which* treatment must be provided,[95] the Court has yet to address

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89. 521 U.S. at 365-66.

90. *Id.* at 366.

91. *See* Winick, *supra* note 34, at 531.

92. 521 U.S. at 366.

93. In justifying its decision, the majority emphasized that Hendricks was placed in a unit segregated from the general prison population and received some treatment. *See id.* at 367-68. The majority also quoted its statement in *Allen v. Illinois*, 478 U.S. 364 (1986), that "the State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment." *Hendricks*, 521 U.S. at 368 n.4; *see also* Cornwell, *supra* note 7, at 406.

94. This theory was first proposed by Roy G. Spece, in *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1, 33-46 (1978). It derives from the Supreme Court's First Amendment cases holding that state interference with the freedoms of speech and press must be carried out in the least drastic manner possible. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960). Surely, liberty is a more fundamental interest than speech and press.

95. *See* Youngberg v. Romeo, 457 U.S. 307, 321 (1982) ("It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.") (citation omitted). *But see* Riggins v. Nevada, 504 U.S. 127, 135 (1992) (appearing to require less intrusive alternative analysis in the context of forcibly

whether that theory bolsters a right to treatment in the first instance. Indeed, the Court's decision in *Youngberg v. Romeo*,[96] commonly thought to be a conservative take on the right to treatment, explicitly states that involuntarily committed patients are entitled to the care necessary to prevent unnecessary restraint.[97] This holding could easily be parlayed into a robust right to any treatment necessary to reduce prolonged confinement. Thus, while the State should not need to prove a juvenile is treatable in order to subject him or her to preventive intervention, it may have to release a treatable juvenile who is not provided treatment aimed at reducing recidivism.

Note that this "least restrictive alternative" theory of treatment is much stronger when State intervention is preventive as opposed to retributive in nature. Under a purely retributive model, the length of sentence is set according to the nature of the offense and the offender's culpability. The fact that treatment might reduce the offender's dangerousness is irrelevant. Under a preventive model, by contrast, treatment may well determine the length of disposition and therefore should be provided by the State.

2. UNTREATABILITY AS AN EXCLUSIONARY CRITERION

What of the juvenile who is provided treatment but who does not desist in his or her criminal behavior? The traditional juvenile court would transfer such juveniles to adult court, after finding them "unamenable to treatment." That tradition continues today, but transfer can be based on a host of other factors as well, virtually all of which appear to relate to the perceived culpability of the youth. In many states, statutes explicitly require, regardless of treatability, transfer of children who commit certain crimes or have a certain number of prior convictions.[98] Even where amenability to treatment remains an issue as a statutory matter, courts often analyze the issue in a way that suggests that culpability, not treatability, is their primary concern. For instance, two recent reviews of caselaw indicate that courts tend to base transfer decisions predominately on the seriousness of the offense, the number of prior offenses, and the length of time remaining for juvenile court

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administering medication to restore competency to stand trial).

96. 457 U.S. 307 (1982).

97. *See* 457 U.S. at 319 (holding "respondent's liberty interests require the State to provide minimally adequate or reasonable training to ensure . . . freedom from undue restraint").

98. *See* Eric Fritsch & Craig Hemmens, *Juvenile Waiver in the United States 1979-1995: A Comparison and Analysis of State Waiver Statutes*, JUV. & FAM. CT. J., Summer 1995, at 17, 24-31 tbls.1, 2.

jurisdiction,[99] factors which bear only a tangential relationship to treatability.

A preventive regime, in contrast, would focus directly on the extent to which treatment can reduce recidivism. The seriousness of the triggering offense and any prior offenses are relatively unimportant to such an inquiry. More important are details about how and why these offenses were committed, because this information helps determine whether the person will reoffend and how any future criminal conduct may be prevented.[100] Moreover, offense details are only a small part of the data that a well-functioning preventive system would require. As described in Part IV, particularly useful is information about the extent to which "risk factors" are present and can be treated and the extent to which such factors have been addressed in the past.

