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Social Ecology, Preventive Intervention, and the Administrative Transformation of the Criminal Legal System

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SOCIAL ECOLOGY, PREVENTIVE INTERVENTION, AND THE ADMINISTRATIVE TRANSFORMATION OF THE CRIMINAL LEGAL SYSTEM

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ABSTRACT

This Article outlines an administrative model of criminal justice that provides a conceptual framework and empirical justification for transforming our criminal legal system from a backward-looking, adjudicative model grounded in principles of retribution toward a forward-looking model grounded in consequentialist principles of justice aimed at crime prevention and recidivism reduction. The Article reviews the historical roots and justifications for our current system, along with recent advances in the behavioral, social, and biological sciences that inform why and how the system fuels injustice. The concept of social ecology is introduced as an organizing framework for: (1) understanding why individuals do or do not obey the law, (2) identifying and evaluating what works in preventing crime and reducing recidivism, and (3) informing how the criminal law can be transformed into an integrated system of administrative justice that spans juvenile and adult criminal legal systems. Finally, the Article provides a preliminary outline of the paradoxical promise of plea bargaining as a potential cornerstone of comprehensive systemic transformation.

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INTRODUCTION[1]

The National Academy of Sciences convened a committee of social scientists and legal scholars that concluded the American "desire for retribution" was one of the main drivers behind mass incarceration in the United States.[2] This penchant for so-called "retributive justice" is deeply rooted in American culture, common sense, and folk psychology, and is codified in our criminal law.[3] Few, if any, scientifically trained students of criminal behavior have seriously embraced the evil-doer theory of crime that underlies blame-oriented models of criminal responsibility and retributive punishment at the heart of our criminal legal system.[4] However, interdisciplinary scholars and researchers only recently have begun to integrate empirical evidence across social, psychological, and biological levels of analysis in ways that pose a serious challenge to criminal law orthodoxy.[5]

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1. A preliminary draft of this article was originally presented at the Vanderbilt Roundtable on Criminal Justice as an Administrative System sponsored by Vanderbilt University Law School. Other invited speakers and commentators included Professors Lisa Miller, Calvin Morrill, Ben Levin, Issa Kohler-Hausmann, Irene Joe, Christopher Slobogin, John Pfaff, Sara Mayeux, Malcom Feeley, and Senior Judge Jed Rakoff of the United States District Court for the Southern District of New York, and Judge Stephanos Bibas of the United States Court of Appeals for the Third Circuit. I am grateful for all their valuable insights and comments on my presentation. I am especially indebted to Judge Stephanos Bibas who was assigned as the commentator on my presentation. His hard-nosed, incisive feedback is largely responsible for my preliminary efforts in the present article to extend my analytic framework to the plea bargaining context. A subsequent draft incorporating that feedback was completed while I was on sabbatical during the spring of 2022 with appointments at both Vanderbilt and Yale Law Schools. Rudolf Moos, Benjamin Wall, and Christopher Slobogin provided valuable feedback incorporated into the final draft of this article.

2. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 24 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

3. *See generally* Mark R. Fondacaro & Megan J. O'Toole, *American Punitiveness and Mass Incarceration: Psychological Perspectives on Retributive and Consequentialist Responses to Crime*, 18 NEW CRIM. L. REV. 477, 481–83 (2015).

4. *See* Morissette v. United States, 342 U.S. 246, 250–51 (1952); ERIN I. KELLY, THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY 3 (2018) (challenging "the prevailing 'retributivist' theory of criminal justice, its support in moral philosophy, and its populist counterpart, according to which punishment is intended to impose on morally blameworthy wrongdoers the suffering they deserve . . . lead[ing] us to mark the convicted as bad people, [and] to applaud long prison sentences").

5. Fondacaro & O'Toole, s*upra* note 3, at 479, 488.

This Article reviews evidence that questions the evil-doer theory of crime as well as the moral legitimacy of our backward-looking, adversarial, culpability-based system of criminal law.[6] Administrative models of justice, with their greater openness to expertise and ability to simultaneously advance multiple forward-looking policy objectives, provide some of the necessary ingredients for systemic reform to bring the proportion of our citizens who are incarcerated down to levels in line with the rest of the civilized world.[7] The juvenile system will serve as the foundation for reform, as it has historically embraced a wider range and more flexible set of substantive rules, procedures, and policy goals than the adult system.[8] A social ecological framework is presented to help bridge and transform the juvenile and adult systems into a comprehensive system of administrative criminal justice.[9] Finally, the Article will conclude by exploring the paradoxical promise of plea bargaining as a fertile legal context for fundamental transformation of the criminal legal system.[10]

I. AMERICAN CRIMINAL LEGAL SYSTEMS

A. Adult System

The criminal law that serves as the foundation of the American criminal legal system is rooted in Western principles of autonomous individualism, which in turn are grounded in "religion, philosophy, and common sense."[11] Until recently, science has been absent from

6. *See generally* KELLY, *supra* note 4.

7. Mark R. Fondacaro, *The Injustice of Retribution: Toward a Multisystemic Risk Management Model of Juvenile Justice*, 20 J.L. & POL'Y 145, 161 (2011).

8. *See generally* CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, JUVENILES AT RISK: A PLEA FOR PREVENTIVE JUSTICE (2011) (discussing procedural and substantive differences between various conceptions of juvenile justice and the adult criminal justice system).

9. *See generally* Rudolf H. Moos, *Conceptualizations of Human Environments*, 28 AM. PSYCH. 652 (1973) (arguing that knowledge of environmental conditions is essential to understanding human behavior).

10. *See infra* Section V.B, Part VI.

11. Fondacaro & O'Toole, *supra* note 3, at 481, 493.

this foundation.[12] The legal system traditionally has been skeptical and relatively ignorant of science.[13] In the late twentieth century, economics, with its guiding principles of rational self-interest and wealth maximization that aligned with Western liberal and free market principles, began to penetrate and capture legal analysis.[14] This was an initial breakthrough for consequentialists, as the legal community openly embraced the realist notion that law and policy are inextricably linked, albeit with a narrow focus on efficiency as the legal policy goal.[15]

One of the major reasons why economics overcame traditional skepticism and insular legal orthodoxy is the fact that its rational-actor model of human behavior was not a threat to the evil-doer theory of crime embraced by American criminal law.[16] Under common law and criminal law statutes modeled after the Model Penal Code, criminal responsibility generally requires a bad act "actuated by a guilty mind."[17] Once the bad act is established, culpability turns on judgments by either a jury or a judge of what the defendant was thinking at the time of the offense.[18] In legal terms, this might be characterized as a moral judgment model of culpability, grounded in principles of retribution and "just deserts."[19] From a social science

12. *See generally* NAT'L RSCH. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009). Here, I make a distinction between the science of human behavior, including criminal behavior, grounded in the scientific method, and the field of forensic science, which encompasses a wide range of practices that yield evidence often used by prosecutors and admitted at trial that often lack rigorous and systematic empirical testing and validation.

13. *Id.* at 12 ("The judicial system is encumbered by, among other things, judges and lawyers who generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner . . . ."); *see* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 600 (1993) (Rehnquist, C.J., concurring in part and dissenting in part) (revealing his own unfamiliarity with a basic foundational principle of the scientific method) ("I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability,' and I suspect some of them will be, too.").

14. *See generally* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981); Jeffrey L. Harrison, *Law and Socioeconomics*, 49 J. LEGAL EDUC. 224 (1999) (critically analyzing the law and socioeconomics perspective).

15. *See* Mark R. Fondacaro, *Toward an Ecological Jurisprudence Rooted in Concepts of Justice and Empirical Research*, 69 UMKC L. REV. 179, 181 (2000).

16. Fondacaro & O'Toole, *supra* note 3, at 482.

17. *Id.*

18. *Id.* at 490–91.

