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## The Injustice of Retribution: Toward a Multisystemic Risk Management Model of Juvenile Justice

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# **THE INJUSTICE OF RETRIBUTION: TOWARD A MULTISYSTEMIC RISK MANAGEMENT MODEL OF JUVENILE JUSTICE**

*Mark R. Fondacaro\**

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## I. INTRODUCTION

This Article will provide an overview of a Multisystemic Risk Management (MRM) model of juvenile justice that attempts to shift the focus of juvenile justice policy from retributive punishment to recidivism reduction and crime prevention.<sup>1</sup> The MRM model is guided by parallel trends in the fields of psychology and law towards forward-looking systemic models to inform decision making and influence human behavior. In psychology, early models of human behavior that focused narrowly on internal, unidimensional mental states to explain or change complex behavior have been supplemented by more ecological, multisystemic models that consider contextual influences on human behavior and span biological, psychological, and social levels of analysis. This body of cutting edge behavioral science research presents challenges to traditional mens rea analysis in criminal law and highlights the potential injustice of retribution as the basis for legal sanctions. The MRM model promises to improve the fairness, effectiveness, and efficiency of the juvenile justice system by integrating these innovations from psychology with converging trends in law.

In the legal system, and the area of administrative law in particular, recent conceptualizations of due process have gone beyond the traditional backward-looking, case-by-case adversarial model toward more system-wide, forward-looking managerial models that emphasize measurable fairness, accuracy, and efficiency in decision making aimed at implementing substantive policy goals.<sup>2</sup> In previous work, I have attempted to synthesize these converging trends into what I have

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<sup>1</sup> For an expanded discussion of this perspective, see generally CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, *JUVENILES AT RISK: A PLEA FOR PREVENTIVE JUSTICE* (2011).

<sup>2</sup> See generally Mark R. Fondacaro et al., *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955 (2006) (arguing juvenile justice models that focus on enhancing measurable fairness, accuracy, and efficiency may be procedurally and substantively superior to contemporary adult criminal procedures and culpability-based models).

called an “Ecological Jurisprudence.”<sup>3</sup> In essence, the MRM model of juvenile justice represents a specific application of the Ecological Jurisprudence framework. Throughout this Article, the MRM model will be contrasted with traditional approaches to juvenile justice, with an emphasis on those rooted in principles of moral judgment and retribution.<sup>4</sup>

Part II of this Article identifies and presents challenges to traditional models of criminal responsibility that are grounded in outdated and empirically unsupported legal presumptions about human behavior. Part III examines trends towards more ecological models of human behavior in the behavioral sciences. Part IV tracks analogous legal trends in administrative models of due process and procedural justice. Based on a synthesis of these parallel trends in the behavioral sciences and the law, Part V presents general principles of an MRM model of juvenile justice. Finally, Part VI concludes with an outline that illustrates what such a model might look like.

## II. LIMITATIONS OF TRADITIONAL APPROACHES TO CRIMINAL RESPONSIBILITY

Criminal law doctrines have always reflected common sense notions about human nature and the causes of human behavior.

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<sup>3</sup> See generally Mark R. Fondacaro, *Toward an Ecological Jurisprudence Rooted in Concepts of Justice and Empirical Research*, 69 UMKC L. REV. 179 (2000) (arguing the law should reflect an updated understanding of contextual influences on human behavior). As noted previously, “[o]ne of the first tasks of an ecological jurisprudence would be to bring legal assumptions about human behavior in line with empirical research conducted over the past century demonstrating the powerful influences that situational factors have on guiding and directing individual behavior.” *Id.* at 192. Moreover, through the lens of an ecological jurisprudence, basic social psychological research on procedural and distributive justice becomes more salient, guiding the development of procedures aimed at promoting fair and accurate decision making and advancing substantive policy goals, such as recidivism reduction and crime prevention, that are perceived as legitimate. See *id.* at 195.

<sup>4</sup> See generally Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1 (2009) (arguing a prevention-based juvenile system is superior to the contemporary culpability-based system).

