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## Kent Make-Up Their Minds: Juveniles, Mental Illness, and the Need for Continued Implementation of Therapeutic Justice Within the Juvenile Justice and Criminal Justice Systems

Carmen M. Cusack

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# ***KENT MAKE-UP THEIR MINDS: JUVENILES, MENTAL ILLNESS, AND THE NEED FOR CONTINUED IMPLEMENTATION OF THERAPEUTIC JUSTICE WITHIN THE JUVENILE JUSTICE AND CRIMINAL JUSTICE SYSTEMS***

CARMEN M. CUSACK\*

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## I. INTRODUCTION

This article discusses issues and promising solutions to the inundation of minors with mental illness into the juvenile justice (JJ) and criminal justice

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\* Carmen Cusack earned a B.A. and J.D. from Florida International University. At Nova Southeastern University (NSU), she is a Ph.D. A.B.D. in Criminal Justice, specializing in Behavioral Science, and teaches Theory of Child Protection, Investigation, and Advocacy. She has worked in juvenile justice, criminal law, and family law. Her research interests include children's rights, child abuse and pornography, juvenile justice, behavioral science, and alternative and therapeutic justice.

(CJ) systems. Minors, who have fewer rights than adults, require therapeutic justice to treat mental illness. Section II, analyzes the precedent set by *Kent v. United States* for procedural due process in juvenile cases.<sup>1</sup> Subsections A and B, discuss how courts have applied *Kent* to issues that involved juvenile competency and consent for treatment.<sup>2</sup> Many juveniles have been traumatized by abuse and other environmental factors.<sup>3</sup> These children are not hardened criminals. The system should attempt to make them whole before castigating them as adults or deciding to waive them into criminal court. Section III addresses the role that trauma plays in recidivism and entanglements with the JJ and CJ systems.<sup>4</sup> Section IV discusses criminalization of mental illness as it relates to biological and environmental factors, and the justice systems.<sup>5</sup> Therapeutic justice is essential for rehabilitating youth and adults who enter the system and require treatment. Section V explains why therapeutic jurisprudence is about problem solving rather than punishment, with the primary goal of social justice.<sup>6</sup> Section VI discusses mental health court and other programs for mentally ill juveniles in need of therapeutic justice.<sup>7</sup> Section VII offers a new vision for the justice system's treatment of mentally ill delinquents and offenders.<sup>8</sup> This section suggests that society needs to continue shifting the roles of members of the court to a therapeutic position. It also suggests that we need to continue humanely building our response to mentally ill offenders at both the community and political levels.

## II. JUVENILE DUE PROCESS

In 1966, the Supreme Court decided *Kent v. United States*.<sup>9</sup> In a majority decision, the Court held that due process rights, which require a preliminary hearing to apprise defendants of charges, apply to juveniles.<sup>10</sup> Morris Kent, a sixteen-year-old male charged with rape and robbery, moved to the juvenile court for a waiver hearing.<sup>11</sup> Kent's attorney

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1. *Kent v. United States*, 383 U.S. 541 (1966).

2. *See infra* Part II.

3. *See infra* Part II.A-B.

4. *See infra* Part III.

5. *See infra* Part IV.

6. *See infra* Part V.

7. *See infra* Part VI.

8. *See infra* Part VII.

9. *Kent v. United States*, 383 U.S. 541 (1966).

10. *Id.* at 562.

11. *Id.* at 543-44; Stacey Sabo, *Rights of Passage: An Analysis of Waiver of*

requested access to Kent's social service file, arguing that those records would influence the judge's decision.<sup>12</sup> The motion included an affidavit signed by a psychiatrist.<sup>13</sup> The psychiatrist described Kent as severely psychopathic and recommended institutionalization for observation.<sup>14</sup> No hearing was granted, but Kent was waived into criminal court without knowledge of the grounds.<sup>15</sup> Neither Kent's parents nor his attorney were notified.<sup>16</sup> On appeal, the Court held that the lower court had not made a full investigation before waiving the juvenile defendant into criminal court.<sup>17</sup> Due process must apply to juveniles to ensure that judicial discretion is not arbitrary.<sup>18</sup> The defendant's participation is a critically important part of the process, even in juvenile hearings.<sup>19</sup>

### A. Competency

Before *Kent*, states increasingly controlled children on the basis that children were less formed, and thus were less competent than adults and did not deserve full due process.<sup>20</sup> *Kent*'s holding was important because it set a precedent for future juvenile cases, while establishing a list of factors that courts should consider during an investigation.<sup>21</sup> One of these factors dealt with competence.<sup>22</sup> Though this precedent bound courts on judicial waiver, *Kent* does not settle the issue of prosecutorial waiver.<sup>23</sup> Many

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*Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2432 (1996).

12. *Kent*, 383 U.S. at 546; F. Thomas Schornhurst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583, 583-84 (1968).

13. *Kent*, 383 U.S. at 545; Schornhurst, *supra* note 12, at 584 n.10.

14. *Id.*

15. *Kent*, 383 U.S. at 546; Schornhurst, *supra* note 12, at 584.

16. *Id.*

17. *Kent*, 383 U.S. at 561; Sabo, *supra* note 11, at 2432; Schornhurst, *supra* note 12, at 584.

