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# Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept

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## I. INTRODUCTION

The concept of amenability to treatment is, in theory, at the core of juvenile delinquency jurisprudence. From its inception as an entity separate from the adult criminal court, the juvenile court was meant to focus on the rehabilitative potential of children.<sup>1</sup> On this premise, the central inquiry in a juvenile delinquency proceeding should be whether the child found delinquent is amenable to treatment. Disposition should depend upon the rehabilitative potential and needs of the juvenile, and only if no treatment is available in the juvenile system should transfer to adult court be considered.

In practice, amenability to treatment may never have been the focal point that theory suggests it should have been,<sup>2</sup> and it is clearly of

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1. THE INVENTION OF THE JUVENILE COURT 551 (Frederic L. Faust & Paul J. Brantingham eds., 1974) (according to the "orthodox" view of the juvenile court system, the juvenile court "was a legal bridge between the troubled child and the agencies of amelioration."); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 709 (1991) (the original purpose of the juvenile court system emphasized "rehabilitation and the child's 'best interests'").

2. See generally ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969).

secondary importance today.<sup>3</sup> The vagueness of the concept, the inadequacy of treatment programs, and the influence of retributive and incapacitative agendas have helped push it into the background. Nonetheless, legislatures and courts still endorse treatment amenability as an important consideration in delinquency cases. Most commentators also remain attracted to the original rehabilitation-based philosophy of the juvenile court, although their positions vary substantially.<sup>4</sup>

Given the centrality of the amenability construct to juvenile justice theory, one would expect a significant amount of commentary in the legal literature about how the courts interpret the concept. Yet the topic has been all but ignored by legal scholars. There does exist a substantial body of social science research identifying factors that correlate with judicial decisions to transfer a juvenile to adult court.<sup>5</sup> But critical analysis of amenability law, whether in the transfer setting or elsewhere in the juvenile process, is strangely lacking.<sup>6</sup> This article attempts to help fill this void by surveying relevant statutory law and caselaw, as well as pertinent sociological data.

The principal conclusion drawn from this survey is probably not surprising to those who know the system:<sup>7</sup> the amenability to treatment inquiry often ends up being an inquiry about something else. Rather than focusing on treatability, the courts appear to be driven by a mix of incapacitative, retributive and rehabilitative concerns, with the latter focus routinely taking a back seat to the first two objectives. Furthermore, it appears that the law—at least the law one finds in statutes and in appellate decisions—has paid little attention to the

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3. Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57, 63-64 (1992) (arguing that new prosecutorial and legislative waiver provisions remove from the juvenile system those children who are most in need of treatment).

4. Compare 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), with Irene M. Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163.

5. See Part II(C) of this article.

6. Podkopacz and Feld prefaced their description of their 1996 empirical study of waiver by stating “there is remarkably little research on the determinants of waiver . . . .” Marcy R. Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449, 451 (1996).

7. As a presidential commission put it years ago, transfer decisions are often “[n]ot a scientific evaluation of whether the youth will respond successfully to a juvenile court disposition but a front for society’s insistence on retribution or social protection.” TASK FORCE ON JUVENILE DELINQUENCY, THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 24 (1967).

insights of social science about the factors that might be relevant to treatability.

Part II of this article discusses the legal meaning of the treatment amenability concept, particularly focusing on judicial interpretation of amenability in the transfer context, where litigation has been heaviest. Part III critically analyzes the law's approach to amenability. It concludes that both the factors considered by the courts and the way those factors are applied are deficient. Part IV describes the research implications of the foregoing discussion. Part V concludes with brief suggestions for revamping the amenability inquiry.

This article does not address the fundamental issue of whether the rehabilitation orientation of the juvenile court should be reinvigorated (although this author believes that it should be).<sup>8</sup> It does suggest ways such reinvigoration might take place. Among them are reconceptualization of the amenability concept, improved guidelines for assessing it, and restructured treatment programs.

## II. THE LAW'S DEFINITION OF AMENABILITY TO TREATMENT

The treatment amenability inquiry permeates the juvenile court process, from intake through disposition.<sup>9</sup> Yet virtually all the caselaw on the subject comes from litigation focused on just one stage of the process: the decision whether juvenile court jurisdiction ought to be

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8. See Christopher Slobogin et al., *A Preventive Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 1999 WIS. L. REV. 185 (1999). Numerous arguments have been made against such an orientation, among them: (1) that juveniles are no more treatable than adults, Anna L. Simpson, Comment, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CAL. L. REV. 984, 984-85 (1976); (2) that treatment has not been shown to "substantially" reduce recidivism and "[t]here is no reason to suppose that we are approaching a breakthrough", Franklin E. Zimring, *Dealing with Youth Crime: National Needs and Federal Priorities*, Report to the Coordinating Council on Juvenile Justice and Delinquency Prevention 8 (Sept. 1975); (3) that intervention might actually increase recidivism, *id.* at 23; and (4) that "[t]he juvenile court has demonstrated a remarkable ability to deflect, co-opt, and absorb ameliorative reform virtually without institutional change," Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 276 (1984).

9. For a general treatment of the stages of the juvenile process and their interaction with the amenability issue, see GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS* 426-28 (2d ed. 1997) (describing treatment considerations at the intake, dispositional bargaining, transfer, dispositional, and post-dispositional stages).

“waived.” Consonant with the initial rehabilitative premise of the juvenile court, traditional theory posited that children who are amenable to treatment in the juvenile system should not be transferred to adult court. Of course, in many states today, that is not even the theory, much less the practice. The modern statutory trend is to *require* transfer in situations involving violent crimes and certain age thresholds,<sup>10</sup> and to make amenability a secondary issue even when transfer is discretionary.<sup>11</sup> Nonetheless, treatment amenability remains a central issue, at least as a formal matter, for most children subject to transfer. Thus, the following discussion draws heavily from transfer law.

The most influential source of law on amenability to treatment in the transfer context has been the appendix to the Supreme Court’s opinion in *Kent v. United States*.<sup>12</sup> Neither endorsed nor relied upon by the Court, this appendix consisted entirely of a memorandum setting forth the criteria governing disposition of waiver requests in the juvenile court

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10. In recent years a number of states have granted prosecutors non-appealable discretion to file juvenile cases in adult court, usually circumscribed by age and offense criteria (prosecutorial waiver). Additionally, many states mandate transfer for juveniles of a certain age or who have committed certain offenses (legislative waiver). See Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 521 (1995). For a state-by-state description of transfer statutes, see Kirk Heilbrun et al., *A National Survey of U.S. Statutes on Juvenile Transfer: Implications for Policy and Practice*, 15 BEHAV. SCI. & L. 125, 128-43 (1997).

11. See, e.g., *State v. Doe*, 704 P.2d 1109 (N.M. Ct. App. 1985) (holding that New Mexico’s transfer statute does not require a finding as to amenability); *In re Appeal in Pima County Juvenile Action*, 708 P.2d 776 (Ariz. Ct. App. 1985) (under new regulations, “the juvenile court is no longer required to make a finding of nonamenability before it may order . . . transfer.”); *State v. A.L.*, 638 A.2d 814 (N.J. 1994) (discussing modification of N.J.S.A. 2A:4A-26 from a presumption of amenability to a presumption of nonamenability); *State v. M.M.*, 386 S.E.2d 35, 37 (Ga. 1989) (where transfer is based on severity of crime the state need not prove nonamenability).

12. 383 U.S. 541, 566-67 (1966). The *Kent* factors that might be relevant to amenability to treatment are: (1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver; (2) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted; (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living; (7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions; (8) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the use of procedures, services and facilities currently available to the Juvenile Court.

involved in *Kent*. Ironically the policy, promulgated in 1959, was rescinded before *Kent* was decided in 1966. Yet its list of factors now appears in some version in most state transfer statutes,<sup>13</sup> probably because *Kent* is the Supreme Court's only decision dealing directly with the transfer decision. Other definitional sources include the American Bar Association's Juvenile Justice Standards<sup>14</sup> and the National Advisory Committee on Criminal Justice Standards and Goals,<sup>15</sup> both of which have been important influences on state law, although much less so than the "*Kent* criteria." Finally, a number of state legislatures and courts have devised their own approach to the amenability issue.

The discussion that follows examines first what these sources say about the fundamental definitional issue: amenability to treatment for what purpose? It then describes the types of factors courts consider in deciding whether a particular youth is amenable to treatment, both as a matter of formal law and in terms of the factors social science research indicates courts really consider.

### A. *The Goal of Treatment*

The law's foremost concern in determining amenability is whether intervention will reduce or eliminate recidivism of the offender. The *Kent* transfer criteria refer to "[t]he prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the Juvenile Court."<sup>16</sup> The general statements of purpose that one finds in juvenile delinquency jurisprudence even more directly refer to prevention of recidivism as the overriding goal of treatment. The National Advisory Committee's provision on the purpose of "juvenile delinquency disposition" states that dispositions should

13. By 1987, thirty-nine states had adopted all or a majority of the *Kent* criteria. See Beth Wilbourn, Note, *Waiver of Juvenile Court Jurisdiction: National Trends and the Inadequacy of the Texas Response*, 23 AM. J. CRIM. L. 633, 639 (1996). See also Royce S. Buckingham, *The Erosion of Juvenile Court Judge Discretion in the Transfer Decision Nationwide and in Oregon*, 29 WILLAMETTE L. REV. 689, 694 (1993).

14. ABA, JUVENILE JUSTICE STANDARDS, *Standards Relating to Juvenile Delinquency and Sanctions* (1980) [hereinafter ABA Standards].

15. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1976) [hereinafter NAC Standards].

16. *Kent*, 383 U.S. at 567.

