

Keally McBride

CALIFORNIA PENALTY: THE END/PRICE OF THE NEOLIBERAL EXCEPTION

*And as in private life one differentiates between what a man thinks
and says of himself and what he really is and does, so in historical
struggles one must distinguish still more the phrases and fancies of par-
ties from their real organism and real interests, their conception of
themselves, from their reality.*

-Karl Marx, The Eighteenth Brumaire

One suspects one of the reasons for the “successes” of the penal system in the United States in the early 19th century was the fact of systemic labor shortages. Presumably, the penitents released from Eastern State in Philadelphia were quickly absorbed back into the fold of employment. Because records were not kept during this period in order to protect the anonymity of the inmates, we will never know for sure. Recidivism was low when there was a shortage of workers and paid employment awaited those with minimum skills and average initiative. A country’s economic system has always been one of the background components which helped to determine penal policy and also the backdrop upon which its successes and failures played out, as has been widely acknowledged by many theorists of punishment.

However, the relationship between economics and penalty cannot be neatly summarized. I chafe against arguments

that invoke the most simplistic version of their interconnection, emphasizing the profits of prison privatization, correctional officers unions, prison construction and prison labor. This view bluntly argues that the United States engages in mass incarceration because there are corporations and individuals who make money from it. This “prison industrial complex” argument proposes that capitalist greed drives public policy and criminal law. There is certainly an element of truth in these arguments, as is evident in new debates about prison management; and correctional officers, particularly in California, have a strong and wealthy union that protect their interests vehemently if not insidiously. Yet I do not think the relationship between economics and penal politics is so readily encapsulated.

I have explored in previous work how prison labor came to be part of the general acceleration of market discipline in the 1990’s. Policies requiring prisoners to work accompanied policies demanding welfare recipients also work.¹ Others such as David Garland, Jonathan Simon and Bernard Harcourt have also argued that the emphasis upon incarceration as a response to concerns about security in the 1980’s and 1990’s can be broadly linked to a shift in the United States and Great Britain towards neoliberal strategies of governance. Governments began to emphasize more individual and less collective responsibility for well being, and poverty came to be viewed as an individual pathology rather than social problem. States dismantled social benefits creating more economic insecurity, and offered security from criminality as one of its central tasks. The constellation of sovereignty, citizenship, criminality, and security all shifted in relationship to one another. As it loosened its

grip on economic management, the government took a hardened position on crime. In a sense, we could say that trends of neoliberal governance killed the welfare state and resurrected the Hobbesian one.

The state, taking up ideologies of free choice and individual responsibility, rolled back some forms of regulation, outsourced some of its functions, and noisily scaled back its own ambitions. Of course, as Harcourt (and others) points out, the rhetoric of neoliberalism does not match the reality.² Neoliberal states *are* interventionist and have grown their budgets over the course of the past thirty years. Some forms of government spending and regulation were “naturalized” by neoliberal ideology, and others were repudiated by that same ideology. Thus as the state was declaring its own impotence in some areas such as creating employment demand, it was simultaneously taking on the complete administration of the lives—not the welfare mind you—of an increasing percentage of citizens through mass incarceration.

Mass incarceration was a huge state run endeavor in the era that presumably eschewed state run endeavors, which is why in the title of this talk I called it a “neoliberal exception.” While others, such as Andrew Dilts have argued that prisoners form a sort of exceptional boundary to the structure of liberal citizenship, my invocation here of “exception” is more pedestrian. Why do legislators and citizens who supposedly hate government spending make an exception for mass incarceration? Another way to think about this problem is to say that mass incarceration is a glaring, expensive, anomaly on the neoliberal political landscape, and the fact that such a program is not *seen* as exceptional should give us all pause. Somehow this excep-

tional spending is naturalized; or in David Harvey's language, there is a "fix" that allows mass incarceration to coexist peacefully with the rhetoric of a minimal state.

