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Article

THE IDEA OF "THE CRIMINAL JUSTICE SYSTEM"

Sara Mayeux[1*]

Abstract

The phrase "the criminal justice system" is ubiquitous in discussions of criminal law, policy, and punishment in the United States—so ubiquitous that, at least in colloquial use, almost no one thinks to question the phrase. However, this way of describing and thinking about police, courts, jails, and prisons, as a holistic "system," became pervasive only in the 1960s. This essay contextualizes the idea of "the criminal justice system" within the longer history of systems theories more generally, drawing on recent scholarship in intellectual history and the history of science. The essay then recounts how that longer history converged, in 1967, with the career of a young engineer working for President Johnson's Crime Commission, whose contributions to the influential report The Challenge of Crime in a Free Society launched the modern and now commonplace idea of "the criminal justice system." Throughout, the essay reflects upon the assumptions and premises that go along with thinking about any complex phenomenon as a "system" and asks whether, in the age of mass incarceration, it is perhaps time to discard the idea, or at least to reflect more carefully upon its uses and limitations.

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"The Body is a System or Constitution: So is a Tree: So is every Machine."
— Joseph Butler (1726)

"'What are some of the possible or likely consequences of thinking of the body as a complex system?' ... 'The first consequence might be described as the paradox of feeling responsible for everything and powerless at the same time, a kind of empowered powerlessness.' ... Feeling responsible for everything and powerless at the same time is also a good description, I think, of the emotional state induced by citizenship in this country."
— Eula Biss, *On Immunity* (2014)

Some question the wording. Activists refer instead to "the criminal *punishment* system," believing that "justice" has little to do with American courts and prisons.[2] Lawyers prefer to put themselves in the center—"the criminal *legal* system"—while academics strive for more concise variations—simply "the criminal system."[3] Scholars debate what exactly the "system" encompasses, positing more or less expansive lists of its component parts.[4] In recent years pundits have typed and tweeted countless manifestos about what "the criminal justice system" is and isn't good for.[5] Advocates have drafted blueprints for "a better criminal justice system."[6] Scholars have divided "the criminal justice system" into sub-systems ("the court system," "the prison system") and charted that system's interactions with other systems ("the immigration system," "the welfare system," "the public school system") and explored the ways in which these systems are themselves sub-systems of that larger "governance system" that is our country.[7]

At least in colloquial use, however, few question the premise that there is, in fact, some "system." In virtually every formulation, what remains constant are the words "the" (implying holism) and, most importantly, "system" (implying structure, relations and parts and wholes, inputs and outputs, flows and processes, functions and objectives, and most importantly, dynamic equilibrium). It is thus taken nearly universally for granted that in the United States there exists something called "the criminal

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[2] *See* Victoria Law, "8 ways to support protests against the criminal punishment system," Waging Nonviolence, December 12, 2014, https://wagingnonviolence.org/feature/8-ways-support-protests-criminal-punishment-system-cant-get-street/ (emphasis added).

[3] *See, e.g.*, THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoffs, eds., 2017) (using "the criminal system" throughout).

[4] *See, e.g.*, *id.* at 10-11 (suggesting the inclusion of "seemingly civil phenomena" such as civil contempt, welfare and immigration policy, and school disciplinary rules).

[5] *E.g.* Chris Hayes (@chrislhayes), TWITTER (June 16, 2017, 1:10 PM), https://twitter.com/chrislhayes/status/875807908113416192 ("The criminal justice system - for a million reasons – is not going to transform policing or hold it accountable").

[6] The Sentencing Project, *Building a Better Criminal Justice System: 25 Experts Envision the Next 25 Years of Reform* (March 21, 2012),http://www.sentencingproject.org/wp-content/uploads/2016/01/To-Build-a-Better-Criminal-Justice-System.pdf.

[7] *E.g.* THE NEW CRIMINAL JUSTICE THINKING, *supra* note 3, at 4 (arguing that "criminal justice" is both "a socio-political system" within American society and a "governance system in its own right").

justice system,"[8] a unitary, integrated set of component institutions, processes, and actors that interact with one another through various relational structures and processes in order to collectively perform (or fail to perform) some function or set of functions in society and that we can therefore study, map, seek to understand, manipulate, and seek to improve in systemic ways. This "system" encompasses tens of thousands of functionally related, though formally distinct, entities of an almost impossibly wide-ranging set of sizes, scales, aims, and types. From the Tangipahoa Parish Jail in Ponchatoula, Louisiana, to the Los Angeles Port Police in Southern California, to the Criminal Investigation department of the Internal Revenue Service in Washington, D.C., all are part of "the system," intaking "inputs" ranging from a Minneapolis carpool dad's turn-signal violation to the question of whether the President of the United States obstructed justice and processing them into "outputs," ranging from an anonymous Seattle street person's soon-forgotten two-day stay in the county lockup after a bout of public intoxication to the German corporation Deutsche Bank's negotiated penalty of $7.2 billion after a bout of fraudulent dealings in mortgage-backed securities that helped to crash the world economy.[9]

However, a developing scholarly conversation has begun to examine more critically both the phrase "criminal justice system" and its associated concepts and assumptions.[10] This essay, which is intended to be exploratory and reflective, seeks to contribute to this conversation in two ways.

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[8] Every episode of *Law & Order*, the popular crime procedural that ran from 1990 to 2010 and continues to air in syndication, begins with the narrator's intonation: "In the criminal justice system, the people are represented by two separate yet equally important groups: The police, who investigate crime, and the district attorneys, who prosecute the offenders." *Law & Order: Seasons 1-20* (NBC television broadcast Sep. 13, 1990-May. 24, 2010).

[9] Jan-Henrik Foerster & Yalman Onaran, Deutsche Bank to Settle U.S. Mortgage Probe for $7.2 Billion, Bloomberg, December 23, 2016, https://www.bloomberg.com/news/articles/2016-12-23/deutsche-bank-to-settle-u-s-mortgage-probe-for-7-2-billion.

[10] *E.g.* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (arguing that "criminal justice system" is a "misnomer," since the term encompasses multiple largely separate systems); Bernard Harcourt, *The Systems Fallacy: From Operations Research to Contemporary Cost-Benefit Analysis: The Perils of Systems Analysis, Past and Present* (April 7, 2014), available at https://ssrn.com/abstract=3062867 (tracing the rise of the "criminal justice system" metaphor since the 1960s, arguing that the metaphor has the negative consequence "of masking the political nature" of judicial decision-making in criminal law and procedure, and arguing that this illustrates the flaws in systems analysis in policymaking more generally); Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 558 (2015) (observing that the "criminal justice system" is "not a system at all"); Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice,"* OHIO STATE J. CRIM. LAW, forthcoming, available at https://ssrn.com/abstract=3086452 (discussing recent scholarship troubling the boundaries of both the "criminal justice system" and the concept of "criminal justice" more generally).

There were also earlier dissenters from the dominant "criminal justice system" framework, although their criticisms did not make much of a dent in colloquial understandings. The criminologist George Kelling, for example, sharply criticized policymakers' uncritical belief in something called the "criminal justice system" in a 1991 article that covers some of the same history and makes some similar points as this essay, although from a very different perspective; Kelling offered his critique of the "system" metaphor in the course of making a policy argument for increased policing reoriented around crime prevention and order maintenance. George L. Kelling, *Crime and Metaphor: Toward a New Concept of Policing*, CITY JOURNAL (Autumn 1991), https://www.city-journal.org/html/crime-and-metaphor-toward-new-concept-policing-12733.html. I thank Malcolm Feeley for pointing me to

First, the essay contextualizes the idea of "the criminal justice system" within recent scholarship in intellectual history and the history of science. In one sense, the "systemic" way of talking and thinking about police, prosecutors, courts, jails, and prisons is only about 50 years old. Jstor, the digital archive of academic publications, contains in its database 2,600 scholarly journals across 75 disciplines.[11] Searching this database for articles with the phrase "the criminal justice system" anywhere in their text yields 21,416 results. When these are arranged chronologically, the first "hit" appears in 1929, followed by two articles per decade the 1940s and '50s—and then, beginning in the 1960s, an ever-quickening proliferation. In other words, out of the 20,000 or so scholarly articles referring to "the criminal justice system," more than 99.99% were published after 1960.[12] In another sense, however, these 1960s developments had very deep roots, representing one culmination of a longer trajectory of systems thinking dating back to the Enlightenment. As used in midcentury American thought, the word "system" connoted a complex of conceptual assumptions that had developed first in the natural sciences and then migrated into the social sciences and policymaking. This essay recounts that more general history and how it converged, in 1967, with the career of a young systems engineer to launch the now ubiquitous idea of "the criminal justice system."

The idea of "the criminal justice system" emerged at the conflux of two intellectual streams: first, the general tendency in modern, post-Enlightenment societies to describe social and political institutions with metaphors (though perhaps they are not just metaphors) borrowed from the natural sciences, and thus, to identify "systems" at work in human societies just as the natural world contains a multiplicity of complex "systems" (the solar system, the circulatory system); and second, the more specific versions of "systems theory" and related structuralisms that gradually overtook all of the social sciences in the United States in the first half of the twentieth century. By the 1950s and '60s, versions of systems thinking constituted the mainstream of research and thought across economics, sociology, political

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Kelling's criticism of the term. For another early critique of the term, *see* Alvin W. Cohn, *Training in the Criminal Justice Nonsystem*, 38 FED. PROBATION 32 (1974).

There is also more general literature on the scholarly utility of conceptualizing law and legal institutions as "complex adaptive systems," drawing from complexity science. For an introduction, *see generally* J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191 (2015). Scholars have also debated the utility of particular variants of systems theory for criminal justice specifically. For instance, for an argument that Niklas Luhmann's systems theory can illuminate certain dimensions of American criminal justice, *see* Hadar Aviram, *Taking the Constitution Seriously? Three Approaches to Law's Competence in Addressing Authority and Professionalism*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 3, at 155–67. This essay takes no position on the utility of the most current versions of systems analysis or complexity science for present-day scholarly analysis of criminal justice, but rather is intended to reflect upon the concept of "the criminal justice system," shaped by the state of systems thought as of the 1960s, as an artifact of a particular moment in twentieth-century intellectual and cultural history that has had enduring influence on judicial and popular conceptions.

[11] JSTOR, https://about.jstor.org (last visited Nov 20, 2017).

[12] These statistics are based on the author's own JSTOR searches. Searching Google's Ngrams database of published books yields a similar timeline, although these results should be interpreted as merely suggestive, given the limitations of the database. Bernard Harcourt finds a similar trend in his quantitative analysis of the use of "criminal justice system" in federal and state judicial opinions. Harcourt, *supra* note 10, at 3–4.

science, anthropology, psychology, linguistics, and related disciplines and subfields, and had migrated into the vocabulary of everyday life. The defining faith of this "age of system," to borrow the phrase of intellectual historian Hunter Heyck, was that literally anything could be usefully described as a "system"—a complex hierarchy of component parts existing in relation to one another and in rough equilibrium, which took in inputs and yielded outputs across its interfaces with other systems and subsystems—and therefore charted, diagrammed, modeled, understood, and ultimately, controlled.[13] It is hardly surprising, then, that the phrase "the criminal justice system" spread wildly in the late 1960s when it was introduced to a generation of lawyers, policymakers, jurists, and social scientists that had already learned, from high school science classes, university reading groups, policy schools, MBA programs, foundation grant proposals, military exercises, church sermons, and corporate memos, to think about everything—themselves, their societies, their communities, the institutions they worked for and helped to shape, their world—as one grand system of systems.

Synthesizing insights from recent historical scholarship on the general concept of "systems" and extending those insights into the criminal justice realm, this essay situates the idea of "the criminal justice system" within this broader genealogy of systems theory. It is not my claim that everyone who uses the now commonplace phrase "criminal justice system" means to import with that nomination the assumptions of systems theory in a theoretically rigorous way or even a theoretically aware way. Already by the 1970s some academics had begun to express frustration about the proliferation of vague references to "the criminal justice system" that were not grounded in any way in formal systems theory. Much less is it my claim that the phrase's colloquial ubiquity implies (or is even intended to imply) that the system it identifies is actually managed according to the coordinated and rationalized methods of operations researchers or computer scientists. Precisely the opposite: One of the key progenitors of the phrase "the criminal justice system"—the engineering-trained criminologist Al Blumstein; about whom, more later—laments the fact that in his view, criminal justice remains among "the most primitive of social systems" in the use of quantitative modeling and formal planning techniques.[14] I do think, however—drawing on the insights of scholars working at the nexus of cultural history, intellectual history, and history of science—that in a loose sense, thinking and talking about anything as a "system" does carry along certain broad assumptions that, in this essay, I want to explicate and critique. In fact, it may well be that colloquial uses of the word "system" are *more* likely to carry along crude or poorly thought-through assumptions than the more formally rigorous usage of systems approaches by social scientists and

[13] HUNTER HEYCK, AGE OF SYSTEM: UNDERSTANDING THE DEVELOPMENT OF MODERN SOCIAL SCIENCE (2015).

