

The Price We are Willing to Pay for Punitive Justice in the Juvenile Detention System: Mentally Ill Delinquents and Their Disproportionate Share of the Burden

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INTRODUCTION

If you can't get Democrats and Republicans to agree on everything, you can get them to agree on children.¹

The above statement has been true for mentally ill youth in the juvenile justice system who are in need of mental health treatment.² Unfortunately, the agreement that both Democrats and Republicans have come to regarding mentally ill youth in the juvenile justice system has resulted in a punitive system that, in large part, ignores the mentally ill child's disease. As envisioned by its creators, the juvenile justice system was meant to be a distinct entity from the adult criminal system, with a focus on rehabilitation and an understanding that juveniles should be treated differently from their adult counterparts.³ The original purpose of the juvenile justice system has systematically unraveled in recent years, as indicated by the flurry of state legislation passed that focuses on punitive and "get tough" measures

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1. Sheryl Gay Stolberg, *Congress Awakens to AIDS With a Convert's Zeal*, N.Y. TIMES, May 12, 2002, at A1. (quoting Sandra Thurman, commenting on the success of obtaining record amounts of AIDS funding).

2. See MICHAEL FAENZA ET AL., NATIONAL MENTAL HEALTH ASSOCIATION, COMMUNITY PERSPECTIVES ON THE MENTAL HEALTH AND SUBSTANCE ABUSE TREATMENT NEEDS OF YOUTH INVOLVED IN THE JUVENILE JUSTICE SYSTEM 1, available at http://www.nmha.org/children/justjuv/youth_treatment.pdf (last visited Feb. 22, 2005) (noting that there are two issues that contribute to juveniles not receiving mental health treatment in institutional settings: (1) failure to diagnose, and (2) lack of treatment once assessed).

3. See generally Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1156-67 (2001) (giving a history of the juvenile justice system).

for juvenile crime.⁴ Specifically, it is now much easier for juveniles to be adjudicated into the adult criminal system.⁵ Other types of punitive measures, such as boot camps, abound.⁶ This Note addresses the economic costs of pursuing a punitive juvenile justice system and concludes that society is willing to pay a hefty price for retributive justice. The Note then proposes that state legislatures address the punitive system's disproportionate effect on the mentally ill.

Part I gives a brief overview of the history of the juvenile justice system and discusses the United States Supreme Court cases that have, in part, contributed to the increasingly adversarial nature of the juvenile system. Part II traces the legislative responses, and associated economic costs, which have resulted in the juvenile justice system becoming more punitive. Part III addresses the overwhelming need to reconsider the issue of mental illness within the juvenile justice system. Part IV gives an overview of programs that work, specifically multisystemic therapy⁷ ("MST"), that are both economically superior, and that treat mentally ill juvenile delinquents. Part V discusses why the economically superior models have been largely ignored and argues, at least in cases of mentally ill youth, that the punitive model of juvenile justice cannot be allowed to stand.

I. THE FORMATION OF THE JUVENILE JUSTICE SYSTEM AND THE SUBSEQUENT INFLUENCE OF SUPREME COURT DECISIONS

Until the sweeping juvenile reforms of the nineteenth century, juveniles and adults were treated largely alike in the criminal system.⁸ For example, it was possible to execute a child using the same process mandated for adults.⁹ In the early 1800s, transition began to take place in the form of houses of refuge, which differed from adult prisons in that they focused on education and reformation.¹⁰ The most important indication of change, however, was the Illinois Juvenile Court

4. See PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996-97 UPDATE (1998), available at <http://www.ncjrs.org/pdffiles/172835.pdf> (last visited Feb. 22, 2005).

5. *Id.* at 2 ("States [are continuing] to modify age/offense transfer criteria, allowing more serious and violent juvenile offenders to be tried as criminals.").

6. Doris Layton MacKenzie et al., *Effects of Correctional Boot Camps on Offending*, 578 ANNALS AM. ACAD. POL. & SOC. SCI. 126, 127 (2001).

7. Multisystemic therapy is a family-based program administered by licensed therapists. The leading proponent of the approach is Scott W. Henggeler, Ph.D. For an excellent overview of multisystemic therapy see SCOTT W. HENGGELER, U.S. DEP'T OF JUSTICE, TREATING SERIOUS ANTI-SOCIAL BEHAVIOR IN YOUTH: THE MST APPROACH (1997), available at <http://www.ncjrs.org/pdffiles/165151.pdf> (last visited Feb. 22, 2005).

8. Gilbert et al., *supra* note 3, at 1156; see also Ellie D. Shefi, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 U. MICH. J.L. REFORM 653, 656 (2003) (citing Gilbert et al., *supra* note 3).

9. Gilbert et al., *supra* note 3, at 1156-57; see also Shefi, *supra* note 8, at 656

10. *Id.* at 1157-58; see also THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 64 (1992). The reformers concluded that there were three causes of juvenile crime: bad parents, the "temptations of the streets," and children's unique moral character. *Id.* "The House of Refuge addressed all three problems by removing the children from their parents and from the streets, and by placing them in a highly disciplined program to reinforce their weak moral natures." *Id.*; Shefi, *supra* note 8, at 656.

Act of 1899.¹¹ “[The Act] has been recognized as the most important law pertaining to juvenile delinquents in the nineteenth century because it marked the end of a penal approach . . . and the beginning of what was perceived as a preventative approach”¹² The houses of refuge had given way to the creation of an entire system that was meant to deal exclusively with children.

By 1925 all but two states had followed Illinois’s lead and established courts to deal specifically with juvenile crime.¹³ The new juvenile system differed markedly from the adult system. Judges were allowed to handle cases informally and implement individualized treatment plans.¹⁴ This was possible because the system’s founders believed that juveniles were less culpable and easier to rehabilitate than adults.¹⁵ Being under the age of eighteen meant that a juvenile was a child, and the juvenile courts were committed to dealing with such children within the juvenile system. Thus, over the next fifty years, the majority of juvenile courts maintained exclusive jurisdiction over all youth under the age of eighteen who were charged with committing crimes.¹⁶ The only way for a juvenile to be transferred to the adult system was for the juvenile court to voluntarily waive its jurisdiction.¹⁷ Although transfer was an option, it rarely occurred.¹⁸

In the 1950s and 1960s, the juvenile system slowly began to transition to a more punitive system.¹⁹ In part, the transition from a rehabilitative model to a punitive model took place due to the public’s lack of confidence in the effectiveness of the juvenile system.²⁰ The trend toward punitive measures, however, was also aided by Supreme Court decisions.²¹ Thus, “[t]he seeds of change were planted in a series of Supreme Court decisions in the 1960s and 1970s which, in an effort to ensure fairness, made juvenile proceedings increasingly legalized and adversarial.”²² The decisions thus helped to erode the original rehabilitative purpose of the juvenile system. Four specific cases have been recognized as contributing to the transition.²³

11. Illinois Juvenile Court Act, 1899 Ill. Laws 131.

12. Gilbert et al., *supra* note 3, at 1159; *see also* Shefi, *supra* note 8, at 658.

13. HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 86 (1999), available at <http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html> (last visited Feb. 22, 2005) [hereinafter 1999 NATIONAL REPORT]; Gilbert et al., *supra* note 3, at 1161.

14. 1999 NATIONAL REPORT, *supra* note 13, at 86–87.

15. Eric J. Fritsch et al., *Spare the Needle but Not the Punishment: The Incarceration of Waived Youth in Texas Prisons*, 42 CRIME & DELINQ. 593, 593 (1996).

16. 1999 NATIONAL REPORT, *supra* note 13, at 86.

17. *Id.*

18. Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?*, 42 CRIME & DELINQ. 171, 172 (1996). “Historically, transfer procedures were rarely invoked. The juvenile justice system remained firmly grounded in an orientation to rehabilitate youth through non-punitive treatments.” *Id.*

19. 1999 NATIONAL REPORT, *supra* note 13, at 87.

20. *Id.*

21. *Id.*

22. Bishop et al., *Transfer of Juveniles*, *supra* note 18, at 172; *see also* Gilbert et al., *supra* note 3, at 1163.

23. 1999 NATIONAL REPORT, *supra* note 13, at 90–91.

The first case is *Kent v. United States*,²⁴ decided in 1961. In *Kent*, the Court held that before a juvenile is transferred to the adult system the child has a right to counsel and to a full hearing.²⁵ The Court, in its decision, set out required factors to be considered before the juvenile court voluntarily waives its jurisdiction. The factors listed by the Court have heavily influenced state legislation.²⁶ Most states model their juvenile statutory waivers on the criteria set forth in *Kent*, which are as follows: consideration of (1) the severity and nature of the offense, (2) whether the offense was committed in a violent manner, (3) whether it was a property or personal offense, (4) the merit of the complaint against the juvenile, (5) whether other juveniles who were party to the crime will be adjudicated in the adult system, (6) the maturity level and emotional attitude of the juvenile, (7) the juvenile's past criminal record, and (8) protection of the public and whether the juvenile is amenable to treatment.²⁷ Neither mandatory assessment of a juvenile's mental health nor consideration of existing mental illness is set forth in the criteria. Thus, it is not surprising that a majority of state statutes do not list consideration of the mental health needs of juveniles as a determinative factor in deciding whether or not to transfer a child to the adult system.²⁸

The second case to have a major impact on the juvenile justice system was *In re Gault*.²⁹ In this decision, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment guaranteed children a right to counsel, among other rights, before sentencing within the juvenile system.³⁰ The due process rights afforded by the Court helped to erode the flexibility that had once differentiated the juvenile system from its adult counterpart.³¹ No longer could a court sentence a child to a juvenile penitentiary without her counsel present. However, neither could individually crafted courses of action be implemented without first satisfying due process requirements, which included procedural safeguards that mirrored the adult system.