18. *Kent*, 383 U.S. at 553; Sabo, *supra* note 11, at 2432.

19. *See Kent*, 383 U.S. at 553-54.

20. *See generally* Sabo, *supra* note 11, at 2431 (explaining that because the juvenile court's stated mission was to protect children, the pre-*Kent* understanding—that procedural protections granted to criminal defendants were unnecessary for children—was presumably based on the idea that the state was acting in the child's best interest).

21. *Kent*, 383 U.S. at 566-67; Jennifer Park, *Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Juvenile Waiver Policies*, 76 GEO. WASH. L. REV. 786, 794 n.59 (2008); Sabo, *supra* note 11, at 2433 n.60.

22. *See Kent*, 383 U.S. at 566-67; Park, *supra* note 21, at 812; Sabo, *supra* note 11, at 2433 n.60.

23. *See* David O. Brink, *Immaturity, Normative Competence, and Juvenile*

states have failed to codify any of *Kent*'s holding and are solely guided by case law.<sup>24</sup>

All but six states now allow judicial discretion for at least some waiver decisions. Fourteen states and the District of Columbia . . . allow[] prosecutors the discretion to bring a charge against a juvenile in either criminal or juvenile court. Twenty-two states and the District of Columbia have no minimum age for when a juvenile can be transferred to adult court. Hawaii, Missouri, Tennessee, and Texas always permit judges to make the determinations contemplated in *Kent*, . . . which they accomplish by making waiver discretionary, never mandatory, and by removing all presumptions.<sup>25</sup>

Fortunately, *Kent* prompted several states to adopt legislation that further protects juvenile due process, though many states are still lacking.<sup>26</sup> One protection—the determination of competence by a psychologist or qualified other professional—has been adopted by several states, including Arizona, Colorado, Florida, Georgia, Kansas, Minnesota, Nebraska, Texas, Virginia, Wisconsin, and the District of Columbia.<sup>27</sup>

Virginia Code Section 16.1-356 provides several procedural safeguards for juveniles. Subsection A provides that if “there is probable cause to believe that the juvenile lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense,” then a court will order a competency evaluation.<sup>28</sup> A psychiatrist, clinical psychologist, licensed professional counselor, licensed clinical social worker, or licensed marriage and family therapist may evaluate the juvenile.<sup>29</sup> These professionals must specialize in the forensic evaluation of juveniles and meet the professional standards of expertise set forth by the Commissioner of Behavioral Health and Developmental Services.<sup>30</sup> Subsection B requires outpatient evaluations to be performed at “a

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*Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1563-64 & n.38 (2004); Schornhurst, *supra* note 12, at 598-99.

24. See SARAH HAMMOND, NAT'L CONFERENCE OF STATE LEGS., MENTAL HEALTH NEEDS OF JUVENILE OFFENDERS 5 (2007), available at <http://www.scribd.com/doc/99977429/Mental-Health-Needs-of-Juvenile-Offenders>; Park, *supra* note 21, at 798-800.

25. Park, *supra* note 21, at 799-800, 803.

26. See *Kent*, 383 U.S. at 541; Park, *supra* note 21, at 799-800 (recounting the various waiver approaches that states have taken following *Kent*, while noting that “no state has resolved all of the problems inherent in judicial waiver”).

27. Hammond, *supra* note 24, at 5.

28. VA. CODE ANN. § 16.1-356 (2013).

29. *Id.*

30. *Id.*

community services board or behavioral health authority, juvenile detention home, or juvenile justice facility.”<sup>31</sup> If the juvenile is already hospitalized or requires hospitalization, then the Code does not require an outpatient evaluation.<sup>32</sup>

Apropos to the facts in *Kent*, Subsection C requires the state’s attorney to provide evaluators with any relevant information for the evaluation. The defendant’s attorney is required to provide only the psychiatric records and information that is relevant to the evaluation of competency, within ninety-six hours of evaluation being ordered but prior to the inpatient evaluation.<sup>33</sup> Subsection D protects the juvenile’s due process rights by requiring a hospital director to evaluate a hospitalized juvenile’s competency within ten days of admission.<sup>34</sup> Findings must be reported to the court within two weeks.<sup>35</sup> Subsection E requires the evaluator to comment on “(i) the juvenile’s capacity to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for services in the event he is found incompetent, including a description of the suggested necessary services and least restrictive setting to assist the juvenile in restoration to competency.”<sup>36</sup> The court will rely on the report to determine whether the juvenile is competent to stand trial, as required by Subsection F.<sup>37</sup> In conformity with the holding in *Kent*, a hearing on the juvenile’s competency will be required if requested by either party or if deemed necessary as a matter of law.<sup>38</sup> The moving party will carry the burden of proof.<sup>39</sup> A final procedural safeguard developed in light of *Kent*’s appeal provides juveniles with notice and the right to personally participate in and introduce evidence at the hearing.<sup>40</sup> In Virginia, if a juvenile is found competent, then he or she may be waived into criminal court.<sup>41</sup>

In some states, juveniles have been considered incompetent because of

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31. *Id.*

32. *Id.*

33. *Id.*; *Kent v. United States*, 383 U.S. 541, 541 (1966).

