

BURDENSOME CARE

Kelley Fong* & Mical Raz**

In *Prosecuting Poverty, Criminalizing Care*, Wendy Bach investigates a moment in Tennessee—a fetal assault law nominally intended to help pregnant women using opioids, in effect between 2014 and 2016—to tell a broader story about the interrelation between criminalization and care for poor women.¹ As Bach explains, a group of Tennessee legislators “decided to create a crime,” expanding legal definitions of assault, such that a woman using narcotic drugs while pregnant could be prosecuted for “assaulting” the fetus.² Bach skillfully shows how punitive impulses—to condemn a population that one district attorney called “the worst of the worst”—were not the only justifications legislators offered.³ In addition, they suggested that prosecuting women who used drugs during pregnancy could actually enable the provision of care: that prosecution could be “a road to accessing care” as well as “itself . . . a form of care.”⁴

Bach draws on her extensive research, including legal analysis as well as careful and sensitive interviews, to walk the reader through the far-reaching implications of this criminalization.⁵ Women were denied their liberty and their rights to their children; they fell further and further in debt; they pled guilty to actions that did not meet the legal standard for a crime, because they did not have the resources to withstand the pressures of the state’s coercive interventions. Through meticulous and in-depth analysis of the case files of women prosecuted under Tennessee’s fetal assault law, Bach shows how women were not necessarily offered the treatment services legislators suggested would follow from prosecution.⁶ Even those that did receive some form of “care” through the criminal legal system found this care compromised. In Tennessee and around the country, participating in drug court and mandatory rehabilitation treatment comes with substantial risks of

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1. WENDY A. BACH, *PROSECUTING POVERTY, CRIMINALIZING CARE* 13, 18 (2022).

2. *Id.* at 11, 13.

3. *Id.* at 18.

4. *Id.* at 19.

5. *See generally id.*

6. *Id.* at 159–61.

failure to meet the specified terms, as well as high stakes.⁷ Jailing, fees, probation, family separation—the system is structured “to exact a high price from the defendant who fails.”⁸ Non-clinicians, and in particular, judges subject to little, if any, accountability, are afforded enormous discretion as they determine what kind of a treatment a woman may or may not receive.

Criminalized care, Bach convincingly argues, carries considerable costs.⁹ Bach traces these costs to the ways that situating care within or proximate to punitive systems produces a “corrupted” and “degraded” form of care.¹⁰ This is a generative insight, one we can see operating in a range of contexts. From the judge who prefers “Vivitrol over maintenance drugs,”¹¹ to the pregnant women who decide not to continue maintenance treatments during pregnancy, the standard of care per the American College of Obstetricians and Gynecologists, for fear of CPS involvement,¹² Bach shows how external powers shape the abilities of pregnant women to seek and receive the care they need.¹³

Moreover, reading *Prosecuting Poverty, Criminalizing Care* ought to complicate our understandings of what we consider care. Social services and treatment services for marginalized people—in this case, people who have used drugs during pregnancy—are not any kind of pure “care” distinct from punishment, tarnished only by their proximity to punitive systems.¹⁴ Rather, when we look at what passes for “care,” we see how it is often a form of punishment itself.¹⁵

For instance, Bach describes what happened to Lennon Mason (a pseudonym), a low-income woman struggling with substance use disorder.¹⁶ Mason was required to be in court fifty-three times over nine months, spent two months of this “treatment” plan incarcerated, and, when she inevitably failed, she went to jail and was required to pay court fees of nearly \$2,000.¹⁷ Bach primarily presents this case as evidence of how supposedly rehabilitative or problem-solving courts often open defendants up to even

7. *Id.* at 64, 160–61.

8. *Id.* at 161.

9. *See generally id.*

10. *Id.* at 8.

11. *Id.* at 174.

12. *Id.* at 184.

13. *See generally id.*

14. *Id.* at 4.

15. *Id.*

16. *Id.* at 159–60.

17. *Id.* at 160.

greater punishments, an example of what Stanley Cohen refers to as “net-widening.”¹⁸

Further, Ms. Mason’s punishment was not limited to her incarceration, her fees, and her separation from her newborn.¹⁹ As Bach notes, drug courts like those in which Ms. Mason participated “require a good deal of their participants.”²⁰ Bach points out that Ms. Mason’s required court appearances, for instance, amounted to once or twice each week on average.²¹ Such onerous requirements—requirements imposed upon Ms. Mason and others like her, rather than requirements they themselves sought out—are themselves a form of punishment. As Malcolm Feeley so aptly encapsulates, the process is the punishment.²² Issa Kohler-Hausmann, too, identifies “procedural hassle” as a core tactic of social control in misdemeanor court.²³ Even when people are not subject to formal punishment, Kohler-Hausmann argues, “the collection of burdensome experiences” that constitute case processing is itself a disciplinary and punitive practice.²⁴