[14] Alfred Blumstein, *An OR Missionary's Visits to the Criminal Justice System*, 55 OPERATIONS RESEARCH 14, 14 (2007).

engineers. Metaphors, in the words of economist Deirdre McCloskey, "think for us."[15]

Second, the essay reflects upon the particular limitations and uses of the "system" framework for understanding (or critiquing) the current crisis of mass incarceration, drawing upon the growing historical literature on that crisis. For this purpose, what is most notable about systems metaphors and systems theories alike is that they are essentially ahistorical modes of description. They posit "systems" as self-regulating, through various governing mechanisms and feedback loops; as tending to maintain equilibrium over time; and as always working towards some systemic function or goal. Once mapped and understood, systems can be modified—they can be made more efficient, or more accurate—but only within some outer set of limits or bounds inherent in the function or nature of the system. Generally, systems cannot simply be gotten rid of; if they are destroyed or stop working then they die, and the larger systems of which they are a part may die. Another notable feature of systems is that they are abstract. Every example of a particular type of system is isomorphic to, and interchangeable with, every other example. A veterinarian who has studied the circulatory system can apply that abstract model to the ailments of any particular cat. The idea of a system, in sum, connotes something that is by its nature somewhat generic, dynamic only within a broadly stable structure or equilibrium rather than transforming dramatically over time, and thus, susceptible to description in ahistorical terms.

Meanwhile, the entire thrust of recent scholarship on police, courts, jails, and prisons in the United States is precisely to call into question whether these institutions have any stable function or structure that can be understood abstractly, independently of cultural context and the country's particular history of slavery, conquest, racial segregation, and widening class inequality. In recent years social scientists, historians, and legal scholars alike have generated a proliferating body of studies emphasizing the many ways in which what we call "the criminal justice system" is not particularly systemic at all, in the sense that it has been produced by specific and local histories and individuals; that its component and purportedly analogous parts often do not resemble or act like each other (every unhappy police department is unhappy in its own way); that it has not lately existed in a state of equilibrium, but rather experienced a dramatic rupture beginning in the late 1970s that yielded massive growth in the prison population, as well as any number of qualitative transformations; and that history—the humanistic study of contingent change over time—provides the epistemological and methodological frameworks best suited for understanding this rupture and its legacies.[16] Not surprisingly, then, much of

[15] DANIEL T. RODGERS, AGE OF FRACTURE 47 (2011) (citing [DEIRDRE] N. MCCLOSKEY, THE RHETORIC OF ECONOMICS (1974)). *See also* DONALD MACKENZIE, AN ENGINE, NOT A CAMERA: HOW FINANCIAL MODELS SHAPE MARKETS (2008). For an extended discussion of "criminal justice system" in particular as a metaphor, *see* Kelling, supra note 10. Kelling criticized the metaphor from a law-and-order perspective, arguing that its widespread acceptance was causing the United States to "los[e] the battle against crime."

[16] *See* infra, Section IV.

this new scholarship also features circumlocutions around the phrase "criminal justice system," as historians and historically oriented social scientists attempt to smooth the awkward fit between the assumptions embedded in the colloquial phrase "system" and the observed reality of discontinuity, disequilibrium, locally specific and historically contingent motivations, and change over time—change for the worse in the past and, one hopes, change for the better in the future.[17] Whatever the capacity of the most sophisticated forms of systems theory to account for contingency, and whatever the utility in a narrow technical sense of importing systems analysis into criminal justice policymaking, it seems clear that the looser vernacular "systems talk" that dominates discussions of criminal justice in the United States is not a good fit for the concerns and imperatives that are currently motivating those discussions. Accordingly, perhaps (unless we are actually operations researchers or management scientists) we should discard the idea of "the criminal justice system" as one of many relics of the 1960s "age of system," understanding it not as a generic compound noun but as a culturally specific phrase born of a particular moment, like "the American way of life" or Henry Clay's "American system." "The criminal justice system" would then remain interesting to study historically, for the insights it reveals about the larger worldview that produced it, and perhaps for the effects that it continues to have, but no longer useful as a current analytical category.

The essay begins by briefly tracing the etymology of "system" and the Enlightenment origins of the idea that human societies could be observed and analyzed like natural or mechanical phenomena. Part II of the essay then sketches a portrait of the post-World War II "age of system," in which variants of systems theory and structuralism came to dominate research and thought across all of the major social science disciplines in the United States. This section is based largely on secondary reading in recent works in intellectual history and the history of science. Especially illuminating for my purposes were Hunter Heyck's *Age of System* and Joel Isaac's *Working Knowledge*.[18] Part III shows how, within this larger cultural milieu of systems, police, courts, jails, and prisons all came together in the 1960s in the minds of policymakers and lawyers to form something increasingly called "the criminal justice system." The widely read 1967 federal commission report, *The Challenge of Crime in a Free Society*, provides an illustrative example of how thoroughly this kind of thinking had permeated policymaking by the late 1960s—but more than a representative illustration, it also merits attention for its influential role in popularizing the phrase

[17] *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 2 (2016). Hinton refers to "America's carceral state: the police, sheriffs, and marshals responsible for law enforcement; the judges, prosecutors, and defense lawyers that facilitate the judicial process; and the prison officials and probation and parole officers charged with handling convicted felons." Despite avoiding the term, her tripartite division is essentially the standard model of "the criminal justice system" from the 1960s.

[18] HEYCK, supra note 13; JOEL ISAAC, WORKING KNOWLEDGE: MAKING THE HUMAN SCIENCES FROM PARSONS TO KUHN (2012).

"criminal justice system" and catalyzing its widespread adoption.[19] Part IV skips ahead to the present moment, summarizing how "mass incarceration" has come to be identified as a pressing policy problem and even, in some accounts, a crisis for American democracy writ large. The growing body of historical scholarship that seeks to understand the origins and causes of mass incarceration has generated insights that are, thus far, at least in tension with, if not wholly inconsistent with, the idea of treating the institutions and phenomena under study as a singular, holistic system. Thus, the essay concludes where it began, by asking whether the idea of "the criminal justice system" has outlived its usefulness and should be replaced with (or complemented by) new conceptual frameworks for thinking and talking about the engines and apparatuses of policing and punishment within American society.

The essay does not seek to eliminate the phrase "the criminal justice system"—obviously, and if only because such a quest would inevitably prove futile. Language after all cannot be policed, not even language referring to police. Presumably the phrase has some utility, or people think it does, or it would not be ubiquitous. The essay does, however, seek to historicize the concept of systemicity embedded within the phrase and thereby to encourage more attention to, and reflection upon, the ways in which reflexive invocations of "the criminal justice system" may hinder rather than facilitate thoughtful discussion of the wide range of topics generally subsumed under that terminological umbrella. There are other ways besides the framework of systems to think and talk about the realms of the social, the legal, and the political—ways that might for many purposes be better suited to our present moment and to the urgent needs for decriminalization, decarceration, and police accountability.

I.

Like reason, liberty, and dictionaries, "system" was a fruit of the Enlightenment.[20] Between the sixteenth and eighteenth centuries, variants of the word appeared in the modern European languages to connote some type of "organized whole."[21] The French *sisteme*, derived from the Latin *systema*, originally referred to a musical scale or series of notes. In English, the word came into common use to describe anatomical groupings of organs or body parts (as in "the nervous systeme," which appeared as early as 1669); arrangements of celestial objects (John Locke wrote about the "system of our Sun"); and organized enterprises (Thomas Hobbes, in the *Leviathan*, defined "any numbers of men joyned in one Interest, or one Businesse" as

[19] Pres. Comm'n on Law Enforcement & the Admin. of Justice, The Challenge of Crime in a Free Society (1967), NCJ 000042, available at https://www.ncjrs.gov/pdffiles1/nij/42.pdf.

[20] *See generally* CLIFFORD SISKIN, SYSTEM: THE SHAPING OF MODERN KNOWLEDGE (2016) (tracing the history of "system" as a genre for generating and organizing knowledge about the world, beginning in the Enlightenment period).

[21] This paragraph draws upon, and all quotes in this paragraph derive from, the Oxford English Dictionary entry for "system." *System Definition*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/system (last visited Nov. 20, 2017). For a fascinating and more comprehensive history of "system" understood as a literary genre, *see* Siskin, *supra* note 20.

"Systemes"). In a generic sense, the word "system" is still used to refer to groupings of things or parts (a "built-in sound system," the "interstate highway system"). Across the natural and applied sciences, one encounters geological systems, weather systems, and of course, computer systems. But from the start there was often also a thicker implication within the word "system," a suggestion that the group in question was bound together not only by happenstance or some practical purpose but also because of some divine or cosmological ordination. A writer in 1891 described Christianity as "a system of individuals united together in a great co-operative society whose binding cord is love." As early as 1726, the idea was in circulation—as expressed here by the English preacher Joseph Butler—that anything natural or artificial could equally be thought of as a "system," and thus that systemicity itself might constitute some deep connective tissue weaving together all of creation: "The Body is a System or Constitution: So is a Tree: So is every Machine."[22]

Fully elaborating grand unified theories of how exactly bodies, trees, and machines resembled one another would later preoccupy the twentieth-century systems theorists. But the great insight of the proto-social scientists of the Enlightenment was to transform human societies and polities into phenomena that could be observed, studied, and understood through the methods of science, just like natural phenomena. As Bacon proposed to master the laws of nature, so Montesquieu, Adam Smith, Condorcet, Herder, and Hume sought to master the laws of modern society, the better to chart its future.[23] As intellectual historian Dorothy Ross explains, the development of "social science" constituted one intellectual response to the "discovery of modernity"—that is, "the discovery that history was a realm of human construction." Within historical time, the scientific mastery of "society" would light the path toward that great modern desideratum, "progress": a future world more rational, rich, and happy than today's.[24]

In the United States, by the late nineteenth century, the study of society had largely moved into the universities and begun to fracture into increasingly professionalized "disciplines." The breakneck urbanization of the Gilded Age spurred the growth of sociology and its cousin criminology, both devoted in their origins to the empirical analysis of urban misery in all its forms.[25] Yet the toilers in these fields generally did not define as an object of inquiry "the criminal justice system" as a whole. The word and concept of "system" were certainly available to nineteenth- and early-twentieth-century thought, but the component parts of what would later get assembled into a single system—jails, courts, penitentiaries, the

[22] "System" also took on a somewhat different sense—"system" as a set of beliefs or an ideological plan for how things should be, regardless of whether they actually are (Henry Clay's "American system," "the capitalist system"). In American culture we often hear endorsements of "the free enterprise system" or, in law, "the adversary system." These usages do not exactly refer to an organized whole, though, but more to an ideal method or philosophy among alternatives that may or may not describe actual practice.

[23] *See* DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 5-7 (1991).

[24] *Id.* at 3, 7-8.

[25] *See generally* Mariana Valverde, "Miserology": A New Look at the History of Criminology, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 3.

emerging phenomena of district attorney's offices and police departments—remained more commonly understood and discussed separately.[26]

The idea of the criminal justice system, in the modern sense, first began to percolate in the 1920s and '30s, in the interwar proliferation of "crime surveys." Between 1900 and 1925, homicide rates had doubled, tripled, or even quadrupled in a number of fast-growing American cities.[27] Prohibition further fueled the resultant hysteria, driving the liquor trade underground and generating all of the spectacular violence typical of black markets. It was the era of Al Capone, gangster movies, and "Keystone Kops" who appeared no match for the increasingly business-like forces of organized crime.[28] The generalized fear of crime blended with a more specific set of anxieties about the new phenomenon of the massive metropolis, as the industrial cities of the North and Midwest filled with migrants fleeing the Jim Crow South and the steppes and farms of Eastern and Southern Europe. Fears about violence blended with racialized fantasias about the urban underclass to generate a potent brew of reform energies fixated on "the problem of crime."[29] For urban reformers, imposing order upon the violent metropolis constituted the most pressing governance crisis of the day, and many pinned the blame for disorder, at least in part, on the courts. As historian Jeffrey Adler summarizes the popular view: "Criminals seemed more vicious than ever. Unable to respond to the crisis, the American legal system appeared weak and ineffective."[30]

Thus did a generation of social scientists and reformers come to train their sights upon the nation's courts, police departments, jails, and prisons—what Herbert Hoover referred to, in the first presidential inaugural to emphasize crime policy, as "our system of criminal justice."[31] If the previous generation of progressive reformers had sought to "socialize" the law—to make the courts more therapeutic and responsive to social conditions—now the pendulum swung back. Experiments in rehabilitation were derided as soft-headed. The goal now was to make what was often described as "the criminal justice machinery" more "efficient" at apprehending, charging, trying, and convicting "criminals."[32] The resultant wave of crime surveys and commission reports constituted the first

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[26] "System" was used to nominate these components, as in Beaumont and Tocqueville's famous study of "the penitentiary system." GUSTAVE DE BEAUMONT, ET. AL. ON THE PENITENTIARY SYSTEM IN THE UNITED STATES ; WITH AN APPENDIX ON PENAL COLONIES AND ALSO STATISTICAL NOTES (1833). For an example of a nineteenth-century text making pervasive use of "system" in the educational context ("school system," "our present system of public schools"), *see* A. A. Hodge, *Religion in the Public Schools*, 3 NEW PRINCETON REV. 28 (1887).

[27] Jeffrey Adler, *Less Crime, More Punishment: Violence, Race, and Criminal Justice in Early Twentieth-Century America*, 102 J. AM. HIST. 34, 36 (2014).

[28] *See generally* DAVID E. RUTH, INVENTING THE PUBLIC ENEMY: THE GANGSTER IN AMERICAN CULTURE, 1918-1934 (1996).