34. § 16.1-356.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*; *Kent*, 383 U.S. at 541.

39. § 16.1-356.

40. *Id.*; *Kent*, 383 U.S. at 541.

41. Alan R. Felthous, *Commentary: Competence to Stand Trial in Juveniles and the Judgment Model*, 39 AM. ACAD. OF PSYCHIATRY & THE L. 327-31 (2011).

their immaturity or age.<sup>42</sup> In Virginia, “if the juvenile is otherwise able to understand the charges against him and assist in his defense, a finding of incompetency shall not be made based solely on . . . the juvenile’s age or developmental factors.”<sup>43</sup> No state has a specific age at which a juvenile shall be considered incompetent.<sup>44</sup> In Virginia, if a juvenile cannot be treated, then the court will dismiss misdemeanor charges after one year and felony charges after three years.<sup>45</sup>

*Kent* does not require competency evaluations for juveniles.<sup>46</sup> For example, Oklahoma case law holds that juvenile defendants need not be competent.<sup>47</sup> Nevertheless, determinations of competence to stand trial serve several ends of justice.<sup>48</sup> Expert evaluations ensure accuracy and fairness.<sup>49</sup> If the accused is found competent and guilty, then he or she may consent to treatment.<sup>50</sup>

### *B. Consent*

Consent plays both a direct and indirect role in the context of competency evaluations.<sup>51</sup> Consent need not be granted for the court to order a competency evaluation.<sup>52</sup> The court may order an inpatient evaluation or hospitalization.<sup>53</sup> The juvenile, however, has the right to control certain aspects of the procedure, such as withholding information that is not required or moving the court.<sup>54</sup> Juveniles may have the sole authority to provide informed consent or refuse mental health treatment.<sup>55</sup>

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42. *Id.* (noting that Florida, for example, allows immaturity alone to constitute incompetence).

43. § 16.1-356.

44. Felthous, *supra* note 41, at 328.

45. VA. CODE ANN. § 16.1-358 (2013).

46. *See* Felthous, *supra* note 41, at 328.

47. *Id.*

48. *Id.* at 327.

49. *See id.*

50. *See* Richard E. Redding, *Children’s Competence to Provide Informed Consent for Mental Health Treatment*, 50 WASH. & LEE L. REV. 695, 750 (1993) (noting that while some states offer minors due process protections to consent to treatment, reform is necessary in other states as well).

51. *See id.* at 703 & n.37 (highlighting the different perceptions of competence and consent as reflected by evaluation laws in different states).

52. *Cf.* VA. CODE ANN. § 16.1-356 (mentioning the instances where a competency evaluation shall be ordered without making any reference to consent by the juvenile).

53. Felthous, *supra* note 41, at 328.

54. *Id.*

Parental consent may be required.<sup>56</sup> This element of control implies the exercise of consent.<sup>57</sup>

Meaningful participation is voluntary.<sup>58</sup> The defendant may refrain from meaningfully participating to any extent that cannot be ordered. Paternalism cannot force compliance, even if it is to the juvenile's detriment.<sup>59</sup> In some jurisdictions, such as Wisconsin, inpatient evaluation requires consent by a parent, the juvenile's lawyer, *and* the juvenile.<sup>60</sup> Through the adjudicatory process, children may be ordered to undergo treatment.<sup>61</sup> In this case, they must consent to treatment in order to meaningfully participate to an extent that achieves compliance.<sup>62</sup> If a child is ordered into civil commitment as the result of adjudication, then the child is not competent to consent to treatment.<sup>63</sup> Judicial hearings can help to establish voluntariness and reduce the chance that a child will be treated against his or her consent or his or her parent's consent.<sup>64</sup>

There is no single theory or definition of competency within either the legal or mental health communities. Typical standards include (1) factual understanding of the problem and the treatment alternatives; (2) rational decision making processes; (3) appreciation for the personal implications of the decision; (4) ability to make and communicate a choice; (5) a reasonable choice; or (6) general competence.<sup>65</sup>

"Legal presumptions regarding the capacity of . . . [a] child unilaterally to provide a legally valid consent, that is . . . voluntary, knowing, and intelligent, should differ depending upon (1) the child's age, (2) the type of treatment, and (3) who seeks to have the child treated."<sup>66</sup> Legal protections may depend on jurisdiction, mental health professionals' opinions, and the defense's consent and desire to participate.<sup>67</sup>

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55. Redding, *supra* note 50, at 696.

56. *Id.* at 705.

57. *Id.* at 709.

58. *Id.* at 731.

59. *Id.*

60. WIS. STAT. § 938.295(2)(a)-(b) (2013).

61. Redding, *supra* note 50, at 32.

62. *Id.* at 708-09.

63. *Id.* at 697 n.6.

64. *Id.* at 731.

65. *Id.* at 709-10.

66. *Id.* at 719.