19. Fondacaro, *supra* note 7, at 164.

standpoint, this process is "retrospective mind reading," or the exercise of a decontextualized attempt to identify "what a person was (or was not) thinking."[20]

This evil-doer model of criminal responsibility, with its focus on the individual's conscious, rational choice of whether or not to obey the law, dovetails with traditional economic theory and liberal religious and philosophical traditions, and aligns with folk psychology and common sense about why people do what they do.[21] However, this model is not aligned with modern empirical science and recent advances in understanding the social, psychological, and biological factors that drive human behavior.[22] These interrelated biopsychosocial factors operate mostly outside the awareness of the individual being judged and of those doing the judging.[23] This uncomfortable reality is out of line with the folk psychology and common sense that bind and legitimize our criminal law and justice systems.[24] This decontextualized perspective of an autonomous individual at the heart of the evil-doer theory of crime often results in inaccurate, unfair, and, arguably, immoral outcomes in our criminal legal system.[25] This is the bad news. The good news is that modern theory and research, along with more recent developments in juvenile justice, provide some guidance for a way forward.

B. Juvenile System

In contrast to the adult criminal legal system, the foundation for the American juvenile justice system was poured in more forward-looking, progressive soil.[26] Rather than focusing on the

20. *Id.* at 149.

21. *See* Fondacaro & O'Toole, *supra* note 3, at 481, 493.

22. *Id.* at 492.

23. *See* MICHAEL S. GAZZANIGA, WHO'S IN CHARGE?: FREE WILL AND THE SCIENCE OF THE BRAIN 3–4 (2011).

24. Natalie S. Gordon & Mark R. Fondacaro, *Rethinking the Voluntary Act Requirement: Implications from Neuroscience and Behavioral Science Research*, 36 BEHAV. SCIS. & L. 426, 430 (2018).

25. *See* Robert A. Beattey & Mark R. Fondacaro, *The Misjudgment of Criminal Responsibility*, 36 BEHAV. SCIS. & L. 457, 460–61 (2018).

26. *See* Mark R. Fondacaro, Christopher Slobogin & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 959–60 (2006).

pursuit of retributive justice and delivering just deserts, the primary goal was to rehabilitate the youngster who was not yet fully developed as an autonomous person and was considered redeemable and receptive to positive caring influences.[27] The focus was not on the specific bad acts and guilty mind of juveniles, but on the whole of their developing personality.[28] Benevolent judges would not judge; they would serve as informal therapists.[29] Professional therapists would help socialize errant youth and improve their developing personality so that they would be more likely to obey the law as fully formed, autonomous adults.[30]

This rehabilitative philosophy of juvenile justice ran its course by the late twentieth century, due in part to the inefficacy of intrapsychic therapeutic interventions and a due process revolution in the law.[31] Social scientists threw up their hands and concluded that "nothing works"[32] to rehabilitate juvenile offenders, and the legal community concluded that juveniles were being denied due process and fundamental fairness guaranteed by the Constitution.[33] The Supreme Court attempted to address this "worst of both worlds" dilemma by requiring more adult-like due process, albeit anchored primarily in the Fourteenth Amendment rather than the explicit texts of the Fifth and Sixth Amendments.[34] Thus, although recognition of adult-like procedural due process protections helped morph the rehabilitative juvenile justice system into an adult-like, punitive criminal justice system, anchoring due process in the fundamental fairness doctrine of

27. *Id.* at 955–56.

28. *Id.* at 959–60.

29. *Id.* at 959.

30. *See* Mark R. Fondacaro, *Rethinking the Scientific and Legal Implications of Developmental Differences Research in Juvenile Justice*, 17 NEW CRIM. L. REV. 407, 428, 432 (2014). In this Article, I suggest that the juvenile system's leniency toward youth is based on the presumption that "juveniles should be treated differently than adults because they are developmentally different than adults, they are still 'works in progress,' on their way to full adult development and human autonomy."

31. Fondacaro et al., *supra* note 26, at 956–60.

32. *Id.* at 960; *see generally* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

33. Kent v. United States, 383 U.S. 541, 561–62 (1966); *In re* Gault, 387 U.S. 1, 19–20 (1967); *In re* Winship, 397 U.S. 358, 368 (1970).

34. Fondacaro et al., *supra* note 26, at 961–67.

the Fourteenth Amendment left juvenile justice with potential procedural and substantive flexibility for the future.[35] Based on recent advances in the behavioral and social sciences, that future should be now.[36]

The social science community no longer subscribes to the "nothing works" mantra.[37] Recent advances in the treatment and prevention of delinquent behavior in youth can reduce recidivism rates from over seventy percent to nearly twenty percent.[38] Likewise, social science research on procedural justice and due process has challenged the gold standard status of adult criminal procedures.[39] This has opened the door for empirical investigation to identify fundamentally fair and accurate procedures best suited to advance substantive policy goals of crime prevention and recidivism reduction.[40] Substantive breakthroughs supportive of these forward-looking consequentialist responses to crime have been made possible by systematic empirical research on human behavior that challenges the folk psychology and evil-doer theory of crime at the core of criminal law doctrine.[41] Moreover, empirical challenges to both the rational-actor model and assumptions about self-interest as the dominant human motive[42] have opened the door to investigation of administrative decision-making procedures that promote accuracy and fairness and maximize the attainment of substantive policy goals.

35. *Id.* at 963–64.

36. *See generally* Mark R. Fondacaro, Stephen Koppel, Megan J. O'Toole & Joanne Crain, *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697 (2015) (reviewing recent behavioral science research indicating that state-of-the-art interventions can substantially reduce juvenile recidivism rates when properly implemented).

37. *Id.* at 719–20.

38. Charles M. Borduin, Barton J. Mann, Lynn T. Cone, Scott W. Henggeler, Bethany R. Fucci, David M. Blaske & Robert A. Williams, *Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence*, 63 J. CONSULTING & CLINICAL PSYCH. 569, 573 (1995). *See generally* Yasmin Ali, Amanda C. Benjamin & Mark R. Fondacaro, *Treatment of Juvenile Offenders: Toward Multisystemic Risk and Resource Management*, *in* HANDBOOK OF ISSUES IN CRIMINAL JUSTICE REFORM IN THE UNITED STATES (Elizabeth Jeglic & Cynthia Calkins eds., 2022).

39. Fondacaro et al., *supra* note 26, at 974–84.

40. *Id.*

41. *See* Fondacaro & O'Toole, *supra* note 3.

42. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2496 (2004).

II. EMPIRICAL ANALYSIS OF HUMAN BEHAVIOR

At its inception, the juvenile justice system did not share the policy goals of the adversarial criminal justice system.[43] However, it did share the same folk psychology models of human behavior and the assumptions of autonomous individualism animating criminal law.[44] Children and adolescents were not presumed to be fully autonomous rational actors like adults.[45] Rather, they were works in progress, on their way to full personhood and human agency with the eventual rational capacity to conform their behavior to the requirements of the law, with help from the juvenile court and therapists if necessary.[46]

A. Folk Psychology and Legal Assumptions

The folk psychology model of human behavior that underlies criminal law assumes that most human behavior, including criminal behavior, is the result of the personal exercise of conscious will.[47] Most individuals believe that they are the conscious author of their conduct.[48] This belief is accentuated when people are asked to judge the behavior of others. Although most people recognize situational influences on their own behavior (influences that are almost always considered irrelevant under criminal law), they often attribute the behavior of others in similar circumstances to internal personal attributes and willful conduct.[49] When conduct is illegal, this folk psychology model of human behavior maps cleanly onto the *mens rea* requirement and the causation element of the *actus reus* requirement,

43. SLOBOGIN & FONDACARO, *supra* note 8, at 5–13.
44. *Id.* at 9–10.
45. *Id.* at 7–8.
46. *Id.* at 7–9.
47. Fondacaro, *supra* note 7, at 147–48.
48. *See generally* BERTRAM F. MALLE, HOW THE MIND EXPLAINS BEHAVIOR: FOLK EXPLANATIONS, MEANING, AND SOCIAL INTERACTION (2004) (analyzing folk psychology explanations of human behavior).
49. *Id.* at 173–91 (unpacking that "the way people perceive and reason about themselves is different from the way they perceive and reason about others" and finding evidence that "observers show such a bias of ascribing intentionality when the behavior is harmful").

the latter of which is almost universally presumed and rarely proven at trial.[50]

Over the past several decades, empirical scientists have investigated and challenged the validity of folk psychology assumptions in various legal contexts, mostly at the periphery of the criminal legal system.[51] For example, prosecutors long considered eyewitnesses to be highly reliable sources of evidence in criminal trials.[52] However, rigorous empirical evidence has seriously questioned this presumption.[53] Additionally, although common sense and folk psychology strongly suggest that an innocent person would rarely, if ever, confess to a crime they did not commit, empirical evidence indicates otherwise.[54] The belief that the best way to judge whether suspects are telling the truth is to "look them in the eyes" has been challenged empirically as well.[55]