The third case important to understanding the transition to a more punitive juvenile system is *In re Winship*.³² In this case, the Court expanded its understanding of due process in the juvenile system to include a requirement of

24. 383 U.S. 541 (1961).

25. *Id.* at 561.

26. *Id.* at 566–67; see also PATRICK GRIFFIN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 3 (1998), available at <http://www.ncjrs.org/pdffiles/172836.pdf> (last visited Feb. 22, 2005).

27. *Kent*, 383 U.S. at 566–67; see also Philip H. Witt, *Transfer of Juveniles to Adult Court: The Case of H.H.*, 9 PSYCHOL. PUB. POL'Y & L. 361, 362 (2003).

28. Kirk Heilbrun, *A National Survey of U.S. Statutes on Juvenile Transfer: Implications for Policy and Practice*, 15 BEHAV. SCI. & L. 125, 145; see also Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes on Juvenile Justice*, 41 BRANDEIS L.J. 977, 980 (2003).

29. 387 U.S. 1 (1967).

30. *Id.* at 41.

31. Gene Griffin & Michael J. Jenuwine, *Using Therapeutic Jurisprudence to Bridge the Juvenile Justice and Mental Health Systems*, 71 U. CIN. L. REV. 65, 67 (2002).

32. 397 U.S. 358 (1970).

proof beyond a reasonable doubt.³³ The Court stated, “[I]ntervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.”³⁴ Thus, although this case contributed to the juvenile system’s loss of flexibility, it was based on a concern that the system was not doing an adequate job of protecting the child’s best interests. The Court’s solution was to require juvenile courts to utilize the same standard of proof found within the adult system. Again, at issue was the tension between affording children adequate due process rights and maintaining the flexibility that differentiated the original juvenile court.

The last important Supreme Court decision relevant to understanding the erosion of the juvenile system’s original purpose is *McKeiver v. Pennsylvania*.³⁵ In *McKeiver*, the Court held that children in the juvenile system do not have a right to a jury trial.³⁶ Thus, the Court backpedaled from its previous decisions, which had afforded increased due process requirements for juveniles. The Court was not willing to entirely give up on the unique character of the system: The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say . . . that the system cannot accomplish its rehabilitative goals.³⁷

The Court, in this final decision, recognized that some amount of flexibility is necessary in order to differentiate the juvenile system from the adult criminal system. The Court also implied that the juvenile system, despite its faults, was worth preserving.

The juvenile system, as originally conceived by its founders, was meant to be rehabilitative in nature. The focus was on the individual child and in large part operated as a “coercive casework agency.”³⁸ As faith in the system waned and rehabilitative efforts seemed to fail, the system began to change.³⁹ The Supreme Court decisions discussed above contributed to the erosion of the original understanding of the juvenile system.⁴⁰ The cases also required the system to become more adversarial.⁴¹ Almost grudgingly, the Supreme Court mandated that rehabilitative goals acquiesce to due process rights. The original purpose of the juvenile system and the subsequent Court decisions thus provide a useful backdrop for analyzing the new policies pursued by state legislatures.

33. *Id.* at 368 (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

34. *Id.* at 367.

35. 403 U.S. 528 (1971).

36. *Id.* at 547.

37. *Id.*

38. BERNARD, *supra* note 10, at 93.

39. 1999 NATIONAL REPORT, *supra* note 13, at 87.

40. Bishop et al., *supra* note 18, at 172.

41. *Id.*

II. THE LEGISLATIVE RESPONSE TO PERCEIVED INCREASE IN JUVENILE CRIME:
MANDATORY WAIVER PROVISIONS, PUNITIVE PROGRAMS WITHIN THE JUVENILE
SYSTEM, AND REVISION OF PURPOSE CLAUSES

By the 1980s the juvenile system had lost credibility with the public due to the perceived increase in crime rates.⁴² To some extent the loss of faith in the system was rational—from 1960–1975 juvenile arrests increased over 140%.⁴³ The legislature was quick to respond to the increase in crime. “[M]any States responded by passing more punitive laws.”⁴⁴ The state legislative responses included passing laws that made it easier to transfer a juvenile to the adult system.⁴⁵ Policy within the juvenile system also began to focus on programs that followed “get tough” mantras.⁴⁶

The importance of state legislative responses cannot be overstated. State statutes define who is under the jurisdiction of the juvenile court and what juveniles can be waived to the adult system.⁴⁷ Similarly, state legislatures decide and define mandatory minimum sentencing guidelines and influence policy within the juvenile justice system.⁴⁸ For the purposes of this Note, state legislative policy will also be viewed as a reflection of society’s views and values. By assessing state legislative responses, this Note will attempt to illustrate that society is willing to pay a hefty price for programs and policies that focus on punitive measures.

A. *Transfer to the Adult System*⁴⁹

The 1990s witnessed dramatic change as state legislatures attempted to squelch juvenile crime through legislation that allowed juvenile transfers to the adult criminal system.⁵⁰ The majority of jurisdictions now allow a child as young as fourteen to be tried as an adult.⁵¹ The primary purpose of transferring a juvenile to criminal court is to impose more severe sanctions than are available in a juvenile court.⁵² The policy is also informed by the sense that tougher sentences in a tougher setting will produce better results.⁵³ This Note will focus on two types of waivers:

42. Fritsch et al., *supra* note 15, at 594.

43. *Id.*

44. 1999 NATIONAL REPORT, *supra* note 13, at 88.

45. *Id.*

46. See Gilbert et al., *supra* note 3, at 1166; MacKenzie et al., *supra* note 6, at 127.

47. 1999 NATIONAL REPORT, *supra* note 13, at 93.

48. See Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,”* 87 MINN. L. REV. 1447, 1506 (2003).

49. For excellent reviews and commentary on the policy of adult waiver provisions see Rose, *supra* note 28; Shefi, *supra* note 8; Marisa Slaten, *Juvenile Transfers to Criminal Court: Whose Right Is It Anyway,* 55 RUTGERS L. REV. 821 (2003).

50. 1999 NATIONAL REPORT, *supra* note 13, at 89.

51. Heilbrun, *supra* note 28, at 145.

52. Fritsch et al., *supra* note 15, at 595.

53. See Feld, *supra* note 48, at 1564 (“‘Get tough’ politicians’ sound bites—‘adult crime, adult time’ or ‘old enough to do the crime, old enough to do the time’—exemplify the reformulation of adolescents as responsible for their actions and advance crime policies that provide no formal recognition of youthfulness as a mitigating factor in sentencing.”).

judicial waivers and legislative waivers.⁵⁴ Specifically, this section will examine the procedural safeguards afforded to mentally ill youth before they are transferred to the adult system, assess the social science research data that summarizes the effectiveness of waiver provisions, and question whether or not transfer provisions are economically sound policy.

1. Judicial Waivers—Discretionary

Judicial waivers are the most common form of waiver provisions.⁵⁵ One type of judicial waiver is the discretionary waiver. All but five states allow discretionary waivers, which require individual assessment of the juvenile before deciding whether or not to transfer a case to the adult system.⁵⁶ Although the ultimate decision resides with the judge, state statutes set out criteria that a judge should consider when making her decision.⁵⁷ The criteria set forth in state statutes are generally based loosely on *Kent v. United States*⁵⁸ and specify factors that must be met before a court can waive a juvenile.⁵⁹ In all states where discretionary waivers are utilized, a hearing must be conducted before transfer takes place.⁶⁰

Only ten state statutes, plus the District of Columbia's, mandate consideration of mental illness before allowing transfer.⁶¹ Most limit waiver to juveniles who are "no longer amenable to treatment."⁶² Thus, for the mentally ill child before a judge in a discretionary waiver hearing, the chance is slim that her mental health issues will be explicitly considered before she is transferred to the adult system. This is due to three factors: First, a majority of state statutes do not mandate consideration of mental illness before transfer occurs.⁶³ Second, mental illness can only be considered if it is assessed and diagnosed. There is no mandatory screening process for juveniles within the system, thus it is possible for mental health needs to go undetected and not be considered by the court.⁶⁴ Third, even if assessed and brought before the court, there is no guarantee that the information will be properly

54. Another common method used to transfer juveniles to the criminal court is direct file, which gives the prosecutor the option to file a case in either juvenile or criminal court. Slaten, *supra* note 49, at 836. However, only a few states allow this type of waiver, and many juveniles are tried as adults through prosecutorial discretion. 1999 NATIONAL REPORT, *supra* note 13, at 105. It is considered an executive function. Thus, there is no judicial review of the process and the due process requirements set out in *Kent* do not need to be met. *Id.*

55. 1999 NATIONAL REPORT, *supra* note 13, at 103.