“develop individual responsibility for lawful behavior through programs of reeducation.”<sup>17</sup> State statutes are similar. In Idaho the juvenile code states “It is the . . . primary purpose of this act . . . to provide a continuum of supervision and rehabilitation programs which meet the needs of the youthful offender in a manner consistent with public safety.”<sup>18</sup> Virginia’s statute forthrightly requires juvenile courts “to reduce the incidence of delinquent behavior . . . .”<sup>19</sup>

That protection of society is an important or even the primary goal of juvenile court treatment is not surprising. A more difficult question is whether that goal is considered the *only* goal of juvenile court treatment interventions. In theory, at least, the answer seems to be no. Note that the *Kent* criteria separate protection of society from “reasonable rehabilitation of the juvenile,” suggesting that the latter might subsume the former and cast beyond it. The ABA Standards on transfer are similar in tone. They speak only of whether the youth is a “proper person to be handled by the juvenile court,” which requires, *inter alia*, assessment of “the likely inefficacy of the dispositions available to the juvenile court as demonstrated by previous dispositions of the juvenile.”<sup>20</sup> The word “inefficacy” is vague enough to encompass more than a failure to prevent recidivism. The National Advisory Committee statement, in the sentence immediately following the one quoted in the previous paragraph, states that reeducation “should be pursued through means that . . . recognize the unique physical, psychological, and social characteristics and needs of juveniles; and give juveniles access to opportunities for normal growth and development, while insuring that such dispositions will: . . . [p]rotect society . . . and . . . [c]ontribute to the proper socialization of the juvenile.”<sup>21</sup> Those state statutes that refer to protection of the public also often mention other purposes as well. Idaho’s statute refers to programs that “will individualize treatment and control the juvenile offender *for the benefit of the juvenile* and the protection of society”<sup>22</sup> and Virginia provides that the *ultimate* goal of its family courts is the “welfare of the child.”<sup>23</sup>

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17. NAC Standards, *supra* note 15, § 14.1.

18. IDAHO CODE § 16-1801 (1995).

19. VA. CODE ANN. § 16.1-227(4) (Michie 1999).

20. ABA Standards, *supra* note 14, § 2.2(C)(3).

21. NAC Standards, *supra* note 15, § 14.1. Here and elsewhere the drafters of language about the purpose of juvenile court sometimes seem to have in mind the need to impose sanctions that will reduce recidivism through general deterrence rather than specific deterrence and rehabilitation.

22. IDAHO CODE § 20-501 (1997).

23. VA. CODE ANN. § 16.1-227 (Michie 1999). The trend is clearly to make protection of the public the primary goal of the juvenile court system, however. As one



Some court decisions echo this more expansive definition of treatment goals. For instance, in defining amenability to rehabilitation in the transfer context, a North Dakota court stated that “[r]ehabilitation . . . tries to improve the offender’s future welfare.”<sup>24</sup> Many other decisions use similarly global language, often simply discussing whether a youth is “amenable to treatment . . . within the juvenile system.”<sup>25</sup>

## B. *Assessing Treatability*

While the law has been somewhat vague as to the purpose of treatment within the juvenile delinquency context, it has been relatively specific in delineating factors relevant to deciding whether someone is treatable. These factors can be divided into seven categories: (1) the nature of the juvenile’s offense, (2) the juvenile’s prior record, (3) past treatment efforts, (4) aspects of the juvenile’s environment (family, school peer and neighborhood) and personality (maturity, sophistication) that are relevant to treatability, (5) the juvenile’s willingness to participate in treatment, (6) the availability of treatment, and (7) the age of the juvenile. Not every state requires or suggests consideration of every one of these factors. But together the factors represent the universe of issues that juvenile courts are authorized to consider in determining amenability to treatment.

### 1. *Nature of Current Offense*

Most statutes and cases addressing the transfer issue mandate close attention to the nature of the youth’s offense, especially the extent to which it suggests that the youth threatens public safety. Three of the six criteria in the *Kent* appendix that relate to amenability are devoted in whole or part to this factor: “[t]he seriousness of the alleged offense to the community and whether the protection of the community requires

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example, at one time Minnesota’s statute stated that the purpose of the juvenile court was to “secure for each minor . . . care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interest of the state.” MINN. STAT. § 260.011 subd. 2 (1978). Now the purpose is “to promote the public safety and reduce juvenile delinquency.” MINN. STAT. § 260.011 subd. 2 (1978).

24. *Witowski v. M.D.N.*, 493 N.W.2d 680, 682 (N.D. 1992).

25. *See, e.g., T.C. v. State*, 740 P.2d 739 (Okla. Crim. App. 1987).

waiver . . . [w]hether the alleged offense was committed in an aggressive, violent, premeditated or willful manner . . . [and] [w]hether the alleged offense was against persons or against property . . .”<sup>26</sup> Many states incorporate this language or a close variant in their transfer statutes.<sup>27</sup>

Of course, a youth’s aggressiveness and willfulness during the offense and the type of injury caused by the offense have much less to do with treatability than with culpability and danger to society. Many courts acknowledge this fact and often frankly base transfer largely on the latter two grounds.<sup>28</sup> Indeed, some courts explicitly ignore the amenability to treatment issue if the offense is serious enough,<sup>29</sup> a stance which, even if not contrary to statutory commands,<sup>30</sup> is completely antithetical to a rehabilitation-oriented juvenile justice system. Other decisions,

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26. *Kent v. United States*, 383 U.S. 541, 566-67 (1966).

27. *See, e.g.*, KAN. STAT. ANN. § 38-1636(e) (1993) (identical to *Kent* factors discussed in text); S.D. CODIFIED LAWS § 26-11-4 (Lexis 1999) (identical to *Kent* factors); ARIZ. RULES PROC. JUV. CT. 14(C)(1) & (2) (identical to the *Kent* factors, with the addition of “and whether personal injury resulted” to the second factor). *See generally* Heilbrun et al., *supra* note 10, at 128-143 (indicating that at least 22 states have language similar or identical to the *Kent* language with respect to offense seriousness).

28. *State v. Garza*, 492 N.W.2d 32, 44 (Neb. 1992) (“Rehabilitation has traditionally played a key role in the treatment of young offenders. . . . Nevertheless, the concept of deterrence and the need to balance individual justice with the needs of society . . . also have a place in the juvenile justice system.”); *In re S.K., a Minor Child*, 587 N.W.2d 740, 742-43 (S.D. 1999) (to transfer, judge need only find the juvenile is nonamenable or a threat to public safety); *State v. Duncan*, 250 N.W.2d 189, 194 (Minn. 1977); *Commonwealth v. Waters*, 483 A.2d 855, 858 (Pa. Super. Ct. 1984) (same). *But see* *A Juvenile v. Commonwealth*, 347 N.E.2d 677, 685 (Mass. 1976) (error to transfer solely because of dangerousness).

29. For instance, in *Green v. State*, 916 S.W.2d 756, 759 (Ark. 1996), the court stated “[T]he seriousness of an offense, when coupled with the employment of violence, is a sufficient basis for . . . trying a juvenile as an adult.” *See also* *State v. Campbell*, 598 N.E.2d 1244, 1247 (Ohio Ct. App. 1991) (despite favorable testimony regarding amenability, waiver appropriate in light of defendant’s age—16—and charge of killing victim with a baseball bat); *In re D.F.B.* 433 N.W.2d 79 (Minn. 1988) (age plus serious offense permits waiver); *Cole v. State*, 913 S.W.2d 779, 783 (Ark. 1996) (“[T]he extreme seriousness of the crimes charged . . . alone were clear and convincing evidence which supported the circuit court’s decision” to retain adult court jurisdiction).

30. The preamble to the *Kent* appendix, mimicked in many states, seems to adopt the position that even clearly treatable youths should be transferred if the offense is serious enough or transfer is “necessary” to protect the community. It states: “An offense . . . will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or ‘even though less serious’ if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.” 383 U.S. at 566. *See also, supra* notes 11 & 23.

however, reflect the view that offense seriousness should be considered only if relevant to treatment amenability.<sup>31</sup> In general, the more serious the offense, the less likely a youth will be considered amenable to juvenile court disposition.<sup>32</sup>

## 2. *Prior Offense History*

Obviously related to the nature of the current offense is the nature of the youth's offense history, if any. The *Kent* appendix lists as its seventh variable "[t]he record and previous history of the juvenile . . ."<sup>33</sup> The cases consistently look at this factor. Typical is the statement that, in determining amenability, a court may consider "the minor's behavior pattern including his past record, if any, of delinquency, [and] his degree of sophistication[,] especially as the same may relate to criminal activities . . ."<sup>34</sup> At the same time, most courts—at least most appellate courts—do not probe deeply into offense history. Rather they either merely list the number of prior offenses or they evaluate them relatively superficially, without investigating their precipitants.<sup>35</sup>

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31. See, e.g., *In re Snitzky*, 657 N.E.2d 1379, 1384-85 (Ohio Com. Pleas, 1995) ("[C]onsideration of the facts of the crime [are] relevant only to the child's mental and physical condition, rather than . . . the concern for a legitimate response to the violent crime the child has committed"); *Commonwealth v. Jackson*, 690 A.2d 240 (Pa. Super. Ct. 1997) ("[T]he nature of the conduct will not justify the 'transfer from the juvenile system without a concomitant finding that the youth was not amenable to treatment as a juvenile.'").

32. See, e.g., MISS. CODE ANN. § 43-21-157(5)(1972 & Supp. 1993) (stating that the "seriousness of the offense" and "danger to the public" should be considered in determining whether there are "reasonable prospects of rehabilitation"); *State v. Campbell*, 598 N.E.2d 1244, 1247 (Ohio Ct. App. 1991) ("[I]n determining a juvenile's amenability to rehabilitation, a juvenile court may consider the nature and seriousness of the alleged criminal act."). See also *Hicks v. Superior Ct.*, 43 Cal. Rptr. 2d 269 (Ct. App. 1995); *State ex rel. Lyles*, No. JN90-0922, 1994 WL 811742 (Del. Fam. Ct. 1994); *P.H. v. State*, 504 P.2d 837, 842 (Alaska 1972).

33. 383 U.S. at 567.

34. *H. v. Superior Ct.*, 478 P.2d 32, 36 (Cal. 1970).