More recently, behavioral scientists have begun to challenge the folk psychology presumption of autonomous individualism at the core of criminal law.[56] Recent investigations of the reliability of *mens rea* judgments indicate a tendency to read purpose and intentionality into behavior, even when legal experts judge the evidence on the record to show only negligent or reckless conduct.[57] Basic cognitive and

50. Gordon & Fondacaro, *supra* note 24, at 426–27.

51. *See, e.g.*, John C. Brigham, *The Accuracy of Eyewitness Evidence: How Do Attorneys See It?*, 55 FLA. BAR J. 714, 714 (1981) (explaining that although eyewitness testimony has long been regarded as reliable—a folk assumption—"in recent years . . . scientific researchers have suggested that eyewitness evidence is likely often to be incorrect"); *see also* 2 DAVID L. FAIGMAN, EDWARD K. CHENG, JENNIFER L MNOOKIN, ERIN E. MURPHY, JOSEPH SANDERS & CHRISTOPHER SLOBOGIN, MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 8:14 (2022–2023 ed.).

52. *See* Brigham, *supra* note 51, at 714, 718.

53. *See generally* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 9 (2011) (explaining how eyewitnesses mistakenly identified seventy-six percent of wrongfully convicted people in 250 cases); Gary L. Wells, *Psychological Science on Eyewitness Identification and Its Impact on Police Practices and Policies*, 75 AM. PSYCH. 1316 (2020) (describing recent behavioral science research aimed at improving eyewitness identification).

54. *See generally* Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 112 (2014).

55. *See generally* Maria Hartwig, Pär Anders Granhag, Leif A. Strömwall & Ola Kronkvist, *Strategic Use of Evidence During Police Interviews: When Training to Detect Deception Works*, 30 L. & HUM. BEHAV. 603 (2006) (analyzing inaccuracies in deception detection and research-based strategies for improvement).

56. *See* Fondacaro & O'Toole, *supra* note 3, at 493, 501.

57. Beattey & Fondacaro, *supra* note 25, at 457.

neuroscience research has begun to sever the perceived causal connection between cognition and human behavior universally presumed in the law to actuate the *actus reus* elements of a crime.[58]

B. Challenges to a Ubiquitous Focus on Retribution and Punishment

Criminal law has been resilient at warding off attempts to inform legal doctrine with social and behavioral science. For example, Judge David Bazelon's advocacy for a "rotten social background" defense failed to get any sustained traction.[59] Psychological research aimed at demonstrating a defendant's diminished capacity has also been shot down.[60] More recently, an interdisciplinary team of scholars has tried to ward off the threat posed by advances in behavioral and neuroscience research challenging the free will premise that underlies retributive justifications for punishment.[61] So far, these social, psychological, and neurobiological challenges to legal doctrine have been successfully blocked. However, advances and integration of research in these fields pose a looming existential threat to traditional legal doctrine.[62] These efforts will continue to severely challenge the moral intuitions at the heart of the culpability-based system of criminal law—a system that currently legitimizes retribution and fuels harsh punishment and mass incarceration.[63]

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58. *See generally* Roy F. Baumeister, E. J. Masicampo & Kathleen D. Vohs, *Do Conscious Thoughts Cause Behavior?*, 62 ANN. REV. PSYCH. 331 (2011) (arguing that conscious influences on behavior are "indirect and delayed" and influenced by processes outside the individual's awareness).

59. *See* Elisabeth Winston Lambert, *A Way Out of the "Rotten Social Background" Stalemate: "Scarcity" and Stephen Morse's Proposed Generic Partial Excuse*, 21 U. PA. J.L. & SOC. CHANGE 297, 299 (2018).

60. *See* Clark v. Arizona, 548 U.S. 735, 779 (2006) (holding that it is not a violation of due process for a state to prohibit a defense of diminished capacity).

61. *See* Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J.L. SCI. & TECH. 1, 2 (2008); Francis X. Shen, Morris B. Hoffman, Owen D. Jones, Joshua D. Greene & René Marois, *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1319–20 (2011); Nita A. Farahany, *A Neurological Foundation for Freedom*, 2012 STAN. TECH. L. REV. 4, 2012, at 2.

62. Fondacaro & O'Toole, *supra* note 3, at 478.

63. *Id.*; Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B. 1775, 1783–84 (2004).

III. SOCIAL ECOLOGY

According to the individualistic model of human nature, understanding people and the reasons for their actions requires understanding their internal characteristics and traits and uncovering insights about their personal character.[64] Behavior reflects these personal characteristics and is driven and enacted by the exercise of human agency and conscious will.[65] This model of human nature provides us with a very limited ability to understand why people do what they do, including commit crimes, or how best to get them to change their behavior in a constructive way.[66]

A. Broadening Our Understanding of Human Behavior

During the last century, social scientists such as Kurt Lewin recognized that human behavior is a function of the interaction between the person and the environment.[67] Therefore, trying to understand the nature of human behavior by focusing only on the personal characteristics of the individual is like "trying to understand and analyze the nature of water by focusing exclusively on hydrogen atoms."[68] By the last quarter of the twentieth century, psychologists Rudolf Moos and Urie Bronfenbrenner had proposed social ecological theories of human behavior that place the individual at the center of multiple interrelated life contexts that range from the micro (e.g., family, peer, school, work) to the macro (e.g., legal system, national

64. *See* MALLE, *supra* note 48, at 173 (unpacking the "folk interpretation of behavior" by which humans understand each other's conduct as rooted in "mental states, personality, and the social context"); *see also* Arnold H. Buss, *Personality As Traits*, 44 AM. PSYCH. 1378, 1378–79 (1989) (using the "trait perspective" of psychology to unpack human behavior and asserting that "the trait perspective" differs from behaviorist, dynamic, existential, and biographical approaches to understanding personality and behavior).

65. Fondacaro, *supra* note 7, at 148.

66. *See id.*; Fondacaro & O'Toole, *supra* note 3, at 491.

67. *See* KURT LEWIN, PRINCIPLES OF TOPOLOGICAL PSYCHOLOGY 166–92 (Fritz Heider & Grace M. Heider trans., 1936) (arguing that "changes both of person and of environment" must be considered to understand "psychological processes").

68. Fondacaro, *supra* note 15, at 192.

economy).[69] As kindred researchers developed assessment instruments to measure the influence of these life contexts on individual behavior, behavioral scientists were able to sharpen their understanding of the actual reasons for an individual's behavior.[70] More importantly, the integrated assessment of multiple dynamic contextual influences on the individual helped identify potential levers of change.[71] These advances have paved the way for multisystemic models of therapeutic and preventive intervention that can prevent criminal behavior and significantly reduce recidivism among juvenile offenders.[72]

B. Changing Human Behavior: Preventive Intervention

As noted, the juvenile justice system was born in the optimistic belief that shifting from a punitive to a caring orientation would help to socialize delinquent youngsters into law-abiding adults.[73] Collaboration and guidance from mental health professions was sought and provided.[74] Psychodynamic and insight-oriented theories and therapies dominated those fields at the time.[75] These theories and therapies were developed on anxious, internalizing, highly verbal, and relatively affluent patients.[76] Youth in the juvenile justice system typically did not have those characteristics.[77] Instead, they tended to be drawn from lower socioeconomic backgrounds, with low levels of

69. Moos, *supra* note 9, at 652–53, 657–58; URIE BRONFENBRENNER, THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN 3 (1979).

70. Mark R. Fondacaro & Rudolf H. Moos, *Life Stressors and Coping: A Longitudinal Analysis Among Depressed and Nondepressed Adults*, 17 J. CMTY. PSYCH. 330, 330–31 (1989) (using measures developed to assess stressors in various life domains to examine the relationships among stress, coping behaviors, and depression).

71. *See generally* SCOTT W. HENGGELER, SONJA K. SCHOENWALD, CHARLES M. BORDUIN, MELISA D. ROWLAND & PHILLIPPE B. CUNNINGHAM, MULTISYSTEMIC THERAPY FOR ANTISOCIAL BEHAVIOR IN CHILDREN AND ADOLESCENTS (2d ed. 2009) (describing an effective multisystemic intervention grounded in social ecological theory and research).