To the extent that drug treatment services are onerous and stigmatizing, they do not align with Bach’s broad conception of care, outlined at the start of the book.²⁵ Care, in Bach’s formulation, “enhances, rather than undermines, the dignity and well-being” of the person receiving it.²⁶ Too often, however, the supposed “care” provided to women who have used substances during pregnancy fails to meet this standard.²⁷ The “service plans” proffered by child welfare agencies often include treatment services commonly conceptualized as care.²⁸ But as Dorothy Roberts contends, “It is Orwellian to call this process ‘serving’ families when the vast majority of families are ‘served’ against their will Rarely are parents asked what services they would find helpful. Parents are accused, investigated, and prosecuted just like defendants in criminal court.”²⁹

18. See generally STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION (1985).

19. BACH, *supra* note 1, at 159–60.

20. BACH, *supra* note 1, at 161.

21. BACH, *supra* note 1, at 160.

22. See generally MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979).

23. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 183 (2018).

24. *Id.*

25. BACH, *supra* note 1, at 3–4.

26. BACH, *supra* note 1, at 4.

27. See generally BACH, *supra* note 1.

28. DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES – AND HOW ABOLITION CAN BUILD A SAFER WORLD 184 (2022).

29. *Id.* at 183–84.

In the remainder of this essay, we use the lens of administrative burdens to analyze the experiences of women receiving treatment services, drawing on ethnographic fieldwork and interviews one of the authors conducted with mothers in Rhode Island and Connecticut from 2015 to 2018.³⁰ Pamela Herd and Donald Moynihan conceptualize administrative burdens as the onerous costs that people experience in their interactions with government agencies.³¹ As Herd and Moynihan emphasize, these burdens matter, determining whether people experience the government as “respectful or antagonistic”—or, in other words, purveyors of care or punishment.³²

In line with Bach’s argument about corrupted care, the Rhode Island and Connecticut mothers described how substance use services for new mothers opened them up to additional criminalization and punishment.³³ As in the case of Lennon Mason, detailed by Bach, mothers recognized that failing to meet the high compliance requirements of the services to which they had been referred could lead to or prolong family separation.³⁴ A Rhode Island mother, Colleen (all names are pseudonyms), recounted how after giving birth to her baby, born exposed to substances, her Child Protective Services (CPS) caseworker instructed her to attend a drug treatment program every day: “I was not allowed to miss any. If I missed any, she’d come and take him.”³⁵

Bach also describes how healthcare providers are in a position to turn families over to systems such as CPS, such that engaging with care providers becomes a pathway to punishment.³⁶ Likewise, a Rhode Island mother named Latanya recalled opening up to her treatment counselor when she relapsed. The counselor insisted they call Latanya’s CPS caseworker and let the caseworker know about the relapse. This left Latanya feeling betrayed by this supposed “care”: “They said it was confidential. That’s why I had to leave that program.”³⁷ Latanya’s experience exemplifies how Bach’s

30. See generally KELLEY FONG, *INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES* (2023).

31. See generally PAMELA HERD & DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS* (2018); see generally Frank Edwards, Kelley Fong, Victoria Copeland, Mical Raz & Alan Dettlaff, *Administrative Burdens in Child Welfare Systems*, 9 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 214 (2023), for work the authors have previously written with other coauthors regarding administrative burdens in child welfare systems.

32. HERD & MOYNIHAN, *supra* note 31, at 2.

33. BACH, *supra* note 1, at 72–73.

34. BACH, *supra* note 1, at 159–61.

35. Interview with “Colleen,” in Providence, R.I. (May 20, 2015); FONG, *supra* note 30, at 74–76.

36. See generally Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers’ Institutional Engagement*, 97 SOC. FORCES 1785 (2019).

37. Interview with “Latanya,” in Providence, R.I. (June 4, 2015).

findings extend beyond the specific case of women prosecuted under Tennessee's fetal assault law. We see the dynamics Bach illuminates—how efforts to provide care end up subjecting marginalized people to criminalization—operating in a much broader set of contexts.³⁸

Beyond care as a *pathway* to punishment, however, care is often provided in ways that itself constitutes a form of punishment. Herd and Moynihan conceptualize the costs of complying with requirements as a form of administrative burden.³⁹ Women like those prosecuted in Tennessee—poor women who have recently given birth after using substances during pregnancy—are referred to treatment services that carry substantial compliance costs.⁴⁰ They must spend considerable time in required appointments, as well as travel to dispersed provider locations, often with limited transportation options. These appointments are conducted during regular business hours, scheduled at the providers' convenience. This “dizzying catalogue of burdensome and conflicting obligations,” in the words of Dorothy Roberts, ultimately makes it more difficult for mothers to care for themselves and their children.⁴¹ Feeley, describing a pretrial diversion program that involved regularly scheduled meetings for three months, attributes the program's extremely low take-up rate to the fact that “arrestees consider participation in the program itself a penalty,” and a severe one at that.⁴² State-mandated care is part of the punishment.