67. *Id.*

### III. MANY JUVENILES ARE TRAUMATIZED, NOT HARDENED CRIMINALS

Research shows that children have a tendency to repeat the lifestyle in which they are raised. The tendency, to repeat the behavior patterns experienced during early childhood, is negatively impacted by interpersonal trauma, poverty, sexual trauma, psychological trauma, and social trauma. For example, within the bottom twenty percent of the lower and lower middle class populations in the United States, almost half (forty-two percent) will have children who will remain in the same class bracket throughout their adult lives.<sup>68</sup> Of all children, more than one third of United States minors have experienced at least one traumatic event.<sup>69</sup> Children who witness abuse are ten times more likely to abuse their partners, but children who experience abuse as well as witness it are one thousand times more likely to abuse their partners.<sup>70</sup> The tendency for people to conform to the poor expectations developed in early childhood, combined with the development of post-traumatic stress disorder (PTSD) following repeated exposure to abuse, leads children to self-harm.<sup>71</sup> Self-harming is expressed through addiction to toxins, self-harming actions, and harming others.<sup>72</sup> By adding poverty, low education, low self-esteem, weak or criminal role models, and inadequate community resources to the equation, children who have been harmed or have developed PTSD during childhood have very little chance for sufficiently altering their predispositions enough to avoid future encounters with the JJ or CJ

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68. Jason DeParlem, *Harder for Americans to Rise From Lower Rungs*, N.Y. TIMES (Jan. 4, 2012), [http://www.nytimes.com/2012/01/05/us/harder-for-americans-to-rise-from-lower-rungs.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/01/05/us/harder-for-americans-to-rise-from-lower-rungs.html?pagewanted=all&_r=0).

69. ERICA J. ADAMS, JUSTICE POLICY INST., HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 1 (July 2010), available at [http://www.justicepolicy.org/images/upload/10-07\\_REP\\_HealingInvisibleWounds\\_JJ-PS.pdf](http://www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_JJ-PS.pdf).

70. THE INDIAN HEALTH SERVICE AND BUREAU OF INDIAN AFFAIRS, CHILD PROTECTION HANDBOOK (2005), [http://ktik-nsn.gov/documents/effects\\_dv\\_children.pdf](http://ktik-nsn.gov/documents/effects_dv_children.pdf) (last visited on June 5, 2013) (“Men who have witnessed their parents’ domestic violence are three times more likely to abuse their own wives than children of non-violent parents, with the sons of the most violent parents being 1000 times more likely to become wife beaters.”); DEP’T OF PUBLIC SAFETY, BOSTON, MASS., Know the Facts on Domestic Violence, [http://www.umb.edu/public\\_safety/divisions/special\\_services/domestic\\_violence\\_unit/know\\_the\\_facts\\_on\\_domestic\\_violence](http://www.umb.edu/public_safety/divisions/special_services/domestic_violence_unit/know_the_facts_on_domestic_violence) (last visited on June 5, 2013) (“Children who have witnessed abuse or who have been abused themselves are 1000 times more likely to abuse a spouse/partner or a child when they become adults than are children raised in a non-abusive home.”).

71. ADAMS, *supra*, note 69 at 2.

72. *Id.*

systems.<sup>73</sup>

Research shows that of the ninety-three thousand children who are detained in the JJ System, between seventy-five and ninety-three percent are estimated to have been traumatized to some degree.<sup>74</sup> Studies consistently show that approximately sixty-five or seventy percent of these youth have a diagnosable mental health disorder.<sup>75</sup> Approximately twenty-five percent are significantly impaired by the severity of their disorders.<sup>76</sup> Many of these youth only commit minor offenses and are accosted by a system that lacks community-based services and supervision options.<sup>77</sup>

Many enter the system as the result of addiction that is the manifestation of childhood trauma.<sup>78</sup> Addiction, which can result in violence, theft, homelessness, mental illness, DUI, and other triggers for entering the CJ and JJ systems, makes traumatized children more likely to engage in lifestyles that regularly include exposure to and participation in criminal activity.<sup>79</sup> The more exposure to or participation in crimes, the greater opportunity there is to enter the CJ or JJ systems. Therefore, unresolved trauma will correlate with recidivism.<sup>80</sup> Trauma-sensitive treatments can also reduce recidivism of crimes that are causally linked to disease, anxiety, rebellion, and panic.<sup>81</sup>

The film, *Healing Neen*, illustrates this correlation. Neen was born into a poor family and raised by a neglectful single parent who suffered from addiction.<sup>82</sup> An adult sexually abused Neen at a young age and she

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73. See generally PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, available at <http://www.angola3.org/uploads/Pew-Report-0208.pdf>.

74. ADAMS, *supra* note 69, at 1.

75. JOSEPH J. COCOZZA & JENNIE L. SHUFELT, NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, JUVENILE MENTAL HEALTH COURTS: AN EMERGING STRATEGY 1 (June 2006), available at <http://www.ncmhjj.com/pdfs/publications/JuvenileMentalHealthCourts.pdf>.

76. *Id.*

77. *Id.*

78. VINCENT J. FELITTI, DEP'T OF PREVENTIVE MED. KAISER PERMANENTE MED. CARE PROGRAM, THE ORIGINS OF ADDICTION: EVIDENCE FROM THE ADVERSE CHILDHOOD EXPERIENCES STUDY 6-8 (2004), available at <http://www.nijc.org/pdfs/Subject%20Matter%20Articles/Drugs%20and%20Alc/ACE%20Study%20-%20OriginsofAddiction.pdf>.