This observation is pure hindsight. It is only now that states are starting to squirm under the expense of mass incarceration that it appears as such a foolish venture. I'm afraid I keep running into Marx's *18th Brumaire* as I research current budget crises. A few years ago I surveyed policies of mass incarceration and saw the needless devastation of human lives, communities, families, systemic racism and classism, and saw mass incarceration as a tragedy. I do not want to make it seem any less a tragedy today. However watching different governing bodies try to figure out a way to reduce the costs of mass incarceration without questioning its logic, makes it seem that we have now moved into the era of farce. It isn't clear to me that the entities who are engaged in implementing mass incarceration believe their own rhetoric or logic any more than the inmates; they are actors spinning more and more outrageous yarns. We can only hope that this signals the last, decadent phase of a regime before it topples completely.

While those of us distressed by this turn towards a more authoritarian and less accountable form of governance kept asking when citizens were going to demand political rights in relation to their economic ones, it took the Great Recession to start debate about the inherent wisdom of mass incarceration in circles beyond prison activists. To call what is currently happening a "debate" however would give it more credence than it deserves. Instead, states are struggling to balance budgets, and prisons now appear as an unacceptable weight on an already unbalanced ledger.

Mass incarceration is no longer an affordable exception to the laws of neoliberal governance. In terms of the human cost, it never truly was. Even though I earlier dismissed the idea that economics slavishly determine penal policy, I do think economic realities are straining mass incarceration policies. Not changing them, yet. Today, many of the essential assumptions of neoliberal economics have come under closer scrutiny, but virtually none have been discarded. Out of cowardice, lack of imagination, or ideological blindness, there just haven't been any viable alternatives proposed. Similarly, the stark reality of systemically underfunded governments have made the policy of mass incarceration untenable. Like the canary in the coal mine, the exception to neoliberal governance displays the environment's unsustainability. But no systematic alternatives have emerged to mass incarceration.

Of course, one can also see another possibility in play. The Great Recession may encourage states to maintain their penal industries as a stabilizing force in their local economies. On January 5th, 2011, Andrew Cuomo declared in his State of the State speech "An incarceration program is not an employment program...If people need jobs, let's get people jobs. Don't put other people in prison to give some people jobs."³ Crushed by upstate lobbyists and "small government" Republican legislators, by January 27th, Cuomo later backed off his ambitious plans to scale back the penal apparatus in New York considerably.⁴ It seemed upstate prisons were indeed a viable jobs plan. As Cavadino and Diggan observed, "In a perverse variation of Keynes's hypothetical cure for recession—get the state to hire large numbers of people to dig holes and then fill them in

again—the USA has hired one lot of people to keep another lot locked up.”⁵

Such words would have been inconceivable just a short time ago, when the logic of incarceration was seemingly iron-clad. The fact that they were spoken by a Governor shows that the prison debate may be shifting considerably. Of course the outcome was discouraging, consider what might happen if the terms of the debate move from the character of criminality to the nature of public investment.

We are looking at a crisis of governance, not governability. What I mean by this is that the policy of mass incarceration was naturalized, and garnered political support by a government that focused exclusively on the character of those who are incarcerated. These ungovernable deviants posed such a risk to public and private safety that the government presumably had no other choice than to lock them away. But now the government simply cannot afford to maintain the mass incarceration apparatus that it established. While the fear for and rhetoric about public safety still reigns supreme, now there is evidence of a reconsideration of the character of those in prison. One can see the political (and economic) interests at stake when the character of those in prison comes up for debate. For instance, in opposition to California’s adaptation of early release policies, a political consultant who works for the California Correctional Peace Officers Association and Crime Victims United of California (which incidentally is funded by the correctional union) made the following statement: “The legislation was based on a lie that the prisons are filled with low-level offenders who pose no real threat to public safety, and that is absolutely not true. When you release dangerous people, other people get

hurt.”⁶ Once the character of those in prison starts to become ambiguous, the incarceration of this population becomes evident as a choice. And like all government expenditures, such a choice needs to be weighed by its costs and benefits. If mass incarceration can be debated as a question of governance rather than posed as a solution to ungovernability, then a true opening in our penal environment will have occurred.

Here, I will examine the crisis of California penalty, and look at a few other states as well to examine this crossroads in the mass incarceration experiment. For years the human tragedy of mass incarceration was overshadowed by fear of crime and criminality and a general acceptance of the state’s role to regulate crime. The population subject to incarceration could be imagined as deviant and unrepresentative, and therefore deserving of this exceptional treatment. It is clear that economically marginalized populations often become criminalized, and that criminalization further perpetuates economic marginalization. As Loic Wocquant, and others have observed, criminality often becomes a proxy for race, and disproportionate minority confinement matches disproportionate minority unemployment.

All of this can be taken to indicate a system whereby the state used mass incarceration as a sort of “fix” for the neoliberal economic system and the losers within it. If neoliberal ideologies are predicated upon the “fact” that rational, industrious workers can become winners in the economic system, there needs to be an explanation for those who lose. Labeling those who do not participate in the labor market, or cannot participate in the labor market, as deviant or criminal, and then removing them through incarceration substitutes criminality as

the explanation for structural unemployment. Some, such as Loic Wocquant, have argued to powerful, if not entirely provable effect, that prisons are the new plantations of our economic landscape that brutalize and exploit black bodies.

I could take cold comfort in the fact that states who wanted to let the market reign supreme are finally having to bow to actual budgetary pressures. But as a Californian, what this means is that schools, universities, parks and roads are falling into shambles around me. It's hard to applaud as the chickens come home to roost. But at least the whole crisis may take the prisons down too.

May. I think it is too soon to tell. For what is happening now is that legislators are caught in the trap of their own rhetoric, having to maintain their commitment to public safety as they have accustomed their constituents to expect, but trying to figure out how to do it on the cheap. Any of us who have been watching states (and companies) sort through budgets know that there are all sorts of dubious accounting tricks that are occurring. Like Marx's revenge from the grave, it appears that mass incarceration is a form of neoliberal excess, much like derivatives and adjustable rate mortgages; a practice that seemed natural just a few years ago now looks unsustainable. Is the prison industrial bubble going to pop? Even though building prisons provides contractor employment, rural development, and "good jobs" for guards, suddenly legislators are suddenly awake to the fact this is a massive transfer of wealth from the state. Once the beds have been built, you need to keep paying to have them filled. The costs of incarceration, now that they are put in relief by dollars and cents rather than

those fuzzy ideas about the human suffering, look like they just may be unacceptable.

California gave rise to the popular tax revolt and the backlash against the 60's in the form of Richard Nixon and ultimately Ronald Reagan. At the cutting edge of so many governmental disasters and the political innovations that these spawn, it is worthwhile to consider California as a case study in what I believe is the fiscal unraveling of mass incarceration institutions. Note that I do not say the policies are unraveling, because even in the face of abundantly clear evidence that mass incarceration is a budget item that states can no longer afford, there has not been a debate, shift or reconsideration of these policies. Instead, what we have is the equivalence of an individual bankruptcy, where someone admits they are in over their heads, tries to wipe the slate clean and start over again. But no larger lesson seems to have been learned at this point.

In fact, in 2009, the deal that Governor Schwarzenegger and the California State Legislature brokered to pass the new budget specifically removed the proposed panel on sentencing reform. Republican legislators would only pass the austerity budget, including changing the conditions of parole and threshold for grand larceny, if reconsidering mass incarceration was *not* on the table. They assented to a slight reduction in prisoners, but only if all the sentencing provisions that got them there in the first place remained in place. They insisted upon adherence to mass incarceration *in principle*, if not in practice. The rule book of neoliberal governance seems entirely intact, even though its application looks increasingly futile, or even bizarre. Here is a (partial) list of the familiar plays, and their recent applications.

Play One: Consider Offshore Production. Everyone knows about cutting the costs of mass incarceration through privatization. But outsourcing can also provide for significant cash savings, as Governor Arnold Schwarzenegger argued as he presented a proposal to move California prisons to Mexico. On January 25th, 2010 in a press conference in Sacramento, in reply to questions about reducing state spending, Schwarzenegger offered the idea of paying for the government of Mexico to build prisons, then sending all undocumented immigrants over the border to be detained. The proposal would reduce overcrowding, reduce prison construction and maintenance costs. Off the cuff, the Governor asserted California would be able to save 1 billion dollars by starting this program.