The case of Sherea, a mother in Connecticut, illustrates the compliance costs of treatment services. After testing positive for marijuana during pregnancy, CPS referred Sherea to outpatient substance use treatment. Initially, she hoped she could complete the program promptly: “They said the most I would have to do is eight weeks. If not, then only two weeks . . . I'm hoping and praying it's not eight weeks, only two.”⁴³ Sherea's comments illustrate how mothers often experienced treatment referrals as something foisted on them, rather than something they were affirmatively choosing to pursue. For Sherea, the referral was like a sentence—the length of which would be determined by someone else.

Two weeks, it turned out, was too much to hope for. Initially, she was assigned to a program that met at 5:30 p.m., which Sherea was able to attend. But then she was switched to a more intensive program that met at 9 a.m. three days each week. She did not have childcare for her newborn available

38. FONG, *supra* note 30, at 173–74.

39. HERD & MOYNIHAN, *supra* note 31, at 2.

40. BACH, *supra* note 1, at 160–61.

41. ROBERTS, *supra* note 28, at 185.

42. FEELEY, *supra* note 22, at 233.

43. Interview with “Sherea,” in New Haven, Conn. (May 8, 2018).

at that time, which was documented many times in CPS case notes. Because of this, she did not attend any of the treatment provider's meetings; she simply called the program each day to communicate her inability to attend. Neither the program nor CPS offered childcare (nor transportation, for that matter, as Sherea did not have a car). Although Sherea said she appreciated the group therapy, she added that "it isn't helpful when I gotta be there at 9:00 in the morning and I don't have a babysitter."⁴⁴ Soon, she planned to return to work, as her baby was almost three months old. But, she wondered, "if I go back to work, how do they expect me to come to group in the morning?"⁴⁵ Such compliance costs constitute a form of punishment, as Sherea was repeatedly reminded of her noncompliance—and, if she did comply, this would restrict her from working.

In Rhode Island, a mother named Melanie was referred to a treatment program that met every weekday from 8 or 9 a.m. until 3 p.m. For Melanie, too, this program's structure felt like punishment: "I can't sit in a room all day, because I do have ADD. I'll fricking go nuts."⁴⁶ She was willing to do three days a week, perhaps in the mornings, but service providers insisted that she attend for the full day, every day. They suggested that during her program participation, they would provide Melanie with Adderall so that she could pay attention. "No, I don't want to do it," Melanie recalled responding.⁴⁷ For that, she was labeled noncompliant. For Melanie, "care" came in the form of being subjected to an environment essentially inaccessible to her due to her disability or being mandated to be medicated in ways she did not want.

Marissa, in Rhode Island, likewise described how required services felt constraining rather than affirming. Marissa was living in a mother/child reunification house that required residents to attend various group meetings around town to support their recovery, yet did not allow them to have vehicles. "It doesn't leave me time, personally, to go do anything that I'd like to do," Marissa shared.⁴⁸ "It's hard. Yeah, I'll tell you, sometimes, to be honest, at night I cry. I cry. I'm like, 'Oh my God, please, how can I just move on?'"⁴⁹ All the required groups, Marissa continued, are "restrictions that keep me from pursuing some of the other things that I would like to," such as events at her church.⁵⁰ She added that appointments were spread out

44. Interview with "Sherea," in New Haven, Conn. (July 5, 2018).

45. *Id.*

46. Interview with "Melanie," in Providence, R.I. (Apr. 11, 2015).

47. *Id.*

48. Interview with "Marissa," in Providence, R.I. (Feb. 4, 2015).

49. *Id.*

50. *Id.*

throughout the day, and, without transportation provided, “you can’t do anything but sit here and basically do nothing and learn nothing. For me, it’s hard.”⁵¹ Here, Marissa is not invoking any links between the mother/child house and the child welfare or criminal legal systems; she is not describing risks of further criminalization. For Marissa, the program and its requirements are a punishment in itself.

In treatment services, we see another kind of administrative burden as well: what Herd and Moynihan term “psychological costs,” or “the stresses, loss of autonomy, or stigma that come from” encounters with public services.⁵² