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Path Dependence and Criminal Justice Reform: Introducing the Special Issue

Thomas Guiney, Ashley Rubin and Henry Yeomans

Calls for the reform of criminal justice have been made across modern history. Regular readers of this journal will be familiar with the work of eighteenth-century intellectuals, such as Cesare Beccaria and Jeremy Bentham, who demanded an end to capital punishment; those prison reform campaigners, such as the Howard League of Penal Reform, which became active in the nineteenth century; and non-governmental organizations like Amnesty International who have championed human rights and worked against their infringement since the mid-twentieth century. In recent times, the ongoing challenge of reversing the momentum towards mass incarceration, the Black Lives Matter movement and associated calls to defund the police, #MeToo, as well as calls for climate justice have all created fresh pressure for reform across the globe. This long and lively history is illustrative of the fact that few areas of public policy invite greater or more sustained scrutiny of practical effectiveness and the contestability of fundamental liberal democratic principles, such as legitimacy, justice, authority and human rights, than criminal justice. More importantly, the chequered pattern of success and failure that these reform movements collectively create, as well as the considerable life-span of some campaigns, is testament to just how difficult it can be to alter the central institutions of criminal justice systems.

This special issue brings together a group of scholars who use the theoretical framework of path dependence to analyse the challenge of reforming criminal justice. It begins from a shared understanding that criminal justice reform is a temporal process. By this mean we mean that efforts to change criminal justice unfold through time and, as such, their prospects for success or failure, along with the strategies reformers adopt and the obstacles they encounter, are fundamentally affected by the timing of key events and the sequence in they occur. The characteristically mixed fortunes of efforts to reform criminal justice invite a constellation of questions. Why is meaningful reform so hard to achieve? When, and under what conditions, is reform likely to be successful? How do those with power resist and deflect calls for reform?

Why do so many reforming initiatives fail or end up moving in a very different direction to that intended by their original architects? Viewing reform as a temporal process requires researchers to abandon the idea that the occurrence or non-occurrence of reform can be understood through synchronic research which deals with contemporary matters only. If researchers can instead analyse the rise and fall of reform processes through ‘moving pictures’ (Pierson 2004) then new opportunities open up for careful, theoretically informed criminological research.

Particular importance is attached here to the promise of path dependence as a means through which to examine criminal justice reform as a temporal process. Path dependence brings the interplays of change and continuity into sharper focus, it highlights the role of key events in shaping what comes afterwards, and it foregrounds the institutional factors which sometimes enable change and often work against it. It invites us to think about the varied ways in which individuals and social groups, with different types and amounts of political power (Goodman, Phelps and Page 2017), try to affect change in conditions that are not of their own choosing. Path dependence can thus help us to think reflexively about the ‘present’ and offer valuable new insights to progressive reformers who may at times be frustrated by a lack of apparent progress. In this context, we see considerable promise in the framework of path dependence as a way to re-think how we ‘do’ criminological research. We hope that this special issue can help to carve out a more established place for path dependence approaches within research on crime and punishment.

Theorizing path dependence

Path dependence is now well established in the social sciences. It began life in economics as a way to explain the persistence of ‘suboptimal’ outcomes such as the QWERTY keyboard (David 1985) and has since travelled to such diverse fields as political science, international development, sociology, and organization studies. At its core, path dependence is an approach founded upon a recognition that the nature and range of actions that can be taken in the present are both constrained and constituted by past events (Pierson 2000; Mahoney 2000; Mahoney and Thelen 2010). Critical junctures are typically posited as establishing or institutionalizing certain norms, rules or practices during key historical moments before the subsequent operation of certain mechanisms, like positive feedback effects and switching costs, militate

against further changes and instead function to reproduce these established arrangements (Pierson 2000; Prado and Trebilcock 2009; Rubin 2022). Generally speaking, path dependence is applied to meso-level dynamics and has been put to work explaining a broad range of complex social phenomena, including technological innovation, labor relations, participation in trade unions and parliamentary effectiveness. It has proven useful in identifying and understanding critical junctures as key formative moments which often begin and end path dependent processes, as well as providing a window onto the important processes of institutional reproduction which are seen to promote stability between these critical junctures. As Rubin (2022, p.5) has argued, path dependence can then be thought of as a powerful theoretical toolkit that ‘shifts our gaze from the beginning and end of the story to the underexplored middle’.