56. TORBET & SZYMANSKI, *supra* note 4, at 3.

57. Slaten, *supra* note 49, at 832.

58. 383 U.S. 541 (1961).

59. GRIFFIN et al., *supra* note 26, at 3.

60. *Id.*

61. Heilbrun, *supra* note 28, at 145.

62. 1999 NATIONAL REPORT, *supra* note 13, at 103.

63. Heilbrun, *supra* note 28, at 145.

64. LISA MELANIE BOESKY, JUVENILE OFFENDERS WITH MENTAL HEALTH DISORDERS: WHO ARE THEY AND WHAT DO WE DO WITH THEM? 225–26 (2002). Even if a juvenile goes through screening and assessment, they still might not be diagnosed for several reasons. The reasons include juvenile justice workers not having appropriate training in detecting mental illness and lack of self-reporting by juveniles. *Id.*

considered. Judges are not mental health experts and often have difficulty understanding the meaning and implications of mental health diagnoses.⁶⁵

2. Judicial Waiver—Mandatory

The provisions for consideration of mental health issues for discretionary waivers, although largely nonexistent, are much more protective of mentally ill children than state statutes that provide for mandatory waivers. By 1997, fourteen states had passed legislation that allowed for mandatory waivers.⁶⁶ The statutes allow the juvenile court to maintain jurisdiction over a child. However, if the child commits a certain class of crime and is of a certain age, the juvenile court judge must waive jurisdiction if she finds that there is probable cause to believe that the juvenile committed the crime.⁶⁷ “[T]he juvenile court has no role other than to confirm that the statutory requirements for mandatory waiver are met. Once it has done so, the juvenile court must send the case to a court of criminal jurisdiction.”⁶⁸

It is therefore possible that a mentally ill child residing in a jurisdiction with a mandatory waiver statute will be adjudicated in an adult criminal court without *any* consideration of her mental illness. Mandatory waivers remove the possibility that mental health needs will be assessed and considered before the decision to transfer. The only requirement that the judge must consider before waiving is whether or not there is probable cause that the child committed a crime.⁶⁹ The recent trend toward the expansion of mandatory waivers is also disheartening for the mentally ill child—states have been increasing the list of offenses encompassed in mandatory waiver statutes as well as lowering the age at which a child may be sent to adult court.⁷⁰

3. Statutory Waivers

Another popular method for adjudicating children in the adult system is statutory exclusion, which, in essence, strips the juvenile court of jurisdiction.⁷¹ A majority of states recently passed legislation providing for statutory exclusion.⁷² Statutory exclusion is the most common way for a juvenile to be transferred to the adult criminal system.⁷³ When a child is transferred through statutory waiver, the offense is thought to “transform the child into an adult who no longer deserves the

65. Arturo Ricardo Garcia, *Termination of Parental Rights of the Mentally Ill: An Analysis of Washington Law*, 37 GONZ. L. REV. 489, 504. “Although judges have general ideas on mental illness, it is quite likely that they have little or no direct experience with a mentally ill person.” *Id.*

66. TORBET & SZYMANSKI, *supra* note 4, at 3.

67. *Id.*

68. GRIFFIN et al., *supra* note 26, at 4.

69. *Id.*

70. Fritsch et al., *supra* note 15, at 595.

71. 1999 NATIONAL REPORT, *supra* note 13, at 106.

72. TORBET & SZYMANSKI, *supra* note 4, at 5. As of 1997, twenty-eight states had passed statutory exclusion legislation. *Id.*

73. 1999 NATIONAL REPORT, *supra* note 13, at 106.

more solicitous consideration presumably offered by the juvenile courts.”⁷⁴ One policy behind statutory exclusion is that once a child commits a crime she becomes an adult and thus deserves adult punishment.⁷⁵

Again, as with mandatory judicial waivers, statutory exclusion results in the mental health needs of a child not being explicitly considered before her transfer to the adult criminal system. A child only has to be of a certain age and commit a specified crime to become an adult in the eyes of the law.⁷⁶ Courts have repeatedly rejected constitutional challenges to statutory waivers.⁷⁷ Thus, it appears that this popular method of transfer will continue to stand without intervention by the courts. If the mental health needs of children are to be considered, it is up to state legislatures to craft legislation specifically mandating that a child’s mental health be assessed and considered before transfer.⁷⁸

4. Assessment of the Mental Health of a Child before Waiver to the Adult System

The majority of mechanisms for waiving a juvenile to the adult system do not *explicitly* mandate that a child be evaluated and assessed for mental illness. Even though mental diagnoses are not mandated for consideration, it is important to note that courts regularly utilize psychologists to help in their decisions.⁷⁹ However, “[a]t the heart of these evaluations are the issues of amenability to treatment, dangerousness, and whether or not the youth is mature.”⁸⁰ Psychologists and mental health professionals are therefore not relied upon to shed insight into whether a child has an existing mental illness. Furthermore, no state statutes mandate that mental illness be considered as the determinative factor before transfer.⁸¹ At best, mental health issues become tangential considerations—they are viewed only in light of how they affect other factors. At least some mental health experts recognize this trend. A recent letter to the editor of a leading journal lead some to decry that “a psychiatric perspective has not been considered in [the] debate” about juvenile transfers to adult court.⁸²

74. Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. & POL’Y REV. 85, 118 (2003).

75. *Id.*

76. Jeffrey A. Butts, *Can We Do Without Juvenile Justice?*, 15 CRIM. JUST. 50, 54 (2000) (“Georgia, for example, excludes all juveniles age 13 and older from juvenile court if they are charged with one of several violent offenses such as murder, voluntary manslaughter, rape, or armed robbery with a firearm. Arizona automatically excludes juveniles charged with any felony if the youth was adjudicated for two or more prior felony offenses.”).

77. Slaten, *supra* note 49, at 835.

78. *See infra* Part V.B.

79. Randall T. Salekin et al., *Juvenile Waiver to Adult Criminal Courts*, 7 PSYCHOL. PUB. POL’Y & L. 381, 396–97 (2001).

80. *Id.* at 397.

81. *See generally* Heilbrun, *supra* note 28.

82. Arthur L. Whaley & Karestan Koenen, *The Juvenile-as-Adult-Criminal Debate* [letter to the editor], 40 J. AM. ACAD. CHILD. ADOLESCENT PSYCHIATRY 619, 619 (2001).

5. Are the Goals of Transfer Provisions Being Met?

Transfer provisions have become common within the juvenile system.⁸³ Gone are the days when juvenile courts were reluctant to give up jurisdiction over a child. When analyzing reasons behind the influx of such provisions, it is important to question the underlying reasons for the popularity of waiver legislation. The trend toward adjudicating children in the adult criminal system is borne out of two presumptions.⁸⁴ First, it is assumed that juvenile offenders who commit serious crimes should be treated as adults.⁸⁵ Second, it is thought that repeat offenders within the juvenile system should be transferred because, by recommitting crimes, they have proven themselves to be unamenable to treatment.⁸⁶ Thus, the purpose of the waivers is to punish the most severe offenders by adjudicating them to adult court and imposing adult sentences.⁸⁷ The remainder of this section will address whether or not the stated purposes are being achieved.

It is first important to note that the policy of increasing the ease with which juveniles are transferred to the adult system was not based on systematic research.⁸⁸ The legislation was passed without any consideration of what is known about "what works" for juvenile delinquents.⁸⁹ It is striking that the trend towards transfer provisions is based on nothing more than the intuitive belief that by passing "get tough" legislation, society will be sending a chilling message to delinquent youth.⁹⁰

Studies considering whether transfer provisions have adhered to their original purpose of adjudicating only the most serious offenders have been inconclusive.⁹¹ Some studies have found that the majority of juveniles waived had committed violent crimes.⁹² Others concluded that waivers were utilized most often for juvenile property offenders.⁹³ The social science data indicates that the original purpose of sending only the most violent offenders to the adult system has not consistently come to fruition. It has also been found that the purpose of sending juveniles to the adult system (so that they receive harsher punishments) has been frustrated. In one study, transferred juveniles *received* longer sentences than they would have in the juvenile system, but they did not actually *serve* longer sentences because they were released prematurely.⁹⁴

6. The Economic Cost of Transfer Provisions

In terms of decreasing economic costs by reducing recidivism, the policy of transfer has not been shown to be cost-effective. This paper assumes that a decrease

83. See generally TORBET & SZYMANSKI, *supra* note 4.

84. Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, CRIME & JUST. 81, 82 (2000).

85. *Id.*

86. *Id.*

87. Fritsch et al., *supra* note 15, at 596.

88. Bishop et al, *supra* note 18, at 171.

89. *Id.*

90. *Id.* at 173.