79. Ginger Lerner-Wren, PowerPoint Presentations, NOVA SE. UNIV. (2012) (slide presentation on file with author).

80. *Id.*; Lenore E. Walker, PowerPoint Presentations, NOVA SE UNIV. (2011) (slide presentation on file with author).

81. Lerner-Wren, *supra* note 79.

82. HEALING NEEN (In the Hollow Films 2010).

suffered repeated traumas.<sup>83</sup> Soon enough, Neen began to express her trauma through addictive behaviors, as she used crack to numb the pain.<sup>84</sup> Her crack-use amplified the negative behavior, and her addiction turned her to prostitution and homelessness, which resulted in her exposure to violence and the CJ system.<sup>85</sup> Without therapeutic intervention, the PTSD kept her in a physiological pattern of criminal activity until Neen made a conscious effort to change.<sup>86</sup> After six dozen arrests, Neen made the decision to change her economic status, abstain from repeating her mother's behavior, and take responsibility and care for herself.<sup>87</sup> To cope with her trauma, Neen had to realize that the traumatic events were undeserved events that occurred to her, not because of her.<sup>88</sup> This realization was instrumental in helping Neen avoid the recidivistic pattern.<sup>89</sup>

#### IV. CRIMINALIZATION OF MENTAL ILLNESS

Mental illness has long been treated as a crime. People with mental illness have been mistreated and misunderstood throughout human history.<sup>90</sup> Until very recently, the CJ system met mental illness with punishment rather than humane understanding or treatment.<sup>91</sup> Without treatment for their mental illnesses and their concurrent issues, such as addiction, people with mental illness are likely to repeatedly cycle through the system, which is a greater problem than arbitrary due process violations. It amounts to a human rights violation that contributes to unnecessarily high rates of incarceration among the mentally ill.<sup>92</sup> This problem needs to be urgently solved by the CJ and JJ systems and local

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Lerner-Wren, *supra* note 79. See generally RISDON N. SLATE & W. WESLEY JOHNSON, *THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS & OPPORTUNITY FOR THE JUSTICE SYSTEM* (2008) (describing the history of maintaining order with persons with mental illnesses).

91. Arthur J. Lurigio & Andrew Harris, *The Mentally Ill in the Criminal Justice System: An Overview of Historical Causes and Suggested Remedies*, 2 PROF. ISSUES IN CRIM. JUST. 2 (May 2007), available at [https://kucampus.kaplan.edu/documentstore/docs09/pdf/picj/vol2/issue2/The\\_Mentally\\_Ill\\_in\\_the\\_Criminal\\_Justice\\_System.pdf](https://kucampus.kaplan.edu/documentstore/docs09/pdf/picj/vol2/issue2/The_Mentally_Ill_in_the_Criminal_Justice_System.pdf).

92. *Id.* at 2.

communities.<sup>93</sup> Mentally ill people need problem-solving courts and community-based treatment.<sup>94</sup> Therapeutic Justice involves both of these elements.<sup>95</sup>

#### V. THERAPEUTIC JUSTICE

Therapeutic Justice is about problem-solving rather than punishment, and the goal is social justice.<sup>96</sup> Therapeutic jurisprudence includes the use of collaborative law, preventative law, holistic law, intervention, humanization, rehabilitation, and transformation.<sup>97</sup> The desire to achieve social justice, which is a human right, motivates advocacy for and participation in problem-solving courts.<sup>98</sup> There are several types of problem-solving courts that serve vulnerable populations.<sup>99</sup> Drug Court, Domestic Violence Court, Homeless Court, Juvenile Court, Mental Health Court, Peer Court, Unified Family Court, and Veterans Court are success and assistance-oriented, rather than penalty-oriented, facets of social justice.<sup>100</sup> Often, these courts rely on diversion programs to rehabilitate and reintroduce offenders.

If competent but mentally ill juveniles are waived into criminal court, then they ought to be waived into mental health courts. Broward County's Mental Health Court is a holistic problem-solving court that helps homeless people, people with serious mental illnesses, those who suffer from drug addiction, and other vulnerable populations, by treating individuals' mental needs and their various issues simultaneously.<sup>101</sup> Broward County's

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93. *Id.* at 3.

94. See generally RACHEL PORTER ET AL., WHAT MAKES A COURT PROBLEM-SOLVING?: UNIVERSAL PERFORMANCE INDICATORS FOR PROBLEM-SOLVING JUSTICE, CTR. FOR CT. INNOVATION (FEB. 2010), available at [http://www.courtinnovation.org/sites/default/files/What\\_Makes\\_A\\_Court\\_P\\_S.pdf](http://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf) (discussing the need of problem solving courts to address the underlying problems of litigants).

95. Ginger Lerner-Wren, *Mental Health Courts and Repairing the World*, CUTTING EDGE L., pt. 1-4, <http://www.cuttingedgelaw.com/video/judge-ginger-lerner-wren-mental-health-courts-repairing-world> (last visited June 20, 2013).