Path dependence, moreover, has ‘matured’ as an approach (Rubin 2022). It has been criticised in the past for being overly deterministic, of concentrating upon institutional constraints on decision-making without paying adequate attention to the extent of choice that actors are afforded or the role of different actors in creating the institutional boundaries within which these choices are made (e.g., Peters et al, 2005). This rather rigid, structuralist version of path dependence was often reliant on a punctuated equilibrium model of social change which concentrated upon long spells of path dependent stability separated by brief moments of rapid transformation, usually caused by exogenous events (Cappoccia and Kelemen, 2007: 344). Researchers working in the path dependence tradition have responded to many of these points. Mahoney and Thelen (2010), for example, have focused extensively on gradual and incremental institutional change in some of their work, including its causation by agency and endogenous institutional factors. We now have a more dynamic, agentful analytical framework that foregrounds the constitutive role of timing and sequence in shaping policy outcomes in addition to helping identify a more varied set of causal factors that create path dependent trajectories which, once set in motion, are hard to reverse (Levi 1997 p.28; see also Thelen 1999, Thelen 2003, Rubin 2022).

For these reasons, the path dependence approach has huge potential to help explain the complex picture of institutional stability, incremental reform, and occasional periods of rapid policy change that we see in so many criminal justice settings across time and place. It challenges the assumption, implicit in

much grand social theory, that big outcomes, must have big causes, and invites us to pay closer attention to the ‘stickiness’ of existing institutional arrangements. It enables us to study how the timing and sequence of events can create policy legacies that endure long after the initial socio-economic conditions that precipitated them have faded. Plus, it is increasingly attuned to how the interaction of agency and institutional constraints can, in some instances, produce a stop-start form of social change while, in others, will result in more nuanced interplays of change and stability.

Path dependence and criminology: An emerging research agenda

Given the explanatory power of this theoretical toolkit, it is surprising that path dependence has achieved only limited traction in mainstream criminological scholarship. For example, a search of the leading journals for studies on penal reform returns only a handful of articles per journal that mention the term “path dependence”; most of these articles only use the term in passing, while very few use path dependence as a theoretical framework (see Table 1). One reason for this underuse may be that there remain significant misconceptions about what constitutes path dependence, and many scholars seem to be familiar only with outdated, rigid or under-theorized notions of path dependence that suggest little more than ‘history matters’ or punctuated equilibrium (see Rubin 2022). Additionally, to the extent that criminal justice scholars use path dependence frameworks at all, there has been a lack of systematic research on the precise causal mechanisms that drive path dependent processes, particularly outside the American federal system. Unless scholars are directly exposed to criminological uses of path dependence, or uses of path dependence in political science and sociology, many are likely to remain unaware of path dependence’s potential or even what it is.

Journal (active since)	Number of Articles
Theoretical Criminology (1997-)	2
Punishment & Society (1999-)	6
Law & Society Review (1966-)	11 (5 related to crime and punishment)
British Journal of Criminology (1960-)	16
Howard Journal of Crime and Justice (1920-)	0

Table 1. Number of Articles Returned in Search for “Path Dependence” by Journal.¹

This is now beginning to change, and we see promising signs that path dependence is beginning to become a more established feature of the criminological lexicon as it dovetails with broader research agendas that seek to bring temporality back into the study of crime and its control (Campbell and Schoenfeld 2013; Catello, 2022; Churchill et al, 2021; Loader and Sparks 2006). In recent years, path dependence has been used in a range of criminal justice settings: to explain how criminal careers are shaped by macrological processes that unfold across the broad sweep of historical time (Farrall et al 2022); to investigate how carceral logics become ‘locked in’ to the organizational cultures of many criminal justice agencies (Weiss 2022); to make sense of how, and why, commercial principles have become so firmly engrained in contemporary British policing (Topping 2021); to interrogate the continuing importance of the 2008 Great Recession as a significant critical juncture that helped shaped the long-term developmental trajectory of American mass incarceration (Karstedt, Bergin and Koch 2019).