[29] On the 1920s as the first "war on crime," *see* MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 281-312 (2003).

[30] Adler, *supra* note 27, at 36.

[31] Herbert Hoover, *Inaugural Address. March 4, 1929*, The American Presidency Project, http://www.presidency.ucsb.edu/ws/?pid=21804 (last visited Febraury 22, 2018).

[32] Adler, *supra* note 27, at 36-37; *see also* WILLRICH, supra note 29, at 281-312.

significant attempts to study *as a whole* all of the component steps along the way from arrest to incarceration, and how they all related to one another.[33]

Still, the interwar crime surveys never quite added up to a systemic model integrating all of the different parts. A leading example of the genre, the *Illinois Crime Survey*, used not the language of system but mechanical metaphors apt for the industrial age, taking as its subject the "machinery of justice." It was organized around separate chapters on each component of that machinery—felonies, the Supreme Court, the felony trial courts, the juries, the prosecutor, the police, the coroner, and so on—but never quite combined them all into one stereoscopic picture.[34]

Nevertheless many of the individual reports' conclusions, and even the structure of their analysis, hinted at systemic thinking. E.W. Hinton's chapter on "The Trial Courts, in Felony Cases," for instance, tabulated statistics on "all felony prosecutions in the year 1926" in Cook County (Chicago), nineteen other Illinois counties (both urban and rural), and, for comparison, the city of Milwaukee.[35] Hinton presented the data sequentially, giving the reader the impression of an assembly-line conveyor belt. At the start of the process, a large number of arrests were placed upon the belt, but at each subsequent step, more and more cases fell off. By the end, only a small number remained for final processing into convictions.[36] Comparing Chicago's figures with Milwaukee's, Hinton worried that Chicago was "turning loose an undue number."[37] The centerpiece of Hinton's report was the table of all of his data: hundreds of tiny black numbers and annotations, all bunched together in tight little boxes and rows.

In 1931, the federal government's Wickersham Commission, charged by the Hoover Administration with conducting a nationwide study of Prohibition, produced a similarly wide-ranging body of work synthesizing data and observations about the criminal justice "machinery" around the country.[38] Together the reports constituted essentially an attempt to model the "system" though again, not yet framed in quite those terms. Thus in the 1970s, a criminologist steeped in the age of system could look back on the Wickersham Commission's fourteen volumes as "rather disconnected," although they contained "invaluable" information.[39]

Prior to the 1960s, then, there was not much systematic analysis of what only later came to be called "the criminal justice system." Criminologists

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[33] These efforts built upon the early statistics-gathering efforts of nineteenth-century penal reformers. *See* CAROLYN STRANGE, DISCRETIONARY JUSTICE: PARDON AND PAROLE IN NEW YORK FROM THE REVOLUTION TO THE DEPRESSION 73-75 (2016).

[34] Ill. Ass'n for Crim. Justice, Illinois Crime Survey (1929), available at https://homicide.northwestern.edu/pubs/icc/.

[35] *Id.* at 202.

[36] *See id.* at 204-16. First, "a number of cases failed to survive the preliminary examination" (204); then, at the grand jury stage, "a further substantial elimination took place" (205); and so on.

[37] *Id.* at 216.

[38] U.S. Nat'l Comm'n on Law Observance & Enforcement, U.S. Wickersham Commission Reports (1931). Volumes included "Report on Police," "Report on Prosecution," "Report on the Causes of Crime," and "Progress Report on the the Study of the Federal Courts."

[39] Samuel Walker, *Reexamining the President's Crime Commission:* The Challenge of Crime in a Free Society *after Ten Years*, 24 CRIME & DELINQUENCY 1, 10, (1978).

focused their research on the causes of crime—social circumstances, psychology, individual pathologies—not the institutional mechanisms through which criminal charges were processed and certainly not systematic quantitative analysis or mathematical modeling of those mechanisms.[40] Reformers and legal scholars attempted in the 1920s and '30s to collect empirical data on policing, courts, jails, and prisons, but presented these component parts as "machinery," not "systems."

II.

"System" would permanently combine with "criminal justice" only in 1967, at the height of the Cold War explosion in federal, foundation, and university investment in the social sciences.[41] Buoyed by this infusion of resources, the Cold War imperative to develop unified theories of human behavior (the better to spread democracy), and at least within the victorious United States, post-World War II confidence in human ingenuity and enterprise, midcentury social scientists revived the old Enlightenment idea that human societies could be mastered and steered toward progress through the methods of science.

In these years the concept of "system" and more generally an interest in parts, wholes, structures, and functions—the conviction that there existed underlying bedrock realities beneath surface symbols and particularities, which could be modeled abstractly and thus manipulated and compared across "cases"—overtook or at least gained a strong foothold in virtually every social science or "human science" discipline, including sociology, anthropology, political science, economics, psychology, and linguistics, while also spawning and fueling the growth of new fields literally devoted to the study of systems such as operations research, management science, and cybernetics.[42] The "systems theory" of the sociologist Talcott Parsons epitomized the trend. Any realm of society could be described as a "system," Parsons suggested in *Economy and Society*, "exchang[ing] inputs and outputs over its boundaries with its situation."[43]

Within each discipline, leading lights churned out field-defining works analyzing their object of study in these terms: not only *The Social System*, by Parsons (1951), but also *The Political System*, by David Easton (1953), and *How the Soviet System Works*, by Raymond Bauer, Alex Inkeles, and Clyde Kluckhohn (1956). The anthropologist A.F.C. Wallace spoke of cultures as "culture systems" and developed a theory of "cultural-system

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[40] Michael D. Maltz, Operations Research in Studying Crime and Justice: Its History and Accomplishments, in HANDBOOKS IN OPERATIONS RESEARCH AND MANAGEMENT SCIENCE 206-07 (S.M. Pollock et al., eds., vol. 6 1994).

[41] *See generally* HEYCK, *supra* note 13, at 51-80; ISAAC, *supra* note 18, at 158-90; AUDRA J. WOLFE, COMPETING WITH THE SOVIETS: SCIENCE, TECHNOLOGY, AND THE STATE IN COLD WAR AMERICA (2013).

[42] HEYCK, *supra* note 13, at 1.

[43] TALCOTT PARSONS & NEIL J. SMELSER, ECONOMY AND SOCIETY: A STUDY IN THE INTEGRATION OF ECONOMIC AND SOCIAL THEORY 310 (1956). On Parsons, *see* HEYCK, *supra* note 13, at 115; ISAAC, *supra* note 18, at 160-63.

innovation."[44] This mode of thinking also built on earlier developments in the study of industrial management. In their 1939 study of an assembly line, *Management and the Worker*, Roethlisberger and Dickson had described every industrial organization as a "social system" and the task of "human resources" as maintaining equilibrium of that system.[45] In a quantitative analysis of articles published in the flagship journals of the major social science disciplines—anthropology, economics, political science, psychology, and sociology—Heyck shows that while only 7 percent of articles employed the concepts of "system, structure, function, [and] modeling" in 1930, that figure was over 60 percent by 1970.[46]

Social scientists were explicit about borrowing this mode of thought from the natural and physical sciences, to whose cultural authority, objectivity, and empirical rigor they aspired for their own disciplines. By the 1920s, relativity theory and other developments had shifted the emphasis across the physical sciences away from static or "mechanical models" towards viewing matter in terms of "activity or process."[47] Alfred North Whitehead, in 1926, defined "science" as the study of "organisms," and indeed, the study of parts and wholes, organization and process soon became the organizing framework of cell biology, physiology, biochemistry, and physical chemistry.[48] The physicist J. Willard Gibbs, in 1917, introduced the idea that matter and energy together constituted "physicochemical systems." Paul Samuelson, the inventor of modern macroeconomics, dedicated to Gibbs his path-breaking book *Foundations of Economic Analysis*, which famously described "the economy as a thermodynamic system."[49]

Gibbs also influenced the Harvard biochemist L. J. Henderson, who developed the view of blood as a physicochemical system maintaining its own equilibrium and in turn contributing to the overall stability of the larger system, the body, of which it was a part.[50] As early as 1918, Henderson proposed that "the characteristics of the organization of living things" were "not peculiar to such organisms." The tendency "to speak of the organization of society is more than a figure of speech," he suggested, given "the similarity of regulatory processes and of the conditions of stability in the two instances."[51] Over time, Henderson developed a fascination with "the apparent orderliness of certain systems," expanding his domain beyond blood to encompass "the organization, the organism, the universe, and

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[44] HEYCK, *supra* note 13, at 118.

[45] ISAAC, *supra* note 18, at 91.

[46] HEYCK, *supra* note 13, at 2.

[47] John Parascandola, *Organismic and Holistic Concepts in the Thought of L. J. Henderson*, 4 J. HIST. BIOLOGY 63, 64 (1971).

[48] *See generally* ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD (1926).

[49] HEYCK, *supra* note 13, at 35. Samuelson recalled that as a Harvard graduate student, "it was my good luck that Harvard's E.B. Wilson, only protégé of thermodynamicist Willard Gibbs, provided essential hints that helped in the development of revealed preference and the anticipation of the inequalities techniques in post-1945 economics programming." William A. Barnett, *An Interview with Paul A. Samuelson*, 8 MACROECONOMIC DYNAMICS 519, 530 (2004).

[50] Parascandola, *supra* note 47, at 97-102.

[51] *Id.* at 102 (quoting L.J. HENDERSON, MECHANISM FROM THE STANDPOINT OF PSYCHICAL SCIENCE, 575 (1918)).

society."[52] Building on this interest, Henderson became an acolyte of the Italian economist Vilfredo Pareto, whose *Trattato di Sociologia Generale* presented society itself as a system of mutually dependent variables tending toward equilibrium. In the 1930s, Henderson formed a study group at Harvard to read and discuss Pareto's *Trattato*, many of whose members, including Talcott Parsons, became key progenitors of systems thinking.[53]

Of course, each systems-oriented field had its own parameters and definitions. But, in a very broad sense, describing the world as a system necessarily reflected certain shared premises.[54] First, of course, was simply the premise that *everything* could be described and understood as a system. There was nothing in the human or natural realm that could not in some way be understood as a complex of individual components related to one another (functionally, if not formally or officially) in some type of hierarchy, whether it be the individual cell, the individual frog, an individual person, a family, a Fortune 500 corporation, a nation, the international community of nations, an individual bank, the collection of banks within a country ("the financial system"), and so on. And all of these systems shared common features and tendencies. The study of cells could illuminate the management of business organizations, and vice versa, not simply as a source of illustrative analogies but because the same laws of organized systems applied universally across all types and scales of systems. The entire world and everything in it was a system of interlocking systems, big and small, systems within individuals and systems that connected individuals, systems within systems within systems. This was, in the words of the anthropologist A.J.C. Wallace, a "holistic view of society as an organism integrated from cell to nation," such that "events in one subsystem are information to other subsystems."[55]

Systems thinking was also broadly functionalist. In operations researcher C. West Churchman's description, all organizations, whether "companies, groups of parties in a machine, the functional elements of the human body," had some "external goal" toward which they were working. By adjusting to feedback, they adapted to their environments in order to better work toward their goals.[56] Systems theory grew alongside, and intertwined with, the various disciplinary turns to structural-functionalism (in sociology), or structuralism (in anthropology, psychology, philosophy, linguistics), which posited that institutions and entities within human societies developed in order to serve particular collective "functions" or needs. Since behavior always reflected function, any system component

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[52] *Id.* at 63.

[53] ISAAC, *supra* note 18, at 63-91; *see generally* Parascandola, *supra* note 47.

[54] *See* HEYCK, *supra* note 13, at 10. The ensuing discussion largely draws upon Heyck, *id.* at 10-12, although I have not fully reproduced his list (nor reproduced its exact grouping of features) but highlighted those dimensions of systems thinking most relevant to my discussion in this essay of "the criminal justice system."

[55] *Id.* at 119 (quoting ANTHONY WALLACE, *Revitalization Movements*, 58 AA 2, 264-81, 280 (1956)).

[56] *Id.* at 105 (quoting C.W. CHURCHMAN, INTRODUCTION TO OPERATIONS RESEARCH, 4,6 (1957)).

could be known and measured purely by observing its behavior, which is to say, its effects upon other components of the system.[57]

Perhaps the most important feature of systems, however, was self-regulation. Systems tended by definition to contain internal mechanisms of control and feedback that enabled them to maintain dynamic equilibrium.[58] Like the concept of "system" generally, this idea was imported into the social sciences from earlier findings in the natural and physical sciences. In his studies of blood, the Harvard biochemist L. J. Henderson had described "the tendency of systems towards a state of dynamic equilibrium" as "a law or basic fact of nature," equivalent to the laws of thermodynamics.[59] "No characteristic of organisms is more certain than survival," he wrote. "Living things do in fact persist over long periods of time as physico-chemical systems which remain approximately in a stationary state."[60] Later, through his reading of Pareto, Henderson refined his definition of equilibrium as applied to social phenomena. "If a small modification of the state of a system is imposed upon it," he explained, "a reaction will take place and this will tend to restore the original state, very slightly modified by the experience."[61] In his sociology lectures, Henderson inculcated students with his conviction that the concept of equilibrium "applies not only in the fields of pathology and sociology but very generally in the description of almost all kinds of phenomena and processes." For Henderson the tendency of systems to maintain equilibrium was the most basic law of all, "one of the most general aspects of our experience" and "one of the commonest aspects of things and events."[62]

Systems, then, might change, but not in a revolutionary or disruptive way—always in a self-regulating way. Systems moved through time not randomly or chaotically (or even contingently) but through the carrying-out of cyclical, repeated operations and algorithms that could, like structure, be modeled, understood, and predicted. "Hence," writes Heyck, "the widespread fascination" among midcentury social scientists "with descriptions of processes rather than states, with production systems, courses of action, strategies (sequences of moves), algorithms, heuristics, feedback paths, flowcharts, and decision trees."[63] (See also, one might note, the fascination among midcentury jurists with "legal process" and "due process" and "political process."[64]) Systems tended to adapt to their

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[57] *See id.* at 34-35 (describing the various turns to structuralism).