72. *Id.* at 8.

73. SLOBOGIN & FONDACARO, *supra* note 8, at 9.

74. Mark R. Fondacaro & Lauren G. Fasig, *Judging Juvenile Responsibility: A Social Ecological Perspective*, *in* HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 359–60 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006).

75. *See id.*

76. *Id.*

77. *Id.* at 360.

educational achievement and verbal fluency, and they tended to externalize rather than internalize their emotional problems.[78] Moreover, researchers began to realize that even with high-functioning adults, gaining insight into one's problems often did not lead to resolution of the problems nor to constructive and lasting behavioral change.[79] Thus, after decades of effort to fulfill the rehabilitative promise of the juvenile justice system, the social science and legal communities embraced the "nothing works" mantra.[80]

In the latter half of the twentieth century, experimental psychologists began to perceive human problems as learned responses that could be unlearned or replaced by new learning.[81] Moreover, interventions began to focus on the environmental circumstances that facilitated learning of adaptive and maladaptive behaviors.[82] Early on, psychologists tried to promote positive behavior change among at-risk youngsters by focusing on a single aspect of the environment, for example, rewards and punishments by a therapist, parent, or teacher.[83] The initial results were positive but modest and proved to be short-lived after intervention was terminated, and the children were subjected to the same environmental circumstances that contributed to their problems in the first place.[84] Although researchers knew environmental influences were central to the socialization and learning of prosocial and antisocial attitudes and behaviors, those influences were largely neglected and unincorporated into the folk psychology of the individual.[85]

A breakthrough came when social ecologists laid out a framework for conceptualizing the multisystemic influences on human behavior

78. *Id.* at 360, 363.

79. *Id.* at 359–60.

80. Martinson, *supra* note 32, at 48; Kent v. United States, 383 U.S. 541, 556 (1966).

81. *See* Fondacaro et al., *supra* note 36, at 715. *See generally* ROBERT M. BROWNING & DONALD O. STOVER, BEHAVIOR MODIFICATION IN CHILD TREATMENT: AN EXPERIMENTAL AND CLINICAL APPROACH (1971) (describing the research methods, designs and intervention techniques of behavioral modification with children).

82. BROWNING & STOVER, *supra* note 81, at 5–6.

83. *Id.* at 12.

84. *See* F. Charles Mace & John A. Nevin, *Maintenance, Generalization, and Treatment Relapse: A Behavioral Momentum Analysis*, 40 EDUC. & TREATMENT CHILD. 27, 27–30 (2017).

85. *See* Fondacaro & O'Toole, *supra* note 3, at 482.

and developed instruments to assess various dimensions of the social environment.[86] In my collaborative research with Rudolf Moos, we showed that depressed patients' poor coping responses were due in part to an increase in chronic life strains, which wore down their personal resources and ability to engage in effective coping.[87] This line of research was extended to children and adolescents at risk for antisocial behavior and led to a better understanding of why youths get into trouble with the law.[88]

Researchers then categorized environmental influences into potentially changeable risk factors (e.g., family conflict, association with deviant peers), salient resources (e.g., family support, association with prosocial peers), and static or immutable risk factors (e.g., gender, race).[89] This paved the way for psychologists to develop intervention programs grounded in social ecological theory and research.[90] Risk and resource factors tied to criminal behavior serve as levers for change aimed at preventing criminal behavior.[91]

In the fields of psychology and public health, preventive interventions are generally categorized by their focus on primary, secondary, or tertiary prevention.[92] Primary prevention requires intervening before a problem occurs; secondary prevention involves intervening as quickly as possible to reduce the length and severity of a problem.[93] Tertiary prevention is "synonymous with treatment" and involves reducing the amount of dysfunction resulting from a problem that has already occurred.[94] The juvenile justice system could be characterized as a secondary preventive intervention aimed at reducing

86. Moos, *supra* note 9, at 657–58; Fondacaro & Moos, *supra* note 70, at 332.
87. Fondacaro & Moos, *supra* note 70, at 339–40.
88. HENGGELER ET AL., *supra* note 71, at 7.
89. *See generally* Gina M. Vincent, John Chapman & Nathan E. Cook, *Risk-Needs Assessment in Juvenile Justice: Predictive Validity of the SAVRY, Racial Differences, and the Contribution of Needs Factors*, 38 CRIM. JUST. & BEHAV. 42 (2011) (presenting the findings of research assessing dynamic and static risk factors and evaluating their ability to predict criminal behavior).
90. HENGGELER ET AL., *supra* note 71, at 2.
91. Vincent et al., *supra* note 89, at 45.
92. Alexandra Ponce de Leon-LeBec & Mark R. Fondacaro, *Prevention and Criminal Justice Reform*, *in* HANDBOOK OF ISSUES IN CRIMINAL JUSTICE REFORM IN THE UNITED STATES 587–88 (Elizabeth Jeglic & Cynthia Calkins eds., 2022).
93. *Id.* at 587.
94. *Id.* at 587–88.

the likelihood that youngsters will become adult offenders. By contrast, primary prevention interventions typically focus on changing individual and environmental risk and resource factors in life contexts outside the formal justice systems.[95] The advantage of primary prevention programs aimed at delinquency prevention is that they are not bound by discredited assumptions about human behavior,[96] antiquated legal doctrine,[97] or constitutional constraints that may hamper constructive reform of the criminal legal system.[98] Although they operate in the shadow of these constraints, secondary preventive interventions with youth involved in the juvenile justice system can provide a model and catalyst for reforms adapted to the adult criminal legal system.[99] Systematic research along these lines has been underway over the past few decades.[100]

A comprehensive review of the literature on evidence-based treatment[101] and preventive interventions with at-risk youth and juvenile offenders is beyond the scope of this paper.[102] However, as an example, I will briefly describe multisystemic therapies informed by social ecological models of human behavior. These therapies focus on dynamic risk factors across multiple levels of analysis (psychological, interpersonal, community) and across a range of life contexts associated with risk for delinquent behavior ("family, peers, school, neighborhood").[103] Properly implemented, community-based multisystemic interventions can reduce juvenile recidivism rates from

95. *See id.* at 591–94 (describing school- and community-based prevention programs).

96. Fondacaro & O'Toole, *supra* note 3, at 502–03.

97. *See e.g.*, Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1316 (1975) (critiquing the Supreme Court for rigidly adhering to the idea that traditional adversary procedures are the gold standard of due process); *see also* Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCH. PUB. POL'Y & L. 211, 246, 249 (2004) (empirically demonstrating that individuals prefer hybrid over constitutionally based adversarial procedures).

98. *See generally* Fondacaro et al., *supra* note 26, at 958 (arguing that anchoring procedural justice in the doctrine of fundamental fairness, rather than the explicit texts of the Sixth Amendment, increases constructive options for reform of the juvenile justice system).

99. *See infra* Section V.B. (discussing how the plea bargaining process, rather than formal criminal trials, may provide the most promising context for evidence-based, systemic transformations aimed at crime prevention and recidivism reduction rather than retribution and "just deserts").

100. *See* Ali et al., *supra* note 38, at 534.

101. *See generally id.*

102. *See* Ponce de Leon-LeBec & Fondacaro, *supra* note 92.