96. *Id.*

97. Lerner-Wren, *supra* note 79.

98. *Id.*

99. PORTER, *supra* note 94, at 1.

100. Peggy Hora, *Problem-Solving Judge*, CUTTING EDGE L., pt. 1-4, <http://www.cuttingedgelaw.com/video/judge-peggy-hora-problem-solving-judge> (last visited June 20, 2013); Lerner-Wren, *supra* note 79; KJRH-TV, *Veterans Court*, YOUTUBE, (Aug. 9, 2010) [http://www.youtube.com/watch?v=\\_b1Ao3thsQw](http://www.youtube.com/watch?v=_b1Ao3thsQw).

101. NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING

Mental Health Court is the archetype of an effective Therapeutic Justice model because the court, presided over by Judge Lerner-Wren and others, takes a human rights approach to mental illness and a problem-solving approach to justice.<sup>102</sup>

When misdemeanants with mental illness are arrested in Broward, they are identified by jail staff within twenty-four hours and are evaluated by a psychiatrist to determine whether they qualify.<sup>103</sup> Following a qualifying psychiatric evaluation, a judge may order the defendant to be stabilized.<sup>104</sup> This strategy is important for the offenders and overall incarceration rates.<sup>105</sup> Not every non-violent offender with concurrent issues is a good fit for the Mental Health Court.<sup>106</sup> From 1997-2000, only one third of the evaluated defendants qualified for participation.<sup>107</sup> If charged with a misdemeanor, a qualifying defendant will be referred to the Mental Health Court.<sup>108</sup> The Mental Health Court judge will then recommend pre-adjudication diversion into treatment.<sup>109</sup> In treatment, judges will monitor the defendant for up to one year.<sup>110</sup> Upon successful completion of a diversion program, the State's Attorney may dismiss the charges, reduce the charges, suspend prosecution, or give credit for time served.<sup>111</sup>

Since adjudication may be withheld at the preliminary hearings and many offenders enter treatment, some incarceration time before and after

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COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 50-52 (2009), available at [www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20217](http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20217).

102. Lerner-Wren, *supra* note 79.

103. DEREK DENCKLA & GREG BERMAN, RETHINKING THE REVOLVING DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS 8 (2001), available at <http://www.courtinnovation.org/sites/default/files/rethinkingtherevolvingdoor.pdf>.

104. *See id.* (suggesting that the incorporation of diversion programs has impacted the well-being of offenders as well as the overall incarceration statistics); *see also* Lerner-Wren, *supra* note 79 (discussing how mental health courts can help facilitate social justice).

105. PEW CTR. ON THE STATES, *supra* note 73, at 11.

106. DENCKLA & BERMAN, *supra* note 103, at 9.

107. *Id.* at 10.

108. *Id.* at 8.

109. *Id.*

110. *Id.*; Lerner-Wren, *supra* note 79.

111. *See* DENCKLA & BERMAN, *supra* note 103, at 8 (explaining the State's attorney's ability to: (1) grant an immediate dismissal or suspension of charges for defendants that agree to participate in treatment diversion; (2) condition the dismissal or reduction of suspended charges on the successful completion of treatment; or (3) require the defendant to plead guilty to the charges, but award credit for time served in lieu of incarceration).

adjudication is reduced.<sup>112</sup> Broward judges can recommend diversion into treatment for up to one year.<sup>113</sup> If treatment is successful, then the state may dismiss or reduce the charges, suspend prosecution, or give credit for time served.<sup>114</sup>

## VI. PROGRAMS FOR MENTALLY ILL JUVENILES

Criminalization of the mentally ill occurs because of traditional ignorance about mental infirmity, an absence of adequate CJ and JJ solutions for dealing with the mentally ill, and a lack of political interest in rehabilitating and holistically treating the mentally ill.<sup>115</sup> Problem-solving courts oppose traditional warehousing and revolving door policies.<sup>116</sup> Evidence that demonstrates a lack of success in traditional CJ and JJ models should inform public policy and the community that a therapeutic approach is best when dealing with the mentally ill.<sup>117</sup> In general, public policy has failed to treat the mentally ill and conform to public opinion, even though sixty percent of people do not want to warehouse nonviolent offenders and it costs approximately \$80,000 per year per child to do so.<sup>118</sup> A longitudinal study of over 17,000 people provides compelling evidence that untreated childhood trauma, which worsens in the traditional JJ and CJ models, increases the risk for heart disease, cancer, diabetes, and several other major illnesses, which also increases public costs.<sup>119</sup> A few outstanding pilot programs rooted in therapeutic jurisprudence, however, provide evidence of their success in responding to the mentally ill more appropriately than traditional CJ and JJ methods.<sup>120</sup>

Good public policy demands that all juvenile courts include a Juvenile Mental Health Court component.<sup>121</sup> Juvenile Mental Health Courts save money and reduce crime by treating children with mental health

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112. *Id.*

113. *Id.*

114. *Id.*

115. Lerner-Wren, *supra* note 79; Lurigio & Harris, *supra* note 91, at 4-5; SLATE & JOHNSON, *supra* note 90, at 282.

116. Hora, *supra* note 100.

117. *Id.*

118. KJRH TV, *supra* note 100; Hora, *supra* note 100.

119. CINDY D. NESS, SCHUYLER CTR. FOR ANALYSIS & ADVOCACY, THE ADVERSE CHILDHOOD EXPERIENCES (ACE) STUDY 1 (2009), *available at* [http://www.scaany.org/resources/documents/ace\\_study\\_summer2009.pdf](http://www.scaany.org/resources/documents/ace_study_summer2009.pdf).