35. See, e.g., *In re K.J.K.*, 357 N.W.2d 117, 119-120 (Minn. Ct. App. 1984) (transfer held permissible after a brief listing of record); *In re T.M.*, 393 S.E.2d 448, 449 (Ga. Ct. App. 1990) (same); *Armer v. State*, 773 P.2d 757 (Okla. Crim. App. 1989) (despite evidence of rehabilitative potential, transfer was permissible where rape had been forceful and violent and where juvenile had had prior contacts with juvenile system, some involving inappropriate sexual and violent behavior); *MMT v. Dist. Ct.*, 637 P.2d

### 3. *Past Treatment*

This factor dovetails with offense history; a series of past treatment efforts usually means a series of offenses. Indeed, the relevant criterion in the *Kent* appendix lumps past crimes and past treatment together under its “record and previous history” rubric; it elaborates by mentioning “previous contacts with [the local juvenile system], other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.”<sup>36</sup> As one might expect, a juvenile who has been subject to juvenile treatment programs in the past and reoffended is less likely to be found amenable than one who has not undergone any treatment.

Some courts are sensitive to whether any treatment efforts that took place were meaningful. In *M.L.S. v. State*,<sup>37</sup> for instance, the court noted that the juvenile had been in contact with the juvenile system on “only” two previous occasions. Furthermore, the first occasion, resulting from an allegation that the youth was a child in need of supervision, failed to provide any services. The second contact was initiated by the youth himself on a claim that he had been “abandoned,” and resulted in a short stay in the youth shelter before release to his mother. In conjunction with testimony about treatability, this information led the appellate court to overturn both the trial court’s finding of nonamenability and its decision to transfer, despite two charges of attempted murder and erratic behavior while in detention. As is true with offense history, however, a number of cases suggest that the key issue for courts with respect to this factor is simply the number of previous “contacts” with the juvenile system.<sup>38</sup>

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876 (Okla. Crim. App. 1981); *D.R.D. v. State*, 767 P.2d 207, 211 (Alaska Ct. App. 1989) (noting that “dangerousness is the converse of amenability to rehabilitation” and that a person can be “dangerous” simply because of “repeated criminality.”).

36. 383 U.S. at 567.

37. 805 P.2d 665 (Okla. Crim. App. 1991).

38. See *State v. Harris*, 494 N.W.2d 619, 625 (S.D. 1993) (“Neither the statute nor our decisions have required the court to find that the juvenile unsuccessfully exhausted the resources of this state’s juvenile justice rehabilitation programs prior to transferring proceedings to adult court.”); *Commonwealth v. Berry*, 648 N.E.2d 732 (Mass. 1995) (past treatment of juvenile was a failure because juvenile “had been hospitalized with a diagnosis of conduct disorder [and] drug abuse [and] . . . had been enrolled in a drug rehabilitation program” yet had reverted to his former antisocial behavior after treatment); *People v. Lyons*, 513 N.W.2d 170 (Mich. Ct. App. 1994) (describing in brief several failed treatment attempts, most of them aborted by the juvenile’s escape); *C.H. v. State*, 252 S.E.2d 22, 23 (Ga. Ct. App. 1979) (listing treatment failures). For an example of a good effort to evaluate past treatment attempts, see *J.A.G. v. Guerrero*, 552 N.W.2d 317, 321-22 (N.D. 1996).

#### 4. *Environment and Personality*

This factor—itsself a constellation of factors—is the most speculative and subjective of the seven identified here. Evidence concerning this factor often involves expert testimony from mental health professionals and other specialists on a variety of psychiatric, familial and social variables, with the common theme being the extent to which they cast light on the youth's treatability. The *Kent* appendix refers to "[t]he sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living."<sup>39</sup> Ohio's regulations governing amenability assessments list "the child's age and his mental and physical condition . . . [t]he child's family environment; [and] . . . school record" as elements to consider.<sup>40</sup> Consistent with current "get-tough" attitudes, other states have de-emphasized assessment of these types of factors. For instance, Massachusetts' transfer statute requiring assessment of "the family, school and social history of the child"<sup>41</sup> was replaced in 1996 with a statute that stresses dangerousness and an undelineated assessment of amenability.<sup>42</sup>

In an apparent effort to encourage broadscale inquiry into the youth's functioning, some state statutes also refer to "the probable cause of the minor's delinquent behavior" as a factor separate from seriousness of the offense.<sup>43</sup> Additionally, many states require an assessment of whether the juvenile either meets the state's test for insanity or, more generally, should be committed to an institution for those with mental illness or mental retardation; if so, juvenile jurisdiction is usually retained.<sup>44</sup> Not necessarily inconsistently, some courts consider psychological stability

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39. 383 U.S. at 567.

40. OHIO REV. CODE ANN. JUV. R. § 30(F)(1)-(5) (Banks-Baldwin 1994).

41. MASS. GEN. LAWS ANN., ch. 119, § 61 (West 1993).

42. See *Commonwealth v. O'Brien*, 673 N.E.2d 552, 555 n.2 (Mass. 1996).

43. ALASKA STAT. § 47.10.060(d) (LEXIS 1998).

44. ARIZ. RULES PROC. JUV. CT., Rule 12(d); *S.H. v. State*, 555 P.2d 1050 (Okla. Ct. App. 1976); *Ogden v. J.K.M.* 557 N.W.2d 229 (N.D. 1996) (more amenable because suffering from depression). Most states avoid a broad definition of mental illness in this context, so as to ensure that juveniles with personality disorders are not automatically retained in juvenile court. See, e.g., *In re Appeal in Coconino County*, 754 P.2d 1356, 1361 (Ariz. Ct. App. 1987) ("Arizona appellate courts have consistently . . . excluded character and personality disorders from the definition of 'mental disorder' [for purposes of juvenile commitment]. . .").

to be a good indicator of treatability.<sup>45</sup>

### 5. *Willingness*

This factor can be considered part of the youth's "personality" and thus relevant to the previous factor, but it is one that is often separated out in case law. For instance, many cases refer to the youth's motivation to be treated as an aspect of the transfer decision,<sup>46</sup> and others make much of the juvenile's "remorse" or lack thereof.<sup>47</sup> Statutes also occasionally include a criterion that seems focused on willingness to undergo treatment. For instance, Alabama's transfer statute includes "the juvenile's demeanor" as one factor to be considered.<sup>48</sup> The *Kent* appendix's allusion to "emotional attitude" might also function as a proxy for degree of motivation to change.<sup>49</sup>

### 6. *Availability*

This factor is mentioned in virtually every transfer statute. Most states echo the language of the *Kent* appendix, which refers to rehabilitation "by use of procedures, services and facilities currently available to the Juvenile Court."<sup>50</sup> Others seem to be somewhat more vague as to whether programs have to be "currently available." In Indiana, for instance, the court must determine that the juvenile "is beyond

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45. *In re Appeal in Coconino County*, 724 P.2d 54, 60 (Ariz. Ct. App. 1986) (emphasizing that juvenile was "bright, emotionally stable"); *People v. Gregory C.*, 602 N.Y.S.2d 492, 495 (Sup. Ct. 1993).

46. *See, e.g., State v. Mastracchio*, 605 A.2d 489, 494 (R.I. 1992) ("no evidence . . . that defendant would have cooperated with or would have been receptive to rehabilitation efforts."); *D.R.D. v. State*, 767 P.2d 207, 210 (Alaska Ct. App. 1989) ("uncertainty regarding D.R.D.'s motivation" one factor leading to affirmance of waiver order); *State v. Hambel*, 1994 WL 371348 (Ohio Ct. App. 1994); *Ward v. Commonwealth*, 554 N.E.2d 25 (Mass. 1990).

47. *Commonwealth v. Morningwake*, 595 A.2d 158, 162 (Pa. Super. Ct. 1991) (juvenile offered no justification for action; merely blamed others); *Commonwealth v. McDonald*, 582 A.2d 328, 335 (Pa. Super. Ct. 1990) (despite no prior treatment, transfer justified because the offense was committed with "extreme callousness"); *In re Appeal in Coconino County*, Juv. Action No. J-9896, 724 P.2d 54, 60 (Ariz. Ct. App. 1986) (in denying transfer, emphasizing that there was "no question Appellant had shown remorse with respect to her criminal conduct. . .").

48. ALA. CODE § 12-15-34(d)(4) (Supp. 1998).

49. *Kent v. United States*, 383 U.S. at 541, 567 (1966).

50. *Id.* at 567. *See Heilbrun et al., supra* note 10, at 128-143 (listing over 25 states that use such language).

rehabilitation under the juvenile justice system.”<sup>51</sup> Regardless of how the availability issue is framed, however, lack of programs,<sup>52</sup> or at least lack of programs that are easily accessible,<sup>53</sup> is often the primary reason for transfer.

Some courts also state that the chance that rehabilitation will be even less likely in the adult court system is irrelevant in making the transfer decision.<sup>54</sup> To these courts, transfer is permissible whenever a viable treatment is not available in the juvenile system even if what *is* available in the juvenile system is “better” (i.e., will do less harm) than anything the adult system has to offer. Other courts have granted transfer based on a finding that rehabilitation is more likely in the *adult* system.<sup>55</sup>

51. IND. CODE ANN. § 31-6-2-1.5 (Michie 1997). *See also* R.C. § 2151.26(A) (c)(i) (requiring the court to find that the juvenile “is not amenable to care or rehabilitation . . . in any facility designed for the care, supervision, and rehabilitation of delinquent children”).

52. *State v. Simpson*, 836 S.W.2d 75 (Mo. Ct. App. 1992) (transfer of 14-year old permissible because juvenile rehabilitation authorities testified that they lacked adequate facilities to deal with a 14-year-old homicide offender); *Commonwealth v. Cessna*, 537 A.2d 834 (Pa. 1988) (juvenile did not show that there was a juvenile facility that would accept him); *In re R.M.*, 648 S.W.2d 406 (Tex. Ct. App. 1983) (no programs to treat juvenile who became violent when he consumed alcohol). The most dramatic effect unavailability can have is illustrated by *Stanford v. Commonwealth*, 734 S.W.2d 781 (Ky. 1987). There the court rejected the juvenile’s argument that “the state has an obligation not to execute a juvenile who is deemed to be amenable to treatment but for whom the state offers no appropriate treatment program.” *Id.* at 792.