103. *See* SLOBOGIN & FONDACARO, *supra* note 8, at 136–37.

over seventy percent to almost twenty percent at a fraction of the cost of institutional confinement and the time needed for a course of traditional psychotherapy.[104] The positive results of these interventions—interventions based on a more contextualized understanding of human behavior—hold great promise for a forward-looking risk and resource management model of juvenile justice directed at recidivism reduction and crime prevention rather than blame and retributive punishment.[105] Moreover, recent reconceptualization of due process and procedural justice in the context of the juvenile justice system provides a guiding framework for the implementation and integration of instrumental policy goals of recidivism reduction and crime prevention across the entire criminal legal system.[106]

C. Procedural Justice

In the context of the adversarial adult criminal legal system, constitutionally based procedural safeguards are generally considered the gold standard of due process protection.[107] By contrast, the juvenile system initially emphasized informal procedures that were better aligned with its rehabilitative philosophy and policy goals.[108] Juvenile courts generally operated outside the traditional parameters of legal accountability and appellate review until the due process revolution of the 1960s and ’70s.[109] When the Supreme Court eventually took notice of the shortcomings of the juvenile justice system, spurred on by the “nothing works” ethos in the therapeutic and social science communities, Justice Abe Fortas declared that juvenile offenders were getting “the worst of both worlds.”[110] Justice Fortas authored a majority opinion that led to a string of Supreme Court cases that

104. Borduin et al., *supra* note 38.
105. *See* Fondacaro, *supra* note 7, at 160, 164.
106. *See generally* Fondacaro et al., *supra* note 36 (proposing an integrative framework for reform across the juvenile and adult criminal legal systems).
107. *See* Lafler v. Cooper, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting) (describing a “full-dress criminal trial” as “the gold standard of American justice”).
108. Fondacaro et al., *supra* note 26, at 955–56.
109. *Id.* at 961–71.
110. Kent v. United States, 383 U.S. 541, 556 (1966).

eventually granted juveniles almost all of the procedural safeguards afforded adults, with the exception of a jury trial.[111] Although those cases looked to the adult model as the gold standard, the Court eventually anchored its juvenile due process jurisprudence in the more flexible doctrine of fundamental fairness guaranteed by the Fourteenth Amendment rather than the explicit text of the Constitution.[112] This coincided with a broader due process revolution begun by *Goldberg v. Kelly* and cabined by *Mathews v. Eldridge*.[113]

The *Mathews* decision suggested that due process outside the adult criminal law context involved a balance of fairness, accuracy, and efficiency in decision-making rather than adherence to formal procedural requirements of the presumptive gold standard of adult criminal procedure.[114] As recognized by Justice Felix Frankfurter in a concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, due process is not a fixed set of rigid rules but an evolving and flexible construct that is highly dependent on context for its meaning,[115] just as the assessment and judgment of human behavior is

111. Fondacaro et al., *supra* note 26, at 956, 967.

112. *Id.* at 963–64, 985.

113. Goldberg v. Kelly, 397 U.S. 254, 270–71 (1970) (finding that although some governmental benefits may be ceased without a pretermination hearing, in the context of welfare termination, due process requires a pretermination hearing to prevent injustice to a potentially qualified welfare recipient); Mathews v. Eldridge, 424 U.S. 319, 321 (1976). The *Goldberg* holding, despite its narrow scope, expanded the concept of due process rights. *Goldberg*, 397 U.S. at 270–71.

114. *Mathews*, 424 U.S. at 335. The Supreme Court indicated that due process analysis requires consideration of the following three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

115. 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring). In elaborating on the context dependent nature of due process, Justice Frankfurter noted:

> "[D]ue process" . . . is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and

highly dependent on social context for its meaning. Overall, the legal embrace of a fundamental fairness conception of due process, encompassing both "truth seeking" and perceptions of fairness, led pioneering social psychologists such as John Thibaut and Laurens Walker to investigate empirically what procedural features and safeguards actually improve accuracy and fairness in decision-making.[116]

Over time, this line of research produced findings with important substantive and procedural implications for criminal law and eventual reform of the criminal legal system.[117] Substantively, procedural justice research demonstrated that people, including those charged with felonies, "care as much or more about how they are treated as they do about the outcome of the situation."[118] This finding challenged rational-actor models of human behavior and the notion that the dominant human motive is the instrumental pursuit of self-interest.[119] Moreover, even when people do not get their way, they are more likely to accept and respond positively to a negative outcome when they are treated fairly.[120] More recently, investigators found that a hybrid combination of investigative and adversarial procedures, rather than strict adherence to gold standard procedures, better optimized the

> government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Id.

116. *See* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 5 (1975) (describing their seminal effort to apply social psychological research methods to the study of subjective and objective aspects of procedural justice and comparing the relative strengths and weakness of adversary versus inquisitorial procedures).

117. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 2–3 (Melvin J. Lerner ed., 1988) (providing a comprehensive review of empirical research on procedural justice).

118. *See* Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 L. & SOC'Y REV. 483, 503 (1988); *see also* Mark R. Fondacaro, Michael E. Dunkle & Maithilee K. Pathak, *Procedural Justice in Resolving Family Disputes: A Psychological Analysis of Individual and Family Functioning in Late Adolescence*, 27 J. YOUTH & ADOLESCENCE 101, 102 (1998).

119. Fondacaro, *supra* note 15, at 180–81.

120. *See, e.g.*, Raymond Paternoster, Ronet Bachman, Robert Brame & Lawrence W. Sherman, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 L. & SOC'Y REV. 163, 192 (1997). Spousal assault suspects, who perceived that they were treated fairly by police during arrest, were less likely to be rearrested for assault than those who perceived that they were treated unfairly. *Id.*

balance of accuracy and fairness in decision-making.[121] Overall, these findings demonstrate that a flexible management system of administrative decision-making—more similar to the Environmental Protection Agency's administrative management system than to the adversary judicial system—could be structured to implement and evaluate the attainment of substantive policy goals, such as crime prevention and recidivism reduction, and deliver procedural due process that matches and even exceeds the traditional gold standard.

IV. ADMINISTRATIVE JUSTICE

In the midst of the due process revolution, Judge Henry Friendly famously wrote:

> [T]he Supreme Court has yielded too readily to the notions that the adversary system is the only appropriate model and that there is only one acceptable solution to any problem, and consequently has been too prone to indulge in constitutional codification. There is need for experimentation, particularly for the use of the investigative model, for empirical studies, and for avoiding absolutes.[122]

Judge Friendly's experimental spirit coincided with the legal shift toward administrative models of due process that first addressed "dispute resolution in the civil law context and gradually migrated to areas like child support enforcement and drug and mental health courts."[123] These changes were driven in part by procedural and efficiency considerations and a more systemic view of due process. For example, in the child support context, the traditional adversary

121. *See generally* Shestowsky, *supra* note 97.
122. Friendly, *supra* note 97.
123. Fondacaro, *supra* note 7, at 159; *see* Mark R. Fondacaro & Dennis 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, 369 (1996); *Overview of Drug Courts*, NAT'L INST. JUST. (July 22, 2020), https://nij.ojp.gov/topics/articles/overview-drug-courts [https://perma.cc/YCM2-BXHH].

model identified the most "culpable" noncustodial parents who were delinquent on large amounts of child support and pursued them on a case-by-case basis.[124] On a state-wide level, however, the aggregate sum of child support awarded to custodial parents fortunate enough to have adequate representation and prevail at a trial was quite modest.[125] The shift toward a more systemic, managerial model of due process opened the door to a wide range of enforcement procedures that facilitated the processing of the large influx and backlog of child support cases.[126] Much larger total amounts of delinquent child support payments were collected by, for example, mass mailings threatening to revoke professional and motor vehicle licenses of delinquent obligors who failed to pay their arrears.[127]

There has been a similar development in drug and mental health courts, driven by a shift in policy toward more forward-looking objectives of treatment and recidivism reduction.[128] These developments incorporate a procedurally more flexible and substantively more forward-looking managerial, administrative model of criminal justice that requires tracking the success of both individual defendants and specific treatment programs.[129] Moreover, consistent with administrative models of justice, these systemic legal innovations are more open to expert input and guidance by empirical evidence to advance the procedural goals of accuracy and fairness in decision-making and substantive policy goals, such as increasing collections of child support or reducing recidivism among drug offenders.[130]

124. Fondacaro & Stolle, *supra* note 123, at 359–60.

125. *See id.* at 360 (noting that the traditional court-based system was incapable of handling the "influx of child-support cases" attributed in part to increased "rates of divorce, separation, and out-of-wedlock births").

126. *Id.* at 360–62.

127. *See id.* at 358.

128. *See* NAT'L INST. JUST., *supra* note 123.

129. *See id.*

130. *See* James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 368 (1976); Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 476 (2003).

