

BEYOND SEPARATION: TROUBLING THE NOTION OF CORRUPTION AND TURNING THE CRIMINALIZATION LENS ON CARE ITSELF.

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Let me begin by saying that reading the essays and interacting with the authors in this volume was a privilege. Writing a book and sending it into the world is, to say the least, a strange and vulnerability-testing experience. That others took the time to engage and found some value in the work is, for me, a continued source of wonder. In this brief essay, I attempt, in the hopes of advancing our collective conversation, to highlight the ways in which the contributors build upon and expand themes identified in the book, with a particular focus on the generative and productively troubling possibilities found in the conversation between the legal scholars and social scientists in this symposium, and to suggest some thoughts on a path forward.

The book's primary goals are three-fold: to excavate the ways in which a narrative of care hides punishment, to trace the corruption of care that results from the deep structural intermingling of institutions of support and care from institutions that have the power to punish, and to begin, in the systems most directly implicated in the story of Tennessee's fetal assault prosecutions, to identify the legal and policy mechanisms by which care might be separated from punishment.¹

Several of the essays in this volume build on and deepen this work. As we learn, the merging of punishment with care and the deep corruption that results is both rooted even more deeply in history than I suggested (Professor Lee) and can be found in a wide variety of settings - family regulation (Professors Lee, Fong and Raz), juvenile delinquency (Professor Caldwell), the criminalization of abortion (Professor Ikemoto), and in the many, many

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1. See WENDY A. BACH, PROSECUTING POVERTY, CRIMINALIZING CARE 6 (2022).

forms of purportedly problem-solving courts (Professor Kaye). If Professor Schept is right when he generously suggests that the book reveals “elements of our historical moment that have been understudied, including how we think about the very constitution of the carceral state” and challenges “sacred liberal ideas about the benevolent state,” so too do these essays wonderful essays (and the books that go with them).²

In addition, adding significantly to the list of legal mechanisms that might assist in the separation of care from punishment, Professor Song focuses squarely on the applicability of *Ferguson v. the City of Charleston*³ to the use, in prosecutions, of information obtained or disclosed in a medical setting.⁴ Making clear, in every way possible, the vast extent of the presence of police themselves inside the institutions that provide healthcare, tracing the relationships between those police and prosecute and everyone else (family regulation and healthcare staff) and revealing the ways in which healthcare providers take on policing as a core function are all vital if we are to use legal tools to enforce privacy and mitigate the particular harms that results from criminalized care.⁵

Beyond this, what’s particularly exciting in the volume, is what generates from its interdisciplinary nature. I was struck once again, reading the articles and participating in the symposium, by how much we all have to learn from each other and for me, as one of the law professors among the presenters, by how much the law professors have to learn from careful and critical social science work. How, for example, might Professor Song’s worthy goal of leveraging Fourth Amendment/Ferguson claims be advanced through engagement with Professors Raz, Fong and Lee’s thorough exploration of the precise nature of collaborations between healthcare professionals, family regulation workers and the police?⁶ How should Professor Fong, Raz, and Lee’s findings about how family regulation workers view their own jobs (and the care or lack thereof they provide) effect how we analyze and propose to reform the legal and regulatory structures of

2. See TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY’S CHILD WELFARE SYSTEM (2016); See KELLEY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES 7 (2023); see also MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY 2 (2020); Judah Schept, *Diagnosing the Carceral State: A Review of Prosecuting Poverty, Criminalizing Care*, by Wendy Bach, 53 SW. L. REV. 277 (2025).

3. 532 U.S. 67 (2001).

4. See Ji Seon Song, *Every Hospital is Ferguson v. City of Charleston*, 53 SW. L. REV. 286 (2025).

5. See *id.*

6. See *id.*; See Kelley Fong & Mical Raz, *Burdensome Care*, 53 SW. L. REV. 218 (2025); see also Tine Lee, *The Deep Roots and Wide Reach of Combining Punishment and Care*, 53 SW. L. REV. 266, 270-72 (2025).

those systems?⁷ How might Professor Schept's incisive description of the nature of the carceral, the importance of geography, and the naming of *carceral humanism* effect how we all think about analyzing legal and institutional structures?⁸

More broadly there is productive tension, between the essays and, to a certain extent, between the disciplines on display. The tensions, though real, also lay in false binaries – between the here and now and some visionary future, between the so called practical and the so-called ideal. We are all asking - how much do we challenge and what can we leave unchallenged? In some ways, it's true that the law professors (me among them) are perhaps too drawn to the practical, the institutional, and the here and now. Hewing tightly to our training, legal scholars tend to ask, what can we fix today that might mitigate harm today? How do we strengthen our arsenal? How can we mitigate the harm of the state institutions to which we are inextricably bound (and is that tight binding between lawyers and the state impossible to entirely escape)? But to lump the social scientists here on the other side of this binary – the supposed visionary or long term in contrast to the practical and the here and now – does far too little justice to everyone's work. Nevertheless, distanced in some way from the professional operation of these systems, situated firmly in the role of critical observer, and less compelled to “fix it,” the social scientists help us all see a bit more clearly what is happening and what might happen. Again, a shout-out to interdisciplinary engagement.

Turning this productive tension on my own work, it's certainly true that the book leaves key assumptions relatively untroubled. In the introduction to *Prosecuting Poverty, Criminalizing Care* I spent a bit of time focused on the words in the title.⁹ As to the fourth word, “care,” I attempted to differentiate the corrupted and deeply criminalized form of “care” offered to those whose stories feature in the book from another, larger and better vision of the word.¹⁰

The next word in the title, care, as used in this book, is intentionally broad and evocative of basic human rights. In its deepest and broadest sense, care is something society owes to its members. It is a set of basic supports – housing, economic security, healthcare, safety, education. But care as it is used here is not only about what society should provide to its members. It is also, crucially, about how it should be provided. Care, as it is used here and in its best form, is inextricable from dignity. Society provides that form

7. See Fong & Raz, *supra* note 6 at 224-25; see also Lee, *supra* note 6 at 272-73.

8. See Schept, *supra* note 2.

9. BACH, *supra* note 1 at 3-4.

10. *Id.*

of care when it does so in a way that enhances, rather than undermines, the dignity and well-being of the individual, family, or community receiving that care.¹¹

Realizing this vision is, in some ways, outside the scope of the book (or so I decided). But separating the book's primary goals from this larger vision leaves in place a perhaps too easy notion of some form of pre-criminalized care to which we might turn if only we separate care from punishment. As Professor Kaye cogently argues,

. . . . while care cleaved from criminal governance offers some definite advantages, this is still the biomedical capitalism which created OxyContin and deliberately hid its dangers, marketing this hazardous product in such an irresponsible manner as to cause the death of hundreds of thousands of people.¹²

Fair point. Even fairer:

Rehabilitation and biopolitical "care" must thus be seen as civilizational projects, akin to Native boarding schools, the poorhouse, and the asylum. The civilizing and caring violence offered by these institutions act *both* as a mode of assimilation and a mode of control, whether by pressing diseased victims toward reintegration or by containing (or destroying) those who can never be expected to join.¹³

Fair too is the critique, not waged here but waged elsewhere, that lawyers are deeply complicit in legal systems that reinforce racial capitalism, and efforts at "reform," led by experts, have an uncanny power to strengthen the status quo.¹⁴

But then I think, ok, absolutely. But a pregnant person in Northeast Tennessee with an accurately diagnosed opioid use disorder is still likely to have a healthier pregnancy, a healthier child, and a healthier family if she receives medication assisted treatment, delivered in an integrated setting. And that same person, faced with the removal of her child by the family policing system and/or her prosecution for pregnancy related conduct, needs, at the very least, a highly skilled and resourced set of defense lawyers. Certainly today, given the options available, she should have access to that care and those services, with all their compromises and problems, and be able to choose whether to take advantage of it. I suspect the symposium participants would largely agree, and perhaps that's actually not the tricky

11. *Id.*

12. Kerwin Kaye, *Punishment as Care: A Discussion of Wendy Bach's Prosecuting Poverty, Criminalizing Care*, 53 SW. L. REV. 242, 254-55 (2025).