53. Courts sometimes refuse to look beyond their immediate locale, and rarely examine alternatives outside the state. *See, e.g.*, *Dillard v. State*, 623 P.2d 1294 (Idaho 1981) (transfer permissible because contract with California to provide juvenile treatment had expired and there were no placement contracts with other states); *P.K.M. v. State*, 780 P.2d 395, 399 (Alaska Ct. App. 1989) (no obligation to look beyond state borders).

54. *State v. J.D.S.*, 723 P.2d 1278, 1279 (Alaska, 1986) (improper for waiver court to compare chances of being rehabilitated in juvenile court with chances of being rehabilitated if treated as an adult; waiver should have been granted); *People v. Allgood*, 126 Cal. Rptr. 666 (Ct. App. 1976) (same). *Cf. People v. Joe T.*, 121 Cal. Rptr. 329, 332 (Ct. App. 1975) (holding invalid a waiver based on referee’s determination that sentencing alternatives in adult court “would be better suited for appellant than the local treatment programs available through the juvenile court.”).

55. *State ex rel. Juvenile Dep’t v. George*, 862 P.2d 531 (Or. Ct. App. 1993); *In re Appeal in Pima County*, 527 P.2d 104 (Ariz. Ct. App. 1974) (transfer permissible when no juvenile facilities are available).

## 7. Age

Even if a treatment program is “available” in the sense that it exists within the jurisdiction, it may not be available to a particular youth because of the time necessary for treatment to be effective. Every state age-limits the dispositional jurisdiction of the juvenile court (to either 18 or some age between 19 and 25).<sup>56</sup> Accordingly, numerous decisions find a juvenile unamenable to treatment, despite a possibility that treatment will work, because the treatment regimen cannot be completed by the requisite age.<sup>57</sup> Thus, one court distinguished between “treatment” (which refers to any interventions that can help the youth) and “rehabilitation” (which refers only to those interventions that can help the youth by the time juvenile jurisdiction lapses).<sup>58</sup> Using this terminology, if a treatment program cannot “rehabilitate” the youth, it is, in a real sense, “unavailable” in the juvenile system.

### C. Research on the “Reality” of Transfer Decisions

A number of studies explore the characteristics of cases that result in transfer to the adult system. Some of these studies look at the reasons courts explicitly give for transferring a juvenile, while most independently code variables that correlate with a transfer decision. One review of 36 of these studies indicated that the most important factors in the transfer decision are the seriousness of the offense, prior record, the results of previous treatment efforts, and age (i.e., the first three factors and the last factor of the seven identified above).<sup>59</sup> A General Accounting Office survey of prosecutorial reasons for recommending transfer also identified these four factors as the most important.<sup>60</sup>

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56. See U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 15 (1996).

57. *In re Appeal in Maricopa County*, 674 P.2d 841, 845 (Ariz. 1983) (1 1/2 years not long enough to effect rehabilitation); *G.B.K. v. State*, 376 N.W.2d 385 (Wis. Ct. App. 1985) (expert testimony that juvenile needed a minimum of two years of treatment and that only 26 months remained in juvenile court jurisdiction justified transfer); *In re A.B.*, 520 A.2d 783 (N.J. Super. Ct. App. Div. 1987); *Commonwealth v. Leatherbury*, 568 A.2d 1313 (Pa. Super. Ct. 1990); *In re T.M.*, 393 S.E.2d 448 (Ga. Ct. App. 1990); *D.E.P. v. State*, 727 P.2d 800 (Alaska Ct. App. 1986).

58. *Commonwealth v. O'Brien*, 673 N.E.2d 552 (Mass. 1996).

59. JAMES C. HOWELL, *JUVENILE JUSTICE & YOUTH VIOLENCE* 98 (1997); see also, DONNA M. HAMPARIAN ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS* (1982).

60. GENERAL ACCOUNTING OFFICE, *JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS* (1995). Other factors that were not considered as important were “family background of the offender”; “sophistication and maturity of



Research also indicates that gender is a significant factor (with males being transferred more often), and a few studies indicate that race plays a disproportionate role in the transfer decision (with African-Americans being most likely to be transferred),<sup>61</sup> although other studies find no relationship between race and transfer.<sup>62</sup>

Social science research thus identifies six factors that appear to be important in amenability determinations. With respect to three of these factors—offense seriousness, prior record, and age—these data largely support the description of judicial decisionmaking already given. The studies show that courts usually gauge offense seriousness by whether it involved violence, use of a weapon, or an exhibition of maliciousness (although the research also seems to show that drug offenses are now considered “serious” by many courts).<sup>63</sup> Prior offense history usually involves consideration of little else beyond the number of juvenile court adjudications and the number of transfers to adult court.<sup>64</sup> Finally, the

the offender”; “the availability of more serious punishments in criminal court”; “the availability of a youthful offender facility”; “the need to protect the community”; and “prosecutive merits of complaint”.

61. Edward W. McNulty, *The Transfer of Juvenile Offenders to Adult Court: Panacea or Problem?* Paper presented at the annual meeting of the American Society of Criminology, Boston (1995); OHIO DEPARTMENT OF YOUTH SERVICES, *JUVENILES TRANSFERRED TO ADULT COURT IN OHIO, FISCAL YEAR 1992* (1993); Rob Roy & Carl Sagan, *Juvenile Bindovers in Massachusetts* (unpublished, 1980).

62. Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 *CRIME & DELINQ.* 259 (1987) (race a determining factor only in homicide cases); Tammy M. Poulos & Stan Orchowsky, *Serious Juvenile Offenders: Predicting the Probability of Transfer to Criminal Court*, 40 *CRIME & DELINQ.* 3 (1994) (race not a factor); Podkopacz & Feld, *supra* note 6, at 481 (in a comprehensive study of 330 judicial waiver decisions, race found not to be an important factor).

63. In 1989, the majority of juveniles convicted in adult court after transfer committed property crimes (41%) and drug crimes (15%). MICHAEL A. JONES & BARRY KRISBERG, *IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY* 33, fig. 16 (1994). A number of other studies indicate that property offenses are the predominant offense among transferred juveniles. See DEAN J. CHAMPION & G. LARRY MAYS, *TRANSFERRING JUVENILES TO CRIMINAL COURTS: TRENDS AND IMPLICATIONS FOR CRIMINAL JUSTICE* 77 (1991). But this finding is likely best explained as a judicial desire to transfer recidivists rather than the result of a determination that property crimes are “serious.” *Id*

64. Research shows a very high correlation between past offenses and transfer. See, e.g., HOWARD N. SNYDER & JOHN L. HUTZLER, *NAT’L CTR. FOR JUVENILE JUSTICE THE SERIOUS JUVENILE OFFENDER: THE SCOPE OF THE PROBLEM AND THE RESPONSE OF JUVENILE COURTS* (1981) (prior record was a better predictor of juvenile court dispositions than any other variable; about 60% of those violent offenders with more

research verifies that, although youths aged 16 and over are much more likely to be transferred, the transfer decision is usually not based on age per se, but on the fact that insufficient time exists in which to “rehabilitate” the juvenile. For instance, one study found that a nonamenability determination was three times as likely in courts with jurisdiction of youths up to ages eighteen or nineteen than in courts that had extended jurisdiction until the twenty-first birthday, and four times the rate of those courts that could retain jurisdiction past the twenty-first birthday.<sup>65</sup>

Conversely, the research findings about two other factors that may influence transfer—race and gender—contrast with the courts’ silence about these factors. Of course this silence is not surprising. To the extent the research is correct that race and gender are independent variables, courts may not even be conscious of their effect.<sup>66</sup>

Less clear is what the research indicates with respect to the last factor it identifies as important to transfer—past treatment history. According to some studies, courts merely look at the number of (failed) treatment attempts,<sup>67</sup> whereas according to other studies courts examine recommendations of staff, previous mental health treatment, available programs, or a combination thereof.<sup>68</sup> A related point is that the type of research reported here inevitably relies on “codable” factors. Highly variable psychological and environmental considerations, including degree of remorse, are much harder to discern and code than demographic characteristics, seriousness of the offense, prior offenses,

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than two prior referrals were waived or incarcerated and 35% of serious property offenders with more than two prior referrals were waived or incarcerated).

65. ELLEN NIMICK ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, *JUVENILE COURT WAIVER: A STUDY OF JUVENILE COURT CASES TRANSFERRED TO CRIMINAL COURT* (1986); see also SNYDER & HUTZLER, *supra* note 64. Age may also play another role in the transfer decision. One study found that youths who started their delinquent careers at a relatively young age were more likely to be transferred. Fagan et al., *supra* note 62, at 275-76.

66. *But see* BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* 129 (1993) (“One judge admitted that when he adjudicates a black youth he views that youth very differently from other youth even if the youth is charged with a similar offense. Specifically, black males are seen as less controllable and with limited family support if returned to the community.”).

67. See NIMICK ET AL., *supra* note 65 (waived juveniles tend to have a large number of prior referrals and an early age of onset; more than two-thirds of those waived had five or more court referrals); JAMES P. HEUSER, OR. DEP’T OF JUSTICE CRIME ANALYSIS CTR., *JUVENILES ARRESTED FOR SERIOUS FELONY CRIMES IN OREGON AND “REMANDED” TO ADULT CRIMINAL COURTS: A STATISTICAL STUDY* (1985) (waived cases were generally older with an extensive juvenile court referral history).

68. See HOWELL, *supra* note 59, at 98 (this variable “involves a complex determination reflecting a wide range of considerations”).

or number of treatment failures. In short, although the research suggests that current offense, offense history, treatment history and age in relation to dispositional jurisdiction are most important to the amenability determination, personality and environment, willingness to undergo treatment, and availability of treatment facilities may play significant roles as well.

### III. ANALYZING THE LAW'S APPROACH TO AMENABILITY DETERMINATIONS

Part II discussed the possible purposes of the amenability determination and set out the amenability criteria established by statutes and judicial decisions. It also suggested, based on a survey of the caselaw and social science research identifying correlates of treatability determinations, that courts are applying the amenability criteria with some regularity if not with interpretive consistency. This part of the article examines the appropriateness of both the avowed purposes of the amenability determination and the legal criteria used to make that determination. It also looks at the legal and practical obstacles to obtaining information about these factors.