The Governor's aides admitted this was the first they had heard of the idea, along with the startled DOC staff present at the press conference. Matthew Cate, secretary of the department of Corrections and Rehabilitation admitted some jurisdictional issues could get tricky, but said he would have to look into it. Since undocumented immigrants only comprise 19,000 of California's 171,000 prisoners, it is not clear how the Governor arrived at his estimate that this program would reduce the correctional budget by 15%.

Play Two: Look for the big cash out. The value of Bay Area real estate is legendary. Why waste such excellent two-bridge views on a correctional facility? This was the logic behind State Senator Jeff Denham's proposal to sell San Quentin, perched directly on the Bay in exclusive Marin County. He conjectured that the property would garner 2 billion dollars, even during the real estate slump in the Golden

State. Denham has tried two times previously to push this legislation on the floor. This time, it found some receptivity amongst democratic lawmakers such as Assembly member Jared Huffman. “Does it make sense anymore in 2009 to continue to invest in expanding this prison facility on the most prime piece of real estate in Northern California, or should we finally start to think about some non-correctional uses for this unique property?”⁷

Some legislators pointed out that selling the property would only exacerbate California’s prison overcrowding problem, meaning that money would have to be spent to replace the facility which currently houses 5,300 inmates. Real estate development consultant Stephen Roulac is enthusiastic about the possibilities however: “We would love to see a performing arts center prospectively here, possibly a museum, condominiums, possibly a tie in with a university.” State universities in California are currently turning away students due to budget cuts. In his 2010 State of the State Address, Governor Schwarzenegger proposed passing a constitutional amendment requiring the state to spend more on public higher education than prisons. This proposal was dismissed as unsound by the state comptroller’s office.

Play Three: Overstate the profits to soothe the shareholders. Arizona’s plan to privatize their entire prison system, including the death row facilities in order to cut costs has garnered a great deal of national attention. The final outcome will likely become clearer on April 1st, which is the deadline that the state has established for deciding which bid to take from different Private Correctional Firms. Arizona faces a 2 billion dollar budget gap, one of the largest deficits in the country. In

order to cut costs, since raising taxes is considered politically unfeasible, the state has come up with an intriguing list of proposals including cutting: state monitoring for air pollutants, monitoring of loan agencies and mortgage brokers, cutting funds for school tutors, eliminating subsidized health care for children and privatizing the entire prison system.

Initially the DOC said that privatizing death row would bring in even more savings, causing confusion amongst private corporations. Would they also be put in charge of executions? Officials assured the New York Times that, “While executions would still be performed by the state, officials said, the department of corrections would relinquish all other day to day operations to the private operator and pay a per diem fee for each prisoner.” Todd Thomas, who works for Corrections Corporation of America seemed to think some aspects of incarceration were only possible for, well, the state. “The liability is too great. I don’t think any private entity would ever want to do that.”

Arizona officials are being far sighted in their plans. They have estimated the saving from complete system privatization for the next fifty years to be at least 100 million dollars. Senate Bill 1028 allows private vendors to take over the prison system, also stipulates those bidding for the right need to pay the 100 million dollars up front in order to win the contract. This will allow some instant payback to the Arizona budget. Arizona is using this trick in other venues as well: House Bill 2010 which was signed into law suggested that the state sell its own property and then lease it back in order to generate revenue immediately. Plans for the complete privatization were put on hold

when it appeared that no private correctional firm was going to bid for the contract.

As of February 2011, Arizona continues its debate about privatizing their entire prison system, even though there was a hiccup when inmates escaped from privatized facilities bringing public awareness to the fact that private prisons are more susceptible to such events. 2001 Arizona budget figures one billion dollars for the Department of Corrections, with 58% of these dollars going to private corporations.

Play Four: Offload costs to another unit to balance the books. This strategy is quickly becoming the most popular move in 2011. In his proposed 2011-2012 California State Budget, Jerry Brown states that “offenders convicted of non-violent, non-serious, non-sex offenses, and without any previous convictions for such offenses, would fall under local jurisdiction, while the state would be responsible for inmates convicted of the most serious offenses.”⁸ Remarkably, this budget provision does not question the logic of incarcerating “non-serious offenders”, it just establishes that the state is unable to do so and passes the buck to counties. Of course, county facilities are already overcrowded and local governments are just as cash strapped as the state. Yolo County Sheriff Ed Prieto told reporters, “We’re maxed out pretty much all the time, the only thing we could do is release county inmates to make room for state inmates.” Federal consent decree requires jails to release prisoners when they are at 90% capacity. This would mean half to 3/4s of the 45 jails with such population caps would routinely release prisoners.⁹ Brown’s plan would reduce inmates through this mechanism. No need for sentence reform.

A similar slight of hand is happening between the State of California and the Federal government. In his proposed budget, Jerry Brown singled out the incomplete reimbursement rate from the federal government for housing undocumented felons as a source of California's budget woes. But in Obama's proposed budget in February 2011, he cut the reimbursement to state department of corrections for undocumented felons even further. Perhaps

Play Five: Adhere to the core mission. Just like Starbucks decided to go back to focusing on coffee in order to increase profitability in 2009, the California Department of Corrections has decided to go back to simplified warehousing. The current budget for rehabilitation programs in state prisons is 600 million dollars. This budget will be reduced to 350 million, allowing lay offs of 600 to 900 educational and vocational prison instructors. Some of these programs actually make money, such as a program in landscape cultivation at Soledad Prison that has inmates work at a nursery, giving them cultivation skills and providing seedlings for replanting in the state's forests and parks. But these expenses would indicate that DOC officials expect time in prison to be rehabilitative or life changing in some fashion. The new trend is to emphasize that time in prison doesn't have very much impact. (See Play Number Seven.)

Play Six: Find Hidden Assets. In Alabama, the state's general budget is facing what some describe as a "financial cliff" for 2011. The list of requests for additional revenue produces a clear depiction of how mass incarceration impacts one state's budget:

Additional requests from General Fund Agencies for the 2011 budget (a partial list):

- 283 million for Medicaid
- 14 million for Alabama Public Health
- 124 million for the Department of Mental Health and Retardation
- 27 million for the Department of Human Resources
- 185 million for the Department of Corrections
- 4 million for the Unified Judicial system¹⁰

Chief Justice Sue Bell Cobb has forbidden people from using space heaters in their state offices in order to reduce energy costs, snapping “I told folks to go put on more clothes.” Luckily, the Department of Corrections may be able to help with this problem. The Prison Commissioner had the excellent idea to allow Foote Oil and Gas to test for oil at the G.K. Fountain Correctional Center. Two test wells seemed especially promising, leading to a 400K five-year contract between the company and the state, allowing them to explore this geological hot spot. The DOC also gets 25% royalties and a bonus for additional wells that might be placed in the future. In an interview about the deal, Commissioner Richard Allen said, “It would help us a lot. Every dollar we get would be put to good use.” The Alabama DOC also sold off one of their farms for 100k, allowing the state to take the 500K and add 125 beds to their currently overcrowded system. No plans have been announced for how to pay for the staff to monitor the new additions.

Play Seven: When all else fails, roll the dice. On January 25, 2010, in response to the new legislation to reduce the prison population at state prisons, inmates were given one day off of their sentence for each day served with good behavior. Immediately, local wardens started releasing prisoners from their also overcrowded jails. Hastily, then Attorney General Jerry Brown explained that the policy was only intended for STATE facilities, not local ones. After one week of consideration, he reversed this decision, since the law revised the California penal code, which also includes county facilities. There was also a great deal of confusion about whether the law could be applied and well behaved inmates who has served half their sentence could be released immediately. Brown explained that only days served after the order had gone into effect would begin to reduce the inmates' sentences.

In the confusion, thousands of inmates were released who apparently should not have been. In response to the outcries of victims rights groups who claim that early release endangers public safety and displays callous disregard to the suffering of crime victims, state officials point out that the length of the sentence served bears no relation to recidivism. California has the worst recidivism rate in the United States, approximately 70% of inmates return to custody in some form or another after release. But if time in jail has no link to future criminality, what exactly does time in jail do?