These procedural and substantive shifts toward systemic models of administrative justice also align with multisystemic, social ecological models of human behavior and the potential flexibility of both the juvenile justice system and plea bargaining.[131] However, realizing the nature and potential benefits of these alignments requires a comparison to the baseline experience of individuals subjected to the current culpability-based juvenile and adult criminal legal systems. These systems are themselves potent, and all too often, harmful and counterproductive facets of the life contexts of juveniles and adults charged with a crime.[132] For those found guilty and sentenced to prison, jail, or probation, these systems are especially powerful features of the individual's social context.[133] Both juveniles and adults charged with serious felonies, including the few who elect to stand trial, are each represented by an attorney who speaks on their behalf and typically encourages them to remain silent. They are forced to confront narrowly focused evidence presented by a prosecuting attorney attempting to prove beyond a reasonable doubt that they committed an illegal act with a guilty mind. In both cases, a jury or judge renders a verdict regarding their guilt or innocence, grounded in retributive principles of culpability. Their degree of culpability is based on a retrospective judgment of what they were or were not thinking at the time of the forbidden behavior.[134]

At sentencing, contextual information about aggravating and mitigating circumstances surrounding the crime might be presented, with a juvenile offender perhaps getting a modest culpability and sentencing discount based on youthful immaturity, at least in the case of a capital offense.[135] The major feature of the sentence is a certain

131. *See infra* Section V.B.

132. *See* Lonn Lanza-Kaduce, Jodi Lane, Donna M. Bishop & Charles E. Frazier, *Juvenile Offenders and Adult Felony Recidivism: The Impact of Transfer*, 28 J. CRIME & JUST. 59, 72 (2005) (reporting results of study demonstrating that juveniles transferred to adult court had increased recidivism rates). *See generally* CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT (2006) (providing a critical and empirical analysis of the harmful effects of the American penal system).

133. *See* Lanza-Kaduce et al., *supra* note 132, at 73. *See generally* HANEY, *supra* note 132.

134. Fondacaro & O'Toole, *supra* note 3, at 490–91.

135. Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

length of time confined to an institutional setting or under probationary supervision. The judge in the case is unlikely to know anything about the fate of the offender upon completion of the sentence unless the person recidivates and ends up before the same judge. The prosecutor in the case gets to add a win to their conviction tally, if they prevail, and perhaps extra recognition for longer sentences. On the other side, the defense attorney is rewarded for obtaining shorter sentences, with the ultimate prize being an outright acquittal, even if only based on a legal technicality.

The traditional adversarial criminal trial system poses some constitutional, legal, and, especially, cultural challenges to efforts aimed at aligning the system with a more managerial, administrative model of criminal justice. For example, the Fifth Amendment right to remain silent means that relevant information about whether, why, and how the person may have violated the law will be excluded from legal decision-making regarding liability.[136] The residual affective reactions and moral condemnation associated with a guilty verdict based on a decontextualized judgment of the defendant's culpability are likely to color the weight given to aggravating and mitigating evidence at sentencing.[137] The culpability-based legal standards for criminal responsibility then dictate a punitive sanction of liberty deprivation served in prison or on probation, measured on the unidimensional scale of sentence length.[138]

The individualistic and competitive cultural values that underlie many facets of American society[139] suggest that most prosecutors and defense counsel alike will consider an adversarial system—with winning as the goal—as the best, if not ideal, system of criminal

136. U.S. CONST. amend. V. In exercising the right to remain silent, the accused can refuse to reveal information that may be highly relevant.

137. *See* Narina Nuñez, Kimberly Schweitzer, Christopher A. Chai & Bryan Myers, *Negative Emotions Felt During Trial: The Effect of Fear, Anger, and Sadness on Juror Decision Making*, 29 APPLIED COGNITIVE PSYCH. 200, 208 (2015).

138. *See, e.g.*, U.S. SENT'G COMM'N, GUIDELINES MANUAL 2 (2004), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2004/manual/gl2004.pdf [https://perma.cc/3WVC-AGP6].

139. *See* Dan Simon, Minwoo Ahn, Douglas M. Stenstrom & Stephen J. Read, *The Adversarial Mindset*, 26 PSYCH. PUB. POL'Y & L. 353, 353 (2020).

justice. Deviations from this traditional model, including plea bargaining, are considered instances of second-class justice when measured against traditional principles of just deserts, making it difficult to realize systemic change of the criminal legal system.[140] However, the plea bargaining system, where almost all criminal cases are actually resolved, faces few, if any, constitutional barriers to systemic change.[141] As we shall see in the next section, once the foundation of the juvenile and adult criminal legal systems are integrated and grounded in principles of social ecology, administrative law, and preventive intervention, the reimagination of plea bargaining opens the door even further to the possibility of evidence-informed systemic change of legal doctrine and culture toward more forward-looking, constructive responses to crime.[142] The next section describes a preliminary attempt to lay that foundation.[143]

V. TOWARD INTEGRATION AND TRANSFORMATION OF THE CRIMINAL LEGAL SYSTEM

A social ecological framework indicates that an integrated assessment of multisystemic influences is necessary to understand why people behave as they do.[144] In turn, these interrelated systemic influences are potential levers for desired change. The juvenile and adult criminal legal systems are themselves interrelated and embedded in their own social ecological network. Just as we cannot fully understand or effectively prevent criminal behavior without a complete picture of the individual's social contexts, we cannot address the problem of crime without understanding the interrelations between the juvenile and adult criminal legal systems and the institutions with

140. *See* Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205, 205–06 (2021).

141. *See* Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 114–25 (1999) (arguing the that the Supreme Court has given its blessing to plea bargaining since the 1970s and that previously inalienable rights are now bargaining chips in the plea bargaining process).

142. *See infra* Section V.B.

143. *See infra* Section V.

144. *See* Fondacaro, *supra* note 15, at 185; Fondacaro & O'Toole, *supra* note 3, at 503.

which they are connected and embedded: state and national government, law enforcement, local communities, families, schools, and the health care and mental health systems.[145] The juvenile and adult legal systems cannot solve the problems of juvenile and adult crime on their own.

Fortunately, there are viable alternatives to the current criminal legal systems that provide fundamentally fair decision-making and promote crime prevention and recidivism reduction. The integration of recent legal trends toward more systemic, administrative models of due process with advances in the behavioral sciences can provide a path toward transformation via a performance-based multisystemic risk and resource management system of juvenile and adult criminal justice.[146]

A. Outline of a Multisystemic Risk and Resource Management System

Several guiding principles to establishing a comprehensive, integrated, performance-based, multisystemic risk and resource management system of juvenile and adult criminal justice can be distilled from an integration of converging legal and behavioral science trends toward systemic approaches to decision-making.[147] The framework presented here is a tentative outline of a performance-based management system that promotes fair, accurate, and efficient decision-making to facilitate crime prevention, recidivism reduction, and, ultimately, greater legitimacy and public acceptance of the criminal legal system.

145. Mark R. Fondacaro & Darin Weinberg, *Concepts of Social Justice in Community Psychology: Toward a Social Ecological Epistemology*, 30 AM. J. CMTY. PSYCH. 473, 482–83 (2002).
146. Fondacaro et al., *supra* note 36, at 726.
147. *Id.* at 725–30.

The guiding principles are as follows:

The system should be forward looking—aimed at measurable goals of crime prevention and recidivism reduction.[148]

The juvenile system should be the initial focal point—due to its grounding in a more flexible, fundamental fairness model of due process, its historical commitment to rehabilitation, and its potential preventive influence on adult crime.[149] Given that the age-crime curve peaks at around age seventeen[150] and relatively few individuals begin engaging in serious crime after the age of twenty-five, beginning by raising the age of juvenile court jurisdiction to age twenty-five and providing first-time offenders with effective, preventive multisystemic intervention would significantly reduce the number of adults entering the current adult criminal legal system.

Jurisdiction should be triggered by nonaccidental engagement in behavior prohibited by criminal statute—*mens rea* and retrospective mind reading would be eliminated. Adjudication of legally prohibited behavior would be based on proof beyond a reasonable doubt.[151]

Decision-making should be based on a comprehensive, multidisciplinary, multisystemic assessment of the defendant—the multidisciplinary team would be headed by a legally trained judge with expertise in due process and the protection of liberty interests. The multidisciplinary team would prepare a Multisystemic Risk and Resource Management Plan (MRRMP). The team would be comprised of individuals with expertise in psychological, social, medical, educational, public safety, community, management, and evaluation

148. For clarity of analysis, I have not emphasized restorative justice, which retains a retributive, just deserts element, as a substantive policy goal. However, the framework outlined here clearly can accommodate measurable restorative justice goals and outcomes such as enhanced public acceptance, especially during a transition from a backward-looking punitive system toward a forward-looking system aimed at crime prevention. However, at present, there is not sufficient empirical evidence demonstrating that restorative justice interventions as currently conceived and practiced have a substantial impact on recidivism reduction among offenders with serious, multisystemic risk factors and limited social resources.