Suppose that as a result of this inquiry the determination is made that a dangerous juvenile who has committed an offense is untreatable. The traditional justification for transfer in this situation, apparently, is that the juvenile court has nothing to offer such a youth.[101] This may be true, but it does not mean a preventive regime cannot respond in such a situation. The juvenile system can provide preventive detention of dangerous, untreatable juveniles as easily as the adult system can. Furthermore, research strongly suggests such detention is less crimogenic than incarceration within the adult system.[102] Finally, to the extent

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99. *See* Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, J. CONTEMP. LEG. ISSUES (forthcoming 1999) and Frank Zimring, *Standards for Transfer to Criminal Court*, at 195 (manuscript on file with authors) (stating that "most juvenile waivers fit one of three problem case profiles:" juveniles who have committed a very serious crime; juveniles with extensive records; and juveniles close to the age boundary).

100. The "anamnestic" approach, which combines actuarial information with a detailed description of offense dynamics, is considered the best information source for prediction.. *See* GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 284 (2d ed. 1997); Marc Miller & Norval Morris, *Predictions of Dangerousness: An Argument for Limited Use*, 3 VIOLENCE & VICTIMS 263, 269 (1988).

101. Alternatively, the justification is that such youth are too dangerous to handle in the juvenile system. As suggested in the text, however, a juvenile detention center can handle most violent youth as well as an adult prison can. As to the real reasons transfer occurs, see *supra* note 99.

102. *See* Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 43 CRIME & DELINQ., 557 (1997) (a comparison of 2800 youth transferred to adult court and a same-sized sample identified higher short-term and long-term recidivism rates among the transferred youths); Jeffrey Fagan, *The Comparative Advantages of Juvenile Versus Criminal Court Sanction on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL'Y 77, 94-95 (concluding that recidivism rate for juveniles prosecuted for rohbery in criminal court is twice that of those tried in juvenile court, regardless of sentence type or severity).

untreatability is a function of the unavailability of resources, resort to the adult system would be unfair, both because the state is responsible for the child's "untreatability" and because such resources may become available at some later point in time.

There may be one instance, however, in which transfer from a preventive regime is justifiable: When a juvenile has been provided appropriate treatment and has intentionally spurned it, while at the same time continuing to reoffend. The rationale for this position is not that the preventive approach does not work—it can, using incarceration—but rather that, at some point, punishment is the most appropriate response because it is truly deserved. When the youth has intentionally failed to respond to the opportunity to change behavior and attitude, the justification for application of the just deserts model is at its strongest. Additionally, preserving a vestige of transfer jurisdiction enhances the efficacy of the preventive regime because it provides an incentive for youth to participate in juvenile justice treatment programs and to avoid reoffending.

While this discussion of treatability, untreatability, and treatment lays out a systemic framework, it is lacking in context. How do we determine whether someone is treatable or untreatable? More fundamentally, what is "treatment?" The final section of this Article provides partial answers to these questions by exploring in more detail how a preventive system of juvenile justice intervention would work.

IV. JUVENILE DISPOSITION UNDER A PREVENTIVE REGIME: RISK MANAGEMENT AND ECOLOGICAL INTERVENTIONS

The ultimate test of the preventive model or a hybrid of it is whether recidivism can be reduced through treatment programs. It must be conceded that historically the juvenile system has not done particularly well in this regard. But new developments in the way "treatment" is conceptualized and in specific types of intervention programs give some cause for optimism. More specifically, the advent of the risk management concept and the creation of new, ecological intervention programs have reinvigorated thinking about preventive techniques. After explaining these developments and providing some concrete examples of their implications, this Article revisits the amenability to treatment issues just discussed and proposes that a *presumption* of amenability be recognized as a fundamental aspect of a preventive juvenile system.

A. Toward a Risk Management Model of Juvenile Justice

In light of the original juvenile court's emphasis on reorienting wayward children toward "productive" lives,[103] it is important to emphasize that treatment intervention in a *Hendricks* regime is aimed *solely* at reducing recidivism. This proposition not only flows from the police power orientation of *Hendricks*, but also may be required by the Supreme Court's decision in *Donaldson*, discussed earlier in this Article. In *Donaldson*, the Court expressly held that the State may not coercively intervene in people's lives "merely to ensure them a living standard superior to that they enjoy in the private community."[104] The central task in constructing an intervention program in a preventive regime, therefore, is developing a method of differentiating between three classes of people: those who will not reoffend, those who will reoffend if not treated, and those who will reoffend regardless of treatment.