It is difficult to understand the reticence for sentencing reform given the general confusion over what the law is. If sentencing reform might give the impression of inexactitude or leniency, what does mistakenly releasing thousands of inmates reveal? Sheriff Clay Parker, president of the California State

Sheriff's Association remarked to the press after the fiasco: "It's really tough for us because the law is not black or white."¹¹

Attempting to achieve clarification, Democratic Assemblyman Alberto Torrico introduced legislation to have the early release program apply only to state prisons, not county facilities. "It's not meant to apply to local inmates period. We were dealing with a state crisis." Local governments, facing steep budget deficits challenge the exclusive application of the program. One Orange County judge tried to halt all early releases, but failed to stem the tide of cost saving amnesties. The legislation is pending, but expected to win bipartisan support. Legislators are hoping to achieve some consistency since "The law took effect January 25th but has had widely different impacts from county to county because sheriffs interpreted the law differently."¹²

Though penal officers have wielded the argument that recidivism and length of sentence have no relation, federal orders to reduce the prison population in California have also served for limited cover from political backlash. The state of Michigan has also been ordered to reduce its prison population, and has started a similarly controversial, though less confused, early release program.

In February 2010, Supreme Court Justice Kennedy gave an address in Southern California, chastising the Golden State for indulging in what he called "overincarceration." Perhaps this may be the start of a more systematic reevaluation of the carceral state. As I stated earlier, a shift in the public imagination towards considering incarceration a question of gover-

nance rather than governability is absolutely necessary before such a debate can happen.

Amidst the uncomfortable justifications for mass incarceration amidst tanking state and local budgets, I found encouragement in the recent restructuring of California's parole system, a shift that has gone largely unnoted by the headline hungry press. In order to reduce the load on parole officers around the state, now low risk ex-offenders will no longer need to go through any sort of parole process. Oscar Hidalgo, spokesperson for California Dept. of Corrections argued for the shift: "What you really have is a changing California parole structure that is really unprecedented. It allows our agents to focus on the highest risk parolees, which increases public safety."¹³ A few weeks earlier, Hidalgo indicated that the shift in parole structure would also work to eliminate petty recidivism as well. "We think ultimately this will allow our agents to keep their eye on more serious individuals. You start changing your prison population to the people who need to be in there rather than just rotating people in for four months at a time."¹⁴ This may not be a wholesale debate, but if correctional officials are publically admitting that they are engaging in unnecessary incarceration, we might have some hope for a reconsideration of sentencing practices sometime soon.

NOTES

- 1 See “Hitched to the Post: Choice, Citizenship and Prison Labor” in *Punishment and Political Order*. University of Michigan Press, 2007.
- 2 Bernard Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order*. Harvard University Press, 2011.
- 3 Danny Hakim and Nicholas Confessore. “Speech Suggests Pro-Business Approach by Cuomo.” *The New York Times* January 5, 2011.
- 4 Danny Hakim and Thomas Kaplan “As Republicans Resist Closing Prisons, Cuomo is said to Scale Back Plan.” *New York Times*, January 28, 2011.
- 5 Qtd in Marie Gottschalk, “Cell blocks and Red Ink” *Daedalus*, Summer 2010.
- 6 Andy Furillo, “California Prepares to Release Thousands More Prisoners.” *The Sacramento Bee*, February 15, 2010.
- 7 Dan Simon and Scott Thompson “California Lawmaker Proposes Selling San Quentin Prison” CNN.com. <http://www.cnn.com/2009/US/03/31/oceanfront.prison.html>.
- 8 Governor’s Budget Summary, “Corrections and Rehabilitation.” 2011-2012.
- 9 Brad Brannan, *Sacramento Bee*. “Brown’s Prison Plan Has a Hitch: County Jails are Overcrowded, too.” January 18, 2011.
- 10 All business Report, December 20, 2009. “Alabama Agencies Warned about 2011 General Fund budget’s ‘financial cliff’.”
- 11 “Five Counties release 1,500 inmates early; Authorities act in response to a state law aimed at cutting the prison population.” Andrew Blankstein and Richard Winton, *LA Times*. February 11, 2010.
- 12 Marisa Lagos “Bill to Limit Early Release to State Prisons.” *San Francisco Chronicle*, March 1, 2010.
- 13 Furillo, “California Prepares”
- 14 Sam Stanton, “California Inmate Release Plan Begins.” *The Sacramento Bee*, January 25, 2010.