149. Fondacaro et al., *supra* note 26, at 958–67.

150. Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. REV. 674, 675 (1993).

151. Fondacaro et al., *supra* note 36, at 727.

issues relevant to the development, implementation, and evaluation of an MRRMP focused on individual crime prevention and recidivism reduction. Members of the multidisciplinary team would be drawn from or have ties to key social institutions (e.g., schools, health care, mental health and social service systems, law enforcement, and community groups). These team members would also serve as links to the institutions in the social ecological network of the criminal legal system.

Sanctions should be the least restrictive interventions necessary to prevent recidivism and protect public safety—there would be a presumption in favor of community-based intervention except in cases involving high and unmanageable risk to public safety.[152] In cases involving low risk, first-time offenders, the sanction may involve a mere warning. On the other end of the spectrum, in the rare case where a person was deemed unequivocally in need of confinement on public safety grounds, they would be sentenced to a humane institutional setting and their status would be periodically reviewed for placement in a less restrictive setting.[153]

A rebuttable presumption of expungement—the criminal record of all first-time offenders would be expunged or made publicly inaccessible upon completion of their intervention requirements.[154] The prosecution would bear the burden of proof and persuasion to rebut the presumption.

Confidential and limited record retention—confidential records for first-time offenders would be retained only for purposes of risk assessment and management should the offender be adjudicated for a subsequent offense,[155] as well as for purposes of de-identified evaluation research.

152. *Id.*

153. For a preliminary step in this direction, see Christopher Slobogin, *Preventive Justice: How Algorithms, Parole Boards, and Limiting Retributivism Could End Mass Incarceration*, 56 WAKE FOREST L. REV. 97, 99 (2021) (calling for a sentencing system of "preventive justice" administered by parole boards that retains retributive limiting principles but requires release "at the expiration of the low end of the [sentencing] range unless the offender is found to pose a high risk for committing violent crime, based on the results of a statistically derived risk assessment tool").

154. *See* Fondacaro et al., *supra* note 36, at 727.

155. *Id.* at 728.

Information Management System—outcome data (like recidivism data) from individual MRRMPs would be used to guide and terminate intervention at the individual level. The data could be aggregated to evaluate interventions and programs and reviewed to make reforms at a systems-wide level.

Juvenile system as a natural laboratory—empirical data retained by the information management system would be used to conduct "research on procedural and substantive issues relevant to procedural justice, risk management . . . recidivism reduction, crime prevention, and public acceptance of alternatives to retributive punishment."[156] The results of this research would be incorporated into the juvenile justice system and provide guidance for similar systemic change of the adult criminal legal system.

Juvenile and adult systems would be ecologically self-aware—the relationship between the juvenile and adult systems would be strengthened and each would develop the capacity to strengthen its relationships with other institutions relevant to the management of risk for criminal behavior (like families, schools, religious institutions, health care, mental health, and social service systems, law enforcement, and employers).[157]

B. The Way Forward: The Paradoxical Promise of Plea Bargaining

Previous sections of this Article focused primarily on the criminal trial and described and critically analyzed how recent advances in the behavioral and neurosciences are beginning to challenge the assumptions of autonomous individualism at the foundation of retributive justifications for punishment.[158] The result of this critical analysis was the articulation of alternative, evidence-based, consequentialist justifications for punishment and responses to crime. However, the criminal legal system's adherence to retributive justifications for punishment is not the sole contributor to mass

156. Fondacaro, *supra* note 7, at 163.
157. *Id.*
158. *See supra* Section II.B.

incarceration. The near total reliance on plea bargaining to hold defendants accountable for alleged crimes acts in concert with our retributive system to lower the bar and increase the opportunities to secure guilty pleas that prosecutors chalk up as victories in our adversary legal system.[159]

As an initial step toward systemic change, we have seen how the juvenile system has fewer constitutional constraints standing in the way of an evidence-based transformation of the criminal legal system.[160] However, plea bargaining, where most cases are resolved system-wide, arguably is even more open to the forward-looking regime proposed in this Article.[161] Outside of very limited constitutional concerns about separation of powers and the Eighth Amendment,[162] neither of which have hampered the increased reliance on plea bargaining in criminal litigation to date, there is virtually a legally permissible blank slate on which to draw the outlines of a forward-looking, evidence-based, consequentialist system of plea bargaining that promotes decarceration, crime prevention, recidivism reduction, public safety, and cost savings.[163]

In the current system, the power in plea bargaining has clearly tipped toward the prosecution and away from the defense and the courts as the result of mandatory sentences and strict sentencing guidelines.[164] Anna Vaynman and I have suggested that reestablishing the balance of power between prosecutors, defense counsel, and judges

159. *See* Alschuler, *supra* note 140, at 205, 233–34.

160. *See supra* Section I.B.

161. Bruce P. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 ANN. REV. L. & SOC. SCI. 131 (2005) (asserting "roughly 95% of persons convicted of felonies in America waive their right to trial by jury by entering guilty pleas. Most such pleas derive from plea bargaining, whereby defendants plead guilty in exchange for prosecutorial and judicial concessions").

162. *See generally* King, *supra* note 141, at 180 (concluding "it is almost as if the Constitution is not the supreme law of the land, but merely an expensive option-package that a defendant can purchase if [they] do[] not want the models available on the lot for a discount").

163. *See* Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1508 (2016) (proposing reforms to plea bargaining focused on sentencing that embraces forward-looking risk assessment and management guided by investigative procedures while retaining traditional culpability and trial procedures at the culpability phase).

164. Anna D. Vaynman & Mark R. Fondacaro, *Prosecutorial Discretion, Justice, and Compassion: Reestablishing Balance in Our Legal System*, 52 STETSON L. REV. 31, 32 (2022).

should be an important focus of efforts to improve the plea bargaining system.[165] This systemic focus requires going beyond addressing clearly sanctionable prosecutorial misconduct to addressing the legally sanctioned, often one-sided, more-punitive-than-compassionate exercise of broad prosecutorial discretion that is subject to little oversight and challenge. A more systemic focus on prosecutorial discretion requires recentering the analysis away from exclusively placing blame on prosecutors for the imbalance and broadening the focus to encompass forward-looking administrative solutions both within and outside of prosecutors' offices aimed at taking plea bargaining out of the shadows and increasing transparency.[166]

In plea negotiations, in line with the recommendations above regarding juvenile and adult criminal trials, there is a need to shift the frame of reference forward, beyond the narrow focus on the length of the sentence, to the personal, social, and economic consequences of punishment.[167] To do this effectively, from the prosecution side, would require a performance-based information management system that quantifies and monitors not only conviction rates and sentence length but also recidivism rates, and which provides incentives for prosecutors whose plea agreements lead to crime avoidance and cost reductions.

As an initial procedural step toward promoting transparency and accountability, documentation within an information management system might require prosecutors "to file every offer with the court,

165. *Id.* at 31–33.

166. *Id.* Many scholars, researchers, and practitioners describe plea bargaining as occurring in the shadow of a trial—with the likelihood of conviction, potential sentence length, and strength of evidence presented at trial driving the negotiations. However, stepping back, from a more systemic standpoint, what is really happening is that plea bargaining is occurring in the shadow of a criminal legal system that could not possibly handle more than a small fraction of the nearly ninety-five percent of cases resolved through a guilty plea. This clearly suggests that defendants as a group may have more bargaining power than the shadow of the trial formula suggests.

