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INVESTMENT TALK: COMMENTS ON THE USE OF THE LANGUAGE OF INVESTMENT IN PRISON REFORM ADVOCACY

“With nearly all 50 states facing budget deficits, it’s time to end business as usual in state capitols and for legislators to think and act with courage and creativity. We urge conservative legislators to lead the way in addressing an issue often considered off-limits to reform: prisons. Several states have recently shown that they can save on costs without compromising public safety by intelligently reducing their prison populations.”¹

-Newt Gingrich & Pat Nolan

A consensus appears to be forming around a particular way of talking about prison reform in the United States: lawmakers, we’re told, need to reinvest the resources currently spent on mass incarceration into cost-effective alternatives. A quick survey of the political landscape reveals the breadth of this consensus. At the state level, governors, legislators, and reform advocates alike are pushing for cost-reducing, return-producing ‘reinvestment’ strategies.² On the national level, Senator Jim Webb’s call for a committee to investigate criminal justice spending in the United States³ and Senator Sheldon Whitehouse’s call for a federal “Criminal Justice Reinvestment Act”⁴ highlight the newfound social currency of the language of business and finance in advocating for prison reform. In the face of fiscal crisis, politicians and policymakers across the

political spectrum appear to be looking to maximize the return of each dollar invested in the prison system.

The turn to investment language in discussions about prison reform is hardly surprising; a series of recent financial disasters in the United States all but ensured that ‘bubbles’ and ‘bailouts’ would steep into the public imagination. More than simple rhetorical flourish, there is convincing evidence that metaphors organize analytic frames that can powerfully structure the terms of a given public debate.⁵ Put more polemically: bad metaphors can make for bad politics. In this essay I focus on an emerging discourse around criminal justice policy. This discourse, what I call *investment talk*, uses the conceptual metaphor⁶ “Justice is an Investment” to argue for large-scale prison reform. While this metaphor is compelling, particularly in these hard economic times, my central reservation is that reformers that use investment talk are forking over a critical politics and philosophy of punishment to a potentially quietist finance discourse.

In this essay I take a twofold approach. First, to give context for my later discussion, I provide a bit of background on the “Justice Reinvestment” policy movement and the discourse it has helped generate. Second, I highlight potential problems with using the metaphor of investment to build a case for prison reform. A different set of concepts, I argue, is needed to build a case for limiting the size and scope of the criminal justice system.

I. JUSTICE REINVESTMENT

A new policy framework for criminal justice reform has coalesced under the banner of “Justice Reinvestment.” Justice Reinvestment is currently a lightning rod for prison reform debate in the United States: the Council of State Governments’ Justice Center helped implement Justice Reinvestment policies in more than 10 states over the last 5 years, including states with relatively large carceral populations like Arizona, Michigan, North Carolina, and Texas.⁷ Furthermore, additional states have independently created programs modeled on the Justice Reinvestment framework. In Illinois, for instance, “Redeploy Illinois”⁸ borrows from the Justice Reinvestment framework to restructure the funding for county-level juvenile justice programs. Major prison reform organizations like The Sentencing Project,⁹ Vera,¹⁰ and the Urban Institute¹¹ have backed both state and national-level Justice Reinvestment proposals. While at this time the future of Senator Sheldon Whitehouse’s “Criminal Justice Reinvestment Act of 2010” is uncertain, the amount of discussion and support the legislation has generated among national policymakers is a testament to the status of this new framework at all levels of government, including federal.

Advocates of Justice Reinvestment look at prisoners and criminal justice institutions as *financial investments*. Some investments produce returns, others become toxic and diminish in value. From this perspective, advocates argue, “both our prison and parole/probation systems are business failures.”¹² The goal of these policies is to redirect the billions of dollars spent annually on prisons in the United States to “rebuilding the human resources and physical infrastructure—the schools, healthcare facilities, parks, and public spaces—of neighbor-

hoods devastated by high levels of incarceration.”¹³ The central proposed institutional innovation is to shift control of (and responsibility for) criminal justice policy to local communities. The financial cost of incarcerating an individual in a state facility, advocates contend, is not efficiently allocated. Arrest, prosecution, and judicial authority operate mainly at the municipal and county levels while the costs of the prison system are borne by the entire state. In short, there is a free-rider problem: counties have a financial disincentive against coming up with local solutions to problems for which state prisons are now used in such high numbers.¹⁴ For example, one experiment in juvenile justice reform cited in the original position paper on Justice Reinvestment¹⁵ was implemented in Oregon’s Deschutes County. The county was free to spend a multi-million dollar annual block grant as it saw fit on the condition that it would be ‘charged back’ the cost of incarcerating juveniles who it sent to state incarceration facilities.¹⁶