120. ADAMS, *supra* note 69, at 5.

121. COCOZZA & SHUFELT, *supra* note 75.

eligibility.<sup>122</sup> It is in the public's interest to save three dollars for every one dollar spent on child offenders, which is the cost differential between rehabilitative models and traditional justice models.<sup>123</sup> In Wraparound, a child's mental health is evaluated during the initial contact and referral; during intake, detention, judicial processing, secure correctional placement, and probation, the program monitors the child's needs and establishes a supervised reentry plan for the child.<sup>124</sup> Parents, schools, therapists, police, counselors, psychologists, neighbors, friends, family, child welfare contacts, and other members of the community, assist the children with their issues in order to divert them from the JJ and CJ systems.<sup>125</sup> Community-based treatment takes an average of ten to eighteen months, during which time the intensity of the treatment can be regulated and impacted by all of the participants.<sup>126</sup>

Public policy currently permits the mentally ill to opt for incarceration rather than receive treatment. It would be in the public's interest to continue developing community-based treatment so that they do not want to opt for incarceration. The existing deficiencies in public policy could perhaps be remedied by inviting the mentally ill to preemptively participate in community-based rehabilitation and treatment.<sup>127</sup> By encouraging self-help rather than penalizing mental illness or retroactively treating illness, mental health courts rectify historical prejudices, encourage thrifty and compassionate public policy, and continue to build healthy and humane communities.

## VII. SHIFTING THE VISION FOR ALL MENTALLY ILL OFFENDERS

The legal actors in problem-solving courts participate differently than their peers do in traditional courts.<sup>128</sup> The main role of judges in Mental Health Courts is to carefully guide and monitor individualized psychiatric programs that are designed to treat, often concurrent, problems.<sup>129</sup> Judges

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122. *Id.* at 3.

123. Lerner-Wren, *supra* note 95.

124. JOSEPH J. COCOZZA ET AL., TECHNICAL ASSISTANCE PARTNERSHIP FOR CHILD AND FAMILY MENTAL HEALTH, ADDRESSING THE MENTAL HEALTH NEEDS OF YOUTH IN CONTACT WITH THE JUVENILE JUSTICE SYSTEM IN SYSTEM OF CARE COMMUNITIES: AN OVERVIEW AND SUMMARY OF KEY ISSUES 5 (Sept. 2010), available at [http://www.ncmhjj.com/pdfs/publications/SOC\\_Overview.pdf](http://www.ncmhjj.com/pdfs/publications/SOC_Overview.pdf).

125. KQED TV, *supra* note 100.

126. COCOZZA, *supra* note 75, at 3.

127. *Id.* at 5.

128. Lerner-Wren, *supra* note 95.

129. See DENCKLA & BERMAN, *supra* note 103, at 8.

use pre-adjudication diversion into treatment as a way to solve the problem throughout the next year rather than criminalizing mental illness and increasing the chance for recidivism.<sup>130</sup> This is distinct from traditional JJ and CJ models in which the judge adjudicates.<sup>131</sup>

Advocates in mental health courts play a very distinct role as well.<sup>132</sup> For example, the State's Attorney participates in reentry as well.<sup>133</sup> He or she will refrain from prosecuting if the defendant satisfies the judge's treatment plan and orders.<sup>134</sup> Another example of alternately purposed advocacy is in Peer Court where teens represent their client's narrative in the interest of coming to a solution rather than stigmatizing, labeling, or merely punishing.<sup>135</sup> In community-based treatment, the role of police officers may also differ from the role of police officers in the traditional CJ and JJ systems.<sup>136</sup> In *Healing Neen*, as Neen attempted to report that she was brutally raped, the police ignored her report, and instead of helping her, they engaged her in an encounter that led to one of her scores of arrests.<sup>137</sup> In community-based treatment, the police are part of the rehabilitative team that offers mentorship and structure to the defendant.<sup>138</sup>

"Problem-solving courts can demonstrate community involvement through contact with local residents and community-based organizations and participation in community events."<sup>139</sup> In Family Court, a team-mentality facilitates domestic violence screening.<sup>140</sup> Anyone from mediators to judges, to attorneys and other state employees may screen case files and participants for domestic violence.<sup>141</sup> This allows mediators and other justice members to shelter the victim from the aggressor; it also provides the victim with a special opportunity to tell his or her story at the

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130. *Id.*

131. *Id.*

132. *See id.* (emphasizing the specific roles different advocates play in mental health courts).

133. *Id.*

134. *Id.*

135. Fantom Penguin, *Peer Court Provides Opportunities for Both Struggling and Successful Teens*, YOUTUBE, (Aug. 6, 2011) available at <http://www.youtube.com/watch?v=3Z0Ys4TPAD0>.