91. Fritsch et al., *supra* note 15, at 596.

92. *Id.*

93. *Id.*

94. *Id.* at 603.

in future recidivism rates is an indication of economically superior policy. By comparing recidivism of transferred youth to a sample of youth in the juvenile system, studies have allowed insight into whether or not transfer to the adult system is economically superior.⁹⁵ One study found that transfer does not reduce recidivism. Rather, transfer actually aggravates recidivism over a short-term period.⁹⁶ Aggravation of recidivism due to transfer also appears to occur in the long run.⁹⁷

Thus, it appears that transfer provisions do not reduce recidivism or adhere to their original purpose of adjudicating only the most violent offenders and sentencing them to long periods of time:

Extant studies of the effectiveness of transfer as a crime control policy are too few to be definitive, but they all point toward the same conclusions. There is no evidence that transfer has any general deterrent value: the enactment and implementation of well-publicized transfer legislation does not appear to decrease the incidence of target offenses. Similarly, there is no evidence that transfer has marginal specific deterrent benefits over processing in the juvenile system. The existing research indicates that juveniles prosecuted as adults offend more quickly and at rates equal to or higher than comparable youth retained in the juvenile system. When transfer is applied broadly to offenders who are neither particularly serious nor particularly chronic, any short-term incapacitative gains appear to be quickly offset.⁹⁸

It is not surprising that the original goals of transfer provisions have not been realized, as they were based on nothing more than a gut reaction by state legislatures.

The conclusions of the empirical research lead to the question of what other goals transfer provisions might achieve. In other words, perhaps the goal of transfer criteria is not to reduce recidivism or to deal with the most violent juvenile offenders. Perhaps the real, but unstated, goal is to implement a punitive system and obtain punitive justice. If that is the goal, then society's quest for retribution has been achieved. The most recent data illustrates that 7000 youth have either been adjudicated or are awaiting trial within the adult system.⁹⁹

Regardless of the ultimate purpose of transfer legislation, it is imperative to assess how transfer will affect a mentally ill child. Not surprisingly, a mentally ill child within the adult system faces a dubious fate. The adult system is not equipped to deal with the specific mental health needs of juveniles.¹⁰⁰ Furthermore, it is at least possible that the prison setting exacerbates existing mental health issues in a

95. Bishop et al., *supra* note 18, at 171–72.

96. *Id.* at 183.

97. Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 CRIME & DELINQ. 548, 558 (1997). “[T]he transferred youth who subsequently reoffended were rearrested more times and more quickly than were the nontransferred youth who reoffended . . .” *Id.*

98. Bishop, *supra* note 84, at 85–86.

99. 1999 NATIONAL REPORT, *supra* note 13, at 208–09 (“Males, 17-year-olds, minorities, and person offenders predominate among youth sent to adult prisons.”).

100. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1133 (2002).

child. The needs of mentally ill children are systematically ignored when courts decide transfer—thus the possibility of mentally ill youth entering the adult system is great. Society and state legislatures are pursuing a punitive system, but should mentally ill children be forced to pay for it with their health?

B. Boot Camps: Punitive Measures within the Juvenile System

Like legislation allowing for juvenile transfer to adult court, juvenile boot camps were established in response to a perceived increase in crime.¹⁰¹ The parallel between boot camps and waiver criteria also includes the fact that both policies were pursued without any reliance on social science data.¹⁰² Boot camps were first introduced in the adult system, and as their popularity grew they were incorporated into the juvenile system as well.¹⁰³ Juvenile boot camps proliferated and as of 2000 there were seventy operating camps.¹⁰⁴ The following section addresses how boot camps operate, whether or not they reduce recidivism, and how their existence affects mentally ill children.

1. Boot Camp Background

Boot camps are structured on the model of military basic training.¹⁰⁵ Accordingly, participants wear uniforms, march in military-type style, and have a drill sergeant that commands them.¹⁰⁶ The daily activity of the youth is marked with rigor. Juveniles must wake up early and follow a set schedule over which they have little control.¹⁰⁷ The focus throughout the day is on physical activity, and at any time they can be commanded to engage in activities such as push-ups.¹⁰⁸ The juvenile camps differ from the adult camps in some ways. Although they remain extremely militaristic, recently juvenile camps have begun to focus more on vocational and educational training.¹⁰⁹

Despite their popularity, boot camps are controversial.¹¹⁰ Opponents of boot camps question whether military-style “rehabilitation” based on punishment is the best way to treat juvenile offenders.¹¹¹ Additionally, critics question the underlying theories of the camps:

101. DALE G. PARENT, U.S. DEPARTMENT OF JUSTICE, CORRECTIONAL BOOT CAMPS: LESSONS FROM A DECADE OF RESEARCH 1 (2003), available at <http://www.ncjrs.org/pdffiles1/nij/197018.pdf> (last visited Feb. 22, 2005).

102. Edward J. Latessa et al., *Beyond Correctional Quackery—Professionalism and the Possibility of Effective Treatment*, 66 FED. PROBATION 43, 44 (2002).

103. MacKenzie et al., *supra* note 6, at 127.

104. *Id.*

105. Doris Layton MacKenzie, U.S. Department of Justice, A National Study Comparing the Environments of Boot Camps With Traditional Facilities for Juvenile Offenders 1 (Aug. 2001), available at <http://www.ncjrs.org/pdffiles1/nij/187680.pdf> (last visited Feb. 22, 2005).

106. *Id.*

107. *Id.*

108. MacKenzie et al., *supra* note 6, at 127.

109. PARENT, *supra* note 101, at 2.

110. See MacKenzie et al., *supra* note 6, at 127.

111. *Id.* at 127–28.

Need we now point out the numerous programs that have been implemented with much fanfare and with amazing promises of success, only later to turn out to have "no effect" on reoffending? "Boot camps," of course, are just one recent and salient example. Based on a vague, if not unstated, theory of crime and an absurd theory of behavioral change ("offenders need to be broken down"—through a good deal of humiliation and threats—and then "built back up"), boot camps could not possibly have "worked." In fact, we know of no major psychological theory that would logically suggest that such humiliation or threats are components of effective therapeutic interventions. Even so, boot camps were put into place across the nation without a shred of empirical evidence as to their effectiveness, and only now has their appeal been tarnished after years of negative evaluation studies.¹¹²

Like the policy of waiving juveniles into the adult criminal system, the rehabilitative theory underlying boot camps is not based on empirical evidence and is not influenced by social science research.¹¹³ Despite criticism of the camps, their popular appeal has not waned, as indicated by the large number of camps that still exist.

2. The Economics of Boot Camps

Even though the camps were not formulated based on social science research, it is still important to ask whether they are an economically superior model of juvenile justice. If they are effective in reducing recidivism rates, then an argument can be made that the social science data that supports alternative forms of incarceration is irrelevant. The research on recidivism of participants in boot camps, however, indicates that boot camps have not been effective in reducing rearrest.¹¹⁴ Some researchers found that, compared to juveniles in traditional incarceration settings, no significant reduction in recidivism rates was found for boot camp participants.¹¹⁵ Another study compared ten different evaluations of boot camps and found that recidivism rates were 10% higher for juveniles in camps as

112. Latessa et al., *supra* note 102, at 44 (sources omitted). The article goes on to list four sources of correctional quackery: (1) failure to use existing research when designing programs, (2) failure to assess and classify offenders, (3) failure to use treatment models that are recognized as being effective, and (4) failure to evaluate existing processes. *Id.* at 44–47.

113. *Id.* at 44.

114. PARENT, *supra* note 101, at 4. The study conducted for the National Institute of Justice surveyed empirical studies on the effectiveness of boot camps. Regardless of whether the camps were for juveniles or adults, the consistent findings were that the camps did not reduce recidivism rates. The reasons suggested for the lack of effectiveness included that the length of stays in camps was too short, participants were not prepared for reentry into the community, state legislatures had set forth conflicting goals, and the camps lacked a coherent underlying treatment model. *Id.*

115. MACKENZIE, *supra* note 105, at 2. Although recidivism rates in the camps and traditional institutions did not differ, the study did find important differences in perception. Specifically, youth in the camps were more likely to feel cared for and felt that they were better equipped to deal with society once released. *Id.* at 10.

compared to those in traditional juvenile settings.¹¹⁶ Thus, the difference between boot camps and traditional incarceration is illusory. Some research even suggests that boot camps have a detrimental effect on recidivism rates.

If the goal of reducing recidivism rates is not being achieved through boot camps, then why do camps remain a popular way to “treat” juveniles, especially when there is an abundance of evidence-based treatment models that have been proven to be effective?¹¹⁷ Perhaps the answer lies in an unarticulated goal of programs such as boot camps—the goal of punishment. There is no question that the military-style of boot camps is intended to inflict punishment, and at times physical pain, on participants. Regardless of the “real” purpose of boot camps, they are an indication that the juvenile system is increasingly focused on punitive measures and less so on its original goal of rehabilitation.