[58] *See* ISAAC, *supra* note 18, at 86-91; *see generally* CYNTHIA RUSSETT, THE CONCEPT OF EQUILIBRIUM IN AMERICAN SOCIAL THOUGHT (1966).

[59] Parascandola, *supra* note 47, at 100.

[60] *Id.* at 101 (quoting L.J. HENDERSON, BLOOD: A STUDY IN GENERAL PHYSIOLOGY, 15-16 (1928)).

[61] L. J. HENDERSON, PARETO'S GENERAL SOCIOLOGY 46 (1935). Henderson proselytized Pareto's ideas and the concept of equilibrium generally throughout the Harvard faculty, "giv[ing] greater impetus to diffusion of equilibrium concepts among American social scientists than any other single individual." RUSSETT, *supra* note 58, at 117.

[62] ISAAC, *supra* note 18, at 86-87 (quoting Henderson's lectures).

[63] HEYCK, *supra* note 13, at 36.

[64] *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994).

environments, changing as needed in response to environmental changes in order to continue humming along and serving their purpose. The anthropologist A.J.C. Wallace described "cultural systems" as equally tending toward equilibrium: If, he posited, "[a] human society" could be "regarded as a definite kind of organism, then "[a] corollary of the organismic analogy is the principle of homeostasis: that a society will work, by means of coordinated actions (including 'cultural' actions) by all or some of its parts, to preserve its own integrity by maintaining a minimally fluctuating, life-supporting matrix for its individual members, and will under stress, take emergency measures to preserve the constancy of the matrix."[65]

Together, this set of premises implied an understanding of social science in which the goal of the research enterprise was to develop models of the structure of systems, so that the systems under study could be better understood, predicted, and, ultimately, controlled or directed.[66] To model a system is necessarily to reduce, to simplify, to abstract. That, after all, is the point of models, which are not useful if they replicate the entirety of whatever is being modeled. While models can take many forms (metaphors, pictures, concepts, mathematical equations, three-dimensional miniatures), in practice, the enterprise of midcentury modeling often translated into diagrams: visual representations that sought to communicate the underlying structure of systems in a simple and easily reproducible, manipulable way. Talcott Parsons and Edward Shils, of Harvard's Department of Social Relations, became especially fixated on diagrams as strategies for concretizing their theories and, along the way, demonstrating to patrons and administrators the scientific character of their work.[67] But they were hardly alone. Flipping through midcentury textbooks and journals reveals a cornucopia of boxes and arrows, tables, flowcharts, organizational pyramids, decision trees, matrices—the whole repertoire of diagrams that have now become standard apparatuses of scholarly, policy, and business communication.[68] Trees occupied pride of place, because they could capture the complexity and hierarchy of systems while also allowing for the incorporation of growth or expansion (new branches, for instance) over time. Heyck catalogs "the proliferation of tree structures in midcentury science: organization charts, ... decision trees in decision theory, treelike mappings of strategies in game theory," flowcharts, "semantic trees, fractal trees, genetic trees, evolutionary trees, descriptions of the nervous system as having a treelike structure, and, of course, the myriad trees in computing."[69]

"System," then, implied a relative disinterest in local specificity (except as raw data for building larger theories), and also a relative emphasis on the synchronic and the static over the diachronic and the dynamic. An interest in how systems adjusted and calibrated to maintain steady-state equilibrium did not lend itself easily to the historicist view of human societies as

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[65] HEYCK, *supra* note 13, at 118-19 (quoting WALLACE, REVITALIZATION MOVEMENTS, 264-81, 280).

[66] HEYCK, *supra* note 13, at 18.

[67] ISAAC, *supra* note 18, at 185-86.

[68] *See* HEYCK, *supra* note 13, at 12.

[69] *Id.* at 11-12.

undergoing qualitative change over time and even, occasionally, revolutionary rupture: like a surfer engulfed by a wave, a society might find itself submerged in overwhelming waters and come out somehow different on the other side. L. J. Henderson, in his sociology lectures, drew no distinction between extremely mundane examples of equilibrium (a flame that flickers in the wind but returns to "its original form"; an infant regaining weight after an illness) and world-historical tragedies. According to Henderson, "within a decade the traces of the earthquake and fire in San Francisco could hardly be seen, or the devastation of the war of 1914-1918 along the battlefront in Northern France," and these were simply additional examples of "equilibrium" no less than candles and infants.[70] The notion, of course, that France had simply restored itself to equilibrium after 1918 would shock any historian. But in the systems view, what mattered was that the grass had grown over the trenches. Clearly, this was also not a view of the world that left much room for cultural difference. Henderson inspired at Harvard the proliferation of "case studies"—historical or anthropological investigations into thirteenth-century English villages, Irish farm communities, Navajo reservations, Boston's North End. As intellectual historian Joel Isaac writes of these studies, they all framed their subjects not as unique or consequential in themselves but as exemplary instances of "the general phenomenon of social order."[71]

None of this is to suggest that systems thinkers lacked any awareness of change—after all, their goal in modeling systems was to enable the better management of systems, and thus to spur change in the direction of greater efficiency. And if a person or a frog could be a system, then sometimes systems died. However, to explain how homeostatic systems might change necessarily required elaborate theorizing, and the theories always remained somewhat unsatisfactory. Whether Wallace with his revitalization theory in anthropology or the economist Walt Rostow with his stages of modernization, mid-century social scientists struggled to develop models of how under very particular conditions, systems otherwise existing in a state of self-regulating equilibrium could suddenly escape stasis and transform.[72] Indicating the difficulty of escaping the logic of system, such theories tended to presuppose some overarching logic or process that would drive change, and thus history itself became a system governed by processes and law-like relationships between component parts, all of which could be modeled.[73]

This was not, then, a totally static or cyclical view of history. After all, systems thinkers were modern liberals—they were not premodern Christians living in eschatological time or Marxists awaiting the revolution—and thus,

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[70] ISAAC, *supra* note 18, at 87 (quoting Henderson's lectures).

[71] *Id.* at 89-91 (quote from 88).

[72] On theories of modernization and change, *see generally* HEYCK, *supra* note 13, at 143-58. Heyck notes that Rostow developed his modernization theory partly in reaction to the Parsons/Shils view of society, which he considered too static. *See also, generally*, NILS GILMAN, MANDARINS OF THE FUTURE: MODERNIZATION THEORY IN COLD WAR AMERICA (2004).

[73] *See* HEYCK, *supra* note 13, at 123.

they necessarily conceived of history in terms of change. But they were not historicist in the way of modern historians, who increasingly over the twentieth century came to understand change to reflect human agency and choices—choices understood in the moral sense, as the product of conscientious reflection and the exercise of the will, and not simply as responses to stimuli.[74] Whatever the epistemological limitations of the historicist model of change, its utility lies in its flexibility: since it does not posit universal laws but only contingent responses to particular situations, by definition there is no particular situation that cannot be accommodated within its regard. In contrast, when systems theorists developed theories of change, there always remained some residual "fuzziness" as to the core question of how exactly transitions occurred.[75]

That systems thinking eventually migrated into criminal law and penal policy should hardly have been surprising. It would have been more surprising had it *not* done so. Between 1955 and 1975, the "system" worldview was so mainstream across so many academic fields that anyone of the growing numbers of Americans who attended college in that period would have been exposed in one way or another, and probably in multiple ways, to this mode of thinking.[76] Perhaps they encountered systems in the functional sociology of Talcott Parsons, the economics textbook of Paul Samuelson, the "systems approach" that dominated the new fields of operations research and management science, or the looser way that these concepts trickled into articles, textbooks, and lectures on a wide range of subjects. As Heyck writes, the "systems" approach, "the set of assumptions it encompassed and the exemplary work it produced," became "the ideas, ideals, and methods" of those who led "the War on Poverty at home and a war in Vietnam abroad; of those who trained new elites in schools of business and public administration; of those who wrote the basic textbooks from which a generation learned how the economy, society, polity, and even the mind worked; and of those who wrote the position papers, books, and magazine articles that helped set the terms of public discourse in an era of mass media, think tanks, and issue networks."[77]

Moreover, while the tent of system may have fit awkwardly over some of its objects, it was not any great conceptual stretch to refer to police, courts, jails, and prisons as a "system," particularly by the 1960s. After all, these local components really were related to one another—they communicated, they shared data, they were nodes between which police cars and sheriff's vans literally traveled—and more so than ever before. In the 1830s, it would not have made intuitive sense to talk about the nation's scattered and highly localized jails, constables, and courts as a "system" because they did not have formal or functional relationships with one

[74] For a provocative critique of this dimension of historicism as practiced by twentieth-century professional historians, *see* Walter Johnson, *On Agency*, 37 J. SOCIAL HIST. 113 (2003).

[75] HEYCK, *supra* note 13, at 154.

[76] *See id.* at 2.

[77] *Id.* at 200; *see also* Harcourt, supra note 10, at 35 (noting that systems analysis affected criminal law and procedure both directly and indirectly, because it was simply "in the air in the 1960s").

another.[78] Over time, as law became codified—systemizing doctrine and procedures both within states but also across, as precedent now traveled in the technology of "case reporters" across jurisdictions—courts became more integrated with one another. As career police and prosecutors replaced part-time amateurs and states developed ever-more complex penal bureaucracies, every part of the process became "professionalized," and professionals, as they are wont to do, formed communities of pedagogy and practice that transcended their local institutional homes.

Most importantly, in the twentieth century, the United States Supreme Court—first haltingly in the 1920s and '30s and then more dramatically in the 1960s—began to elaborate constitutional doctrines of criminal procedure that established new rules for every local and state court and police department, on top of whatever local and state rules they already had.[79] For the first time, then, it made some sense to imagine a hierarchical system with invisible structures and lines of communication connecting the Supreme Court in Washington, D.C., with any given local sheriff in far-flung Maine or California. At the same time, the federal government, through initiatives like the Law Enforcement Assistance Act, began on a much greater scale than ever before to offer funding and training programs to local police and prosecutors—but also to request newly comprehensive forms of reporting and data in return.[80] Through law, policy, practice, and culture, the nation's myriad law enforcement institutions came to be connected with one another in ever-more elaborate and cross-cutting functional relationships, though not by any official chain of command.[81] Precisely because these relationships of communication and direction were never (or rarely) formalized as official relationships of command and control, they lurked beneath the surface of legal texts and doctrines and needed to be excavated and modeled before they could be fully understood. They were, in that sense, the perfect objects for the sort of structuralist-functionalist study that systems thinking perfected.

But there is another and more intriguing sense in which systems thinking lent itself well to criminal justice by the late 1960s. Since the mid-1920s—and enduring into the 1970s—the incarceration rate in the United States had remained remarkably stable, hovering around 110 prisoners per

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[78] *See, e.g.*, LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH (2009) (reconstructing the localized nature of courts and punishment in the antebellum Carolinas).

[79] *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000). Illuminating contemporary discussions of the trend include A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 250 (1968); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

[80] *See* MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (1980); Elizabeth Hinton, *"A War within Our Own Boundaries": Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 J. AM. HIST. 100 (2015).

[81] On the implications of these developments for federalism, *see* Sara Mayeux & Karen Tani, *Federalism Anew*, 56 AM. J. LEGAL HIST. 128 (2016).

100,000 population.[82] Beneath the vicissitudes of "crime waves" and the popular fixation on especially gruesome but unrepresentative murders, there seemed to be some capacity latent within the courts and prisons to keep the overall complex humming along in a relatively steady state. Al Blumstein later described this finding in the exact terms of dynamic equilibrium, positing "a homeostatic process whereby the system could become tougher when crime rates went down ... and ease up when crime rates went up (by means such as offering earlier release on parole or increasing the rate of probation or other community-based sanctions as an alternative to incarceration)."[83] On the basis of this finding, Blumstein and his colleague Jacqueline Cohen published a famous paper proposing a unified "theory of the stability of punishment."[84]

And it was true that anyone familiar with prison administration through the 1970s could easily understand the field as yet another example of the general pattern—self-regulating homeostasis achieved through adjustment to feedback—that scientists had by then observed in organisms and social systems of all kinds. In California, for example, it was widely known that the "Adult Authority"—the state's corrections agency, including its parole board—wielded ultimate control over the length of prison terms actually served, regardless of judges' sentencing decisions.[85] When the prisons threatened to become overcrowded, then parole was granted more liberally. Exploiting these feedback mechanisms, Ronald Reagan—though later famously "tough-on-crime" as president—presided as governor of California over a 34% *decrease* in the state's incarceration rate.[86] Reagan's policy of encouraging the early release of prisoners (in his case, in order to save money) could be understood as a fairly straightforward example of the phenomenon of homeostasis (or dynamic equilibrium) described in the "age of system" by operations researchers, management scientists, and anthropologists alike, the process the anthropologist Wallace described when he wrote that systems tend, when "under stress, [to] take emergency measures to preserve the constancy of the matrix."[87]

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[82] Alfred Blumstein & Jacqueline Cohen, *A Theory of the Stability of Punishment*, 64 J. CRIM. L. & CRIMINOLOGY 198, 201 (1973).