In our Western liberal democracy, both criminal law doctrines and the common sense notions they reflect traditionally have focused on an individual's personal choices or conscious will as the primary if not sole determinative force behind criminal behavior. Although the law tracks common sense or "folk psychology" conceptions of human behavior rather closely, it is much slower and more removed from scientific advances in how we conceive of complex causes and consequences of human behavior. For example, I like to ask my students whether they have ever taken a course in psychology or criminology that has covered the topic of criminal or deviant behavior. Almost all of them raise their hands. I then ask them whether they recall the extensive body of research conducted over the past century on the "evil doer" theory of crime. Typically, none raise a hand and most look puzzled until I inform them that no serious or systematic research on the causes of crime has been rooted in an "evil doer" theory. Yet that is the implicit theory underlying the criminal law.

In traditional criminal law, two conditions must be met in order for a person to be found guilty of a crime. First, the person must have committed a bad act (*actus reus*), and second, the individual must have had a guilty mind (*mens rea*) at the time that he or she committed the offense. Given a particular bad act (e.g., killing a person), whether or not a defendant is found to be legally accountable turns on judgments about the individual's mental state at the time of the offense. For example, under the Model Penal Code (MPC): if a person is judged to have acted purposely, knowingly, recklessly or negligently, he is legally accountable for his crime and subject to punishment. If on the other hand, he is judged to have acted without a guilty mind or in a non-negligent manner, he is not legally responsible or subject to criminal punishment.

The severity of punishment sanctioned for a crime under the MPC increases with the perceived degree of culpability at the time of the offense (i.e., more punishment for an illegal act committed with purpose than one committed recklessly). The justification for meting out more severe punishment for more culpable mental states is grounded largely in principles of retribution and just deserts, which is the notion that a person

should be punished in proportion to his or her moral culpability for the offense—no more and no less—reflecting the “evil doer” theory of crime.

As suggested above, the idea that people should be punished in proportion to their moral blameworthiness is rooted in Western Liberal notions of autonomous individualism. That is, it is assumed that people make conscious choices that guide their behavior and that people who break the law choose to do so and can choose to do otherwise. This notion of free choice and the legal presumption of autonomous individualism provide the rationale and justification for retributive punishment. Although this legal presumption of autonomous individualism is consistent with common sense notions about human nature and in fact is generally consistent with folk psychological notions as well,<sup>5</sup> it is not consistent with the overwhelming weight of behavioral science research on the actual causes and determinants of human behavior.<sup>6</sup>

There are several lines of behavioral science research that challenge the presumption present in both law and folk psychology that human behavior is almost fully guided by conscious human thought. Although a comprehensive review of these separate lines of research is beyond the scope of this Article, I will outline their contours and main findings. First, it is important to point out that in the legal context, determination of mens rea is based on a retrospective, social judgment about what a person was (or was not) thinking at the time he or she committed an illegal act—in essence, retrospective mind reading. It should be noted that in the criminal law, and under the MPC in particular, mens rea determinations are presumed to assess and represent the actual subjective mental state of the defendant at the time of the offense, with the rare exception of criminal

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<sup>5</sup> See generally BERTRAM F. MALLE, *HOW THE MIND EXPLAINS BEHAVIOR: FOLK EXPLANATIONS, MEANING, AND SOCIAL INTERACTION* (2004) (analyzing folk psychological notions).

<sup>6</sup> See generally Daniel M. Wegner & Thalia Wheatley, *Apparent Mental Causation: Sources of the Experience of Will*, 54 AM. PSYCHOLOGIST 480 (1999) (explaining various experiments that demonstrate how the subjective experience of conscious will is distinct from the actual causal chain that leads people to act).

offenses based on a negligence standard of culpability. This raises questions about how reliable and consistent individuals (a judge or jurors in the case of a criminal trial) are in making retrospective judgments about what particular defendants were actually thinking at the time each committed an offense. Moreover, even if jurors are consistent or reliable, it does not mean their retrospective judgments of past mental state are accurate or valid; instead, they may be consistently biased or just plain wrong.

If the criminal law presumes that almost all of human behavior is guided by conscious choices about whether to obey the law, then clearly early theoretical speculation about the “unconscious” by Sigmund Freud and his followers provides a potential basis for calling this presumption into question. However, we do not have to rely on Freudian speculation about unconscious processes to cast doubt on legal presumptions about human behavior; there is a new body of systematic behavioral science research referred to as the “new unconscious” that draws on cutting edge social psychological and cognitive neuroscience research to challenge the notion that most human behavior is guided directly by conscious deliberation or intentionality.<sup>7</sup> This line of research suggests that little, if any, human behavior conforms to legal presumptions or folk psychological notions of consciously or cognitively induced conduct.

Recent efforts to make the best scientific case for a link between cognition and conduct fall far short of the kind of dualistic model that underlies criminal liability. Under the Model Penal Code, a guilty defendant is presumed to have made some conscious choice to either bring about a specific illegal result (act with purpose), or to act despite being practically certain that a criminal outcome would result (act with knowledge), or act while consciously disregarding a substantial and unjustifiable risk (act recklessly). The criminal law presumes a direct connection between a guilty mind and bad behavior. However,

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<sup>7</sup> See generally *THE NEW UNCONSCIOUS* (Ran R. Hassin et al. eds., 2005) (discussing research that indicates that human behavior is less deliberate than it was traditionally thought to be).

the weight of cutting edge behavioral science research does not support this presumed link between thought and action.

For example, in an article entitled *Do Conscious Thoughts Cause Behavior?*, Baumeister and his colleagues set out to take on the emerging consensus in the behavioral and neurosciences that “conscious thought has little or no impact on behavior.”<sup>8</sup> The authors use two different metaphors to explicate the role that conscious thought plays in behavior: a train whistle and a bomb fuse. They suggest that the current dominant view in the behavioral sciences analogizes the relationship between conscious thought and behavior to the role of a steam whistle on a train: “[I]t derives from and reveals something about activity inside the engine, but it has no causal impact on moving the train.”<sup>9</sup> In short, “[b]ehavior does not originate with a conscious decision.”<sup>10</sup> After reinterpreting the literature in the light most favorable to foundational legal presumptions, they settle on the analogy of conscious thoughts as serving a similar role as a fuse serves in detonating a bomb—it does not light the match or initiate the explosion but it serves a mediating role.<sup>11</sup> Rather than serving as a direct or concurrent causal influence on behavior, as the law presumes (and indeed requires), Baumeister and colleagues conclude that the bulk of the research is more consistent with the view that conscious thought has “offline and indirect effects on later behavior.”<sup>12</sup> Overall, they deduce that nothing they “reviewed would prove that any behavior emerged

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<sup>8</sup> See generally Roy F. Baumeister et al., *Do Conscious Thoughts Cause Behavior?*, 62 ANN. REV. PSYCHOL. 331 (2011).

<sup>9</sup> *Id.* at 332 (discussing the view articulated by Thomas Huxley in 1874). The writers then cite two of the current leading researchers in the field, who echo this view: “Conscious intentions signal the direction of action—but without causing the action . . . .” *Id.* (quoting Daniel M. Wegner & John A. Bargh, *Control and Automaticity in Social Life*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 446, 456 (Daniel T. Gilbert et al. eds., 1998)).

<sup>10</sup> *Id.* at 332 (quoting Ap Dijksterhuis et al., *Effects of Priming and Perception on Social Behavior and Goal Pursuit*, in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 51, 52 (John A. Bargh ed., 2007)).

<sup>11</sup> *Id.* at 334.

<sup>12</sup> *Id.* at 351.



from exclusively conscious processes.”<sup>13</sup> Yet, that is precisely the legal presumption that underlies traditional criminal law doctrine—that culpable mental states occur concurrently with and induce criminal behavior. Baumeister and his colleagues have tried to assemble the best available evidence against the prevailing view in the behavioral sciences that “conscious processes lack causal efficacy.”<sup>14</sup> If the strongest case for the direct causal influence of mens rea on human behavior does not support traditional legal presumptions, then continued reliance on those presumptions in the law is misguided. In addition, continued reliance is unjust to the extent that such erroneous presumptions provide the moral justification for retributive punishment.<sup>15</sup>

In addition to the lack of scientific evidence to support the view that conscious thought directly drives behavior, there are several additional reasons to challenge traditional legal presumptions about human behavior and the “evil doer” theory of crime they reflect. Early research conducted by Heider and Simmel<sup>16</sup> suggests that human beings have a natural bias to read intentionality into behavior when they are asked to explain or judge the behavior of others, even when intentionality is not possible. For example, they conducted an experiment in which subjects observed the movement of three geometric figures (a large triangle, a small triangle, and a circle) and were asked to explain the movements of the figures. Nearly all of the subjects characterized the geometric figures as animated persons, even when they were asked nothing more than to “write down what happened in the picture.”<sup>17</sup> When asked to interpret the movements of the figures as human actions, subjects typically attributed internal motives to the figures. Heider and Simmel concluded that when people see the big triangle “hitting” the

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<sup>13</sup> *Id.* at 354.

<sup>14</sup> *Id.* at 353.

<sup>15</sup> See Mark R. Fondacaro & Lauren G. Fasig, *Judging Juvenile Responsibility: A Social Ecological Perspective*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 355, 368 (Nancy E. Dowd et al. eds., 2006).

<sup>16</sup> See generally Fritz Heider & Marianne Simmel, *An Experimental Study of Apparent Behavior*, 57 AM. J. PSYCHOL. 243 (1944).

<sup>17</sup> *Id.* at 245.

little triangle (i.e., coming into contact), they tend to infer that the big triangle intends or desires to “hurt” the little triangle.<sup>18</sup> Thus, there seems to be a human readiness or tendency to over attribute the behavior of others to internal psychological attributes such as intentionality. This can have severe consequences for defendants under existing criminal law doctrine where jurors are asked in first degree murder trials whether the defendant premeditated and deliberated before killing the victim. Whether or not premeditation and deliberation are inferred can mean the difference between life and death for the defendant. Heider and Simmel’s work suggests that people may have a natural bias toward inferring internal mental states such as intent or desire to explain behavior even when an objective judgment would not support such an inference, as in the case of the movement of inanimate geometric figures.

In addition to a human tendency to read intentionality into behavior when it does not or cannot exist, individuals who are asked to judge the mental state of another may be influenced by their own subjective experiences of conscious will. This can add bias to the task of retrospective mind reading if in fact the subjective experience of conscious will is illusory and has no causal influence over anyone’s behavior, either as an observer or as an actor.

Wegner and Wheatley<sup>19</sup> have conducted empirical research studies that support the view that the experience of conscious will is illusory. They found that people could be influenced to believe that they had deliberately willed a behavior by merely being asked to think about the behavior before it was involuntarily induced. The authors found that the subjective belief that conscious will had played a role in events was a function of the extent to which the thought directly preceded the action, was consistent or compatible with the action, and was the exclusive apparent cause of the action. They summarized their findings as follows:

The experience of will is the way our minds portray their operations to us, then, not their actual operation.

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<sup>18</sup> *Id.* at 257.

<sup>19</sup> Wegner & Wheatley, *supra* note 6, at 490.

Because we have thoughts of what we will do, we can develop causal theories relating those thoughts to our actions on the basis of priority, consistency, and exclusivity. We come to think of these prior thoughts as intentions, and we develop the strong sense that the intentions have causal force even though they are actually just previews of what we may do. The real causal mechanism is the marvelously intricate web of causation that is the topic of scientific psychology. The sense of will is not directly connected to this web and instead is an expression of our tendency to take what Dennett has called an “intentional stance” toward people. The intentional stance involves viewing psychological causation not in terms of causal mechanism but rather in terms of agents who have desires and beliefs that cause their acts. Conscious will is part of the process of taking an intentional stance toward oneself.

This analysis suggests that the real causal mechanisms underlying behavior are never present in consciousness. Rather, the engines of causation are unconscious mechanisms of mind.<sup>20</sup>

Echoing this view, Bargh and Chartrand have summarized the available research and concluded that the lion’s share of human behavior is guided by non-conscious mental systems rather than conscious will.<sup>21</sup> Finally, Libet conducted an influential study demonstrating that voluntary human acts and the subjective experience of intent that precede them are themselves preceded by unconscious brain activity, suggesting a subordinate role at best for conscious will as a causal initiating force driving human behavior.<sup>22</sup>

To understand why the legal system, general public, and even members of the mental health and behavioral science communities continue to support traditional legal presumptions

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<sup>20</sup> *Id.*

<sup>21</sup> See John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOLOGIST 462 (1999).

<sup>22</sup> Benjamin Libet, *Unconscious Cerebral Initiative and the Role of Conscious Will in Voluntary Action*, 8 BEHAV. & BRAIN SCI. 529, 536 (1985).

about human behavior that are inconsistent with scientific research, we turn to the topic of folk psychology.<sup>23</sup> Folk psychology refers to the “fundamental assumptions [that people make about] human behavior and its relation to the mind,” including the capacity to infer mental states and what other people are thinking.<sup>24</sup> In essence, folk psychology or a folk theory of mind reflects what individuals construe about what another person thinks or intends, which may or may not actually capture the subjective conscious experience of the other person.<sup>25</sup> So, even if folk psychology concepts correspond directly with legal concepts or standards of mens rea, neither folk nor legal concepts necessarily reflect an actual, accurate or valid characterization of what another person was (or was not) thinking at the time he or she disobeyed the law.

Malle and Nelson have attempted to integrate aspects of “legal and layperson view[s] of human behavior” in an effort to clarify concepts of mens rea in the criminal law.<sup>26</sup> They point out that research on folk psychology faces two primary challenges in the legal realm.<sup>27</sup> The first challenge focuses on how to establish precise definitions of the concepts of mental states relevant to judgments about culpability; the second relates to how to determine the extent to which inferences about mental states are in fact “reliable and accurate.”<sup>28</sup> Unfortunately, their research, like much of the research in this area, only focused on the first challenge, as they sought to determine the link between folk concepts and related legal concepts such as intentionality.<sup>29</sup>

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<sup>23</sup> See generally MALLE, *supra* note 5.

<sup>24</sup> *Id.* at 30–36.

<sup>25</sup> But see MODEL PENAL CODE § 2.02 (1962) (including the other person’s subjective experience in the mens rea requirements for purpose, knowledge, and recklessness).

<sup>26</sup> Bertram F. Malle & Sarah E. Nelson, *Judging Mens Rea: The Tension Between Folk Concepts and Legal Concepts of Intentionality*, 21 BEHAV. SCI. & L. 563, 563 (2003).

<sup>27</sup> *Id.* at 564.

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* at 566–78 (suggesting that the legal concepts of mens rea should be aligned with the ordinary meanings attached to them by laypersons).

Their results point to similarities and discrepancies between laypersons' and legal concepts of mens rea, and they make some recommendations for bringing them both into better alignment. However, their research communicates little if anything about how closely judgments of mens rea based on folk concepts or legal concepts approximate what a defendant was thinking at the time he or she committed a crime.

Other attempts to examine laypersons' understandings of mental states empirically, and their correspondence with legal definitions of mental states, have met with very limited success.<sup>30</sup> Again, none of this research gets at the deep and fundamental issue of whether judgments based on folk or legal concepts are accurate and valid. Moreover, as noted above, the weight of the behavioral science research relevant to the nature of the link between human mental states and behavior suggests that neither folk psychology nor legal presumptions about the role of mental states in criminal behavior are likely to be accurate enough to serve as a primary justification for retributive punishment. Overall, understanding limitations on the ability to read the minds of criminal defendants retrospectively may give us reason to question reliance on traditional legal presumptions as a justification for retributive punishment.

Although the law is slow in tracking scientific advances, it can and has been moved by convincing theories and research—consider, for example, how the law was nearly captured by the field of economics and the rational actor model of human behavior in the 1990s. However, there are emerging parallel trends in the behavioral sciences and the law that promise to converge to transform criminal law, beginning with the juvenile justice system. These trends, as will be noted in the next two sections, include a broadening of the focus in the behavioral sciences from conscious, atomistic mental states such as intent and deliberation, to unconscious processes and to dynamic,

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<sup>30</sup> See generally Laurence J. Severance et al., *Inferring the Criminal Mind: Toward a Bridge Between Legal Doctrine and Psychological Understanding*, 20 J. CRIM. JUST. 107 (1992). Severance discusses the results of his study, which was designed to detect “how laypeople, asked to serve as ‘jurors,’ interpret and apply legal instructions on the definitions of culpable mental states.” *Id.* at 107 (“Laypeople do not comprehend mental state distinctions that are differentiated in legal doctrine.”).

contextual, and systemic influences on human behavior. Likewise, the trend in the law, and administrative law in particular, is to move away from a case-by-case adversarial model of dispute resolution to a more forward-looking, managerial system of due process that focuses on fairness and accuracy in decision making and the implementation of instrumental policy objectives.

### III. ECOLOGICAL MODELS OF HUMAN BEHAVIOR

Social psychological research conducted throughout the twentieth century expanded the scope of inquiry about the causes of human behavior beyond the internal mental states of individuals to contextual and situational influences. For example, ecologically-oriented theorists such as Bronfenbrenner,<sup>31</sup> Lewin,<sup>32</sup> and Moos<sup>33</sup> have developed models of human behavior that focus on the dynamic relationship between the individual and aspects of his or her social environment. In contrast with traditional legal presumptions that suggest illegal behavior is the consequence of a conscious choice that can be fairly judged through a process of retrospective mind reading, an ecological perspective suggests that in order to understand why a person behaves the way he or she does on a particular occasion, one must understand the *ongoing* relationship between the individual and aspects of his or her social environment.

Consistent with an ecological perspective, systematic research has demonstrated that people tend to overestimate the degree of personal or conscious control that others have over their behavior and tend to underestimate the importance of

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<sup>31</sup> See URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* (1979) (defining human development as a permanent change in the way a person views and handles his or her environment).

<sup>32</sup> See KURT LEWIN, *PRINCIPLES OF TOPOLOGICAL PSYCHOLOGY* 166-92a (1935) (arguing that "changes both of the person and of environment" must be considered to understand "psychological processes").

<sup>33</sup> See Rudolf H. Moos, *Conceptualizations of Human Environments*, 28 AM. PSYCHOLOGIST 652, 652-65 (1973) (arguing that knowledge of environmental conditions is essential to understanding human behavior).

situational influences—a phenomenon referred to in the behavioral science literature as the “fundamental attribution error.”<sup>34</sup> For example, when people are confronted with the unusual behavior of others (e.g., the killing of a parent by a juvenile), they are prone to try to explain the behavior in terms of the juvenile’s psychological disposition (e.g., aggressiveness, impulsivity) rather than the objective situation facing the person (e.g., escalating physical abuse) or the person’s subjective construal of the situation (e.g., the belief that he will be killed if his father flies into a drunken rage). Other research supporting the importance of contextual influences on human behavior include Mischel’s analysis of studies demonstrating the importance of situational influences over personal characteristics on whether a person lies, cheats, or steals;<sup>35</sup> Milgram’s work on obedience to authority and the willingness of otherwise typical citizens to administer powerful electric shocks to another person as punishment for providing incorrect answers;<sup>36</sup> and the work of Darley and his associates demonstrating that ninety percent of seminary students who were in a hurry to give a lecture on the Good Samaritan parable were willing to walk right by a person asking for help.<sup>37</sup> These classic social psychological studies provide additional evidence to challenging the “evil doer” theory of crime that bases culpability primarily on judgments of a past mental state rather than taking contextual influences into account.

In addition to expanding the scope of analysis beyond mental states, ecological models have been helpful in identifying contextual domains that both influence deviant behavior (e.g., family, peers, school, and neighborhood) and can serve as levers of change to prevent criminal conduct. For example,

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<sup>34</sup> RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 120, 122–23 (1980).

<sup>35</sup> See WALTER MISCHEL, PERSONALITY AND ASSESSMENT 23–25 (George Mandler ed., 1968).

<sup>36</sup> Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOCIAL PSYCHOL. 371, 371–78 (1963).

<sup>37</sup> John M. Darley & C. Daniel Batson, “From Jerusalem to Jericho”: A Study of Situational and Dispositional Variables in Helping Behavior, 27 J. PERSONALITY & SOCIAL PSYCHOL. 100, 100–08 (1973).

Multisystemic Therapies have drawn on ecological theory and research and have developed a systematic intervention program focusing on multiple levels of analysis (psychological, interpersonal, community) in various life contexts associated with risk for delinquent behavior (e.g., social skill deficits, family conflict, peer pressure, school, neighborhood and community influences).<sup>38</sup> Although traditional psychological interventions with juvenile offenders based on intrapsychic explanations of delinquency have been largely ineffective, state-of-the-art multisystemic interventions have been able to reduce recidivism rates from around seventy percent to around twenty percent, even for very serious offenders. This suggests that a shift in focus away from retrospective mind reading and retributive models of juvenile justice toward a more forward-looking risk management model focused on recidivism reduction and prevention of criminal behavior holds great promise for juvenile justice reform. Moreover, recent reconceptualizations of due process in the juvenile justice context provide opportunities for developing a forward-looking system aimed not at punishment or just deserts but the implementation of instrumental policy goals of recidivism reduction and crime prevention.

#### IV. ADMINISTRATIVE MODELS OF DUE PROCESS

The shift in the behavioral sciences toward more systemic models of human behavior is consistent with a shift in the law toward administrative models of due process.<sup>39</sup> This shift began primarily to address dispute resolution in the civil law context and gradually migrated to areas like child support enforcement and drug and mental health courts. Procedural and efficiency considerations drove changes in the child support context. It was simply easier to process the large influx of cases and collect larger total sums of delinquent child support payments by using mass mailings threatening to revoke the motor vehicle or professional licenses of delinquent obligors if they failed to pay

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<sup>38</sup> See generally SLOBOGIN & FONDACARO, *supra* note 1.

<sup>39</sup> See generally Fondacaro et al., *supra* note 2.



their arrears than it was to use traditional adversarial trial procedures to pursue individual claims on a case-by-case basis.<sup>40</sup> In addition to efficiency considerations, institution of drug and mental health courts was driven by a change in substantive policy objectives—moving away from retributive punishment toward treatment and recidivism reduction. These new policy goals were facilitated by an increasingly managerial, administrative model that tracks the success and failure of individual defendants and various treatment programs. In the juvenile justice context, the need to handle large numbers of cases efficiently and effectively, coupled with a shift in policy towards evidence-based multisystemic interventions aimed at recidivism reduction and crime prevention, seems to invite a more administrative model of due process as well.

In the adult criminal justice system, there are clear constitutional constraints on moving toward administrative procedures. For adult criminal defendants, specific adversarial procedures are required by the explicit texts of the Fifth and Sixth Amendments. While due process is also fundamental to the juvenile justice system, due process for juveniles is anchored primarily in the Due Process Clause of the Fourteenth Amendment and principles of “fundamental fairness,” not the explicit texts of the Fifth and Sixth Amendments. This opens the door for procedural reform in the juvenile justice system that promotes fair, accurate and efficient decision making and facilitates the implementation of a multisystemic risk management model of juvenile justice aimed at promoting recidivism reduction and crime prevention. One of the major advantages of a fundamental fairness view of due process is that the degree of fairness and accuracy of decision making can be judged based on empirical evidence rather than by whether traditional procedural safeguards have been incorporated into the decision making process. Whether particular procedural safeguards actually enhance or diminish accuracy and fairness in

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<sup>40</sup> See Mark R. Fondacaro & Denise P. Stolle, *Revoking Motor Vehicle and Professional Licenses for Purposes of Child Support Enforcement: Constitutional Challenges and Policy Implications*, 5 CORNELL J.L. & PUB. POL’Y 355, 357–63 (1996).

decision making is “recast into empirical hypotheses rather than framed, as they have been up to now, by reference to adult criminal procedure requirements.”<sup>41</sup>

Administrative law scholars have been the first to suggest that the courts are not an institution particularly well-suited for taking useful advantage of behavioral science expertise.<sup>42</sup> Courts tend to be reactive, backward looking, and to lack the necessary resources to locate and use research findings. Administrative bodies, on the other hand, are better equipped for this task. They tend to be forward looking, aimed at program and policy implementation, and to have the institutional expertise and resources to seek out and use behavioral science research to inform decision making. If a fundamental fairness approach to due process requires fair and accurate decision making performed in an efficient manner, then traditional procedural safeguards are seen as relevant but not necessarily essential. Procedural safeguards are considered to be consistent with a fundamental fairness view if they can be shown empirically to be tied to fairness, accuracy, and efficiency in decision making. This suggests that the attainment of fundamental fairness in juvenile justice might best be accomplished under an administrative model of decision making that puts in place a management system for the ongoing evaluation of both individual cases and the functioning of the system as a whole. Such a performance-based management system could focus on both procedural and substantive criteria—in essence, evaluating the accomplishment of both due process and recidivism reduction. As noted above, many of the questions about what constitutes due process would be recast into empirical questions. For example, does the assistance of counsel actually contribute to perceived fairness, to accuracy of decision making, or to better life outcomes for juveniles? Likewise, is cross-examination actually the great engine of truthseeking, as the Supreme Court has characterized it? Or does it actually contribute to obfuscation and delay, as others have suggested? Are judges necessarily the best decision makers with respect to

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<sup>41</sup> Fondacaro et al., *supra* note 2, at 985.

<sup>42</sup> *Id.* at 967–70.

truth seeking and fairness? What effect does the privilege against self-incrimination actually have on truth seeking? On perceived fairness? On substantive outcomes? Is this privilege perhaps less essential in a forward looking regime using effective, state-of-the-art interventions? These are just a few of the questions that might be addressed by future research and the MRM model of juvenile justice.<sup>43</sup> The next section outlines some of the basic principles of an MRM model, which provide a comprehensive framework for procedural and substantive reform.