Justice Reinvestment, as a schedule of policy proposals, is a much-needed innovation in criminal justice policy. Rather than short-term, stop-gap budget adjustments and expensive sentencing policies that fail to demonstratively increase safety, Justice Reinvestment policies incentivize long-term planning, prevention, and non-traditional avenues for minimizing the use of prison confinement. It puts *no*-entry above prisoner ‘re-entry.’ Importantly, the bulk of the available evidence suggests these policies substantially decrease incarceration rates. However, Justice Reinvestment is more than simply a set of policy proposals. It is also a policy discourse—it offers a system of concepts, a language, to understand and address mass incarceration in the United States. That language is the language of

business, of investment. Significantly, this language is stretching beyond discussions of concrete Justice Reinvestment policies; from the ‘returns’ generated by parole reform to the ‘upside risk’ created by aggressive prosecution tactics in the 1980s and 90s, the language of investment is rapidly becoming a dominant way to speak about crime and punishment policy.¹⁷

Before committing to this language, it behooves reform advocates to think about the opportunities and constraints nestled in this new discourse.

II. THE POLITICS OF INVESTMENT TALK

By focusing on Justice Reinvestment as a *discourse*—investment talk—I aim to highlight how the language of investment in prison reform, independent of the particulars of policy proposals, might subtly constrain and reshape the public debate over mass incarceration, for better or worse.¹⁸

Jonathan Simon nicely captures the contemporary prison reform zeitgeist in a recent article. After drawing an analogy between the troubled assets that contributed to the recent housing crisis and the “troubled assets” of mass incarceration, he suggests that Justice Reinvestment is precisely the kind of “bailout” that struggling communities need.¹⁹ He proposes to replace the language of the “War on Crime” with the language of regulated markets. The analogy to the housing bubble in particular, he suggests, “will help us think in new ways about how to resolve the social and institutional legacies of that ‘war’ [on crime].”²⁰

While a progressive step forward from the strategies and rhetoric of the war on crime, there are reasons to be chastened

in our optimism for this new discourse. As scholars like Katherine Beckett (and Jonathan Simon himself) have noted,²¹ crime is not simply an object of governance but a *means of governance*. The conceptual metaphors that structure discourses like the war on crime (“Crime is War”) and broken windows policing (“Crime is Disorder”) are different ways of organizing the reality of crime, ultimately shaping policy debates in favor of particular forms of intervention. Like its predecessors, investment talk has the potential to become a powerful new discourse that shapes debate over criminal justice policies for years to come.

In thinking about the metaphor of investment and its entailments, I see at least two issues that warrant increased scrutiny: (1) the treatment of justice as a distributive good and (2) the assumption that investment talk implies, as some have suggested, *limited* punishment.

Politics and distributive justice

The metaphor of investment shapes the mass incarceration issue into a *distributive* problem. In the distributive paradigm, justice is understood to be the morally proper distribution of social benefits and burdens among society’s members.²² What’s wrong with mass incarceration, following the investment metaphor, is that resources are currently misallocated or inefficiently distributed in the prison system. Crime, safety, punishment, justice—the concept of distribution represents each term as though it is a static thing, instead of a function of social relations and processes.²³

What remains unexamined in the distributive paradigm is the structure of allocation itself, the political and social rela-

tionships that produced resource inequalities (or inefficiencies) in the first place. It is not just that investment talk can produce a ‘moral hazard’—a pernicious faith that, whatever the origins of crime and political inequality, policy elites can effectively manage risks. Investment talk also encourages reform advocates to think of themselves primarily as consumers, to focus their energy on the acquisition of government benefits rather than community rights to participate in debate and decision-making about the aims and practices of punishment policy.

Furthermore, *who* gets to intervene in the penal sphere is taken for granted. The presumption that government has an unfettered right to intervene in the penal sphere reinforces what Bernard Harcourt calls “neoliberal penality.”²⁴ He contends that by creating and reinforcing a categorical division between a space of “free” self-regulation (markets) and an arena where coercion is necessary and appropriate (punishment), neoliberal penality has facilitated the growth of mass incarceration in the U.S.²⁵ Interestingly, and perhaps a wrinkle for Harcourt’s analysis, investment talk seems to collapse the market/penalty divide: the language of investment and markets is now being used to argue *for* government-led penal interventions. In short, investment talk submerges key dimensions of the politics of punishment.

Some might argue that I’m complicating matters that need not be complicated: investment talk is just systematized common sense. Crime must be minimized and returns to each dollar invested in punishment must be maximized. Drawing from my analysis above, the central omission in this ‘common sense’ appeal is the fact that crime and punishment policies are inextricably instruments of *politics* not simply an objective harm or

cost calculation. While cost calculations are absolutely necessary for prison policy reform,²⁶ they are entirely insufficient to address the inequities produced by mass incarceration. By narrowing acceptable discussion to debates about the distribution of resources, investment talk elides foundational questions about democratic politics and political agency.

Limited punishment?

Part of the allure of investment talk is the promise that it will encourage substantial reductions in the use of state punishment. Justice Reinvestment policies, for instance, are often mentioned in the same breath as financial crisis. The ripple effect of financial crisis, the argument goes, has put a tremendous strain on state budgets and has encouraged a bipartisan search for ways to scale back the use of prisons. Perhaps counter-intuitively, I see no reason why investment talk, even when used in the context of ‘crisis,’ implies limited punishment. Unlike, say, a classical Beccarian view of punishment as *limited* and *proportionate* to the offense, investment talk does not call into question the size of the prison system or the severity of penal practices; it only questions the ‘returns’ produced by particular investments. If the risks are priced right, if the investments are generating acceptable returns,²⁷ the system maintains equilibrium—the “punishment bubble” described by Simon becomes “sustainable growth” and critics are left without the conceptual resources to call for the contraction of the prison system.²⁸

Furthermore, there is no necessary relationship between financial crisis and limited punishment. Marie Gottschalk’s excellent article “Cell Blocks and Red Ink” offers clarity on this

point. If history is any guide, she explains, economic crisis may actually *increase* support for more punitive policies. At a minimum, the evidence suggests that a “sea of red ink may be a necessary, but not sufficient, condition to force the closing of prisons and jails and to spur a sharp drop in the incarcerated population.”²⁹ Most important, and key for the argument presented here, Gottschalk persuasively argues that “framing this issue [prison reform] as primarily an economic one will not sustain the political momentum needed over the long haul to drastically reduce the prison population.”³⁰ The case of mid-century mental asylum deinstitutionalization, she suggests, demonstrates “the enormous importance of political context for the development and implementation of successful federal and state policies to dramatically shrink state institutions.”³¹ The deinstitutionalization of mental hospitals, among other factors, required the emergence of major, interconnected, and durable movements to pressure policymakers to embrace change. Current bipartisan support for legislation like the Criminal Justice Reinvestment Act smacks of fair-weather friendship, little more than a contingent alliance between fiscal conservatives and the social left. Gottschalk makes the important point that large-scale decarceration will eventually *cost money*—exiting prisoners need significant vocational, housing, health, and economic support.³² A political alliance built on cost-reduction is unlikely to endure once state legislatures and Congress need to start writing checks.

Often reform advocates take a strategic, ‘anything but incarceration’ approach toward penal policy. My final point is simple, but often overlooked—punishment does not need walls and cages to function. The exclusion, stigma, and inequality

associated with U.S. punishment practices are not reducible to prison confinement. Policy analysts like Mark Kleiman (I think rightly) see the future of imprisonment as a kind of “virtual” or “outpatient” incarceration.³³ This transition, however, does not necessarily translate into *limited* punishment. In fact, such a transition could enable a rapid expansion of the scope of U.S. criminal justice interventions. Scholars like Katherine Beckett and Steven Herbert describe municipal policies that “banish” former prisoners from particular spaces within a city.³⁴ It is not hard to imagine the use and expansion of modern day redlining techniques to contain the ‘criminal class’ among us in the stead of prison confinement.

This is all simply to say that neither investment talk, nor financial crisis, nor even decarceration implies limited punishment. Advocates interested in limited punishment must draw on other discursive wells to build a case for the large-scale contraction of the penal sphere.

CONCLUSION

Investment talk has the potential to become the dominant discourse used by contemporary prison reformers, appealing to the political sensibilities of both social liberals and fiscal conservatives.³⁵ Ironically, this political consensus is achieved precisely by obscuring the politics of punishment. As argued above, investment talk both elides discussions of political agency and fails to provide the conceptual resources necessary to call for limited punishment. While the Justice Reinvestment movement offers a promising set of prison reform policies, reform advocates ought to be wary of using investment talk as a general framework to understand and respond to the mass incarcera-

Christopher D. Berk

tion issue. Advocates interested in limiting the scope of criminal justice interventions need to find another vocabulary to open up the debate about prison reform. While it is beyond the scope of this essay, a useful alternative reform discourse might be found within the movement that deinstitutionalized mental asylums in the 1950s.³⁶ A prison reform movement on the scale of mental asylum deinstitutionalization can only be sustained if the aims of punishment practices are explicitly called into question.

NOTES

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- 1 See Newt Gingrich and Pat Nolan, “Prison reform: A smart way for states to save money and lives,” *Washington Post*, January 7, 2011.
- 2 For instance, see Richard Fausset, “Prison reforms no longer taboo for conservatives,” *Los Angeles Times*, January 29, 2011.
- 3 “Senator Webb Reintroduces National Criminal Justice Commission Act,” last accessed February 8, 2011, <http://webb.senate.gov/newsroom/pressreleases/02-08-2011-02.cfm>.
- 4 “Legislation Introduced in Senate and House to Better Manage Prison Population Growth,” last accessed February 8, 2011, <http://whitehouse.senate.gov/newsroom/press/release/?id=69c4b8f5-4ddf-49fd-b2d6-3d4ebc1c4f4e>.
- 5 See generally Jennifer Hochschild, *What’s Fair?* (Cambridge: Harvard UP, 1981); Dennis Chong and James Druckman, “Framing Theory,” *Annual Review of Political Science* 10 no. 1 (2007): 103-126.
- 6 “Conceptual metaphor” is the idea that conventional metaphors structure the conceptual system individuals use to make sense of the world around them. Lakoff and Johnson (1980) write: “Novel metaphors can have the power of defining reality. They do this through a coherent network of entailments that highlight some features of reality and hide others. The acceptance of the metaphor, which forces us to focus only on those aspects of reality which it highlights, leads us to view the entailments of the metaphor as being true. Such “truths” are true, of course, only relative to the reality defined by the metaphor” (484). The novel metaphor “Justice is an Investment” and its entailments are *reality defining*. They provide the foundation on which advocates make (or dissemble) claims about propositional truth. The systematicity of a given conceptual metaphor allows us to comprehend one aspect of a concept in terms of another while hiding other aspects of the concept that are not coherent with the metaphor. Entailments that are coherent with the conceptual metaphor—justice is returns, justice is markets, justice is business—are privileged while those that are not—justice is politics, justice is equal treatment,

justice is proportionality—are pushed into the background or excluded entirely. See George Lakoff and Mark Johnson, “Conceptual Metaphor in Everyday Language,” *The Journal of Philosophy* 77 no. 8 (1980): 453-486.

- 7 “Work in the States,” *The Council of State Governments*, last accessed February 8, 2011, <http://justicereinvestment.org/states>.
- 8 Crystal Yednak, “State attempts to keep more kids out of prison,” *Chicago Tribune*, May 31, 2004.
- 9 Judith Greene and Marc Mauer, “Downscaling Prisons: Lessons from Four States,” *The Sentencing Project*, http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf.
- 10 “Justice Reinvestment Initiative,” *Vera Institute of Justice*, last accessed February 8, 2011, <http://www.vera.org/project/justice-reinvestment-initiative>.
- 11 “Justice Reinvestment at the Local Level,” *Urban Institute*, last accessed February 8, 2011, <http://www.urban.org/center/jpc/justice-reinvestment/>.
- 12 Susan Tucker and Eric Cadora, *Ideas for an Open Society: Justice Reinvestment* (New York: Open Society Institute, 2003), 3.
- 13 Ibid, 2.
- 14 Eric Cadora, “Justice Reinvestment in the US” in *Justice Reinvestment—A New Approach to Criminal Justice* eds. Rob Allen and Vivien Stern (London: International Centre for Prison Studies, 2007), 9.
- 15 Tucker and Cadora 2003, 6ff.
- 16 Cadora 2007, 12.
- 17 For two high-profile examples, see Mark Kleiman, *When Brute Force Fails: How to have less crime and less punishment* (Princeton: Princeton UP, 2009): 133-134; Jonathan Simon, “Clearing the ‘troubled assets’ of America’s punishment bubble,” *Daedalus* 139 no. 3 (2010), 94.
- 18 Some might view the language of advocates as epiphenomenal, as mere window-dressing for raw political-interest calculations. It is a fact of life, after all, that political actors use the posture of a cost-benefit analyst, a

truth-seeker, or an impartial arbiter to surreptitiously achieve self-serving ends. While I don't have the space to develop the logic here, a convincing case can be made that language norms function as a constraint on discussion—even when used strategically. See Jon Elster, "Strategic uses of argument" in *Barriers to Conflict Resolution* ed. Kenneth Arrow et al. (New York: Norton, 1995).

19 Jonathan Simon, "Clearing the 'troubled assets' of America's punishment bubble," *Daedalus* 139 no. 3 (2010).

20 Ibid, 91.

21 See Katherine Beckett, *Making Crime Pay* (New York: Oxford UP, 1997); Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford UP, 2007).

22 Iris Young, *Justice and the Politics of Difference* (Princeton: Princeton UP, 1990), 16. Reiman (2004 [1979]) nicely describes what it means to look at crime as a series of processes and relations: "the reality of crime as the target of our criminal justice system [...] is not a simple objective threat to which the system reacts: it is a reality that takes shape as it is filtered through a series of human decisions running the full gamut of the criminal justice system." See Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison* 7th ed. (USA: Pearson, 2004).

23 See Young 1990.

24 Bernard Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge: Harvard UP, 2011).

25 Ibid, 40ff.

26 "Data-driven" policy is absolutely indispensable; however, we should not confuse an 'evidence-based' argument with an 'investment' calculation. The former presupposes the existence (and importance) of deliberation and debate, the latter does not.

27 One could even argue, following Wacquant, that prisons are generating returns—just not for communities at the margins of political power. See generally his discussion of "prisonfare" in *Punishing the Poor: The Neoliberal Government of Social Insecurity* (USA: Duke UP, 2009).

- 28 How a crime or punishment is “priced”—take drug possession for instance—is a function of factors as diverse as geography, the offender’s race, foreign policy objectives, cultural stigma, and media coverage. It’s not, as Jonathan Simon (2010) claims, that the value of drug possession (or the drug offender) is ‘inflated’ (which implies some true value), it’s just that he has a normative ideal of what variables and their weights should be included in the price function.
- 29 Marie Gottschalk, “Cell Blocks and Red Ink,” *Daedalus* 139 no. 3 (2010), 67.
- 30 Ibid, 70.
- 31 Ibid, 6.
- 32 The classic constraint is the ‘Principle of Least Eligibility’: In order to preserve deterrence, conditions of life in prisons—or, more generally, the administration of punishment—would have to guarantee a level lower than that minimum conditions endured by a free human being. See Georg Rusche, “Labor Market and Penal Sanction: Thoughts on the Sociology of Criminal Justice” in *Why Punish? How Much?: A Reader on Punishment* ed. Michael Tonry (New York: Oxford UP, 2010).
- 33 See Kleiman 2009, 98; Mark Kleiman, “Toward fewer prisoners and less crime,” *Daedalus* 139 no. 3 (2010), 122.
- 34 Katherine Beckett and Steve Herbert, *Banished: The New Social Control in Urban America* (New York: Oxford UP, 2010).
- 35 A convincing parallel can be drawn to Gottschalk’s (2006) discussion of the demise of the rehabilitation paradigm in the 1970s. Briefly, advocates on the political left railed against racial bias in prison sentences while advocates on the right railed against “permissive” judges—the result of both critiques converging was severe mandatory minimum sentencing schemes. A critique of justice “investments” can easily morph into a case for expanded, not limited punishment. See Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge UP, 2006).
- 36 See Gottschalk 2010; Bernard Harcourt, “Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s,” U of Chicago Law & Economics, Olin Working Paper No. 542; U of Chicago, Public Law Working Paper No. 335 (January 26, 2011).