#### A. *The Goal of Treatment*

Part II noted that some statutes and cases are vague as to whether one of the goals of the juvenile system is treatment aimed at improving the general welfare of the juvenile, beyond that necessary to prevent recidivism. An issue of possibly constitutional proportions is whether government has the authority to coerce such expanded treatment. Under traditional civil commitment theory, for instance, the state may intervene coercively in the lives of those with mental illness to prevent danger to self or others, but not "to ensure them a living standard superior to that they enjoy in the private community."<sup>69</sup>

To this theoretical observation can be added an empirical one. Meta-analyses of large numbers of juvenile treatment programs have found that the treatments most likely to "work" in terms of reducing recidivism have three attributes: (1) the interventions are applied primarily to high-

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69. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). This point is developed further in Slobogin et al., *supra* note 8, at 191-92.

risk (i.e., relatively dangerous) individuals; (2) targets of treatment are criminogenic factors (e.g., antisocial attitudes or peer relationships, criminal role models, lack of prosocial skill development) rather than vague personal/emotional problems (e.g., poor self-esteem); and (3) the interventions focus on developing skills that offenders are capable of applying rather than “nondirective” or “insight” approaches.<sup>70</sup> All three of these attributes, and particularly the first two, suggest that treatment programs are least likely to be effective at reducing recidivism if they aim merely at improving the self-concept of the youth or in some other vague way are designed to “help.” Intervention is most likely to be successful if its goal is straightforward reduction of identified precipitants of recidivism among the most dangerous.

These theoretical and practical points should lead to the conclusion that juvenile court treatment ought to focus forthrightly on preventing recidivism, not on improving the juvenile generally. At the same time, a system triggered *solely* by a desire to reduce recidivism may run afoul of other philosophical principles. In *Kansas v. Hendricks*,<sup>71</sup> the Supreme Court held that the government may incarcerate an individual on dangerousness grounds alone if it shows that the individual is suffering from a “mental abnormality” that reduces the ability to control behavior. Imposing *criminal punishment* solely on the grounds of dangerousness is still anathema, however. In light of *In re Gault*<sup>72</sup> and the more adult-like system that has followed in its wake, juvenile court disposition today is probably most accurately viewed as punishment, which means that imposition of a treatment intervention should be limited to those youths who have committed culpable criminal acts. In other words, even a youth who is likely to commit crime and can be successfully “treated” should not be found “amenable to treatment” and subject to juvenile court jurisdiction without proof of an act that merits punishment.<sup>73</sup>

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70. D. A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369 (1990); see also Mark W. Lipsey, *Juvenile Delinquency Treatment: A Meta-Analytic Inquiry Into the Variability of Effects*, in META-ANALYSIS FOR EXPLANATION 83 (Thomas D. Cook et al. eds., 1992).

71. 521 U.S. 346, 356-57(1997).

72. 387 U.S. 1 (1967) (imposing adult procedures on the juvenile court process).

73. Even if juvenile court disposition is not viewed as punishment, a position taken in Slobogin et al., *supra* note 8, at 196-200, proof of a threshold act should be required for utilitarian reasons. *Id.* at 205-06.

## B. *A Critical Analysis of the Amenability Factors*

For the theoretical and practical reasons just discussed, the rehabilitative reach of the juvenile system should be limited. The amenability issue of most concern to policymakers, however, arises in those cases in which the juvenile system clearly does have jurisdiction. Based on a survey of statutes, caselaw and field research, Part II identified eight factors the courts might consider in this regard: (1) seriousness of the offense; (2) offense history; (3) treatment history; (4) environmental and personality factors; (5) willingness to be treated; (6) availability of treatment; (7) age; and (8) race and gender. Each is analyzed critically below.

### 1. *Offense Seriousness*

Intuitively and empirically, the nature of the offense in the abstract bears no relationship to treatability. Youths who commit homicide are not per se less amenable to treatment than youths who commit burglary or possess drugs. Research indicates that one of the best predictors of violence for ages twelve to twenty-five is early antisocial behavior of virtually *any* type (including temper tantrums and verbal aggression).<sup>74</sup> Thus, offense seriousness may well bear no relationship or even a negative relationship to treatability.

Perhaps recognizing this possibility, many courts go beyond the offense on its face and delve into the manner in which it was committed. As Part II indicated, they may look at the youth's motives in committing the crime, the degree of maliciousness, whether it was part of a group action, and so on. Part II also noted, however, that courts' analysis of the offense is often superficial. Furthermore, the sense one gets from these cases (a sense that is not dissipated by the significant increase in automatic transfer statutes based entirely on the nature of the offense) is that the real purpose behind the courts' offense analysis is assessment of culpability, not of treatability. Again, the former bears no necessary relationship to the latter.

The nature of the offense is relevant to treatability only if a truly

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74. Mark W. Lipsey & J.H. Drezon, *Predictors of Serious Delinquency in Adolescence and Early Adulthood*, in *SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS* (Rolf Loeber & David P. Farrington eds., 1998).

“anamnestic” approach to prediction is taken.<sup>75</sup> It is well-established that assessing dangerousness based on diagnosis or actuarial data is of limited utility without an individualized assessment of offense patterns.<sup>76</sup> Similarly, discerning whether antisocial behavior can be curbed through treatment requires exploring in detail the particular themes of the individual’s misconduct.<sup>77</sup>

## 2. Past Offenses

As noted earlier, courts give the nature of past offenses even shorter shrift than the nature of the current offense. Yet just as the current offense must be analyzed in depth, so should past offenses be examined for clues as to treatability. It is a truism that the best predictor of future acts is past acts.<sup>78</sup> Incisive analysis of past acts for risk factors will suggest whether and how treatment will succeed.

Also noted earlier was the fact that courts sometimes seem satisfied merely with counting up the number of offenses and finding the frequent recidivist to be nonamenable. Certainly a relationship exists between number of past offenses and reoffending.<sup>79</sup> But courts also need to take into account whether treatment interventions occurred after any of the past offenses and, if so, how effective they were. If past offenses did not trigger meaningful treatment, or ended in diversion out of the system, then they should ordinarily not weigh heavily in the amenability determination. All that is shown by a long history of untreated previous offenses is that, left untreated, the youth reoffends.

## 3. Past Treatment Attempts

If courts considered this factor seriously, then the problem just

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75. This approach, described further in the text, was championed by Morris and Mills. See Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1, 13-14 (1985).

76. MELTON ET AL., *supra* note 9, at 290; JOHN MONAHAN, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 85-90* (1981).

77. See Ivan P. Kruh & Stanley L. Brodsky, *Clinical Evaluations for Transfer of Juveniles to Criminal Court: Current Practices and Future Research*, 15 BEHAV. SCI. & L. 151, 156 (1997) (evaluation must include “examination of the situational details of the crime.”).

78. JOHN MONAHAN, *supra* note 76, at 71.

79. *Id.* (“If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each prior criminal act.”).

described would be avoided. Yet, as noted earlier, many courts handle this factor the way they do prior offense history; if there are a large number of past treatment attempts, the juvenile must be unamenable. The reality is that the match between a youth's problems and treatment programs is not always felicitous and can often be improved upon; unfortunately, effective treatment often requires trial and error.<sup>80</sup> Ideally, courts would examine the precise type of treatment provided in the past to ascertain whether the proper treatment course was utilized and, if so, whether it was effectively implemented.

#### 4. *Personality and Environment*

This factor is the crux of the amenability determination. Offense and treatment history are in reality only a part, albeit a significant part, of an assessment of the youth's personality and environment. The overall inquiry should be focused on the individual's potential for "risk management," a concept developed by Monahan and Steadman.<sup>81</sup> Risk management involves identifying "dynamic"<sup>82</sup> risk factors—that is, potentially modifiable characteristics or influences that correlate with a risk of recidivism—and developing a method of managing those characteristics and influences.

Research has identified several dynamic risk factors. Beginning with the more endogenous factors and moving to the more exogenous ones, they include: (1) anger, impulsivity, risky behavior, lack of empathy, lack of commitment to school, mental disorder; (2) familial conflict, lack of family bonding; (3) poor school or occupational environment, gang membership; (4) availability of psychoactive substances and guns; and (5) poverty-stricken, run-down community setting.<sup>83</sup> State statutes and caselaw mention only a few of these factors specifically (e.g., school and family). However, the relevant language from the *Kent* appendix—"[t]he sophistication and maturity of the juvenile as determined by

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80. Even for something as straightforward as antipsychotic medication, up to six weeks may be necessary before the appropriate titration is found. AMERICAN PSYCHIATRIC ASS'N, *PSYCHIATRY FOR MEDICAL STUDENTS* (1984).

81. JOHN MONAHAN & HENRY J. STEADMAN, *VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT* (1994).

82. Dynamic risk factors are to be contrasted with static risk factors, e.g., gender and prior offenses, that are not subject to modification.

83. THOMAS GRISSO, *FORENSIC EVALUATIONS OF JUVENILES* 133-49 (1998) (describing risk factors).

consideration of his home, environmental situation, emotional attitude and pattern of living”<sup>84</sup>—is sufficiently broad that it could be said to cover all of them.

This is not the place to elaborate on these risk factors or comment on the types of interventions that might have an impact on them. That discussion is largely clinical in nature.<sup>85</sup> However, judicial consideration of these risk factors does raise one important conceptual issue. The *Kent* language, mimicked by many state transfer statutes and judicial decisions,<sup>86</sup> makes the youth’s “sophistication and maturity” the focal point of the personality inquiry. Why are these latter two factors considered so integral to the amenability determination?