Theorists have described two methods of carrying out this task. The traditional approach is based on a prediction, while the second is called risk management.[105] The prediction approach calls for a dichotomous, up-or-down decision as to whether a person is "dangerous" and treatable. The prediction ideally is based both on static predictor variables, such as gender and prior arrests, and dynamic "risk factors," such as current substance abuse, peer influences, or family problems, that may be subject to amelioration. The risk management approach is more fluid, in that there is no single, final decision as to whether a person is or is not dangerous. Rather, an individual is continually assessed over time in an effort to assess the ebb and flow of dynamic risk factors, and efforts are made to "manage" those factors in a way that minimizes recidivism.

The initial determination as to whether a juvenile should be subject to juvenile court jurisdiction must be based on a dichotomous prediction. Because virtually every juvenile offender can be associated with at least one dynamic risk factor, a risk management approach applied at the front

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103. Even before the advent of the separate juvenile court, courts talked about "reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society . . . ." *Ex parte* Ah Peen, 51 Cal. 280, 281 (1876). Platt has argued that the subsequent development of the juvenile court was part of a concerted effort to impose middle-class, Protestant, and patriotic values on an immigrant-laden lower class. *See* PLATT, *supra* note 5, at 98. Others argue that Platt exaggerates this point, but do concede at least some validity to it. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 413-15 (1993).

104. 422 U.S. at 575.

105. For one description of this distinction, see Kirk Heilbrun, *Prediction Versus Management Models Relevant to Risk Assessment: The Importance of Legal Decision-Making Context*, 21 LAW & HUM. BEHAV. 347 (1997).

end would mean routine intervention, an outcome obviously inconsistent with a preference for liberty. Once the decision to intervene is made, however, the risk management approach is a particularly a useful way of conceptualizing how a preventive treatment regime should work.

A risk management model of juvenile justice might include the following features:

> (1) Interventions that are comprehensive in scope and "multisystemic" in nature[106] (i.e., focus on the social systems that affect the juvenile, not just on the juvenile in isolation), and that vary along a continuum from minimum to maximum restriction depending on recidivism risk and threat to public safety;
>
> (2) An Individual Risk Management Plan (IRMP) for each juvenile, which would seek to match the offender with the type of intervention that has the greatest likelihood of promoting the prevention of recidivism while at the same time protecting public safety;
>
> (3) A risk management team (RMT), which would be responsible for the IRMPs and monitor the intervention, headed by a case manager, with input from the child, family members, school authorities, juvenile justice officials, mental health experts, vocational counseling professionals, and other interested parties;
>
> (4) Ongoing, periodic evaluation and modification of the interventions, based on empirical evidence. To facilitate this objective, a juvenile justice record-keeping system should be established, with empirical data on offender characteristics and the efficacy of various intervention strategies serving as a source of ongoing feedback for program and policy reform;
>
> (5) Oversight of the management system and record keeping, either through the juvenile court, or through an administrative body, the state court administrator's office, or any other judicial, administrative, or hybrid entity with the competence to

106. See *infra* Part IV.B for further explication of this term.

implement and evaluate juvenile justice policy objectives (i.e., recidivism reduction and protection of public safety).[107]

The following three cases illustrate how this risk management approach and the preventive regime it would implement would work in the juvenile context. These three cases are hypothetical, but all represent typical cases in today's juvenile court.

Jimmy G. *Jimmy G. is fifteen. He is the oldest of four children and a good student in school. His mother, a homemaker throughout most of Jimmy's childhood, began working part-time as a cashier at the local supermarket about three years ago, when her husband began having difficulty holding a job as an auto mechanic because of drinking problems. Jimmy has never been in serious trouble with the law but lately he has been staying out all night with a group of rowdy friends. He has begun drinking heavily on the weekends because it makes him feel more confident and helps him forget about the horrific abuse that his father has leveled against him, his mother, and his younger siblings. When Jimmy was twelve, his father punched him in the mouth at the dinner table and knocked out his two front teeth because he spilled his glass of cola on the new light-colored carpet in the dining room. At home, Jimmy is always very edgy and anxious because he is never sure when he or some other family member will be beaten by his father during a drunken rage. Every member of the family has been beaten to the point of requiring medical treatment, but the causes of the injuries have always been covered up and hidden from the authorities because all family members fear that they will be beaten even more severely if they tell on their father. Jimmy feels responsible for protecting his mother and siblings but is always beaten himself if he tries to intervene during one of his father's rampages against another family member. Last week, Jimmy came home from school and saw his mother sitting on the couch, crying, with a badly broken nose and a split lip. He saw his father passed out on the easy chair with an emptied six-pack at his side. Without asking what happened, Jimmy walked calmly into his bedroom, grabbed a baseball bat from his closet, returned to the den, and bashed his father's head with the bat. His father died instantly. When the police arrived, he told the investigating officer that he had been trying to work up the nerve to confront his father over the past year or so. He was charged with first degree murder.*