3. How Do the Camps Affect Mentally Ill Youth?

The mere existence of boot camps is disadvantageous to mentally ill youth. Ironically, there are more procedural safeguards in place for a mentally ill child being considered for placement in a boot camp than there are for a mentally ill child being considered for transfer to the adult system.¹¹⁸ Generally, the screening process for entry into the juvenile camps prevents mentally ill children from being placed there, as a psychological exam is usually required before a juvenile is admitted.¹¹⁹

The fear of sending a mentally ill child to a boot camp can be addressed by the requirement of psychological assessment. The real threat that boot camps and other programs like them pose to the mentally ill child is economic in nature. Precious dollars are being spent on programs that do little more than satisfy society’s quest for retribution.¹²⁰ For the mentally ill child, receipt of services is largely dependent on funding.¹²¹ The economic burden of retributive programs such as boot camps thus diverts monies away from the formation of evidence-based programs that are proven to work for children with mental health needs.

116. STEVE AOS ET AL., WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, THE COMPARATIVE COSTS AND BENEFITS OF PROGRAMS TO REDUCE CRIME 21 (May 2001), available at <http://www.wsipp.wa.gov/rptfiles/costbenefit.pdf> (last visited Feb. 22, 2005).

117. See *infra* Part IV.

118. MACKENZIE, *supra* note 105, at 2.

119. *Id.*

120. “How many millions of dollars have been squandered? How many opportunities to rehabilitate offenders have been forfeited?” Latessa et al., *supra* note 102, at 44.

121. BRUCE KAMRADT, NATIONAL CENTER FOR MENTAL HEALTH AND JUVENILE JUSTICE, FUNDING MENTAL HEALTH SERVICES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM: CHALLENGES AND OPPORTUNITIES 1 (Dec. 2002), available at http://www.ncmhjj.com/pdfs/publications/Funding_Mental_Health_Services.pdf (last visited Feb. 22, 2005). “Regardless of the reasons for funding problems, research shows that economics play a decisive role in whether or not a youth gets timely and significant mental health support.” *Id.*

C. Purpose Clauses—Retribution Defined

Adult waiver provisions and the proliferation of boot camps are both indications that the juvenile system has moved away from its original purpose of rehabilitation toward a more punitive system. Another indication of this trend is amendments to states' purpose clauses.¹²² Purpose clauses articulate the intent behind a state's sentencing practices.¹²³ Thus, it is significant that seventeen states have changed their clauses to focus on safety, sanctions, and accountability.¹²⁴ Before the amendments, the language of the purpose clauses focused on the child's "best interest."¹²⁵ Examples of current amendments include language such as "hold juveniles accountable for criminal behavior," "provide effective deterrents," and "impose punishment consistent with the seriousness of the crime."¹²⁶ Thus, state legislatures are frankly announcing that the purpose of the juvenile system is no longer solely about rehabilitation and the child's best interests.¹²⁷ The amendments to the purpose clauses are tangible indications that the juvenile system is becoming more punitive.¹²⁸

Purpose clauses provide a helpful context for understanding the meaning of the waiver provisions and boot camps. As the juvenile system becomes more punitive, programs such as boot camps are being introduced and policies such as transfer to the adult court are being pursued with vigor. The blurring of the line between the adult and juvenile systems is occurring through these policies.¹²⁹ Perhaps the purpose clauses can be seen simply as the state legislatures being honest—the best interest of the child matters no more. What society wants is retribution and punishment and the state legislature is intent on delivering.

For the mentally ill child, however, this honesty is chilling. Often, mental health issues are the underlying cause of the child's entry into the system.¹³⁰ The punitive policies of the juvenile system cause three problems: First, the possibility of transfer increases the chances that a mentally ill child will be sent to an adult system not equipped to deal with juvenile mental health needs. Second, punitive programs within the juvenile system mean that economic resources are being diverted from programs that address a child's mental health needs. Third, an argument can be made that the shift from the best interests of the child to

122. 1999 NATIONAL REPORT, *supra* note 13, at 89.

123. Barry C. Feld, *The Juvenile Court Meets the Principles of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 847 (1988).

124. See TORBET & SZYMANSKI, *supra* note 4, at 9.

125. Feld, *supra* note 123, at 842.

126. See, e.g., 1999 NATIONAL REPORT, *supra* note 13, at 89.

127. See Feld, *supra* note 123, at 842.

128. See Randie P. Ullman, *Federal Juvenile Waiver Practices: A Contextual Approach to the Consideration of Prior Delinquency Records*, 68 FORDHAM L. REV. 1329, 1338–39 (2000).

129. Feld, *supra* note 123, at 821.

130. Gail A. Wasserman et al., *The Voice DISC-IV With Incarcerated Male Youth: Prevalence of Disorder*, 41 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 314, 314 (2002). "Youth in the justice system are at high risk for mental health problems that may have contributed to illegal behavior and that are likely to interfere with rehabilitation." *Id.*

punishment criminalizes juvenile mental illness.¹³¹ If the intent of the juvenile system is to punish, then in a sense society has chosen to punish, and not treat, children's mental illness.

III. THE PREVALENCE OF MENTAL ILLNESS WITHIN THE JUVENILE JUSTICE SYSTEM

The previous Parts discuss the particular problems that mentally ill youth face within the increasingly punitive justice system. As society turns toward retribution as its preferred method of justice, it is imperative to assess how many mentally ill youth will be affected. Unfortunately, a large-scale study on the prevalence of mental illness within the juvenile system has not been conducted.¹³² Although no definitive study is available for analysis, the existing social science research points to the same conclusion: "[Y]outh involved with the juvenile justice system have significantly more mental health disorders than youth in the general population. And the mental health disorders from which these youth suffer are often serious and debilitating."¹³³

To some extent, policymakers have recognized that there is a danger that the juvenile justice system is becoming a de facto dumping ground for youth with mental health issues.¹³⁴ The criminalization of mental illness within the adult system is well documented.¹³⁵ "[P]olicymakers, practitioners, and advocates now recognize that the same trends and issues exist in the juvenile justice system."¹³⁶ Although there has been increased recognition of mental illness within the juvenile system, the fact remains that juvenile detention systems are housing an extremely large number of mentally ill youth. It is thus important to question how many mentally ill children have been impacted in the past two decades by the punitive

131. See Linda A. Teplin, *Criminalizing Mental Disorders: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCHOL. 794 (1984) (finding that mentally ill offenders were more likely to be arrested than non-mentally ill offenders). Teplin's research focused on adult offenders. However, as the juvenile system moves toward a more punitive system that mirrors the adult system an argument can be made that the same problems might occur.

132. BOESKY, *supra* note 64, at 4.

The need is great for large-scale studies on mental health disorders within the juvenile justice system in order to determine how many youth suffer from psychiatric disorders—as well as the nature of their disorders. Unfortunately, national studies are very expensive, time-consuming, and require a significant amount of coordination and collaboration between several systems (e.g., mental health and juvenile justice).

Id.

133. *Id.*

134. Joseph J. Cocozza & Kathleen R. Skowrya, *Youth with Mental Health Disorders: Issues and Emerging Responses*, 7 JUVENILE JUSTICE 3, 4–5 (April 2000), available at http://www.ncmhjj.com/pdfs/publications/Youth_with_Mental_Health_Disorders.pdf (last visited Feb. 22, 2005). At the federal level there has been increased attention to the mental health issues of juveniles. *Id.* at 3.

135. See generally Teplin, *supra* note 131.

136. Cocozza & Skowrya, *supra* note 134, at 5.

measures adopted by state legislatures. A review of three studies assessing the number of mentally ill children within the system is a modest attempt to illustrate the breadth of the problem.

One study surveyed 1829 detained youth in Chicago.¹³⁷ The youth were assessed for several hours by interviewers, the majority of whom had masters' degrees in psychology and pertinent experience working with youth.¹³⁸ The results of the research indicate that the most common disorders among youth within the juvenile justice system are substance use disorder and disruptive behavior disorder.¹³⁹ However, once the researchers excluded conduct disorders, they found that almost 60% of males and over 66% of females "met diagnostic criteria and had diagnosis-specific impairment for one or more psychiatric disorders."¹⁴⁰ Thus, of the 1829 youth, at least 1097 suffered from some type of mental disorder.

Another study, conducted in 2000, attempted to assess depression and other selected psychiatric disorders, such as alcohol abuse, somatoform, panic, and anxiety disorders, among 1024 incarcerated youth.¹⁴¹ Twenty-two percent of the youth suffered from severe depression, and 25% suffered from moderate depression.¹⁴² Thus, 47%, or 484 youth, suffered from severe or moderate depression.¹⁴³ Further, 19.2%, or 197 youth, were diagnosed with an anxiety disorder.¹⁴⁴ The prevalence of depression and anxiety, among other disorders, was found to be of major concern. This study is in line with others that indicate that youth within the juvenile justice system suffer from high rates of mental disorders, specifically depression.

The aforementioned research also sheds light on the ability of the juvenile system to properly diagnose and treat juveniles who have severe psychiatric problems. Of the 484 youth diagnosed with severe or moderate depression, only 94, or 19%, had been previously diagnosed.¹⁴⁵ Of the 94 youth who had been diagnosed, only 69 were receiving treatment.¹⁴⁶ In other words, 484 juveniles who were incarcerated within the juvenile system suffered from a diagnosable

137. Teplin et al., *supra* note 100, at 1134.

138. *Id.* at 1134-35. Diagnoses were made using version 2.3 of the Diagnostic Interview Schedule for Children ("DISC"), which allows for assessment of disorders within the past six months. Rates of disorders were then calculated using DSM-III-R criteria, as were rates for diagnoses that met DSM-III-R criteria as well as self-reported factors. *Id.* at 1135.