#### V. GUIDING PRINCIPLES OF A MULTISYSTEMIC RISK MANAGEMENT MODEL OF JUVENILE JUSTICE

Several guiding principles to establishing an MRM model of juvenile justice can be distilled from an integration of the converging trends in the behavioral sciences and the law towards systemic approaches to decision making. However, it is important to note that these are only guiding principles and not a fixed alternative to the current juvenile justice system. What Professor Slobogin and I have proposed in our book, *Juveniles at Risk: A Plea for Preventive Justice*, is the development of a performance-based management system that promotes fair, accurate, and efficient decision making to facilitate achievement of the policy goals of recidivism reduction and crime prevention. If data shows that the current system can better advance these goals, then it should be kept in place until we find more effective alternatives that can be documented with empirical research. The current system and its various facets serve as the baseline for comparison. Overall, we offer a framework that is inherently a work in progress, subject to ongoing evaluation and evidence-based reform.

The guiding principles of this framework, which are discussed in greater detail in *Juveniles at Risk*, include the following. First, the juvenile justice system should be forward looking and focused on behavior, rather than past mental states, and on recidivism reduction and crime prevention rather than retributive punishment. Second, a juvenile justice system based

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<sup>43</sup> *Id.* at 985.

on an MRM model should be grounded in administrative models of justice aimed at comprehensive, least restrictive risk management rather than culpability assessment. Third, decision making should be based on input and expertise of individuals from diverse disciplinary backgrounds. Legal training is not sufficient to address the range of organizational, clinical, psychological, developmental, educational, and evaluation research issues that must be managed. Fourth, decision making should be evidence-based, with the juvenile justice system serving as a natural laboratory for basic and applied research on procedural and substantive issues relevant to procedural justice, risk management, youth development, recidivism reduction, crime prevention, and public acceptance of alternatives to retributive punishment for juveniles. Finally, the juvenile justice system should be ecologically self-aware and have the organizational capacity to understand and foster mutually informative and beneficial relationships with other youth-socializing institutions such as families, schools, communities, law enforcement, and the mental health, health care, and adult criminal justice systems.

#### VI. OUTLINE OF A MULTISYSTEMIC RISK MANAGEMENT MODEL OF JUVENILE JUSTICE

This brings us to the question of what an MRM model of juvenile justice might look like. The general outline provided below is intended to serve as the basis for comparison with our current system:<sup>44</sup>

- Jurisdiction is focused on overt behavior and determined by a legally-trained decision maker.
- A Multidisciplinary Risk Management Team develops, implements, evaluates and refines an Individual Risk Management Plan.
- Data and feedback from IRMP are used to guide intervention and termination of intervention at the individual level.

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<sup>44</sup> See *id.* at 986–87.

- Case-level data is incorporated into a system-wide Information Management System that is used to guide program and policy development and reform.
- Outreach and program evaluation are built into the juvenile justice system.

The juvenile justice system envisioned above has the potential to be quite different from the retributive- and punishment-oriented regimes currently in place throughout the United States. This Article has attempted to outline why the juvenile justice system should change, and how it could be reformed. First, the current system is rooted in an outdated model of criminal justice—one that focuses on culpability assessment and retributive punishment rooted in notions of just deserts. While the retributive model purports to reflect moral judgment, it really reflects retrospective social judgment based on an overly narrow focus on mental states that humans (including judges and jurors) have great difficulty assessing accurately and which the scientific consensus suggests has little if any direct causal influence on behavior. Given the weight of the scientific evidence, to continue the status quo is likely not only misguided, but unjust. Reform is clearly warranted. However, this does not mean that the system can, will, or should be transformed overnight. The current system can serve as a baseline for reform. Some states may pursue small and incremental changes. Others may opt for large scale systemic reforms. In all cases, the key consideration is whether the reforms are making things better or worse than the status quo.

In order to achieve reforms, those interested in promoting juvenile justice must capitalize on converging trends in the behavioral sciences and the law toward more forward-looking, systemic models of decision making and policy implementation. The juvenile justice system may be an ideal place to initiate such reforms. First of all, the juvenile justice system is afforded greater legal flexibility regarding due process considerations. Secondly, the general public is more willing to let go of the reflexive urge to punish juvenile offenders, and to embrace more rational policy objectives such as recidivism reduction and crime prevention in the juvenile justice context. We have the tools

necessary in both the behavioral sciences and the law to create a truly fair and just juvenile justice system. This Article is an attempt to stimulate debate and endorse evidence-based reforms.