167. Slobogin, *supra* note 163, at 1505 ("If . . . plea bargaining were seen as a mechanism for implementing a sentencing regime focused primarily on individual crime prevention rather than retribution—as in the salad days of indeterminate sentencing—and if it were filtered through a system that is inquisitorial (that is, judicially-monitored) rather than run by the adversaries, it would have a greater chance of evolving into a procedurally coherent mechanism for achieving substantively accurate results.").

including information about what charges are being brought against a defendant, every offer made, the plea accepted, incentives offered in exchange for a guilty plea," and more.[168] Better documentation would serve at least two purposes:

(1) It would "reestablish the court's oversight of criminal cases—reintroducing the balance of power that leads to justice," by providing more just outcomes and both confidence in and legitimacy of the system.[169]

(2) It would allow for "systematic review of plea bargains" both within and outside the legal system "to help identify [and address] patterns of biased practices in plea negotiations."[170]

In terms of more substantive changes, there is a need to add new incentives for both prosecutors and defense attorneys, shifting from conviction and acquittal rates to a shared focus on recidivism reduction and crime prevention methods associated with various alternatives to traditional incarceration.[171] This shift toward a mutual goal of recidivism reduction through various alternatives provides a potential stimulus for cultural reform among both prosecutors and defense counsel. Obviously, the cultural reform of prosecutors' offices will require more than just top-down internal changes toward more consequentialist policy goals. It will require the deliberate recruitment of prosecutors who see themselves as facilitators of crime prevention and recidivism reduction rather than dispensers of retributive punishment. From the defense side, the content of the plea recommendations should be broader than the length of sentence and include evidence-based alternatives to the status quo and incarceration, as well as both front-end and back-end reentry planning and resources. Overall, data documenting recidivism rates and costs associated with plea bargaining should be incorporated into a system-wide performance-based risk and resource management system to guide the

168. Vaynman & Fondacaro, *supra* note 164, at 48.
169. *Id.*
170. *Id.*
171. *See* Fondacaro et al., *supra* note 36, at 727.

transformation of the criminal legal system into a juvenile and adult system that is truly just.

Most, if not all, of the principles outlined in the previous subsection could be adapted to fit the plea bargaining context. For example, rather than negotiating how much of a punitive discount a defendant deserves for sparing the state the time and resources of going to trial, plea deals would be forward-looking, aimed at recidivism reduction and crime prevention, and draw on the greater flexibility[172] and more rehabilitative goals of the juvenile justice system to guide sanctions. To bring charges, prosecutors would need evidence they believed was sufficient to prove beyond a reasonable doubt at trial that the defendant engaged in nonaccidental behavior prohibited by criminal statute. Plea negotiations would be guided by input from a comprehensive, multidisciplinary, multisystemic assessment of the defendant, and sanctions would be the least restrictive interventions necessary to prevent recidivism and protect public safety.[173] There would be a rebuttable presumption that the criminal records of any first-time offenders would be expunged, and the retention of their records would be confidential and limited.[174] Details of plea negotiations and their outcomes would be entered into a performance-based information management system to guide and terminate intervention at the individual level, and aggregated to evaluate interventions, programs, policies, and reforms at a systems-wide level. Data retained by the information management system would be used to conduct "basic and applied research on procedural and substantive issues relevant to procedural justice, risk management . . . recidivism reduction, crime prevention, and public acceptance of alternatives to retributive punishment."[175] Finally, both prosecution and defense teams would need to be "ecologically self-aware" and develop their relationships with other institutions relevant to the provision of resources and management of risk for criminal behavior (like families, schools,

172. Fondacaro et al., *supra* note 26, at 963–64.
173. Fondacaro et al., *supra* note 36, at 727.
174. *Id.*
175. Fondacaro, *supra* note 7, at 163.

religious institutions, health care, mental health, and social service systems, law enforcement, and employers).[176] Perhaps most importantly, they would need to formally acknowledge and explicitly develop their relationship with trial courts as institutions of last resort and oversight.

VI. CONCLUSION

The scope of systemic transformation envisioned in this Article is not likely to occur overnight, especially not at the culpability phase of the adult trial.[177] After teaching courses in law and social science, criminal law, and law and neuroscience over the past several decades to both law and doctoral students, I know how unwilling and frightened people are to give up common sense notions of personal autonomy. Beyond imperviousness to even the most compelling empirical evidence, some students are willing to say that they would continue to embrace the security of a belief in free will even if it were proven beyond any doubt that it was an illusion. When those students are being trained as behavioral scientists, I half-facetiously tell them they would be better off as lawyers, with greater latitude to embrace and advocate almost any rational narrative to explain human behavior.

With the juvenile system as an initial focal point for change, research demonstrating that youth continue to develop socially and biologically well into the third decade of life may provide the evidence and justification for expanding juvenile justice jurisdiction to the age of twenty-five.[178] This would place the onus on the juvenile justice system to adopt a forward-looking individual prevention model of juvenile justice.[179] As evidence-based multisystemic interventions aimed at recidivism reduction and crime prevention improve their

176. *Id.*

177. Fondacaro & O'Toole, *supra* note 3, at 501 (recommending that future investigators conduct research aimed at "contrasting folk psychology notions of mens rea and criminal responsibility with evidence from empirical research").

178. Christopher Slobogin, *Treating Juveniles like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 129 (2013).

179. *See* SLOBOGIN & FONDACARO, *supra* note 8, at 13.

effectiveness, they will shrink considerably the pool of potential adult offenders.

I am also optimistic about modest transformation of adult sentencing. The development of specialized problem-solving courts operating under administrative models of justice is a promising step in this direction.[180] Moreover, evidence-based interventions that have been incubated in the juvenile justice system are beginning to show promise in reducing recidivism among adult offenders and could be increasingly incorporated into sentencing.[181]

Paradoxically, the best hope for timely, wide-scale transformation aimed at decarceration may rest with the reconstruction of the plea bargaining system.[182] Like the juvenile system, plea bargaining is characterized by more flexible procedures and is more open to substantive goals that are less tethered to retributive justifications for punishment.[183] The major advantages plea bargaining has over the juvenile trial system is that plea bargaining applies to both juveniles and adults and is where almost all criminal cases are resolved and sanctions are imposed.[184] To fulfill the potential of plea bargaining as a primary site for criminal legal system transformation, justice departments and prosecutors' offices will have to be reorganized as institutions of administrative justice, open to research input on how best to promote procedural justice and recidivism reduction, prevent crime, and protect public safety. At this point, how best to promote this transformation is an open challenge for scholars, researchers, policymakers, legal stakeholders (like prosecutors, defense counsel, judges, and members of the public), advocacy groups, and most importantly, members of the communities disproportionately confined in American prisons.[185] Law schools have a vital role to play in providing future prosecutors, defense counsel, public defenders, judges, and policymakers with the education and skill sets necessary

180. *See* NAT'L INST. JUST., *supra* note 123.
181. Fondacaro et al., *supra* note 36, at 719–20.
182. *See supra* Section V.B.
183. *See supra* Section V.B.
184. Alschuler, *supra* note 140, at 205–06, 208.
185. Fondacaro & O'Toole, *supra* note 3, at 501–03.

to bring about systemic transformation.[186] Likewise, it will be important to actively recruit and hire prosecutors and public defenders with these skill sets, and who are more focused on helping individuals and improving public safety than delivering so-called just deserts.[187]

Even if science fully shrinks the homunculus at the heart of the evil-doer theory of crime, the question will remain whether that will be enough to shrink the retributive heart of the legal system and the American public. Failure to do so will continue to produce winners and losers. Those most affected by traumatic influences and discriminatory biases in the various micro- and macro-social contexts of their lives will continue to be on the losing end of the criminal legal system and will continue to fill our prisons.[188] However, we can develop an administrative model of juvenile and adult criminal justice like the one tentatively outlined in this paper. There are readily available concepts and practices in administrative law, public health, and clinical and community psychology that can be easily adapted.[189] Moreover, transformation can be gradual. The essence of a forward-looking, multisystemic management system of criminal justice is evidence-based feedback and change based on measurable outcomes, such as recidivism rates, costs, and public approval. Effectiveness is always judged in comparison to a baseline.[190] Our current baseline is the American criminal legal system. We now have the scientific and legal tools to challenge and test the status quo. It is widely recognized that the current system is broken.[191] The fate of several million potential future incarcerated Americans urgently awaits fundamental systemic transformation of our moribund criminal legal system.

186. Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law,"* 2005 WIS. L. REV. 455, 456–57 (2005).
187. *Id.* at 461–62.
188. *See* Fondacaro & O'Toole, *supra* note 3, at 495–96.
189. Fondacaro et al., *supra* note 36, at 725–30.
190. Fondacaro, *supra* note 7, at 164.
191. *See, e.g.*, JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE: AND OTHER PARADOXES OF OUR BROKEN LEGAL SYSTEM (2021).