One possible answer to this question is that sophistication and maturity are thought to be inversely related to malleability and treatability. But the “street-hardened” youth, “old beyond his years,” is not necessarily a bad candidate for treatment. For instance, such a youth, despite his maturity, may still be impulsive and unable to empathize, features which may be treatable. Alternatively, the “mature” label, especially when attached to one who is sixteen or seventeen, might simply be another way for the courts to determine that the youth is too old to treat, given the time available in the juvenile system. As developed below, however, the relationship of age to the juvenile system’s dispositional jurisdiction should be of minimal importance, at least if a thorough assessment of treatability is the goal.<sup>87</sup>

A third (and, perhaps, the most likely) reason courts focus on maturity is that, just as with offense seriousness, maturity provides a way of integrating a responsibility determination into the calculus.<sup>88</sup> Some of the original proponents of an independent juvenile system justified it not just on rehabilitative grounds but also on the theory that young people are, as a developmental matter, less culpable for their acts.<sup>89</sup> If the latter

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84. 383 U.S. at 567.

85. See GRISSEO, *supra* note 83; Kruh & Brodsky, *supra* note 77.

86. See Heilbrun, *supra* note 10, at 128-43 (indicating that at least five states use this type of language); see also KAN. STAT. Ann. § 38-1636(e)(6) (1993 & Supp. 1997); State v. Buelow, 587 A.2d 948, 953 (Vt. 1990) (indicating that “maturity of the individual” is a relevant factor).

87. See *infra* text accompanying note 110.

88. See, e.g., *In re B.M.R. v. State*, 581 P.2d 1322 (Okla. Crim. App. 1978) (emphasizing youth’s sophistication and maturity and the cold, calculated manner in which the offense was planned).

89. See THE INVENTION OF THE JUVENILE COURT, *supra* note 1, at 550-53; cf. Hazard, *The Jurisprudence of Juvenile Deviance*, in PURSUING JUSTICE FOR THE CHILD 3 (Margaret K. Rosenheim ed., 1976) (speaking of the “uncertainty about whether young persons should be held fully responsible for their conduct when they violate the criminal law.”). For a modern version of this rationale, see Elizabeth S. Scott & Thomas Grisso,



is the dominant jurisprudential underpinning of juvenile court, then maturity, defined in terms of culpability, should be a primary criterion for transfer to adult court and perhaps for a more punitive disposition in the juvenile system as well. To the extent treatability rather than culpability is the linchpin of the system, however, maturity is only distantly relevant, as a (misleading) way of describing youth for whom treatable risk factors cannot be identified.

### 5. *Willingness*

The psychology literature strongly suggests that treatability is related to one's willingness to be treated.<sup>90</sup> Certainly "talk" therapies depend upon cooperation, but even some forms of organic therapy may do best with a positive attitude.<sup>91</sup> Thus, courts should consider this variable in determining amenability. At least two obstacles might prevent them from doing so, however.

The first is the child him or herself. Consider this description of the typical juvenile charged with delinquency:

[While] adult defendants often wish to appear "sick" in the hope of facilitating less aversive dispositions of their cases, adolescents almost never adopt such a stance. . . . [A] far more common problem is that juveniles "clam up," or, alternatively, try to present themselves as streetwise "tough guys," lest clinicians conclude that they are crazy [or weak]. For many adolescents, including those whose misbehavior is more neurotic or impulsive than characterological, the label of "delinquent" or "troublemaker" is less threatening to their self-esteem than being considered "crazy" or "weird."<sup>92</sup>

Accordingly, an admission of a need for treatment may be difficult even for juveniles who think they need aid. In light of these realities, judges and clinicians should take special pains to distinguish between an

*The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 138 (1997).

90. Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 46 & 52 n.121 et seq. (1991) ("the potential for successful treatments in many contexts increases when the individual accepts treatments voluntarily rather than through coercion," citing research supporting the value of choice, voluntarism, and involvement with constructing treatment plans).

91. See *id.* at 50 ("It has also been suggested that medical and mental health treatment are more effective when provided on a voluntary rather than involuntary basis.") & n.118 (citing literature).

92. MELTON ET AL., *supra* note 9, at 429 (footnote omitted).

unwillingness to seek help and an unwillingness to be labelled sick. "Face-saving" mechanisms should be developed to facilitate a youth's admission that help is needed.

Juveniles may also be unwilling to cooperate because they don't trust the system. Perhaps they've been through "youth programs" before and found them lacking in benefit. Or perhaps they feel abused by a system that doesn't treat them with dignity.<sup>93</sup> Finally, in cases not involving serious violence, they may reason that a finding of amenability will ultimately lead to greater intrusion and disruption than the opposite finding. Again, courts should be aware of these multiple and sometimes conflicting motivations.

A second obstacle to obtaining information about willingness to be treated is constitutional in origin. Admitting that one wants to cooperate and is remorseful strongly implies, if it does not require, an admission of guilt. Because many amenability determinations (including transfer) take place prior to the adjudicatory hearing, this factor could run afoul of the Fifth Amendment, which *In Re Gault* held is applicable to delinquency proceedings.<sup>94</sup> Indeed, a few courts have relied on that constitutional provision in expressly prohibiting a finding of nonamenability based in whole or part on consideration of a juvenile's unwillingness to cooperate during a psychological evaluation.<sup>95</sup> One possible solution to this problem is to bar subsequent use of information obtained for transfer purposes. Indeed, without such protection, obtaining any of the personal information that is important to assessments of treatability may be impossible in some cases.

## 6. Availability of Resources

The paucity of specialized treatment programs (e.g., for substance abuse) often makes this factor the dispositive one. The simple fact is that, if no intervention is available, a treatable youth may be found unamenable to treatment. This reality raises an issue usually avoided by the courts: is there an obligation to create services that don't exist?

Although some courts have been willing to contemplate such an

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93. WILLIAM AYERS, *A KIND AND JUST PARENT* 29 (1997) (describing the Cook County Juvenile Court, where at any given moment 1500 to 2000 cases are pending and the average time given to any case is 12 minutes, with the typical judge making one hundred decisions a day).

94. 387 U.S. 1, 55 (1967).

95. *In Interest of Bruno*, 388 So.2d 784 (La. 1980); *In re Appeal in Pima County*, (Ariz. Ct. App. 1984).

argument,<sup>96</sup> most are likely to give this question a negative answer.<sup>97</sup> First, as a jurisprudential matter, juveniles have no “right” to juvenile court disposition in the first place.<sup>98</sup> That being the case, courts reason, no specific treatment program need be provided. In addition, courts are naturally reluctant to force appropriation of public monies, a matter more appropriately left to legislatures.<sup>99</sup>

Nonetheless, a strong argument can be made that some judicial activism is warranted in this regard. In the related mental health context,

96. In *Hazel v. United States*, 404 F.2d 1275 (D.C. Cir. 1968), the Circuit Court of Appeals for the District of Columbia stated:

We do not find it necessary to determine the difficult question whether the statutory promise of non-criminal treatment in all but exceptional circumstances may be denied the juvenile because of the lack of adequate facilities. We will recognize the undeniable limitations upon the resources available to the Juvenile Court. On the other hand, we also cannot ignore the mockery of a benevolent statute unbacked by adequate facilities. And to the extent that a juvenile with more affluent parents might avoid waiver because of the availability of privately-financed treatment and rehabilitation, constitutional issues may lurk in the problem.

*Id.* at 1280. See also, *Welfare of C. v. State*, 225 N.W.2d 245 (Minn. 1975) (remanding for a determination as to whether, if no treatment program for the juvenile was available, it was feasible to put together such a program and, if so, why the Department had failed to do so).

97. A number of courts have recognized a “right to treatment.” But these cases only enforce the right to the extent necessary to abort abusive practices and require fundamental services. See, e.g., *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Pena v. N.Y. State Div. for Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976); *Inmates of Boys’ Training Sch. v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973).

98. *State v. A.L.* 638 A.2d 814, 818 (N.J. Super. Ct. App. Div. 1994) (“Since statutes governing transfer from juvenile court do not involve a fundamental right or suspect classification, they survive challenges based on due process or equal protection grounds if they are not arbitrary and bear a rational relationship to a legitimate state interest.”); *Lane v. Jones*, 257 S.E.2d 525, 526-27 (Ga. 1979) (treatment as a juvenile is not an inherent right, but one granted by the legislature, which may restrict or qualify that right in any rational way it so chooses); *State v. Martin*, 530 N.W.2d 420 (Wis. Ct. App. 1995) (same); *Cox v. United States*, 473 F.2d 334, 337 (4th Cir.), cert. denied, 414 U.S. 869 (1973) (same); cf. *Marshall v. United States*, 414 U.S. 417, 428 (1974) (upholding exclusion of addicts with two or more felony convictions from discretionary rehabilitation under Narcotic Addict Rehabilitation Act of 1966 because reasonable for Congress to conclude that defendants with prior felonies would be less treatable).

99. Cf. *Stanford v. Commonwealth*, 734 S.W.2d 781, 792 (Ky. 1987) (refusing to reverse death sentence in face of claim that juvenile was theoretically amenable to treatment, on the theory that the defendant “already had all the treatment the Commonwealth can provide.”).

the Supreme Court's decision in *Youngberg v. Romeo*<sup>100</sup> held that the state owes a duty to treat if the professional consensus is that treatment is necessary to protect the safety of a patient or avoid bodily restraint; the Court also intimated that the state owes a duty to provide treatment that will "lead to freedom."<sup>101</sup> Transposed to the juvenile setting, *Youngberg* might mandate treatment that obviates the need for pure incapacitation.<sup>102</sup> Stated another way, government must accomplish its aim (prevention of recidivism) in the least restrictive manner possible, at least when deprivation of liberty is concerned.<sup>103</sup>

A second, quite different legal issue assumes the availability of treatment programs but questions the authority of the legal system to order them. For instance, although courts certainly can require delinquent youths to undergo treatment in state-funded programs, the state's authority to force private agencies to accept such youths is unclear.<sup>104</sup>

Another jurisdictional concern involves the authority of the court to take steps designed to reduce *exogenous* risk factors, i.e., those associated with third parties. Some of the most effective treatment programs, involving "multi-systemic" approaches, require participation of family, peers, schools, employers and others to be effective.<sup>105</sup> Yet

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100. 457 U.S. 307 (1982).

101. *Id.* at 318.