Ultimately, all theoretical innovations must prove their utility in the criminological marketplace of ideas and we, as guest editors, chose to embark upon this project because we have found the theoretical tools associated with path dependence a continuing source of knowledge and insight in our recent scholarship. In his work exploring the theoretical foundations of historical criminology, Yeomans (2019) has argued that greater analytical sensitivity to history can help us to confront criminology’s traditional preoccupation with the contemporary and its peculiarities. Historical time, as Churchill et al. (2021) explicitly argue, flows into the present. Path dependence, then, resonates strongly with historical criminology’s concern for the temporal connections of past and present, offering a tool for examining how specific past actions and events flow into our present and act as institutional constraints. This heuristic symmetry means there is considerable scope for path dependence to be adopted and used more widely by

¹ Notably, few of these articles included a significant discussion of path dependence; most only used the term in passing or the term was part of a title in a citation. All searches were updated on December 21, 2022, across the Sage, Wiley, and Oxford University Press journal websites.

scholars working within this exciting, fast-growing field. In his study of the institutional dilemmas of contemporary prison release, Guiney (2022) draws upon insights from historical institutionalism to show that the parole board model of discretionary decision-making that first emerged during the highwater mark of mid-twentieth century penal modernism has proved remarkably resilient to reform, but is slowly fracturing into a more complex, multi-layered prison release landscape. Across several works, Rubin (2015; 2016; 2022) has applied insights from path dependence and neo-institutional theory (an elaborated theory for path dependence) to explain the development of prisons in the US context across multiple waves, including why the Auburn System of solitary confinement at night and congregate factory-style work during the day became the norm within American prisons from the 1820s to the 1860s (and, outside of the South, arguably longer).

Doing path dependence research in criminological contexts: The collection

This special issue seeks to build upon this disciplinary momentum and aims to put path dependence firmly on the criminological agenda. It sets out, firstly, to explore and exemplify the value of the path dependence approach within our field. But more than this, we hope this collection will engage with the less well understood question of how researchers might go about ‘doing’ path dependence research in criminological settings. Each of the papers presented here confront the challenge of utilizing path dependence as part of a theory-laden process (Mahoney 2000, p.7-8) that can feel very different from some forms of historical research that place a strong emphasis upon chronology, mastery of narrative and triangulation of the archival record. They offer important insights into the challenges of operationalizing a ‘middle range’ research agenda that seeks to strike an appropriate balance between empirical particulars and social theory. Of perhaps greatest import, they draw attention to those research designs that appear to lend themselves particularly well to path dependent study: namely, detailed case study, comparative historical and international study and some forms of longitudinal analysis.

The collection begins with a focus on institutional stability and the stickiness of existing institutional arrangements. The first paper by Ron Dudai engages with recent theoretical debates over de

facto abolition of the death penalty. Working in the historical institutionalist tradition, Dudai traces the contingent developmental trajectory of Israeli penal policy and uses insights from path dependence to explain the remarkable stability of the death penalty as a form of symbolic law. Building on this focus, Thomas Guiney and Henry Yeomans draw upon recent theoretical advances in path dependence to explain the persistence of high incarceration rates in England and Wales. The authors identify prison population forecasting as a poorly understood positive feedback mechanism and draw upon recent controversies over women's imprisonment to demonstrate how the everyday, routinised working practices of the penal system have played an important role in sustaining prison expansionism long after the initial conditions that fueled the mid-1990s prison boom have faded.

The focus of the collection then shifts to consider moments of critical juncture, or path breaking criminal justice reform. Claire Hamilton takes issue with the stagnation or 'stickiness' that is often supposed to characterize the Irish penal system and calls for a more nuanced, approach to path dependence which transcends dichotomous thinking about stagnation and (abrupt) change. Likewise, in her study of American community corrections, Nicole Kaufman identifies the uprising at New York's Attica prison as an important critical juncture in American penal history that opened up new possibilities for reform. Kaufman explores how community organizations sought to navigate this policy window and documents how this period of contestation was shaped by racial politics and anxieties about the control of Black men. Drawing many of these themes together, Javier Wilenmann and Maite Gambardella present a developmental model of probation evolution in Chile. They champion the benefits of taking a 'long-view' of events and show that probation reform was sustained by a series of negative feedback effects associated with the need to 'contain' unprecedented prison population growth.

The collection rounds off by reflecting upon a number of critical perspectives that identify important limitations to path dependence scholarship. In her comparative study of policy transfer in Post-Soviet Latvia and Lithuania, Nadejda Burciu draws upon insights from path dependence to explain the divergent outcomes of penal establishments seeking to import Western-European 'carceral individualism' into a system of gulag-resembling carceral collectivism. Finally, Phillip Goodman and Kaitlyn Quinn use

the metaphor of a palimpsest to analyze the evolution of penal labour in California between 1915 and 2000. Far from confirming the ‘stickiness’ of existing institutional arrangements, the authors reveal a more nuanced picture of continuity and change as penal practices, framings and rhetorical justifications are assembled and re(interpreted) by skilled, and strategically calculating penal administrators.

New directions: path dependence and criminal justice reform

The contributions to this special issue perfectly illustrate the versatility of path dependence. They focus on a variety of penal policies and practices, from probation and community corrections to prisons policy and the death penalty. These articles concentrate upon eight countries - namely Chile, Ireland, Israel, Latvia, Lithuania, UK and USA - that span three continents. And they visit a range of historical periods and settings, including the newly independent state of Israel in the mid-twentieth century and the Baltic states of Latvia and Lithuania in the post-Soviet era. What emerges from these papers is not a simple injunction for readers to make more use of path dependence as a framework for research, but an advocacy for a more refined way of using path dependence within research on crime and punishment that is based around:

- **The centrality of agency to institutional innovation and reproduction.** Tapping into emerging currents of scholarship which are attentive to the role of agency within path dependent processes (e.g. Mahoney and Thelen, 2010), several articles pick up on the extent of choices or general room for manoeuvre that, despite institutional constraints, is often afforded to key actors. The specific role of certain agencies in producing or reproducing specific penal outcomes are discussed, including courts (Wilenmann and Gambardella), penal or welfare administrators (Goodman and Quinn), and prisoner subcultures (Burciu).
- **A dynamic view of institutional stability.** Echoing wider theoretical assertions about the constancy of change within societies (Abbott, 2001) and specific, developing concerns for the explanation of continuity within historical institutionalism (e.g. Mahoney and Thelen, 2010), these

articles collectively reject the idea that institutional stability can be characterised as stasis or inertia. Instead, they identify the positive feedback mechanisms (Guiney and Yeomans), purely symbolic rehearsals of disputes between different political viewpoints (Dudai) or other processes responsible for the ongoing reproduction of existing institutional arrangements.

- **Change as varied and scalar.** This involves recognising that change is not always rapid and radical (as when an equilibrium is punctuated), and does not necessarily affect different levels of governance or practice evenly. In some instances, radical new pathways are not adopted during potential critical junctures and alternative reforms are enacted which embody lesser degrees of change (Kaufman). In others, changes to penal legislation do not result in changes to penal practices (Wilenmann and Gambardella) or shifts in the political rationalities which justify specific punishments do not correspond to changes in the management or experience of those punishments (Goodman and Quinn).
- **The importance of conflict.** This trope is principally inspired by Goodman et al's (2015) agonistic model of penal development in which consensus is generally illusory and penal development is the outcome of conflict between different social, political and professional groups (see also Peters et al, 2005). Some articles highlight the importance of conflict between groups with varying degrees of power and institutional influence in producing key moments of penal change (Kaufman, Goodman and Quinn). Additionally, some of our articles are underpinned by a sense that penal stability also owes much to conflict. Several articles concentrate on situations of apparent consensus, beginning at the seemingly stagnated surface of penal policies or practices before uncovering the depths of contestability that lie beneath (Hamilton). In doing, so, they underline the importance of conflict for understanding both penal change and penal stability.

In addition to promoting a more dynamic, agentful and agonistic model of path dependence, this special issue contains several articles which seek to build bridges between path dependence and other, complementary theories or concepts. Dudai, for example, makes innovative use of Joseph Gusfield's (1986) notion of symbolic politics to help explore the path dependent processes underpinning the continuing existence of the death penalty in Israel. Additionally, Goodman and Quinn find the dichotomy of stability and abrupt change within some path dependence models to be too constraining and propose the metaphor of the palimpsest as a conceptual solution.

The special issue uses path dependence as a cross-pollinating platform from which criminological researchers can engage with other valuable insights from wider disciplines (e.g. sociology, political science). Path dependence does not always emerge as the straightforward answer to the research questions which our contributing authors set, but engagement with a path dependence approach does, in each instance, lead them to examine afresh the connections between past and present and use these to help make sense of the prospects for reform in certain spheres of criminal justice.

For these reasons, we hope this special issue can put path dependence firmly on the criminological agenda. The papers collectively exemplify the value of engaging with the path dependence approach as well as providing an inter-related set of directions for how this approach can be most profitably deployed. We aim for the special issue as a whole to instigate greater discussion and usage of path dependence within studies of crime and punishment. Achieving this would produce richer understandings of how and why change and continuity occur through time which should advance academic knowledge and could usefully inform the work of the many activists, practitioners and professionals who seek to change criminal justice for the better. To put it another way, if this special issue can encourage others in our subject area to adopt a path dependence approach then social scientific knowledge and criminal justice policy and practice stand to gain.

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