136. KQED TV, *supra* note 118.

137. HEALING NEEN, *supra* note 82.

138. KQED TV, *supra* note 118.

139. RACHEL PORTER ET AL., *supra* note 94.

140. Walker, *supra* note 80.

141. *Id.*

mediations or hearings, in order to resolve feelings of victimization.<sup>142</sup> The actors' goals are to help troubled people who enter the system, help their families, help their communities, and find more positive solutions than punishment.<sup>143</sup>

At the community level, the vision needs to be for every person with mental illness to receive treatment.<sup>144</sup> In addition to jail staff, community networks ought to assist in identifying mentally ill misdemeanants to the court, or help them self-identify and then encourage them to choose diversion programs and complete community-based treatment.<sup>145</sup> Community networks should include CJ and JJ members who may be involved with diversion programs, probation, and parole.<sup>146</sup> These are the key people to help the offenders succeed.<sup>147</sup> In traditional models, nearly half of all offenders return to the CJ system within three years of reentry.<sup>148</sup> Community-level intervention, with recovery-oriented fidelities, has been proven to significantly reduce recidivism because it focuses on "hope, healing, empowerment, social connectedness, human rights, and recovery-oriented services."<sup>149</sup>

At the political level, with a community network of JJ and CJ members, researchers, educators, and other volunteers in place, politicians need to resist "lock 'em up" politics and center political initiatives around problem-solving strategies.<sup>150</sup> If "lock 'em up" politics prevail or recidivism is high among felonious, mentally ill offenders due to drug use, then resources

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142. *Id.*

143. Lerner-Wren, *supra* note 95.

144. Harvard Bus. Review, *The Importance of Urgency*, YOUTUBE, (Sept. 8, 2008) [http://www.youtube.com/watch?v=zD8xKv2ur\\_s](http://www.youtube.com/watch?v=zD8xKv2ur_s).

145. *Id.*

146. KQED TV, *supra* note 118; RACHEL PORTER ET AL., *supra* note 94, at 45.

147. HEALING NEEN, *supra* note 82; *Kotter's 8-Step Change Model: Implementing Change Powerfully and Successfully*, MIND TOOLS (2011), available at [http://www.mindtools.com/pages/article/newPPM\\_82.htm](http://www.mindtools.com/pages/article/newPPM_82.htm) (last visited June 20, 2013).

148. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2009/PSPP\\_lin31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_lin31_report_FINAL_WEB_3-26-09.pdf); PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY (2010), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/Collateral%20Costs%20FINAL.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf).

149. Frederick J. Frese et al., *Integrating Evidence-Based Practices and the Recovery Model*, 52 PSYCHIATRIC SERVICES 1462, 1863 (2001), available at <http://ps.psychiatryonline.org/data/Journals/PSS/3580/1462.pdf>.

150. PEW CTR. ON THE STATES, *supra* note 148; see also PEW CHARITABLE TRUSTS, *supra* note 148; Harvard Bus. Review, *supra* note 144.

should be channeled into sentencing the mentally ill to short stays in prison instead of extended sentences.<sup>151</sup> Hawaii's HOPE program is a good model demonstrating how to use community supervision and a multi-fidelity strategy to help mentally ill, recovering addicts avoid extended relapse.<sup>152</sup> HOPE "identifies probationers at high risk of violating the conditions of their community supervision and aims to deter them from using drugs and committing crimes with frequent and random drug tests backed up by swift, certain and short jail stays."<sup>153</sup> Offenders in HOPE's recovery are seventy-five percent less likely to relapse into drug use and fifty percent less likely to return to jail.<sup>154</sup> Juveniles, who are at high risk for violating probation, may be exposed to poor environmental influences. Close supervision would not only benefit the delinquent or the offender, it would be of great benefit to society as well. In this model, juveniles can work while on probation, but can be guided away from negative influences and behavioral patterns by the JJ or CJ systems.

#### VIII. CONCLUSION

Minors with mental illness need improvements in the JJ and CJ systems. Minors should still be granted procedural due process. Minors with mental illness require special safeguards and alternative forms of justice to treat rather than punish their illness. Trauma among incarcerated or delinquent youth has become prevalent to the extent that the system needs to acknowledge it categorically. By responding to this dimension of the problem, society may better reduce crime and aid its most vulnerable citizens. Through the implementation of therapeutic justice, problems can be solved and juveniles—or adults—with mental illness can be treated humanely. Members of the justice system, community partners, and political stakeholders need to set-aside previously entrenched justice models and consider how to reposition themselves so that juveniles are protected and persons with mental illness are guaranteed justice.

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151. STEPHANIE BOSH, PEW CTR. ON THE STATES, THE IMPACT OF HAWAII'S HOPE PROGRAM ON DRUG USE, CRIME AND RECIDIVISM 1 (2010), *available at* [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2010/The%20Impact%20of%20Hawaii%E2%80%99s%20HOPE%20Program%20on%20Drug%20Use,%20Crime%20and%20Recidivism.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/The%20Impact%20of%20Hawaii%E2%80%99s%20HOPE%20Program%20on%20Drug%20Use,%20Crime%20and%20Recidivism.pdf).

152. *Id.*

153. *Id.*

154. *Id.*