102. This argument is particularly strong if the juvenile court is reconceptualized as a preventive regime, with disposition based on dangerousness, rather than a punitive regime, in which dispositions are based on backward-looking assessments of blameworthiness and thus are determinate and independent of treatability. See Slobogin et al., *supra* note 8, at 212-13.

103. See Roy G. Spece, Jr., *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).

104. Cf. *Department of Health and Rehabilitative Services v. Stoutamire*, 602 So.2d 564 (Fla. Dist. Ct. App. 1992) (permitting a court to order a private facility to accept a patient but emphasizing that the decision "should be construed narrowly and employed as precedent only with extreme caution.").

105. See generally SCOTT W. HENGGELER & CHARLES M. BORDUIN, *FAMILY THERAPY AND BEYOND: A MULTISYSTEMIC APPROACH TO TREATING THE BEHAVIOR PROBLEMS OF CHILDREN AND ADOLESCENTS* (1990) (describing an approach that significantly reduced recidivism through "daily or weekly effort by family members," and development of ongoing supports in the extended family and community). See also Devon D. Brewer et al., *Preventing Serious, Violent and Chronic Juvenile Offending: A Review of Evaluations of Selected Strategies in Childhood, Adolescence, and the Community*, in *SERIOUS, VIOLENT, & CHRONIC JUVENILE OFFENDING: A SOURCEBOOK* 61, 69 (James G. Howell et al. eds., 1995) (describing three groups of interventions involving schools (including classroom organization, management, and instructional strategies and peer counseling); families (including parent training, marital/family therapy, and mentoring); and community-level interventions (including community laws

the typical state statute grants the juvenile court specific power only to order the parents of a delinquent youth into therapy.<sup>106</sup> Even in that context the basis of the state's power to force participation in the treatment of another is not clear. One might argue, for instance, that before such coercive intervention may occur evidence that the third party not only was a "cause" of, but was also "responsible" for, the youth's problems should be required.<sup>107</sup> When the third party the court wishes to involve in the treatment plan is someone other than a family member (e.g., school classmates, gang members, other community members) the "responsibility" link is even more tenuous. At the least, without explicit legislative authorization, court-ordered intervention becomes progressively less viable the further it ventures from the individual-centered medical model of treatment.<sup>108</sup>

Dealing with the most pervasive risk factors (e.g., availability of drugs and guns; community poverty) does not involve coercing third parties into treatment programs. But their very pervasiveness makes them less susceptible to judicial control as well. This institutional infirmity again argues for a legislative approach to the problem, an approach that can be brought closer to fruition with strong social science evidence linking these types of factors to recidivism.<sup>109</sup>

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and policies related to weapons, policing strategies, and community mobilization).

106. See, e.g., VA. CODE ANN. § 16.1-278.8(3) (Michie 1995). A number of experimental programs have encountered difficulties enrolling parents of high risk youth. Karol L. Kumpfer & Charles W. Turner, *The Social Ecology Model of Adolescent Substance Abuse: Implications for Prevention*, 25 INT'L J. ADDICTIONS 435 (1990-91).

107. At common law, parents were not liable for the torts of their children. Today in virtually every state they may be liable for the wilful and wanton acts of their children, but not for negligent acts. SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 108 (2d. ed. 1997).

108. The medical model of treatment can be distinguished from the "psychologic" and "social" models, which conceptualize behavioral problems in more contextual terms. See generally Paul Lazare, *Hidden Conceptual Models in Clinical Psychiatry*, 288 NEW ENG. J. MED. 345 (1973), described in RALPH REISNER ET AL., LAW AND MENTAL HEALTH: CIVIL AND CRIMINAL ASPECTS 5-6 (3d ed. 1998).

109. Cf. Carolyn R. Block & Richard Block, *Street Gang Crime In Chicago, National Institute of Justice Research in Brief*, December 1993, at 1, 7 (increase in lethality the result of higher calibre, automatic weaponry); Franklin E. Zimring, *Street Crime and New Guns: Some Implications for Firearms Control*, 4 J. CRIM. JUST. 95 (1976).

## 7. Age

If amenability to treatment is to be taken seriously, age, by itself, should not be a dispositive factor. Yet the research reported earlier suggests that it is, at least in jurisdictions that end dispositional jurisdiction at eighteen or nineteen. A seventeen-year-old juvenile who is amenable to treatment should not be found “nonamenable” simply because he or she is only three months away from the critical next birthday. As many states recognize,<sup>110</sup> extending dispositional age jurisdiction to twenty-one or beyond (and allowing juveniles tried as adults to be sentenced as juveniles) makes sense in a system that is treatment-oriented. The central question, which is moral as well as empirical, is at what age (if any) considerations of culpability and societal desire for punishment outweigh the relatively greater treatability we assume is associated with youth. In other words, at what stage of an individual’s development are we willing to give up a rehabilitative focus to the crime problem? It is not clear that age eighteen, age twenty-one or any other particular age is the right answer to this question; perhaps treatability should remain a consideration far beyond the age of eighteen.

## 8. Race and Gender

No proven correlation exists between a particular race or gender and untreatability. Even if such correlation existed, equal protection concerns would probably bar explicit reliance on this factor.<sup>111</sup> Furthermore, regardless of constitutional considerations, the need to individualize amenability determinations makes these factors of questionable relevance. The various factors laid out above should be assessed for each individual, of whatever race and gender.

None of these points should suggest that courts and clinicians evaluating amenability should ignore the possible effects of race and gender, or of other demographic attributes. Cultural and ethnic influences may help explain antisocial behavior and point toward

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110. Since 1992, eleven states and the District of Columbia have extended the age for juvenile commitments, three of them to 25 years, and four of them indefinitely (until all orders have been complied with or the term of commitment has been served). U.S. DEP’T OF JUSTICE, *supra* note 56, at 15 (1996). At least 16 states have some form of “blended” sentencing, combining juvenile and court act and/or dispositional jurisdiction. *Id.* at xiii.

111. Terence P. Thornberry, *Sentencing Disparities in the Juvenile Justice System*, 70 J. CRIM. L. & CRIMINOLOGY 164 (1979).

specific types of interventions.<sup>112</sup> They may also affect the assessment process itself. For example, experience with and myths about the white power structure might make minority males particularly unwilling to explain their behavior to those in authority.<sup>113</sup> If so, both the anamnestic approach and the assessment of willingness to undergo treatment will be more difficult. Courts and professionals should be especially careful in evaluating such cases.

#### IV. RESEARCH IMPLICATIONS

The foregoing discussion suggests a number of research agendas. Some of these agendas might address fundamental issues, such as whether the underlying assumptions of the juvenile system make sense. Others are geared toward providing lawmakers with useful information about amenability, assuming that issue continues to be relevant. Finally, research could also help individual courts and clinicians in their assessments of amenability.

##### A. Premises

A key assumption underlying the traditional rationale for the juvenile court is that juveniles are more amenable to treatment than adults.<sup>114</sup> Certainly that is the popular assumption, but no research directly tests it.<sup>115</sup> Controlled studies matching different age groups, with other

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112. For instance, given their social and economic status in society, black youths may become "more deeply embedded in and dependent upon the gangs and the illicit economy that flourish in their neighborhoods," which might suggest particular kinds of interventions. Delbert S. Elliot, *Serious Violent Offenders: Onset, Developmental Course, and Termination*, 32 *CRIMINOLOGY* 1, 19 (1994).

113. KRISBERG & AUSTIN, *supra* note 66, at 129-130 ("Lack of ethnic balance and Anglo-American dominance of high-level juvenile justice jobs contribute to the overrepresentation of certain minority groups in secure juvenile justice facilities. . . . Minority youth being processed in the juvenile justice system, as well as their parents, do not always understand how the system works."). Cf. Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 *LAW & HUM. BEHAV.* 249 (1994) (detailing ways in which cultural differences might affect interviewers' ability to discover relevant information about abuse and neglect).

114. For an argument that this rationale is problematic as a justification for a separate juvenile justice system, see Slobogin et al., *supra* note 8, at 190-92.

115. As one commentator, writing in 1976, noted:

[T]here is little evidence to support this simple and popular view. Maturational

variables (such as nature of offense and treatment modalities) kept constant would help test this proposition. Such research would also help identify the range of ages, if any, at which treatment becomes significantly less successful. If such an age threshold exists, it would provide empirical justification for designating the point at which juvenile dispositional jurisdiction ends.

The possibility also exists that juveniles are not particularly amenable to rehabilitation. For instance, if most juveniles “grow out” of their criminal behavior<sup>116</sup> and are generally unresponsive to treatment, a rehabilitation-oriented juvenile justice system may make no sense. Straightforward incapacitation of delinquent youth until age twenty or twenty-five might be the best means of protecting the community. As the discussion below indicates, however, children appear to be eminently treatable under certain circumstances.

## B. *Treatment Efficacy*

A number of recent studies have tested the relative efficacy of various types of treatment programs at reducing recidivism.<sup>117</sup> Contrary to standard perceptions of treatment efficacy,<sup>118</sup> much of this research demonstrates that some types of prevention and early intervention programs are successful at preventing and reducing even serious, violent, and chronic delinquency.<sup>119</sup> Next steps might include additional

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reform is not evidence of a greater amenability to rehabilitative programs; the reform associated with age appears to occur whether or not the offender is apprehended. Apparently, variables that account for maturational reform are not influenced by treatment programs.

Simpson, *supra* note 8, at 1012-13 (footnotes omitted). Since this statement was made, “meta-analyses show convincingly that experimental juvenile justice programs are effective.” HOWELL, *supra* note 59, at 191. However, research has not addressed whether adults would respond in similar fashion to similar or different programs.

116. According to Howell, “[u]ntil longitudinal studies collect self-reports of crime on their samples through adulthood, the presumed midlife disappearance of crime will remain an empirical question.” HOWELL, *supra* note 59, at 168.