139. *Id.* "Half of males and almost half of females met criteria for a substance use disorder, and more than 40% of males and females met criteria for disruptive behavior disorders." *Id.* at 1135-36.

140. *Id.* at 1137.

141. Dina D. Domalanta et al., *Prevalence of Depression and Other Psychiatric Disorders Among Incarcerated Youth*, 42 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 477 (2003).

142. *Id.* at 479. The numbers reported in this paper come from reporting using the Beck Depression Inventory. Another assessment utilized a Patient Health Inventory, which uses DSM-IV criteria. *Id.* at 479-80.

143. *Id.* at 479.

144. *Id.* at 482.

145. *Id.* at 481. Again, these numbers reflect the youth who were diagnosed using the Beck Depression Inventory. *Id.*

146. *Id.* at 481-82.

depressive disorder. However, only 69 of the children were being treated. This study reflects the difficulty the juvenile system has in diagnosing mental disorders, as well as the difficulty the system has in treating those disorders once known.

Another issue that plagues juveniles with mental health issues is comorbidity, or the presence of more than one mental disorder. A study conducted in 1998 assessed comorbidity rates of 1829 detained youth in Chicago.¹⁴⁷ The study found that comorbidity is a significant problem within youth in the detention setting:

Significantly more females (56.5%) than males (45.9%) met criteria for 2 or more of the following disorders: major depressive, dysthymic, manic, psychotic, panic, separation anxiety, overanxious, generalized anxiety, obsessive-compulsive, ADHD, conduct, oppositional defiant, alcohol, marijuana, and other substance; 17.3% of females and 20.4% of males had only 1 disorder.¹⁴⁸

Comorbidity is thus a pressing problem for youth within the juvenile system. The research indicates that mentally ill youth within the system are more likely to suffer from more than one psychiatric disorder at a time. Youth with comorbidity are also at a higher risk for placement within the juvenile justice system, due to the overall lack of mental health services available to them.¹⁴⁹

Juveniles in the justice system are also more likely to suffer from a serious mental disorder than their non-incarcerated counterparts. Again, no conclusive study has been conducted about the exact number of juveniles within the system that suffer from serious mental disorders.¹⁵⁰ However, conservative estimates place the proportion at 20%.¹⁵¹ Thus, the aforementioned studies assess the rate at which juveniles suffer from *any* diagnosable psychiatric disorder, including disorders such as ADHD and conduct disorder. Those suffering from serious mental disorders, however, "critically need access to mental health services because they are experiencing serious problems that interfere with their functioning."¹⁵² This is not to diminish the importance of the "non-serious" types of disorders, but merely to point out that many juveniles within the system are in pressing need of care.

The studies discussed above are a small sample of the research that exists about the prevalence of mental health disorders within juvenile offenders. Whichever study is relied upon, the fact remains that youth within the juvenile justice system are much more likely than non-incarcerated youth to suffer from a mental health disorder.¹⁵³ At least 60% of youth suffer from a psychiatric disorder,¹⁵⁴ and at least 20% suffer from a serious emotional disturbance.¹⁵⁵ Thus, as state legislatures and society pursue a more punitive justice system, the impact on mentally ill youth becomes disproportionate.

147. Karen M. Abram et al., *Comorbid Psychiatric Disorders in Youth in Juvenile Detention*, 60 ARCHIVES GEN. PSYCHIATRY 1097 (2003).

148. *Id.* at 1099.

149. *Id.* at 1105–06.

150. Coccozza & Skowyr, *supra* note 134, at 6.

151. *Id.*

152. *Id.*

153. *Id.* at 5.

154. Teplin et al., *supra* note 100, at 1139.

155. Coccozza & Skowyr, *supra* note 134, at 6.

An additional problem within the system, especially in light of transfer provisions that allow juveniles to be allocated to the adult system, is the lack of screening and assessment in many juvenile institutions.¹⁵⁶ As discussed earlier, it is quite possible that a mentally ill juvenile will be incarcerated in the system without being assessed for mental illness.¹⁵⁷ The lack of screening is problematic because screening and assessment are essential if youth are to receive treatment.¹⁵⁸ There have been calls for evidence-based mental health screening for all youth.¹⁵⁹ As of yet, such screening has not been implemented within the system.

Even if a child within the system is diagnosed with a mental disorder, treatment is not guaranteed. A major barrier to treatment within the system is the lack of funding for mental health services.¹⁶⁰ Thus, the punitive system that has been pursued by state legislatures disadvantages youth by diverting monies away from the development of appropriate treatment models for youth. "It is critical that youth with mental health disorders who are placed in juvenile correctional facilities receive appropriate treatment."¹⁶¹ Even though it is critical, state legislatures have not responded to the pressing need with the same force with which they have pursued retributive measures.

IV. ECONOMICALLY FEASIBLE EVIDENCE-BASED PROGRAMS THAT ADDRESS CHILDREN'S MENTAL HEALTH ISSUES ABOUND—MULTISYSTEMIC THERAPY AND ITS ADVANTAGES

Over the past two decades, studies on the feasibility of juvenile programs that are proven to work have proliferated.¹⁶² This is in stark contrast to two decades ago, when policymakers had little knowledge of what was effective in treating juvenile offenders.¹⁶³ The programs that have been shown to work reduce recidivism, and thus mitigate the future costs to society of housing and processing reoffenders.¹⁶⁴ This section will examine a study that compared the economic benefits of a plethora of juvenile-based programs,¹⁶⁵ as well as examine a particularly effective

156. *Id.* at 9.

157. *See supra* notes 132–33 and accompanying text (discussing the problem of screening and assessment). Only 19% of youth who met the criteria for depression had been previously diagnosed within the juvenile system. *Id.*

158. BOESKY, *supra* note 64, at 225 ("Without proper identification of juveniles' mental health systems: [1] Appropriate referrals to mental health/medical professionals may not be made; [2] Effective treatment strategies may not be provided; and [3] There may be an over-or under-reliance on psychotropic medication.')

159. Gail A. Wasserman et al., *Mental Health Assessments in Juvenile Justice: Report on the Consensus Conference*, 42 AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 752, 752–61 (2003). "[J]ustice sites need to work toward more systematic use of evidence-based screen . . . [and] need to develop instruments covering all important aspects of screening for emergent risk for justice youth." *Id.* at 755.

160. KAMRADT, *supra* note 121, at 1.

161. Coccozza & Skowyra, *supra* note 134, at 10.

162. AOS et al., *supra* note 116, at 1.

163. RICHARD A. MENDEL, AMERICAN YOUTH POLICY FORUM, LESS COST, MORE SAFETY: GUIDING LIGHTS FOR REFORM IN JUVENILE JUSTICE 21 (2001).

164. *Id.*

165. *See* AOS et al., *supra* note 116.

model, multisystemic therapy ("MST").¹⁶⁶ The section will then discuss the benefits to mentally ill delinquents of the economically superior multisystemic therapy program.

A. The Washington Survey—Findings of an Economic Comparison of 400 Studies

An extremely useful tool for evaluating the cost-effectiveness of programs for treating juvenile offenders was published by the Washington State Institute for Public Policy.¹⁶⁷ The project reviewed 400 research studies in order to determine which were the most economically sound investments of taxpayer monies.¹⁶⁸ Reducing recidivism rates was considered the most effective way to gauge economic superiority and benefit to the taxpayers.¹⁶⁹ The limitation of the study is that Washington-specific numbers were used to calculate cost-benefit ratios.¹⁷⁰ Thus, "[t]he degree to which the cost-benefit estimates presented . . . are applicable to non-Washington jurisdictions will depend on many factors, not the least of which are any differences among justice system costs and sentencing practices."¹⁷¹ Despite the study's limitations, it remains a useful way to compare the economic advantages and disadvantages of different programs for juvenile offenders.

The study evaluates programs tailored to both adults and juveniles.¹⁷² The findings for juvenile programs are enlightening:

[T]he largest and most consistent economic returns are for certain programs designed for juvenile offenders. Several of these interventions produce benefit-to-cost ratios that exceed twenty dollars of benefits for each dollar of taxpayer cost. That is, a dollar spent on these programs today can be expected to return to taxpayers and crime victims twenty or more dollars in the years ahead.¹⁷³

Thus, in economic terms it makes more sense to spend money on juvenile offender programs than on adult programs. Over the long run they save taxpayers a larger amount of money.

Of the juvenile programs reviewed, the most economically attractive were found to be "off the shelf" programs that are highly structured and involve training and support mechanisms.¹⁷⁴ Of the "off the shelf" programs, MST was found to be the best of the best.¹⁷⁵ Specifically, the study found that taxpayer gain was \$31,661 for each juvenile who participated, as measured by future administrative cost savings.¹⁷⁶ When the researchers factored in the benefits to future crime victims,

166. See generally HENGGELER, *supra* note 7.

167. See AOS et al., *supra* note 116, at 146.

168. *Id.* at 1, 5.