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107. *Cf.* Mark R. Fondacaro et al., *Psycholegal Research in Non-Judicial Settings: Administrative Law, A New Frontier* (1996) (paper presented at the 1996 Biennial Conference of the American Psychology-Law Society, Hilton Head, South Carolina) (arguing that administrative rather than judicial approaches are better suited for implementing forward-looking policy objectives that draw on social and behavioral science as a guide).

Jimmy meets the age and act thresholds under the preventive regime proposed in this Article: He is fifteen and he intentionally killed his father. Under the proposed regime, a third preliminary question is whether Jimmy presents a clear danger to others. In gathering information for the court and the IRMP on this issue, the RMT would, at a minimum, ask Jimmy about his intentions regarding future violence, examine his school records for evidence of aggressive behavior, and interview family members about whether they or others are at risk if Jimmy is not sent to a secure facility. Because Jimmy has never been in any serious trouble with the law, and because his aggression to date has been directed solely at someone who had physically tormented him for several years and is now dead, such detention is probably not warranted.

Assuming that a secure placement is not necessary, Jimmy could probably be managed safely through probationary supervision that would decrease in frequency and intensity to the extent that he remains law-abiding. Jimmy exhibits several psychosocial risk factors that would be addressed as part of his IRMP. He is highly anxious and fearful and may benefit from social skills training to help him develop nonviolent coping strategies for dealing with conflict. His excessive drinking and potential familial risk for alcoholism may be targets of intervention to the extent that alcohol abuse is judged to be a risk factor for future aggressive behavior. Likewise, behavioral contracting to avoid socializing with rowdy and aggressive peers may be an integral component of his IRMP. Jimmy's success at dealing with these factors, his functioning in the family, school, peer, and neighborhood contexts, and his compliance with the law would be assessed on a periodic basis and his IRMP would be updated and modified accordingly. If he remains law-abiding, juvenile justice jurisdiction might expire within a few years. If, on the other hand, Jimmy reoffends, his IRMP would be modified and tailored to ensure he received the most appropriate intervention at the most appropriate level of supervision to minimize future recidivism risk.

Contrast this disposition with the treatment of Jimmy under a retributive regime. The latter system would focus on establishing Jimmy's culpability for his father's death and calibrating the appropriate punishment. Conviction would probably result in imprisonment for a fairly long term. In today's world, that incarceration would probably take place in an adult institution, where Jimmy's recidivism risk would be enhanced[108] and his chances for developing a stake in his own future would be obliterated.

Charles M. *Charles M. is sixteen years old and has been arrested repeatedly for auto theft. His mother is a single parent who works as a*

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108. *See supra* note 102.

nurse's aide and who always stands by her son when he gets into trouble. She says and truly believes that he is basically a good kid who is just a little "mixed up." Charles has been taken into custody repeatedly and has been in and out of court-ordered treatment programs for years. He was eventually placed in a group home but "escaped" from the premises on two separate occasions, each time eventually being apprehended by police, but not before he had stolen several vehicles on each outing. The prosecutor is presently petitioning to have him tried as an adult due to his habitual offending.

Charles M. is a repeat offender whose recidivism risk is very high. That fact, combined with his previous "escapes" from group homes, make Charles a candidate for secure detention, perhaps for the full allowable two-year period we propose, but perhaps for a much shorter period if this is the first risk management intervention for Charles. During this confinement, his RMT would conduct a comprehensive risk assessment. It would look at the nature of his criminal history (e.g., is he joyriding, vandalizing, or selling the cars he steals?), his mother's past attempts to monitor his behavior (has she ever attempted to set appropriate limits for him?), the nature and appropriateness of past treatment programs (is there any evidence that such treatment programs are effective with young car thieves?), whether there are positive male role models in Charles' family, school, or neighborhood, and the extent to which Charles' car thefts have been tied to his association with delinquent peers.