[83] Blumstein, *supra* note 14, at 19.

[84] Blumstein & Cohen, *supra* note 82.

[85] For an account of the Adult Authority's "almost awesome freedom from legislative or judicial control" prior to late 1970s reforms, *see* Sheldon L. Messinger & Phillip E. Johnson, California's Determinate Sentencing Statute: History and Issues, in Determinate Sentencing: Reform or Regression?: Proceedings of the Special Conference on Determinate Sentencing, June 2-3, 1977, Boalt Hall School of Law, University of California, Berkeley (GPO, 1978).

[86] Rina Palta, *Prison Overcrowding: What would Reagan do?*, KALW (October 4, 2010), http://blog.sfgate.com/kalw/2010/10/04/prison-overcrowding-what-would-reagan-do/.

[87] HEYCK, *supra* note 13, at 118-19 (quoting WALLACE, REVITALIZATION MOVEMENTS, 264-81, 280).

III.

> "Everyone's heard of the 'criminal justice system,' and I think that's a term that's fairly attributable to Al."
> — Daniel Nagin (2016)[88]

Given the cultural context—the structure, as it were—it may have been overdetermined that someone would bring together crime, punishment, and system.[89] As it happened, Al Blumstein would play the major role in doing so, although only the larger cultural context can explain why his model of "the criminal justice system" so readily traveled out of the pages of a federal government report into the everyday vernacular of ordinary Americans. The occasion for Blumstein's intervention was the 1967 report *The Challenge of Crime in a Free Society*, produced by a blue-ribbon commission appointed in 1965 by President Lyndon Johnson. The resultant report constituted both paragon and apotheosis of "criminal justice system" thinking in "systems" terms. In its reliance on federal patronage, its wide-ranging personnel from the overlapping worlds of academia, government, and foundations, and even its very framing—in terms of the distinctive problems of "a free society"—this report also constituted both paragon and apotheosis of the Cold War approach to policymaking generally. There was in those years a widespread anxiety about the need to develop distinctively democratic or "free" solutions to the problems of social disorder in order to distinguish the United States from the gulags and enforced conformity of the Soviet bloc.[90]

Johnson appointed his National Commission on Law Enforcement and Administration in July 1965, partly in response to Barry Goldwater's demagoguery, during the 1964 campaign, on the issue of law and order, which—although Johnson had defeated Goldwater handily—the Democratic Party would spend the next thirty years seeking to co-opt.[91] Johnson also genuinely worried about what he and many Americans viewed as a rising tide of disorder in American cities—epitomized by the 1964 Harlem riots and later, in 1965, by the Watts uprising. For these reasons Johnson announced a federal "War on Crime" to complement (though as it happened, eventually to supplant) his marquee War on Poverty.[92] The commission, charged with developing a national strategy for responding to the problem of crime and proposing congressional legislation, constituted the War on Crime's first foray. After eighteen months, "three national conferences,"

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[88] Carnegie-Mellon University, *Honoring Al Blumstein's Contributions to Public Policy* (press release), March 26, 2016, http://heinz51.rssing.com/chan-12336548/all_p11.html.

[89] Walker, *supra* note 39, at 10-11, observed how the "growing popularity of 'systems analysis'" combined with Johnsonian liberalism's emphasis on federal action together determined *The Challenge of Crime*'s nationwide, systemic framing.

[90] *See* JAMIE COHEN-COLE, THE OPEN MIND: COLD WAR POLITICS AND THE SCIENCES OF HUMAN NATURE (2014).

[91] Though it overstates the argument, NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2015), offers a useful synthesis of how successive Democratic administrations sought to co-opt the issue of "law and order."

[92] *See generally* HINTON, *supra* note 17.

"five national surveys," "hundreds of meetings," and interviews with "tens of thousands of persons," all involving "19 commissioners, 63 staff members, 175 consultants, and hundreds of advisers," the final 340-page report was published, making 200 recommendations spanning "the operations of police, schools, prosecutors, employment agencies, defenders, social workers, prisons, housing authorities, and probation and parole officers." Implementing these recommendations, according to the Commission, might yield "a safer and more just society."[93]

The Challenge of Crime in a Free Society made an immediate splash and has had an enduring influence on what it christened as "the criminal justice system." Released as a trade paperback with over 100,000 copies printed, the report was featured in a 90-minute special on NBC's *Meet the Press*, covered in a special issue of the American Academy of Political Science's flagship journal, endorsed by the American Bar Association, and widely assigned in college courses.[94] Milwaukee police chief Ed Flynn recalls that reading the document as a college student "opened my eyes up to the critical importance of police in a democratic society."[95] From endorsing federal funding for local police to introducing the emergency phone number 911, the Crime Commission's recommendations, as historian Elizabeth Hinton notes, "continue to shape Americans' interactions with law enforcement" to this day.[96] The report also receives continued attention from jurists and scholars, who have developed a tradition of commemorating the report with decennial "anniversary" conferences.[97]

The report also had a more immediate intellectual and cultural effect, however: it popularized the phrase—and the concept—of "the criminal justice system."[98] (It also fueled further study of that system: by defining "criminal justice" as a distinct systemic phenomenon that could be studied as such, the report helped foster the proliferation of bachelor's, associate's, and graduate degree programs in "criminal justice" or "law enforcement."[99])

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[93] Challenge of Crime, *supra* note 19, at v.

[94] Henry S. Ruth, Jr., *To Dust Shall Ye Return?*, 43 NOTRE DAME L. REV. 811, 830-31 (1967); Walker, *supra* note 39, at 4; Warren Lehman, *Crime, the Public, and the Crime Commission: A Critical Review of* The Challenge of Crime in a Free Society, 66 MICH. L. REV. 1487, 1538 n.184 (1968). On the report's publication and reception, see generally HINTON, *supra* note 17, at 100-06.

[95] Erik Gunn, *How Milwaukee Went Soft on Crime*, POLITICO (November 10, 2014), http://www.politico.com/magazine/story/2014/11/milwaukee-soft-on-crime-112740. Flynn writes at greater length about the report in Edward A. Flynn, Miranda *and the Evolution of Policing*, 10 HARV. L. & POL'Y REV. 101 (2016). On the report's influence, *see also* Daniel Bergner, *Is Stop and Frisk Worth It?*, THE ATLANTIC (April 2014), https://www.theatlantic.com/magazine/archive/2014/04/is-stop-and-frisk-worth-it/358644/ (listing Challenge of Crime among "three documents" that illuminate "modern American thinking about the role of the police"). The report is also discussed as a model in the Obama Administration's Twenty-first Century Policing Task Force report.

[96] HINTON, *supra* note 17, at 81.

[97] *See* Symposium, *The Challenge of Crime in a Free Society: Looking Back Looking Forward*, June 19-21, 1997, https://www.ncjrs.gov/pdffiles1/nij/170029.pdf; Press Release, Symposium 2017: The Challenge of Crime in a Free Society: 50 Years Later, March 27, 2017, http://www.gwlr.org/symposium-2017-the-challenge-of-crime-in-a-free-society-50-years-later/.

[98] *See* Cheryl Corley, *President Johnson's Crime Report, 50 Years Later*, NPR (October 6, 2017), http://www.npr.org/2017/10/06/542487124/president-johnson-s-crime-commission-report-50-years-later (quoting Blumstein's assessment that one effect of the report "was a movement toward thinking of the criminal justice system as a system").

[99] *See* Walker, *supra* note 39, at 11.

Whether because of their elite educations or military experience, the blue-ribbon commissioners were almost certainly familiar with variants of "systems" thinking. Chaired by attorney general Nicholas Katzenbach, the commission included such luminaries as Yale University president Kingman Brewster, Jr. (Harvard Law graduate and Navy veteran); the future Watergate prosecutor Leon Jaworski; former Attorney General and future Secretary of State William P. Rogers (Cornell law graduate and Navy veteran); the future Supreme Court Justice Lewis Powell (Air Force veteran and ardent champion of "the American free enterprise system"); New York City Mayor Robert Wagner (an alumnus of Harvard Business School, ground zero of "systems" approaches to management, and of Yale Law School, and an Army veteran); and the Columbia law professor Herbert Wechsler. The commission's dozens of professional staffers, who were younger and often fresh from graduate school, would have been even more thoroughly steeped in systems. Directed by Harvard Law professor (and future dean) James Vorenberg, the staff brought on as consultants or advisers a long list of rising stars in the legal academy including Anthony Amsterdam, Sanford Kadish, Herbert Packer, and Lloyd Weinreb. As associate director, Vorenberg hired Lloyd Ohlin, whose "opportunity theory" of juvenile delinquency had broadly influenced initiatives both within the Kennedy administration and at the powerful Ford Foundation.[100]

However, it was the young engineer hired to oversee technical work and data analysis for the Commission—Al Blumstein—who formed the decisive link, bringing to the Commission not merely a loose zeitgeisty systems mindset but formal training in the systems science of operations research. After completing his bachelor's degree in engineering physics, Blumstein had earned a PhD in 1960 from Cornell's then-new program in operations research and joined the Institute for Defense Analyses, one of the many federally funded research and development agencies established at the nexus of military and civilian investment during World War II and the early Cold War. From there, he was hired as full-time director of the Crime Commission's Science and Technology Task Force.[101] From this fortuitous beginning, Blumstein went on to an illustrious career in criminology as a professor at Carnegie Mellon, becoming in 2007 one of the first Americans ever to win the field's most prestigious international award, the Stockholm Prize.[102] At the time he joined the Commission, however, Blumstein—in his own words—"knew nothing" about criminal justice. He brought to the task his "analytic skills and the system perspective—as well as the ignorance and naiveté that characterized the legendary boy who asked about the 'emperor's clothes.'"[103] To round out his team, he set about recruiting a number of other

[100] HINTON, *supra* note 17, at 82-83.

[101] This biography is drawn from Nancy Ritter, ed., *Al Blumstein: 40 Years of Contributions to Criminal Justice*, NIJ JOURNAL, no. 257, 2007, NCJ 218260, available at https://www.ncjrs.gov/pdffiles1/nij/jr000257d.pdf.

[102] The Stockholm Prize in Criminology, Prize recipients 2007, STOCKHOLM UNIVERSITY, http://www.su.se/english/about/prizes-awards/the-stockholm-prize-in-criminology/prize-winners/prize-recipients-2007-1.95254.

[103] Blumstein, *supra* note 14, at 14.

scientifically trained staffers: a Berkeley graduate student in nuclear physics; an operations-research specialist from IBM; and Richard Larson, a recent MIT graduate in electrical engineering.[104] Larson, just 22 years old, "was wet behind the ears—with virtually no professional experience in applying operations research to crime." He fondly recalled how Blumstein, through patient mentorship, taught him "how to think" and "how to structure problems" using the cutting-edge science of operations research."[105]

Thanks to Blumstein, *The Challenge of Crime in a Free Society* became permeated with a systemic view of its object of study. The phrase "the criminal justice system" (or its variant, "the system of criminal justice") appeared throughout the text, which also featured a dedicated section entitled "America's System of Criminal Justice."[106] Blumstein had not coined the phrase—it had already begun to appear in legal scholarship—but he infused it with substantive weight by taking a rigorous, theoretically informed systems-science approach to the material. In line with the Johnson Administration's preferred framing of crime as a national crisis requiring a federal response, he also influentially modeled the system as a singular, holistic national entity—"*the* criminal justice system"—in contrast to other scholars around the same time, who sometimes wrote instead of each jurisdiction having "*a* criminal justice system."[107] A representative review praised the published report for bringing together for the first time "the entire spectrum of crime prevention, law enforcement, dispensation of justice, and corrections as one system . . ." Although the concept of "interdependence" of these institutions was "not new, the impact of the decision-making process by one segment of this continuum on another has perhaps never before been so well highlighted."[108]

Blumstein and his team contributed to *The Challenge of Crime* not only the terminology of system, but also the report's famous centerpiece: an elaborate flowchart attempting to diagram, in the abstract, all the component parts of "the criminal justice system" and how they related to one another. Decades later, Blumstein recalled with pride how his team had "created the first flow diagram I know of for the whole CJS."[109] One reviewer praised the published volume specifically because of this diagram. Unlike the dry Wickersham Report of thirty years before, *The Challenge of Crime* featured a "refreshing" style and "genuine reader appeal" because it was "profusely illustrated with dramatic photographs and uncomplicated graphic charts and diagrams."[110] Blumstein's flowchart quickly became a staple of criminology textbooks, and the federal Department of Justice still produces and

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[104] *Id.*

[105] Ritter, *supra* note 101.

[106] A separate section concerned "The Juvenile Justice System."