169. *Id.* at 1-2.

170. *Id.* at 3.

171. *Id.*

172. *Id.* at 1.

173. *Id.* at 5.

174. *Id.* at 17. Programs included Multisystemic Therapy, Functional Family Therapy, Aggression Replacement Training, Multidimensional Treatment Foster Care, and the Adolescent Diversion Program. *Id.*

175. *Id.* at 10, 17.

176. *Id.*

the value of the program increased to \$131,918 per juvenile who participated.¹⁷⁷ Likewise, MST is an extremely attractive program for youth with mental health disorders.¹⁷⁸ Not only is it economically superior, but it is also effective in treating youth with mild mental health disorders.¹⁷⁹

The research also found that some programs tailored for juveniles are economically undesirable. One such program is juvenile boot camps.¹⁸⁰ Although the boot camps were estimated to be a less expensive way to initially house adjudicated juveniles within the system, the net gain to taxpayers was nonexistent.¹⁸¹ Over the long run, the camps increased the costs to taxpayers due to the higher recidivism rates of those who had gone through the programs.¹⁸² Thus, the study found that taxpayers *lost* \$3,587 per juvenile who participated in a camp.¹⁸³ Boot camps are not only economically sub-par; they are also an unattractive model for mentally ill youth because they divert money away from development of programs that are suited to address their specific needs.¹⁸⁴ Additionally, mentally ill youth—who comprise roughly 60% of the juvenile population¹⁸⁵—are not allowed to participate in the programs.¹⁸⁶

B. Multisystemic Therapy—Further Discussion of an Economically Feasible Program That Works

The Washington study found multisystemic therapy to be the most economically attractive juvenile program. Unlike adult transfer provisions and punitive programs like boot camps, MST was developed to address the underlying causes of delinquency.¹⁸⁷ Accordingly, the approach focuses on the youth's support system.¹⁸⁸ MST is in accordance with the general consensus among professionals that juveniles "respond well to interventions and treatment that are community-based and designed to rehabilitate."¹⁸⁹ MST has been cited as a model that can inform a family-focused juvenile justice system.¹⁹⁰ Furthermore, it is consistent with child development theory, which views the best programs as "those that

177. *Id.* at 17–18.

178. *See infra* Part IV.B.

179. Griffin & Jenuwine, *supra* note 31, at 85. "The program's emphasis is on juveniles with behavior disorders. MST is an appropriate treatment for juveniles with minor mental illness, but traditionally excludes minors with severe mental illness." *Id.*

180. AOS et al., *supra* note 116, at 21.

181. *Id.* at 21–22.

182. *Id.*

183. *Id.* at 22.

184. *See infra* Part II.B.

185. Teplin et al., *supra* note 100, at 1137.

186. *See infra* Part II.B.

187. HENGGELER, *supra* note 7, at 1–2.

188. *Id.* at 1.

189. William S. Koski, *Foreword: The Political Construction of Youth Crime and its Policy Consequences*, 14 STAN. L. & POL'Y REV. 5, 5 (2003) (noting that these treatments work particularly well for youth offenders that are not violent).

190. *See* Gilbert et al., *supra* note 3, at 1182–87.

address the personal, familial, and societal variables that are essential to healthy child development."¹⁹¹

MST utilizes and addresses the juvenile's family, peer, and community setting.¹⁹² For example, the family unit is assessed and attempts are made to strengthen parenting skills.¹⁹³ Likewise, the juvenile's peer system is reviewed and the juvenile is encouraged to disassociate from negative peer groups and to pursue relationships with positive peer groups.¹⁹⁴ Attempts are also made to work with schools and other community groups in order to strengthen the juvenile's chance for future independence within the community.¹⁹⁵ Thus, the "approach views individuals as being nested within a complex of interconnected systems that encompass individual, family, and extra-familial (peer, school, neighborhood) factors."¹⁹⁶ Accordingly, MST seeks to strengthen and align all factors to suit the best interests of the child.

Trained therapists administer MST.¹⁹⁷ The following example provides an enlightening view of how an MST therapist would deliver the treatment to a fifteen-year-old male who had engaged in theft and alcohol abuse, and whose mother is depressed and single:¹⁹⁸

[P]harmacological or cognitive interventions would address the mother's depression, the therapist would provide individualized skills training in parenting, and considerable attention would be devoted to developing a reliable support system in the mother's natural environment. . . . Likewise, educational or vocational goals will be targeted in collaboration with the youth. Importantly, when family members have difficulty completing agreed therapeutic tasks, the therapists will help the family to identify barriers to task completion and then modify the task to address the barriers.¹⁹⁹

The above illustration of how MST operates leaves no doubt that the model treats the juvenile's underlying problems, not just the symptoms.

There have been at least eight research studies conducted that verify the ability of MST to reduce recidivism rates.²⁰⁰ The research in each study confirms the effectiveness of MST as a tool to treat juvenile delinquents.²⁰¹ One study found that MST was more effective in reducing recidivism and the need for

191. David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL'Y REV. 13, 22 (2003).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Scott W. Henggeler et al., *Family Preservation Using Multisystemic Therapy: An Effective Alternative to Incarcerating Serious Juvenile Offenders*, 60 J. CONSULTING & CLINICAL PSYCH. 953, 955 (1992).

197. *Id.*

198. Scott W. Henggeler et al., *Multisystemic Therapy: Bridging the Gap Between University- and Community-Based Treatment*, 63 J. CONSULTING & CLINICAL PSYCH. 709, 710 (1995).

199. *Id.*

200. MENDEL, *supra* note 163, at 22.

201. *See id.* at 22-23.

institutionalization of serious juvenile offenders than traditional services.²⁰² MST has also been found to be more effective than traditional methods of incarceration in treating many different types of juvenile offenders. MST consistently reduced recidivism rates for adolescent sexual offenders, chronic juvenile offenders, inner-city offenders, and juvenile substance abusers.²⁰³ Thus, there is no doubt that MST, a model based on a scientific understanding of what works for juvenile offenders, is far superior to current traditional practices.

C. Multisystemic Therapy and its Use for Mentally Ill Juvenile Delinquents—A Promising Alternative to Residential Treatment and Incarceration

“The majority of funding currently available for children’s mental health needs in the United States is spent on expensive out-of-home placements.”²⁰⁴ Thus, MST was developed in response to the need for an inexpensive (and scientifically based) alternative to expensive existing options such as residential treatment facilities, psychiatric treatment, and incarceration.²⁰⁵ The average cost for MST is \$6,000 per juvenile participant, which is substantially less than the cost of incarceration, group home placement, or residential treatment.²⁰⁶

The whole purpose of MST is to address the mental health needs of children. As mentioned above, MST has been found to be an effective way to treat juveniles with substance abuse issues.²⁰⁷ Additionally, it has been noted that “MST is an appropriate treatment for juveniles with minor mental illness, but traditionally excludes minors with severe mental illness.”²⁰⁸ Thus, for youth with minor mental illnesses, MST is an attractive and economically feasible alternative to residential treatment or incarceration.²⁰⁹

For disruptive behavior disorders, including oppositional defiant disorder and conduct disorder, MST has been cited as an effective model of treatment.²¹⁰ This finding has broad policy implications for treatment of youth within the juvenile justice system. Many youth with conduct disorders find themselves within the

202. Henggeler, *supra* note 196, at 958. “At 59 weeks postreferral, youth who received MST had slightly more than half as many arrests as youth who received usual services. . . . Youth who received MST spent an average of 73 fewer days incarcerated . . . than did their usual-services counterparts.” *Id.* at 956.

203. HENGGELER, *supra* note 7, at 3–5. See also Scott W. Henggeler et al., *Multisystemic Therapy With Violent and Chronic Juvenile Offenders and Their Families: The Role of Treatment Fidelity in Successful Dissemination*, 65 J. CONSULTING & CLINICAL PSYCH. 821 (1997) (discussing the importance of treatment fidelity in administering MST).

204. HENGGELER, *supra* note 7, at 1.

205. *Id.*

206. MENDEL, *supra* note 163, at 22.

207. *Id.* at 5.