The RMT's overall goal would be the reintegration of Charles into his community, either with his family or on his own, equipped with the vocational or educational skills necessary to develop a stake in his own future. Toward that goal, the RMT would assess Charles' recidivism risk on a periodic basis, both while he is in confinement and once he is out. Unless Charles showed complete unwillingness to respond positively to these efforts, he would remain in the juvenile justice system, in contrast to the likely outcome under a retributive system, which would probably treat him like an adult from the outset.[109]

Billy B. *Billy B. is nine years old and has been a difficult child from birth. He cried incessantly as an infant and was especially difficult to console. Both of his parents like him least of their three children. He never listens to his parents' reprimands and is usually a bully toward smaller and younger children. He is very unpopular at school because of his bullying and has no friends his own age. For the past week he has*

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109. See David A. Harris, *The Criminal Defense Lawyer in the Juvenile Justice System*, 26 U. TOL. L. REV. 751, 756-61 (1995), from which this case is taken. Even in a technically rehabilitation-oriented system, Charles was sentenced to training camp at the time recounted in the excerpt and eventually ended up in an adult detention center. *See id.* at 761.

been skipping school and taking his BB gun into the woods near his house, shooting at birds, frogs, and other small animals. He would like to shoot his neighbors' cat, but they never let it out of their yard. The school principal calls Billy's mother and informs her that Billy has not been attending school.

Because he has not committed a criminal offense, Billy B. would probably not be subject to delinquency jurisdiction under either a preventive or a punishment-oriented regime. If, on the other hand, Billy did shoot and kill his neighbor's cat, he would be eligible for intervention under either system.

The similarity between the systems would end there, however. In a retributive regime, the assessment would be backward-looking, focusing on whether Billy intended to kill the cat and whether he has the mental capacity to be held accountable for his acts. The nature and duration of the punishment would presumably be minimal, little more than a slap on the wrist. Under a risk management regime, by contrast, alarm bells would go off, not so much because he killed the cat, but because his difficult temperament, bullying, peer rejection, cruelty to animals, and truancy are all highly predictive of an intractable, life course of delinquency, especially if left untreated. Considerable empirical evidence indicates that early intervention with such high-risk youngsters may have a significant impact on reducing risk for later juvenile delinquency and even adult crime.[110]

This case presents the greatest contrast between the two systems. A preventive risk management regime would invest considerable resources in children like Billy B., whereas a punishment regime would be relatively unconcerned with him.

B. Will It Work? The Need for Ecological Intervention

A skeptic may dismiss these illustrations, which all depend heavily on effective preventive interventions, as "soft" or unrealistic. Certainly, the history of treatment in the juvenile justice system has not been a happy one.[111] What has changed?

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110. *See* Moffitt, *supra* note 43, at 684.

111. The most famous statement to this effect comes from Justice Fortas' opinion for the Court in *Kent v. United States*, 383 U.S. 541 (1966):

> [S]tudies and critiques in recent years raise serious questions as to whether actual performance [of the juvenile court] measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity,

Probably the most important new development in treatment programs is the focus on ecological intervention, an approach which, as the above cases illustrate, the risk management approach endorses and tries to implement.[112] The underlying assumption of the ecological focus is that human behavior involves an ongoing and dynamic interaction between the individual and aspects of the social environment.[113] In the individual realm, youngsters may have cognitive, emotional, and behavioral skills or deficits that are tied to recidivism risk.[114] In the social realm, a youngster's social context at the micro-level (family, peer, school), meso-level (family/peer interface, family/school interface) and macro-level (community, juvenile justice system) provide resources and strains that may be linked to recidivism risk.[115] Antisocial behavior, ecological theory assumes, is rarely the result of just one of these domains.

The ecological approach also recognizes that the nature of the relationship between the individual and the social context is ongoing and that influences are reciprocal. For example, a child reared in a family environment characterized by high levels of conflict and low levels of support may develop problems with anger control, impulsiveness, and empathy and be at increased risk of engaging in aggressive behavior outside the family context. On the other hand, a child with an irritable

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> at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Id. at 555-56.

112. *See* URIE BRONFENBRENNER, THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN 3-42 (1979) (arguing that efforts to understand and change human behavior must take into consideration the interrelated social contexts in which behavior occurs).

113. *See id.*; *see also* Mark Fondacaro & Shelly Jackson, *The Legal and Psychosocial Context of Family Violence: Toward a Social Ecological Analysis*, 21 LAW & POL'Y 91, 96-97 (1999).