117. The most thorough review of these studies is Lipsey, *supra* note 70.

118. See Zimring, *supra* note 8.

119. Lipsey found that juveniles in treatment groups have recidivism rates about 10% lower than untreated juveniles in control groups and that the best intervention programs produced 20-30% reductions in recidivism rates. *Id.* A study of a multisystemic treatment program showed that the recidivism rate for those who completed the program (22.1%) was one-third of those who participated in other treatment programs (71.4%) or refused treatment altogether (87.5%) and less than one-half of those that dropped out of the multisystemic treatment (46.6%). Charles M. Borduin et al., *Multisystemic Treatment of Serious Juvenile Offenders: Long-Term*



meta-reviews of this research,<sup>120</sup> as well as follow-up studies seeking to verify their findings. Solid reports of success rates are the best method of convincing governments to fund specific programs and, on a more fundamental level, of persuading them that the rehabilitative approach is worth continuing (or reinvigorating, as the case may be). Of course, accurate information about costs would need to be provided as well.

A second inquiry would focus on the criminogenic effects of imprisonment. Although research suggests that juvenile disposition reduces recidivism more (or fosters it less) than adult criminal court sanctions,<sup>121</sup> more research along these lines is necessary. Specifically, it would be beneficial to study the effect of imprisoning juveniles together with adults, compared to detaining juveniles with other juveniles and compared to groups of juveniles who are not put in detention.<sup>122</sup> A likely confounding variable would be the treatment provided to these three groups (because in-prison treatment is highly likely to differ from outpatient treatment). However, if the outcome variance between the first group and the other two is significant (in the direction of higher recidivism of the juveniles incarcerated with adults), the case against current transfer trends would be strengthened. If the difference between the second and third groups is significant, a case for

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*Prevention of Criminality and Violence*, 63 J. CONSULTING & CLIN. PSYCHOL. 569 (1995).

120. The National Research Council is planning such a consolidation of research results, due by October 31, 1999. Janine Bilyeu, Project Summary, at 10 (Sept. 19, 1997).

121. Jeffrey Fagan, *Separating the Men From the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, in SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS 238, 238 (James C. Howell et al. eds., 1995).

122. Although the federal Juvenile Justice and Delinquency Prevention Act of 1974 mandates separation of adults from juveniles in detention facilities, the impetus for this provision was not research indicating effects on recidivism but studies showing the deplorable conditions in which juveniles detained with adults were housed. *Hearings Before the Subcommittee to Investigate Juvenile Delinquency*, Committee on the Judiciary, U.S. Senate, 93rd Cong., 1st Sess. (1973). See generally Fagan, *supra* note 121, at 255 ("replications of this effort are needed, both within the study sites with new cohorts and in other sites."). Similarly, study of incapacitative dispositions within the juvenile system has been lacking. DeWitt L. Weatherly, *Legal Intervention with Juveniles Offenders*, in 1 VIOLENT BEHAVIOR: ASSESSMENT AND INTERVENTION 315, 325 (Leonard J. Hertzberg et al., eds. 1990) ("Well-designed studies of the various outcomes of correction [in the juvenile justice system] are relatively rare," quoting William H. Barton & Rosemary Sarri, *Where Are They Now? A Follow-Up Study of Youth in Juvenile Correction Programs*, 25 CRIME & DELINQ. 162 (1979).

avoiding incapacitative approaches would be made.

### C. Assessing Treatability

Courts and clinicians need guidance about how to evaluate treatment potential. The current and continuing research on recidivism risk factors might be reduced to instruments or checklists that can be used in the field for this purpose. Research comparing the prediction success of evaluations using these instruments to traditional approaches could then be conducted.

Previous discussion suggested that, in addition to the risk factors identified in the research, a juvenile's desire to change might be an important consideration in the amenability determination. Researchers might more directly test this assumption and, if it is borne out, develop (culturally sensitive) methods for ascertaining it. Perhaps even more important, a schema for convincing juveniles that change is worthwhile might prove to be a useful "treatment" device in and of itself.

## V. CONCLUSION: TOWARD A REDEFINITION OF TREATMENT AMENABILITY

The foregoing analysis suggests that the law's definition of the amenability to treatment concept ignores several important variables. More significantly, the analysis suggests that the courts' application of the factors that are considered relevant to the amenability determination is often pretextual.<sup>123</sup> Rather than representing a genuine attempt to assess a child's treatability, courts' evaluation of amenability focuses more on culpability and dangerousness.

The definition of treatment amenability should attempt to implement the rehabilitative premise of the juvenile court. The place to start is the term itself—"amenability" to "treatment." The dictionary definition of amenability alludes both to "capability" and to "willingness;"<sup>124</sup> accordingly, amenability to treatment might mean either an ability to be treated or a readiness to undergo treatment, or both. The concept of

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123. Cf. Michael L. Perlin, *"Half-Wracked Prejudice Leap'd Forth": Sanism and Pretextuality in Mental Health Law*, 10 J. CONTEMP. LEGAL ISSUES 3 (1999) (arguing that much of mental health law is pretextual in the sense that it aims at achieving something other than its stated goals).

124. According to THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Stuart Berg Flexner ed., 2d ed. unabridged 1987), amenable means "ready or willing to answer, act, agree, or yield; open to influence, persuasion or advice; agreeable; submissive; tractable," as well as "capable of . . . being tested, tried, analyzed."

treatment is somewhat more ambiguous. At one end of the spectrum it might focus on medical or psychiatric modalities designed to reduce recidivism. At the other, it might consist of any intervention by a specialist designed to better a person's quality of life.

Compared to the traditional legal approach to juvenile treatment amenability, this article has argued for a relatively narrow treatment objective—reduction of recidivism—combined with a relatively broad inquiry into the youth's offense history, character and attitudes toward the need for change. A definition of treatment amenability that is consistent with the points made in this article might read as follows:

A juvenile's amenability to treatment depends upon the extent to which: (1) those aspects of the juvenile's personality and environment (2) that contribute significantly to an increased risk of criminal behavior (3) can be ameliorated by age [21] through individual, family or community-oriented intervention (4) that is available under the juvenile court system and applicable law.

Below is a short elaboration of this definition, part by part.

(1) *Aspects of the juvenile's personality and environment.* This definition contemplates a thorough anamnestic investigation of the juvenile's offense history and other antisocial behavior, an assessment of the juvenile's characterological and clinical traits, and an evaluation of the effects on the youth of family, peers, school, work, and community. Willingness to be treated would be gauged as well. Superficial analysis of current and prior offenses and past treatment would be insufficient.

(2) *Significant contribution to criminal behavior.* All of this information would be gathered for the purpose of identifying risk factors that significantly correlate with *criminal* behavior. This position would discourage assertion of juvenile court jurisdiction if the only outcome of intervention would be the prevention of minor antisocial conduct or an improvement in "personality" unrelated to reduction of criminal propensities. More importantly, it would avoid the false distinction between dangerousness and amenability that is found in many court decisions and statutes. Under the proposed definition of amenability, the relationship between the two constructs is explicitly inverse: A juvenile is treatable if a juvenile court intervention is likely to lower the risk of criminal behavior. If, on the other hand, the juvenile's dangerousness is not treatable, transfer to adult court should be considered (although given the crimogenic effect of adult dispositions, it should not

necessarily be automatic).<sup>125</sup> Contrary to the insinuation of many courts,<sup>126</sup> amenability analysis does not have to neglect societal interests; indeed, its sole purpose should be to determine how to prevent future harm.

(3) *Amelioration through individual, family or community intervention up to age [21]*. The interventions contemplated should be designed to treat, reduce or modify the identified risk factors. The wording in this part of the definition is meant to emphasize that such interventions would include not only treatment of the individual, but family therapy, restructuring of school or work, and community-oriented or "multi-systemic" programs. The overall approach would be based on the risk management model, involving constant monitoring of relevant risk factors and periodic adjustment of treatment plans to fit changing circumstances.<sup>127</sup> The choice of age twenty-one as the cut-off for this approach merely reflects the median age at which states end the dispositional jurisdiction of the juvenile court.<sup>128</sup> If research indicates that a different age threshold better reflects optimal treatability, then the appropriate adjustment can be made.

(4) *Services available to juvenile court system under applicable law*. Choosing among various programs is up to the court. But the court's options are limited, not just by physical unavailability, but by law. To the extent cooperation of third parties such as parents, extended family members, employers and school officials is required to implement a particular program, serious thought must be given to whether legal methods exist to encourage, cajole, or coerce participation. Furthermore, because the legislature is best equipped to balance funding and efficacy concerns and because courts may otherwise lack the authority, the options "available" under this definition should ultimately depend upon the former body's deliberations. Ideally, the authority granted to the juvenile court would transcend individual-centered, localized treatment programs to the extent it is politically and financially possible to so. Such a broad grant of authority would help juvenile courts operate as "boundary-spanners,"<sup>129</sup> organizations that bring

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125. For further development of this point, see Slobogin et al., *supra* note 8, at 213-15; 224-25.

126. See *supra* text accompanying notes 28-32.

127. For further elaboration of this model, see Slobogin et al., *supra* note 8, at 215-24.

128. Some states end dispositional age at 18, others go as high as 25. See STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME, *supra* note 56, at 15.

129. Cf. Henry J. Steadman, *Boundary Spanners: A Key Component for the Effective Interactions of the Justice and Mental Health Systems*, 16 LAW & HUM. BEHAV. 75 (1992). An example in the juvenile context is the Florida Juvenile Assessment

together disparate community resources in an effort to help children avoid a life of crime.

Compared to current conceptions of amenability, the definition of amenability offered here is not so much a change in content, as it is a change in emphasis. Offense and treatment history are relevant, but only if probed for treatable risk factors. The overall focus is not the juvenile's antisocial behavior per se but the interaction between the juvenile and all aspects of his or her environment, including the juvenile's willingness to change. Treatment is not narrowly conceived as individual-centered but as group- and community-centered. This type of definition—perhaps more finely tuned once research clearly identifies treatable risk factors—should focus courts and professional evaluators on the right issues in determining amenability. The task then becomes providing the resources and energy to make treatment a viable option.

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Center, which integrates at the entry level juvenile justice, mental health, social services, child welfare, and education systems. R. Dembo & R. Brown, *The Hillsborough County Juvenile Assessment Center*, 3 J. CHILD & ADOLESCENT SUBSTANCE ABUSE 25 (1994). A more theoretical description using “managerial” courts is offered by 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).