[107] *E.g.*, DALLIN OAKS & WARREN LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT (1968) (a study of indigent defense in Chicago).

[108] Ben S. Meeker, *Review of Government Reports and Public Documents*, 42 SOC. SERV, REV. 290, 290 (1968).

[109] Blumstein, *supra* note 14, at 15.

[110] Meeker, *supra note* 108, at 290.

distributes an updated version.[111] The chart divided the criminal justice system into "a series of stages, with flow among them described by branching ratios (the percentage of the flow in each stage that flows to each subsequent stage), resources (individual orders in the system or physical resources like courtrooms or jail cells), workloads associated with resource consumption at each stage, and unit costs associated with the resources at each stage."[112] As a well-trained systems thinker, Blumstein had hoped to "build in a feedback capability" into the model, although that proved difficult given the limitations of the available data.[113]

The flowchart built on the insight that had structured reports in the "crime commission" genre since the *Illinois Crime Survey*: the courts do not spend equal time and effort on every case brought to them but operate instead like a filter, taking a large number of arrests on the front end and translating an ever-smaller number of those arrests into charges, trials, convictions, and ultimately, prisoners on the back end. Blumstein's flowchart reproduced this basic timeline but translated it into graphic form, mapping "the criminal justice system" as a funnel-like structure proceeding from left to right. At the left, in the beginning, was the label "crime": the essential input of the system. "Crime" then flowed through a structured sequence of filtering mechanisms, with some amount of it falling out or branching off at each stage: first the police, who investigated, arrested, and booked; then the courts, where cases proceeded along through initial appearance, preliminary hearings, arraignment, trial or plea, sentencing, and appeals; and finally corrections, where cases ended up in probation, prison, or parole, flowing "out of system" only at the very right-hand end of the chart. At each stage, some subset of the input dropped out of the chart altogether: crimes that went unreported or undetected, police reports that did not lead to prosecution, charges that were filed but later dismissed, trials that ended in acquittal, convictions reversed on appeal.

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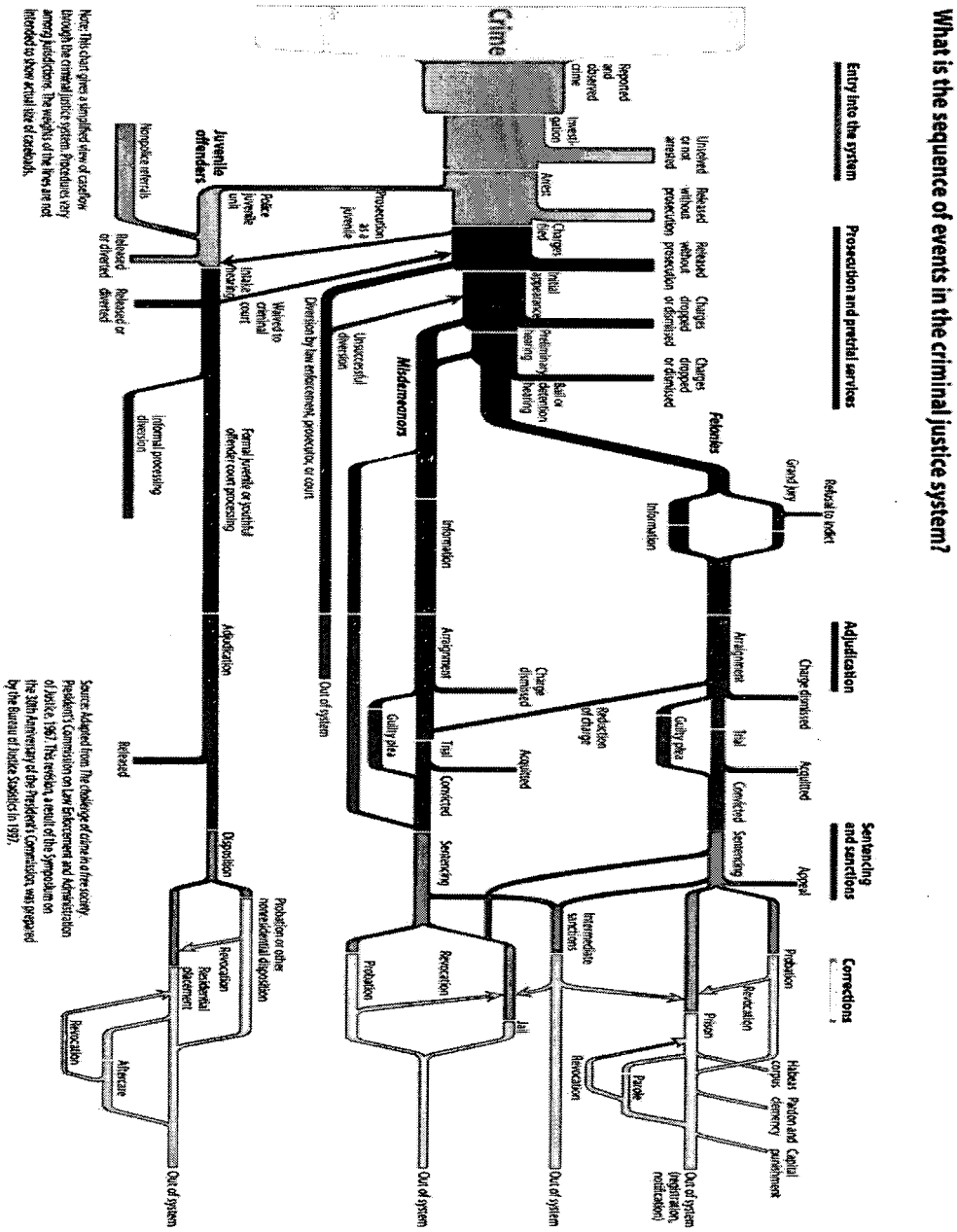
[111] Bureau of Justice Statistics, *Criminal Justice System Flowchart*, *available at* https://www.bjs.gov/content/largechart.cfm.

[112] Blumstein, *supra note* 14, at 15.

[113] *Id.*; Ritter, *supra* note 101.


What is the sequence of events in the criminal justice system?
Entry into the system
Prosecution and pretrial services
Adjudication
Sentencing and sanctions
Corrections
Crime
Reported and observed crime
Investigation
Unsolved or not arrested
Arrest
Released without prosecution
Charges filed
Released without prosecution
Initial appearance
Charges dropped or dismissed
Preliminary hearing
Charges dropped or dismissed
Bail or detention hearing
Felonies
Grand jury
Refusal to indict
Information
Arraignment
Charge dismissed
Guilty plea
Trial
Acquitted
Convicted
Sentencing
Appeal
Probation
Revocation
Prison
Habeas corpus
Pardon and clemency
Capital punishment
Parole
Revocation
Out of system (registration, notification)
Intermediate sanctions
Out of system
Misdemeanors
Information
Arraignment
Charge dismissed
Reduction of charge
Guilty plea
Trial
Acquitted
Convicted
Sentencing
Revocation
Probation
Jail
Out of system
Juvenile offenders
Nonpolice referrals
Police juvenile unit
Prosecution as a juvenile
Intake
Waived to criminal court
Released or diverted
Released or diverted
Diversion by law enforcement, prosecutor, or court
Unsuccessful diversion
Out of system
Formal juvenile or youthful offender court processing
Informal processing diversion
Adjudication
Released
Disposition
Probation or other nonresidential disposition
Revocation
Residential placement
Revocation
Aftercare
Out of system
Note: This chart gives a simplified view of caseflow through the criminal justice system. Procedures vary among jurisdictions. The weights of the lines are not intended to show actual size of caseloads.
Source: Adapted from The challenge of crime in a free society. President's Commission on Law Enforcement and Administration of Justice, 1967. This revision, a result of the Symposium on the 30th Anniversary of the President's Commission, was prepared by the Bureau of Justice Statistics in 1997.

Structuring the chart in this way—framing the system as built around the input of "crime"—did not lend itself to visualizing inputs that were not actually "crimes," such as false reports, cases of mistaken identity, or vindictive prosecutions of the innocent. Clearly these constituted some part of the mass of dismissed charges or overturned convictions, and in that sense they were depicted implicitly within the chart, but they did not have their own concrete form within the structure. Much less did the flowchart enable any easy visualization (or deconstruction) of how the category of "crime" itself was constructed through the complex interaction of moral intuition, positive legislation, and cultural panic, or how policing decisions themselves shaped the discovery (and the available amount) of crime for the system to process. "Crime" was where the chart began, a category of inputs from somewhere out there in society that, for the system's purposes, could be taken as given.

Nor could the flowchart easily accommodate what was obvious to everyone at the time—the way that every stage of the criminal process was permeated with race and class—since, officially, race and class played no part in the courts' and prisons' decision-trees. The Crime Commission, in conducting its fieldwork, developed a special interest in the urban "ghettoes," observing more than 200 urban police chiefs at work and consulting with 2,200 urban police departments.[114] From its origins through its execution, the Crime Commission was shot through with the assumption that what politicians called "the crime problem" was, in large part, the problem of managing urban, African-American youth. Internally, the commissioners heatedly debated these dimensions of their research and some commissioners questioned sections of early draft reports that fixated on African-Americans as the paradigmatic "felons."[115] There was no place in an abstract flowchart for those kinds of conversations or questions.

The fetish for diagrams reflected a broader tendency in midcentury social science, premised as it was upon the notion of a "universal man" whose interactions and institutions could be modeled abstractly. Cold War psychology defined the ideal personality as the "open mind," the fully autonomous, rational, and self-contained individual thinker, and thus viewed any type of prejudice—but also most forms of group identity or "ethnocentrism"—as symptomatic of cognitive deficits.[116] If this worldview represented an improvement over earlier biological and eugenicist discourses premised on inherent racial differences, it nevertheless made it difficult to incorporate into one's models the racial categories that, in everyday life, remained quite salient even for the most open-minded individuals—in part because of the political and cultural durability of those earlier, more essentializing discourses.[117] By the late 1960s, virtually everyone in the United States understood the discourse of "crime" as

[114] HINTON, *supra* note 17, at 84.
[115] *Id.* at 85.
[116] COHEN-COLE, *supra* note 90, at 1-2, 43.
[117] *See* HEYCK, *supra* note 13, at 3.

inextricably bound up with the American experience of race. And yet, in the signature diagram that became textbook knowledge for generations of "criminal justice" students and police officers, there was no place for cultural specificity or particularity of that kind.

The flowchart at the center of *The Challenge of Crime* constituted a near-perfect exemplar of midcentury systems thought. C. West Churchman, in his foundational textbook on operations research, had praised the use of diagrams "to bring together, from various fields of research, knowledge about organizations." "The model . . . is a representation of the system under study, a representation which lends itself to use in predicting the effect on the system's effectiveness of possible changes in the system."[118] Perhaps Blumstein had read Churchman's textbook, but if not, he had certainly read something like it in his graduate studies. Precisely echoing Churchman, Blumstein described his flowchart as "helpful for studying policy changes" and modeling how adjustment throughout the system might affect judicial caseloads and prison populations. But more importantly, in Blumstein's view, "use of the model got people to think about the components as part of an interacting system. For the first time, there was an emphasis on systemwide planning."[119] In subsequent decades this faith in "systemwide planning" came to dominate federal criminal justice policy. The Law Enforcement Assistance Administration, for instance, conditioned federal grants upon the development by state criminal justice agencies of "comprehensive plans" for their criminal justice systems as a whole.[120]

Viewed up close, however, *The Challenge of Crime* betrayed some pulling at the seams, some hints at the tensions of applying this totalizing systems approach. Understandably given his training, Blumstein never considered whether the criminal justice system was anything other than a system—after all, from the perspective of an operations researcher, anything can be described as a system—but he and his team quickly recognized that the institutions they were being asked to study were in fact "quite different from most of the kinds of systems we were familiar with. Even though actions by one part can have an impact on the others, there is no 'system manager.' In particular, the courts, which are a central part of this system, are intended to be independent and to act as a control on the other parts—to constrain them but not to manage them."[121] As another operations researcher later wrote, those attempting to model "the criminal justice system" in the United States always had to confront the puzzle "that there was no system. The separation of powers in governments at all levels . . . also meant that the police paid little attention to the courts, which paid little attention to the correctional system, which paid little attention to the police." The first task

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[118] HEYCK, *supra* note 13, at 185 (quoting C.W. CHURCHMAN, INTRODUCTION TO OPERATIONS RESEARCH (1957)).

[119] Blumstein, *supra* note 14, at 15.

[120] FEELEY & SARAT, *supra* note 80, at 66 (describing the LEAA as animated by the notion that the criminal justice system was insufficiently coordinated, a notion "captured in frequent reference to such terms as 'system,' 'integrated analysis,' 'coordination, cooperation and combination of efforts,' and 'long-range'").

[121] Blumstein, *supra* note 14, at 15.

of Blumstein's task force "was to describe the system, or as it was often called, the 'non-system,' in sufficient detail to permit decision-makers to see how problems in one part of the system affected the rest of the system."[122]

The final text of the report retains stray traces of the analysts' puzzlement. "The system of criminal justice America uses," the report allowed, is in fact "not a monolithic, or even a consistent, system. It was not designed or built in one piece at one time," but consisted of a "philosophic core" surrounded by "layer upon layer of institutions and procedures, some carefully constructed and some improvised, some inspired by principle and some by expediency." Some of these layers were old (trial by jury), others were new (juvenile courts, professional police). In truth, there was no single "criminal justice system" because "[e]very village, town, county, city, and State has its own criminal justice system, and there is a Federal one as well," and although they all "operate somewhat alike" they are not "precisely alike."[123] The overall thrust of the report, nevertheless, was to confirm and reify the existence of something called "the criminal justice system," with its tripartite division into "the police, the courts, and corrections," as depicted in Blumstein's famous chart. These three parts were constantly interacting with one another, such that "reforming or reorganizing any part or procedure of the system changes other parts or procedures." Thus, any "study of the system must begin by examining it as a whole." Nothing occurring in the system was random or chaotic or contingent—the system "is not a hodgepodge of random actions"—but "rather a continuum—an orderly progression of events" consisting of a sequence of "decision points" that could be mapped and understood.[124]

The Challenge of Crime in a Free Society was only the most prominent and influential in a long line of attempts to model the criminal justice system in such a way as to enable the prediction of crime rates and to model how changes in one area of the system would affect others (for instance, how increasing the number of police officers would alter the workload of prosecutors, and so on).[125] Also in 1967, a New York state agency developed "a six-foot-long foldout figure entitled 'The criminal justice process for adult felonies,'" with the goal of using this model as the basis for "a state-wide computerized information system" that would collect and disseminate criminal justice data and, ultimately enable "decisions [to] be made on a more rational basis."[126] In part, these efforts reflected the Cold War moment. They combined the dream of prediction, the great dream of both nineteenth-century criminology and midcentury systems theory, with atomic faith in the power of technology to alleviate endemic social ills (precisely because technology was now powerful enough to end the world

[122] Maltz, *supra* note 40, at 208.

[123] Challenge of Crime, *supra* note 18, at 7.

[124] *Id.*

[125] For a more comprehensive account of systems analysis in post-1960s criminology and criminal jurisprudence that draws on some of the same examples and sources as this section, *see* Harcourt, *supra* note 10, at Part III.

[126] Maltz, *supra* note 40, at 208-09.

altogether; what couldn't it do?).[127] But they also resulted more specifically from the proliferation in policymaking circles of trained "systems analysts," often with military experience. Having "developed command-and-control systems for the military," this new cadre of criminologists "felt that the same techniques could be brought to bear on solving the crime problem."[128] In a telling illustration of the overlap, one of the first beneficiaries of Johnson's Office of Law Enforcement Assistance (the predecessor to the LEAA) was Blumstein's old employer, the Institute of Defense Analyses, which in 1966 received a grant to apply recent military advances to urban policing.[129]

Blumstein later described himself and his task force as "missionaries" into the world of criminal justice, bringing with them the "OR techniques of quantitative modeling, system perspective, and planning."[130] Forty years later, a colleague could observe, "Everyone's heard of the 'criminal justice system,' and I think that's a term that's fairly attributable to Al. He was the first person to conceive of it as a system, and put forth a model of it as such."[131] After the Crime Commission shut down, Blumstein carried on with what became his lifelong project of systemizing criminal justice. The Science and Technology Task Force published its own report, which launched "the modern era of applying operations research to problems of crime and justice."[132] In a series of articles, Blumstein translated his work for the Commission into an agenda for "a systems approach to the study of crime and criminal justice" and, over the course of his career, essentially carried out that agenda, developing complex mathematical models and statistical techniques for measuring recidivism (the better to understand feedback loops within the system), predicting criminal careers, and assessing changes in the incarceration rate.[133] Blumstein's ongoing research continues to yield celebrated insights.

The Crime Commission's legacy overall is more ambivalent. In retrospect, the report reads as an awkward conglomeration, reflecting the liberal politics of many of the commissioners (and their Johnson Administration sponsors) but also their efforts to appease what they perceived as the conservative orientation of law enforcement, policymaking circles, and increasingly, the general public.[134] The report begins with an ominous, Goldwater-esque panorama of an America cowering under spiraling levels of "crime," suffering through a crisis that threatens "the health of the Nation" and renders every American "a victim."[135] In many of the report's individual sections, crime is attributed not to cultural deficit or

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[127] *See id.* at 209 (connecting this optimism about criminal justice with the moon landing).

[128] *Id.*

[129] HINTON, *supra* note 17, at 89-90.

[130] Blumstein, *supra* note 14, at 14.

[131] Press release, Carnegie-Mellon, *supra* note 93.

[132] Maltz, *supra* note 40, at 207.

[133] *E.g.*, ALFRED BLUMSTEIN, A SYSTEMS APPROACH (1967); Alfred Blumstein & Jacquelin Larson, *Models of a Total Criminal Justice System*, 17 OPERATIONS RESEARCH 2 (1969). *See generally* Ritter, *supra* note 106 (summarizing Blumstein's career).

[134] HINTON, *supra* note 17, at 101-03.

[135] Challenge of Crime, *supra* note 18, at 1.

individual immorality but to the "root causes" long familiar from progressive criminology—urban blight, economic inequality. And yet, the long list of policy recommendations proposes not social investment or expanding the welfare state, but rather increased policing. Attorney general Ramsey Clark explained that, "since the social causes of crime cannot be removed very quickly, it is necessary to proceed [first] with a program of criminal justice."[136] It was a testament to how successfully the report had been stripped of War on Poverty trappings that William F. Buckley found much within its pages to praise.[137]

The resultant recommendations formed what became a permanent template for U.S. criminal justice policy: the preservation of nominal local and state control, but now with an overlay of federal coordination of research and data collection and generous federal grants for local and state police, courts, and prisons.[138] *The Challenge of Crime*'s call for "a comprehensive, systems orientation toward criminal justice," steered at the federal level and governed by "a national strategy to reduce crime," quickly spurred congressional action in the form of the Safe Streets Act of 1968, which institutionalized the previously temporary Law Enforcement Assistance Administration to disburse federal grants to local and state criminal justice agencies.[139] The LEAA was phased out in 1974, but components of its role survived in other agencies of the reorganized Department of Justice. Thus the basic governance framework introduced by *The Challenge of Crime* has largely survived even as federal investment in anti-poverty and social programs has stagnated or declined, rendering police and jails "the primary public programs in many low-income communities across the United States."[140]

LEAA funded a wide variety of projects related to courts, jails, and prisons.[141] But it is now best remembered (and often criticized) for pouring funds into local police departments. Although it largely failed at inspiring the state-level systematic planning that its architects hoped for, LEAA "immediately became a vast pork barrel for local police departments," who ever since have depended upon federal largesse for some portion of their budgets.[142] As Elizabeth Hinton has traced, states used LEAA block grants "to increase surveillance and patrols in already-targeted black urban neighborhoods," to acquire "military-grade weapons" for police, and to cultivate "a climate of surveillance and intimidation" in inner cities that frequently erupted into "street warfare between police and residents."[143] The

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[136] HINTON, *supra* note 17, at 103 (citing Milton, Eisenhower et al., *To Establish Justice. To Insure Domestic Tranquility. Final Report on the National Commission on the Causes and Prevention of Violence* (Washington, DC: U.S. Government Printing Office, 1969)).

[137] *Id.* at 104.

[138] On this pattern of "federalism in practice" as a feature of modern U.S. governance *see generally* Mayeux & Tani, *supra* note 87.

[139] Walker, *supra* note 39, at 11.

[140] HINTON, *supra* note 17, at 4.

[141] *See* FEELEY & SARAT, *supra* note 86, at 52-53, 56-57.

[142] Walker, *supra* note 39, at 11.

[143] HINTON, *supra* note 17, at 109-10.

result was to empower police against an ever-more powerless urban poor, establishing the long-simmering dynamic that finally exploded in Ferguson, Missouri, in 2013. One might say the result was to stress the system beyond its capacity to adapt.

IV.

In retrospect, what is most striking about *The Challenge of Crime in a Free Society* is how quickly the premises underlying its systemic perspective became obsolete, and how influential it nevertheless remained—as reflected in the near-immediate uptake of the term "the criminal justice system." Within a few years of its publication, the Great Society optimism that produced it had crashed on the shoals of Vietnam, Watergate, and oil-crisis malaise. Across every field of human inquiry, the "age of system" began to fissure and crumble into what the intellectual historian Daniel Rodgers has christened our current "age of fracture."[144] In the thought-worlds of every field, societies, structures, systems, and macroeconomies melted away, revealing only so many disconnected individual agents, rational actors, performative identities, and freely made choices. The connective tissue of all those midcentury flowcharts had, perhaps, been nothing but lines on a page.

And yet, "the criminal justice system" lumbered on, burrowing its way into the language and becoming simply the default shorthand that lawyers, jurists, legal scholars, pundits, and even ordinary people used when they wanted to talk about—well, what? Some combination of entities and actors having something to do with law enforcement. New York federal judge Constance Baker Motley, essentially restating the diagram at the heart of *The Challenge of Crime*, gave a speech dividing "our criminal justice system" into its "various stages."[145] Supreme Court justices debated whether "the entire Texas criminal justice system" could or could not be described as infected with arbitrary bias.[146] Blumstein's flowchart acquired a life of its own, such that scholars could quip that "the now-famous diagram . . . has apparently been reproduced in every textbook published since 1967."[147] In this way the diagram came to structure how participants in the system themselves understood the processes that the chart was purportedly only modeling.

In a ten-year retrospective on *The Challenge of Crime*, criminologist Samuel Walker reported that the volume was already outdated, having fallen out of step with "the most important developments with respect to crime and public thinking about criminal justice."[148] While the report itself had already diagnosed a crisis of out-of-control crime, reported crime rates had only risen further in the intervening years, further fueling public concern and the

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[144] RODGERS, *supra* note 15.

[145] Constance Baker Motley, *Law and Order and the Criminal Justice System*, 64 J. CRIM. L. & CRIMINOLOGY 259, 260 (1974).

[146] Jurek v. Texas, 428 U.S. 262, 274 (1976).

[147] Walker, *supra* note 39, at 10.

[148] *Id.* at 4.

salience of crime as an issue for electoral politics. Moreover, a general "disillusionment and cynicism" had now set in "about the workings of the American criminal justice system" and in particular, about the capacity of prisons.[149] Reflecting an essentially liberal faith in the welfare state even as it advocated for intensified policing, *The Challenge of Crime* had in many places betrayed remarkable optimism in the power of education, rehabilitation, and treatment programs. By 1977, "the commission's optimism" had come to be "regarded by those in criminal justice as almost a bad joke" because the very idea of rehabilitation no longer seemed possible—as encapsulated in the criminologist Robert Martinson's famous conclusion about prison treatment programs: "Nothing works."[150] Essentially this new malaise about prisons constituted one iteration of the larger sensibility of the 1970s: the very idea that government could productively shape human behavior in any way was under assault from all sides.[151] Nevertheless, Walker did not at the time identify the report's "system" perspective as, itself, also an artifact of its fleeting moment in time. In fact he praised the report, despite the ways in which it was now obsolete, for having generated "increased awareness of the criminal justice system as a system."[152]

By 1980 it was clear that the notion of "system," insofar as it implied equilibrium, no longer (if it ever had) adequately captured the practices of crime and punishment in the United States. Blumstein's "theory of stability of punishment" almost immediately disproved itself. "Shortly after publication of the 'stability' paper," he later recalled, "we saw a major regime change" as incarceration rates began to grow 6-8% per year beginning in the late 1970s. By the 2000s, the United States had "become the world leader in incarceration rate" with a rate of about 490 per 100,000, "more than four times the previously stable rate that had prevailed for over 50 years."[153] Blumstein had always predicted a minor spike in prison rates as the "baby boom" generation made its way through their twenties and thirties—"a 'pig in the python' phenomenon"—but assumed that the system would thereafter return to equilibrium.[154] In retrospect, he laconically concluded, "we grossly underestimated the magnitude of that growth because we did not anticipate the later politicization of punishment policy."[155] The theory that "a society operated much like a thermostat, increasing or decreasing the punishment rate to keep it within the threshold limits of a set point," no longer fit the data.[156] Blumstein himself, with his engineer's sensitivity to the system's inputs and outputs, recognized this

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[149] *Id.*

[150] *Id.* at 8-9; *see, e.g.*, Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 PUBLIC INTEREST 22, 48 (1974).

[151] *See generally* JULILLY KOHLER-HAUSSMANN, GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA (2017).

[152] Walker, *supra* note 39, at 10.

[153] Blumstein, *supra* note 14, at 19.

[154] Blumstein, supra note 14, at 15.

[155] *Id.*; *see also* Maltz, *supra* note 40, at 239.