114. *See* Aaron T. Ebata & Rudolf H. Moos, *Coping and Adjustment in Distressed and Healthy Adolescents*, 12 J. APPLIED DEVELOPMENTAL PSYCHOL. 33, 47-49 (1991) (demonstrating that delinquent adolescents with behavior problems are more likely to cope with life stressors by cognitive avoidance responses—trying not to think about the problem—and emotional discharge responses—letting their feelings out—than are "healthy" adolescents).

115. *See id.*; *see also* Denise Daniels & Rudolf H. Moos, *Assessing Life Stressors and Social Resources Among Adolescents: Applications to Depressed Youth*, 5 J. ADOLESCENT RES. 268 (1990) (demonstrating that delinquent adolescents are more likely to experience negative life events and have more school and home stressors than "healthy" adolescents).

and impulsive disposition may fuel family conflict, which in turn may erode family bonds and contribute to risk for delinquent conduct.[116]

From these observations, it follows that attempts to reduce antisocial behavior must also be ecological in focus. Scott Henggeler and his colleagues provide one example of the efficacy of this approach. Relying on a social-ecological framework, they developed Multisystemic Therapy (MST), which is aimed at reducing recidivism risk and decreasing rates of secure detention and out-of-home placement in chronic, violent juvenile offenders in a cost-effective manner.[117] MST is primarily a family-based intervention that attempts to change how juveniles function in various settings including home, school, peer, and neighborhood environments.[118] Therapists are assigned small caseloads (four to six families) so they can work intensively with offenders and their families over a relatively short period of time (approximately four months). The therapist delivers services in the juvenile's home and other natural settings (e.g., the offender's school or neighborhood) to increase the chances that behavioral change will endure and generalize across settings. Interventions are tailored to the individual case and may involve improving parental monitoring and the quality of parent/adolescent relations, encouraging association with positive adult role models and peers who are engaged in prosocial activities, decreasing contact with delinquent peers, and improving performance in school or at work. The youth's functioning is monitored on an ongoing basis.[119]

Empirical studies have demonstrated that MST reduces long-term recidivism rates in comparison to control groups by twenty-five to seventy percent,[120] a very impressive result.[121] MST also has been shown to

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116. *See* Mark R. Fondacaro et al., *Procedural Justice in Resolving Family Disputes: A Psychosocial Analysis of Individual and Family Functioning in Late Adolescence*, 27 J. YOUTH & ADOLESCENCE 101, 115-116 (1998).

117. *See* SCOTT W. HENGGELER ET AL., MULTISYSTEMIC TREATMENT OF ANTISOCIAL BEHAVIOR IN CHILDREN AND ADOLESCENTS 3-20 (1998).

118. *See Multisystemic Therapy: An Overview* (visited Mar. 19, 1999) <http://www.sc.edu/ifis/MSTfact.html>.

119. *See Multisystemic Therapy: How Is It Done?* (visited Mar. 19, 1999) <http://www.sc.edu/ifis/MSTfact2.html)>.

120. *See* Scott W. Henggeler et al., *Family Preservation Using Multisystemic Treatment: Long-Term Followup to a Clinical Trial with Serious Juvenile Offenders*, 2 J. CHILD & FAM. STUD. 283 (1993); *see also* David C. Tate et al., *Violent Juvenile Delinquents: Treatment Effectiveness and Implications for Future Action*, 50 AM. PSYCHOLOGIST 777, 779 (1995).

121. For instance, the South Carolina Department of Youth Services has estimated that a reduction in adult recidivism by juvenile probationers from 29% to 25% would result in savings equivalent to one-half of the entire budget of the state's juvenile justice system. *See* HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 160 (1995).

be highly cost-effective. For example, in comparison to boot camps, MST provided a $29,000 net gain in decreased costs.[122] This kind of intervention, whether or not it takes place under the aegis of the juvenile justice system,[123] can provide efficient prevention without resorting to prolonged and counterproductive incapacitative punishment.

C. The Amenability to Treatment Issue Revisited

As the foregoing sections demonstrate, a preventive system relying on risk management and an ecological approach to reduction of recidivism endorses an extremely broad view of treatment. According to this view, virtually everyone is "treatable," at least as an initial matter. Only someone who continues to reoffend (or provides strong indications of a willingness to reoffend), despite prolonged exposure to such a system, might be considered untreatable. In short, amenability is presumed.