13. *Id.* at 253.

14. See, e.g., Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L. J. 2497, 2507, 2575 (2023).

part. The tricky part is what it takes to invest in the existence of those supports/services and whether the investment pulls away from larger movement goals. In effect we need to ask - does a policy shift that strengthens her access to treatment, or highly skilled lawyers also strengthen carcerality and racial capitalism.

As Professor Schept aptly notes, perhaps the right next question is how we collectively, and in collaboration with affected communities, attempt to recognize, support, imagine, join efforts toward and lend technical expertise to the project of “abolitionist care” both in the immediate moment and toward a better future.¹⁵ And, keeping in mind the immediate needs of the woman I describe and at least some of the women who were prosecuted for fetal assault (some it seems actually needed medical care and some did not), we need to continually ask - what does the here and now of abolitionist care and abolitionist care praxis look like?

I raise all these questions not because I have the answers, but because it seems to me a very good example of the questions we are all struggling with. And unsurprisingly, the answers probably lay in a combination of proximity, process, and deep comfort with contradiction. One fruitful place to imagine from is Professor Amna Akbar’s most recent deep dive into the nature of non-reformist reforms.¹⁶ Akbar explains that non-reformist reforms are those that aim “to undermine the prevailing political, economic, social order, construct an essentially different one, and build democratic power toward emancipatory horizons.”¹⁷

As Akbar explains, depending on the particular context the same policy proposal (Medicaid for all/ eliminate mandatory reporting) can be either reformist or non-reformist, and the best way to tell is to put the definition not in the hands of a Professor in a law review article, but in the hands of movements. Moreover, that seeming contradiction – the same proposal being reformist or not – is not actually a problem. Embracing rather than shying away from ambiguity, Akbar centers the contradiction at the heart of the term and calls on lawyers and legal scholars to join with movements in the process of constant definition and redefinition of goals and strategies. As she says,

In centering productive contradictions between reform and revolution, the heuristic facilitates strategic and tactical questions that “reformist reforms” do not: it requires engaging with systems as they are, allows one to hold in view bold and radical horizons, and facilitates the identification of strategic battles that might serve as a bridge through popular agitation.¹⁸

15. See Schept, *supra* note 2.

16. Akbar, *supra* note 14 at 2506.

17. *Id.*

18. *Id.* at 2409.

As Fanna Gamal notes, in a recent essay reflecting on Akbar's latest article, embracing these contradictions, sometimes by the same person in the same moment demands "multiple consciousness," and a "dualist approach to a repressive legal system."¹⁹ As Gamal, citing Mari Matsuda, reminds us with the example of Dr. Angela Davis facing a similar set of contradictions,

There are times to stand outside the courtroom door and say "this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom." There are times to stand inside the courtroom and say "this is a nation of laws, laws recognizing fundamental values of rights, quality and personhood." Sometimes, as Angela Davis did, there is a need to make both speeches in one day.²⁰

Similarly, perhaps there are times to enter the site of biopolitical care (the hospital, the treatment center, the clinic) and demand the best form of what is available there; there are times to stand outside and say, as Kaye does, that this system is fundamentally complicit with racial capitalism.²¹ And there are, always, times to imagine. As this fruitful conversation continues, proximity, process, strategic ambiguity, and radical imagination, exercised collectively, may just get us all there.

19. Fanna Gamal, *What Does Critical Race Theory Teach Us About Non-Reformist Reforms?*, LPE PROJECT (Nov. 29, 2023), <https://lpeproject.org/blog/crt-non-reformist-reforms/> (last visited Dec. 8, 2023).

20. *Id.*

21. See Kaye, *supra* note 12 at 254-55.