[156] Maltz, *supra* note 40, at 239.

dynamic quite early, warning in the 1980s that prison growth was "out of control."[157] In 1992, as President of the American Society of Criminology, he worried that "the criminal justice system is behaving irrationally by any criterion," and urged policymakers to abandon "fear and punitiveness."[158]

If prison growth rendered it untenable to speak of the criminal justice system as homeostatic, it also called into question whether the system could meaningfully be charted in purely abstract, procedural terms, as a system that simply processed "crime" inputs into sentencing "outputs." By the 1990s, it seemed to many observers that the system was no longer serving a pure criminal adjudication function, but was, in practice, serving some other function instead—the maintenance of racial hierarchy, say, or the widening of class inequality.[159] Marc Mauer's seminal report, *Race to Incarcerate*, synthesized data revealing the shockingly disproportionate effects of prison growth upon African-Americans and other minority groups.[160] In 2010 Michelle Alexander's runaway bestseller popularized into conventional wisdom the narrative that policymakers, since the 1980s, had repurposed criminal justice into a "new Jim Crow."[161] Marxisants within sociology departments, meanwhile, proffered the theory that global capital needed America's metastasizing prisons as warehouses for the displaced urban proletariat and other surplus laborers left jobless by deindustrialization.[162] These were structural-functionalist theories of a kind, but again not posited on the premise (or hope) of equilibrium. Simplified variants of all these theories soon migrated into mainstream punditry and, by the 2010s, the conviction that the United States had entered a historically unprecedented crisis of "mass incarceration" constituted the mainstream view among both academics and growing numbers of the general public.[163]

While the first generation of studies of mass incarceration tended to sound in political science or sociology, the central problem was how to explain why punishment had *changed* so dramatically, and thus it was only a matter of time before historians stepped in. Blumstein himself offered a convincing start towards an explanation for prison growth, in his eminently systems-thinking terms: "The regime change was brought about by transfer of control by the CJS (which made internal decisions about incarceration to maintain the homeostatic process) to the political system," because crime had transformed into a major issue in electoral politics.[164] But that left open

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[157] Alfred Blumstein, *Prison Populations: A System Out of Control?*, 10 CRIME & JUSTICE 231 (1988).

[158] Alfred Blumstein, *Making Rationality Relevant--The American Society of Criminology Presidential Address*, 31 CRIMINOLOGY 1, 2, 11 (1993).

[159] Lofstrom Magnus & Steven Raphael, Crime, the Criminal Justice System, and Socioeconomic Inequality 21-23 (IZA, DP No. 1982, March 2016), http://ftp.iza.org/dp9812.pdf.

[160] MARC MAUER, RACE TO INCARCERATE (The New Press rev. ed. 2006).

[161] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, (2010).

[162] *E.g.*, LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009); *cf.* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007).

[163] *See, e.g.*, Adam Gopnik, *The Caging of America*, THE NEW YORKER, (Jan. 30, 2012) http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america (providing a leading example of the ideas' diffusion out of academia into popular media).

[164] Blumstein, *supra* note 14, at 19.

the deeper questions of what generated the "transfer of control" to begin with, and why "the political system," once placed in control, responded in the punitive way that it did. In search of answers to these questions, the historian Heather Ann Thompson issued a call to arms in 2010 urging *historical* study of mass incarceration as one of the most important post-World War II developments.[165] In the years since, historians have rushed to meet this call with an ever-multiplying bibliography of local and national studies on policing, criminal law, crime policy, and punishment, based in painstaking slogs through government archives, court records, and microfilm reels around the country.[166]

Although the specific causal explanations vary and will no doubt continue to be debated, what unites this new historical project on mass incarceration is how far its participants depart from the assumptions of the "age of system." To explain American crime and punishment this literature emphasizes individual agency, contingency and indeterminacy, transformative change over time, local specificity, and the distinctive regional legacies of slavery, conquest, and racial segregation, rather than abstract flows of inputs and outputs or repetitive law-like processes.[167] The question, then, is whether it remains useful to talk of "the criminal justice system" in a world where neither contemporary data nor historical scholarship supports the assumption that law enforcement institutions together constitute an abstract structure performing a clearly defined set of social functions in dynamic equilibrium. "While there is no guarantee that we will in fact see substantial institutional change in the size and nature of the carceral state," writes Jonathan Simon in a perceptive reading of the field, "the emerging historiography of mass incarceration has been shaped by the very possibility of that change and has lessons that could be crucial in strengthening the growing movement for reform."[168]

Of course, systems thinking and modeling have enormous utility. They arose in the modern world precisely because they enable the organization of information and data about the sprawling bureaucracies characteristic of the modern world, which would otherwise be difficult to grasp in totality.[169] Systems thinking also enables researchers to move beyond distracting particulars or emotions. In Blumstein's view, the "systems perspective" was especially useful in the field of criminal justice "because of the strong ideological perspectives that pervade" discussions of crime and punishment. Operations researchers, with "their analytical skills and system perspectives

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[165] Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 706 (2010).

[166] *See* Jonathan Simon, *Is Mass Incarceration History?*, 95 TEX. L. REV. 1077, 1077–78 n.2 (2017) (collecting citations). A useful introduction to this burgeoning field are the articles collected in the special issue of the *Journal of American History*, "Historians and the Carceral State," published in June 2015.

[167] *See, e.g.*, KELLY LYTLE-HERNANDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965 (2017) (emphasizing legacy of conquest); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010) (emphasizing legacy of slavery).

[168] Simon, *supra* note 167, at 1078.

[169] HEYCK, *supra* note 13, at 3–4, 13–14.

and without being constrained by the traditional presumptions," could cut through ideology and bring to the field "new insights, new questions, and new challenges."[170] These are all sound arguments in favor of social scientists and engineers lending their expertise to policymaking. But it is a separate question whether, in a broader cultural sense, it remains useful to think and talk colloquially of crime and punishment in terms of a system. After all, the benefits of systems thinking—its abstraction, its lack of emotion—are also its downsides.

We should also reflect upon what it does to participants to think of themselves as components of a "system." Writing in 1977, Samuel Walker generally praised *The Challenge of Crime* for its systemic perspective. But in a footnote, he hazarded one tentative critique—a critique that has since become prophetic. "The systems approach," he noted, "inevitably focused attention on the crime control functions" of police agencies, by locating them firmly within something called a "criminal justice system" whose function is the reduction of crime rates. "Yet, research on the police . . . has convincingly demonstrated that the police spend only about 20% of their time on criminal matters; their primary role is that of a social service agency. Thus, systems thinking contributes to the distorted role image of the police."[171] Public defenders, meanwhile, have often described the psychic dislocation caused by representing individual clients yet also feeling in some sense implicated, often against their will, in the orderly functioning of "the system."[172]

The idea of "the criminal justice system" may have its most pernicious effect upon appellate judges, including the justices of the Supreme Court.[173] The original flowchart, in *Challenge of Crime*, lodged appellate judges upstream in a continuous flow that connected them with every downstream decision of every ordinary police officer patrolling the streets and making arrests. Combined with the Warren Court's "criminal procedure revolution," this imagined connection implicated constitutional doctrine in the imperative of crime control and caused appellate judges to worry, with every exegesis upon the Fourth Amendment, about whether their words would have a negative "feedback loop" causing someone, somewhere to become victimized by crime. This framing has now become pervasive in constitutional doctrine. By selecting criminal cases at random from any recent docket, one can encounter Supreme Court justices writing about the need to balance the "social costs" of enforcing the Fourth Amendment

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[170] Blumstein, *supra* note 14, at 22.

[171] Walker, *supra* note 39, at 11 n.24; *see also* Kelling, *supra* note 10 (arguing that the "system" metaphor caused police to focus on maximizing the number of "crimes" for the system to process, rather than maintaining orderly streets).

[172] *See, e.g.*, Maura Ewing, *A Replacement for Overworked Public Defenders?*, THE ATLANTIC, (July 5, 2017), https://www.theatlantic.com/politics/archive/2017/07/a-replacement-for-overworked-public-defenders/532476/ (quoting public defender's complaint that "[p]eople think that we work for the system").

[173] For an interesting reading of *Miranda v. Arizona*, as well as a number of subsequent Supreme Court decisions, as essentially operating from the premises of systems analysis, *see* Harcourt, supra note 10, at 39–45.

against the "benefits" and to weigh "law enforcement interests" against the interests of individuals.[174]

The implication of framing criminal procedure questions in this way is that criminal procedure questions are also, at least in some attenuated sense, questions about the amount of "crime" that should be tolerated in the service of other values. Because crime, police, and judges are all connected in one grand system, criminal procedure rules are assumed to have some hydraulic connection to crime rates, implying that they should only be enforced when and if the "costs" of vindicating the Constitution are worth the uptick in mayhem. Judges, then, when deciding questions of criminal procedure, understand themselves to also in some sense be making judgments about how much "crime" is worth trading for other values such as privacy, due process, limited government, individual autonomy, and so on. This framing stems from multiple intellectual and cultural roots, to be sure,[175] but among the most important such roots is the tendency since the 1960s to conceptualize appellate judges and police as all component parts of some singular common system.[176] If appellate judges actually had access to complete and accurate information about this system, and could therefore be confident that feedback would flow frictionlessly between them and the police departments that they worry about regulating, then this approach might make sense. But not even the most heroic systems modelers claim that we have achieved anything near that level of pristine insight into "the criminal justice system." Systems, as any systems theorist would happily remind the Supreme Court, are models, not reality. Judges who make decisions on the basis (even subconsciously) of some imagined responsibility to the police, mediated through the imagined systemic effects of their rulings, are likely to estimate those effects wrongly and to err in one direction or another.

There is also a sense in which thinking about something as an all-encompassing system can induce feelings of stasis or paralysis for those within or affected by it, even if the system itself does not actually appear particularly homeostatic. As Elizabeth Hinton observes, the flurry of federal funding and research into "the criminal justice system" that began during the Johnson Administration has tended over time to reinforce the idea with which it began: the idea that the problems of cities, of urban poverty, of racial tensions, and so on are all derivative problems of "the criminal justice

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[174] Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) (Thomas, J.); Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016) (Alito, J.). In contrast, the earliest Fourth Amendment decisions tended to emphasize not cost-benefit tradeoffs, but the danger that using illegally obtained evidence to secure convictions would undermine the government's legitimacy. This theme persisted into the early 1960s, but has steadily faded from emphasis in Fourth Amendment jurisprudence. *See, e.g.*, *Weeks v. United States*, 232 U.S. 383, 393 (1914) (stating that efforts to punish the guilty should not "be aided by the sacrifice of ... great principles"); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (emphasizing the importance of government integrity and adherence to the rule of law).

[175] *See generally* Sarah A. Seo, *Antinomies and the Automobile: A New Approach to Criminal Justice Histories*, 38 LAW & SOCIAL INQUIRY 1020 (2013) (tracing the history of the idea that criminal justice is best understood through the paradigm of tradeoffs between liberty and security).

[176] On this tendency as reflected in jurisprudence, *see* Harcourt, *supra* note 10, at 39–45.

system."[177] "By consistently reinforcing the urgency of the crime issue," Hinton writes, "the new data and the new policies together became a self-perpetuating force that deeply shaped domestic policy and encouraged the continual flow of law enforcement resources into low-income African American communities" even as other types of government investment retreated.[178] In this way, post-1960s criminal justice research "extended a long tradition of racially biased understandings of crime," dating to the Progressive Era, in which the tendentious use of statistics entrenched cultural associations between blackness and criminality and "rationalized the expansion of the American prison system."[179] Intended to help produce a society more fair and just, federally sponsored empirical research on "crime" often fell instead into the hands of police administrators (and their scholarly supporters) who deployed constructed linkages between low-income neighborhoods and criminality to justify further policing and surveillance of those very neighborhoods. But the underlying data was always messier, more flawed, and more incomplete than those who wielded it in the service of surveillance allowed; for one thing, police tended to rely heavily on arrest figures, which do not necessarily correlate with the level of crime as adjudicated by courts. Moreover, reported crime rates are skewed toward street crime, which is easiest to measure; there is no reliable way of quantifying the real-world incidence of white-collar crime since its prosecution is almost entirely a function of its detection.[180] Even within the Nixon administration, one official worried that the new models of computer-generated policing relying on data "without court tested evidence or proof . . . could amount to computerized harassment."[181]

V.

"The criminal justice system" is one of the most enduring legacies of the now-past "age of system." Since the mid-1970s social scientists have fixated less on systems and structure than on networks, chaos, spontaneity, and flexibility.[182] There are, in other words, concepts and frameworks other than the concept of system that can be productively used to describe and understand complex human behavior and institutions. Still, as Hunter Heyck recognizes in his illuminating study, the vision of "system" gained such influence, in its heyday, partly because of its enormous "power and reach."[183] In our present era, cynical about universal laws and mistrustful of bureaucracies, we tend to distrust "organized intervention in the world"

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[177] *See generally* HINTON, *supra* note 17.

[178] *Id.* at 18.

[179] *Id.*; *see also* KHALIL G. MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2011) (providing Progressive Era antecedents).

[180] *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 613–14 (2005) (noting the difficulty of measuring the real-world incidence of corporate crime).

[181] HINTON, *supra* note 17, at 22-24 (quoting official).

[182] HEYCK, *supra* note 13, at 17, 68.

[183] *Id.* at 203.

altogether.[184] Sounding similar themes, historian Daniel Rodgers describes our "age of fracture" as an era of general dislocation, lacking the stability once provided by the conviction that each individual was firmly lodged within grand structures and by the concomitant sense of mutual obligation to others within those structures. Today "choice and flux are imagined to prevail everywhere" and "history itself" seems "increasingly malleable, flexible, and porous."[185] It is hard, at this unstable moment, to recover what seemed so possible about the dreams of progress that animated Bacon's theorizing and Kennedy's rocketships. But perhaps, for the dismantling of mass incarceration, less system and a bit more openness to historical malleability is what is needed.

[184] *Id.* at 204.
[185] Rodgers, *supra* note 15, at 12.