These characteristics of the proposed system have two implications for the jurisdiction of the juvenile court. First, even if act jurisdiction ends at age eighteen, dispositional jurisdiction should extend well beyond that age. The monitoring of risk factors and ecological interventions can take years. Of course, if a person over the age of eighteen reoffends, the adult system may exert jurisdiction over any prosecution that takes place. But if risk management can potentially prevent a sixteen- or seventeen-year-old from reoffending, it should be given a chance to do so, rather than arbitrarily end at age eighteen. Consistent with this approach, many states extend dispositional jurisdiction to twenty-one or even further into the twenties.[124]

The second implication of a broad definition of treatability is that very few juveniles should be considered eligible for transfer to adult court. As suggested earlier, a youth who has offended after demonstrating an unwillingness to participate in treatment programs could justifiably be tried under a retributive model. The foregoing discussion should have made clear, however, that resistance to involvement in

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122. *See Multisystemic Therapy: Clinical Outcomes and Cost Savings* (visited Mar. 19, 1999) <http://www.sc.edu/ifis/MSTfact3.html>.

123. For other accounts of the ecological approach in the related family law area implemented by "managerial judges" in specialized courts, see Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998); Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997).

124. *See* PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, PRBVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 15 (1996). According to the Department of Justice, the typical dispositional jurisdiction ends at age 21, but California, Oregon, and Wisconsin extend that jurisdiction to 25 years of age. *See id.*

rehabilitation must be evaluated across contexts and over time. Youths who are initially quite reluctant and uncooperative may become more willing and invested in their own treatment once they begin participating in an intervention program that challenges their negative preconceptions about "therapy" and provides them with increasing opportunities to participate in their own rehabilitation planning.[125] Accordingly, transfer based on the retributive rationale outlined here should be a rare event.

V. CONCLUSION

The traditional juvenile court, focused on rehabilitation and "child-saving," was premised primarily on a parens patriae notion of State power.[126] Because of juveniles' immaturity and greater treatability, this theory posited, the State could forego the substantive and procedural requirements associated with the adult system of criminal punishment. As an historical and conceptual matter, however, the parens patriae power justifies intervention only for the good of the subject, not for society as a whole.[127] From the outset, then, the image of the juvenile delinquency system as a manifestation of the State acting as "parent" was an implausible one.

This Article has argued that a much more persuasive reason for retaining a rehabilitation-oriented system for juveniles can be found by looking at the police power of the State, specifically its power to intervene to prevent harm by those who are relatively unaffected by the prospects of criminal punishment.[128] This Article laid out some of the

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125. *See* Henggeler et al., *supra* note 120, at 284.

126. "Under the guise of *parens patriae*, the juvenile court emphasized treatment, supervision, and control rather than punishment." Feld, *supra* note 1, at 71.

127. As the Supreme Court stated in *Hawaii v. Standard Oil*, 405 U.S. 251 (1972):

> The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the "royal prerogative." These powers and duties were said to be exercised by the King in his capacity . . . as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as "the general guardian of all infants, idiots, and lunatics," and as the superintendent of "all charitable uses in the kingdom." In the United States, the "royal prerogative" and the "parens patriae" function of the King passed to the States.

Id. at 257 (citations and footnotes omitted).

128. Some people who read earlier versions of this Article were worried about our reliance on *Hendricks*. No doubt the contentions we make in favor of a preventive juvenile justice regime could stand on their own, without reference to that much maligned decision. We nonetheless decided to use *Hendricks* as our springboard, not just because

ramifications of adopting this theory of juvenile justice,[129] as well as some modifications of these ramifications where they require reliance on our incomplete knowledge of human behavior and thus would threaten liberty interests. These proposals offer an alternative both to the juvenile justice system of the past, which was too immersed in child-saving, and the juvenile justice system of the present, which is becoming increasingly punishment-oriented. Our ultimate goal is a system that is *both* humane and just, at the same time it effectively protects society.

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of its Supreme Court pedigree, but precisely because of its notoriety. The push for a retributive system of juvenile justice is currently extremely powerful. It is our hope that linking the juvenile court with the sexual predator model may provide a tactical means of resisting that push. Those legislators who eagerly embrace the preventive crime control scheme that *Hendricks* authorizes for sexual predators may well think twice about imposing a punishment-oriented regime on children, if the equation between the two groups made in this Article can be brought home to them.

129. One issue which we have not addressed is procedure. To the extent relaxed procedures are the result of a parens patriae focus, their rationale disappears once the basis of the juvenile court is located in the state's police power.