208. Griffin & Jenuwine, *supra* note 31, at 85.

209. See *id.* “MST can be funded by a single agency that hires a clinical team and contracts with the MST site in South Carolina for training and supervision of clinicians. This model is an alternative to residential treatment and to using multiple providers. Given that many of the minors served by MST would otherwise be in residential care, courts can arguably recoup their costs and, therefore, MST is very cost efficient.” *Id.*

210. See PETER FONAGY ET AL., WHAT WORKS FOR WHOM? A CRITICAL REVIEW OF TREATMENTS FOR CHILDREN AND ADOLESCENTS 106–92 (2002).

system. This is because "many of the behaviors encompassed by [conduct disorder] involve breaking the law."²¹¹

There is also some evidence that MST is an effective treatment for youth with serious emotional disturbances.²¹² In one study, 116 youth who met placement criteria for psychiatric illness, as designated by American Academy of Child and Adolescent Psychiatry standards, were placed in MST treatment instead of in psychiatric hospitals.²¹³ The results of the study were promising. The youth, in the short run, had positive outcomes.²¹⁴ Family functioning, school attendance, and externalizing symptoms were the factors used to measure success.²¹⁵ However, a study of the youth one year later found that MST does have some limitations for youth with serious emotional disorders. The research concluded that, for these types of youth, a model limited in time is not sufficient.²¹⁶ The researchers concluded that the administration of MST, in and of itself, is not effective for treating youth with serious emotional disturbances.²¹⁷

In conclusion, there is little doubt that MST is an effective and inexpensive way to treat youth within the juvenile detention setting. For youth with mild mental illness, MST has also proven to be a useful tool. There is some preliminary research that shows that MST is effective for treating youth with serious emotional disturbances, but its long term effectiveness is questionable. Overall, however, "[m]ultisystemic therapy is arguably the most promising intervention [that exists] for serious juvenile offenders."²¹⁸

V. THE PRICE WE ARE WILLING TO PAY FOR PUNITIVE JUSTICE IN THE JUVENILE DETENTION SYSTEM: MENTALLY ILL DELINQUENTS AND THEIR DISPROPORTIONATE SHARE OF THE BURDEN

In the beginning, the juvenile detention system in the United States focused on the best interests of the child. However, there has been a strong movement away from the original purpose of the system. The best interests of the child have been traded for more punitive measures, such as adult waiver provisions and juvenile boot camps. The move toward a punitive system must be analyzed and questioned from the viewpoint of the mentally ill children within the system, who by conservative estimates comprise 60% of the population.²¹⁹ The remainder of this paper will make an attempt to do this.

211. *Id.* at 181.

212. See Scott W. Henggeler et al., *One-Year Follow-up of Multisystemic Therapy as an Alternative to the Hospitalization of Youth in Psychiatric Crisis*, 42 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 543 (2003).

213. *Id.* at 544.

214. *Id.*

215. *Id.*

216. *Id.* at 550.

217. *Id.*

218. FONAGY et al., *supra* note 210, at 161.

219. Teplin et al., *supra* note 100, at 1137.

A. Why Are Programs That Work for Mentally Ill Children Not Being Implemented?

The success of MST in treating juveniles and reducing recidivism rates is breathtaking. However, even though the program is inexpensive and reduces recidivism, use of it is not widespread.²²⁰ The Washington Survey, which compared the cost-to-benefit ratios of four hundred programs, found that MST was economically superior to any other model in existence for juveniles.²²¹ However, the legislative response to the findings is disappointing. In Washington, for example, only four of the highlighted programs that were shown to be economically superior are being implemented by the legislature.²²² In short, the superior programs are not being widely implemented.

It appears to make little difference to state policy whether juvenile offender programs reduce taxpayer burden. For example, MST, which was found by the Washington survey to save taxpayers \$31,661,²²³ is not in widespread use.²²⁴ Likewise, the policy of waiving juveniles to adult court, which has not been shown to reduce recidivism rates, is becoming more and more popular.²²⁵ Similarly, the use of boot camps, which have been shown to actually increase recidivism rates as well as *waste* taxpayer money, outnumbers the use of MST programs.

It also appears to make little difference whether policies being pursued by the states are based on sound social science research data. MST, which was formulated to address the underlying causes of delinquency, is not a popular method of treatment. On the other hand, juvenile transfer to adult court is widely implemented by states without any consideration of whether or not it reduces recidivism. Similarly, boot camps were pursued without consideration of whether or not they deliver treatment that has been shown to work.

If economic superiority and social science data do not matter, then what does? One commentator stated:

No student of politics and policy-making should be surprised to find out that social policy frequently diverges from what social science evidence would suggest as appropriate. Nowhere is this lesson more evident than in the arena of juvenile justice. Despite declining rates of youth crime and despite what we know from cognitive and developmental psychology about youth decision-making and behavior, policy-makers have enacted in recent years a host of "get tough" measures that have resulted in greater rates of transfers of youth offenders to adult courts, automatic punishments, and increased incarceration of

220. MENDEL, *supra* note 163, at 21. "Multisystemic Therapy and Functional Family Therapy each served approximately 5,000 young people in 2000—this in a nation that arrests more than 2.5 million adolescents each year and confines more than 100,000 every night." *Id.*

221. AOS et al., *supra* note 116, at 10, 17.

222. *Id.* at 5.

223. *Id.* at 17.

224. MENDEL, *supra* note 163, at 21.

225. See TORBET & SZYMANSKI, *supra* note 4.

youth. While not grounded in social science, *this policy response is at least considered good politics.*²²⁶

Thus, the key factor in changing juvenile justice system policy is not economics or social science data, but voter approval.²²⁷

"Good politics" in the past twenty years has led to an increasingly punitive juvenile justice system. Although there are other factors, such as the Supreme Court decisions that contributed to the formation of an adversarial juvenile justice system, those factors cannot explain the rate at which retributive justice has been pursued. To understand the underlying reasons for the influx of punitive measures, it is essential to look at why politicians receive approval when they pass measures such as juvenile transfer provisions that have not been shown to work. The fact that punitive measures produce voter approval suggests this simple conclusion: society wants retributive justice.

Not only does society want retributive justice, but it is willing to pay for it as well. By pursuing measures that have not been shown to reduce recidivism, and that perhaps even exacerbate it, society loses out on the economic benefits that more effective programs offer. Thus, the punitive appeal of the programs in and of themselves seems to justify their costs. Economically superior programs, which are based on social science research data, have been largely ignored because they do not punish, and punishment is what society wants.

For the child within the juvenile justice system, and the mentally ill child in particular, the answer to why programs that work have been ignored is frightening. The mentally ill child, if she listens carefully, comes to know that her illness and mental health needs mean little in comparison to the satisfaction that society feels from implementing punitive measures. As a society, we have decided that it is worth more to punish her than to help her. We voice this opinion silently, by allowing programs, such as adult transfer provisions, to be pursued without demanding to know if they work. We voice this opinion loudly, by revamping our purpose clauses to declare that the "best interests of the child" no longer matter. We voice this opinion even though we know that the majority of children within the juvenile system are mentally ill and in need of help.

B. A Modest Proposal

The mentally ill child's question is why programs that suit her needs are not being implemented. The answer is that such programs do not punish. For the mentally ill child, this is not a satisfying answer. However, until society's attitudes change and state legislatures respond, the status quo will remain. Juvenile policies respond to cries for retributive justice, and until the cries subside the disappointing

226. Koski, *supra* note 189, at 5 (emphasis added); see also Gilbert et al., *supra* note 3, at 1166. "It is ironic that at a time when there is more research on the diagnosis, treatment, and rehabilitation of delinquents, the court system designed to support such efforts has reverted back to a punitive court and abandoned its rehabilitative mission."

227. MENDEL, *supra* note 163, at 2. "Many states have embraced tough-sounding strategies that appeal to voters but don't work, and most have failed to address longstanding weaknesses and imbalances in our nation's juvenile justice institutions." *Id.*

answer to the mentally ill child is that he or she must remain in a system that is focused more on punishment than on treatment.

This paper has been an attempt to take a systematic look at the punitive measures that have gained in popularity over the past thirty years. It is clear that although the measures might be politically popular, policy rationale behind them are lacking. The punitive measures do not save money, they do not incorporate what we know about the psychological development of children, and they do not reduce recidivism rates. In addition, they adversely affect mentally ill children. From an analytical standpoint, it is clear that the only reason to continue with the aforementioned punitive measures is to appease voters, who perhaps are uniform in thinking that the programs are a legitimate alternative to traditional or innovative programs.

It is imperative that state legislatures reassess the programs and policies that they have been endorsing. Advocates of mentally ill children must help state legislatures understand that when they are voting on measures that deal with the juvenile justice system, they are also endorsing or rejecting a method of treatment for mentally ill children. This is because a majority of children within the juvenile system are mentally ill. Once the correlation between mental illness and those within the juvenile system is recognized, I propose that it will be easier to explain measures that are not perceived as "tough" to the public. In addition, once state legislatures move beyond the intuitive appeal of punitive programs, there will be room to make rational decisions that take into account what programs are most cost-effective.

I propose that the first punitive measure that advocates and state legislatures address is the lack of protection for mentally ill children who are facing waiver into the adult system. It is imperative that state legislatures specifically mandate that before a waiver to the adult system, whether it is prosecutorial, statutory, or judicial, the child at issue must be psychologically assessed to determine her mental state. If it is found that the child has a serious emotional disturbance, that finding must be *determinative*. In other words, if a child has a serious emotional disturbance, he or she must not be waived to the adult system. Society must recognize that this type of child is not equipped to be placed in an environment that is not set up to deal with her serious mental illness. This is a small change—it does not require an overhaul of the system. However, it is a logical change that achieves two purposes. First, it is a small step toward lessening mentally ill children's disproportionate share of the burden of popular punitive policies. Second, it would result in state legislatures recognizing that it is necessary to treat and respond to mentally ill children within the system.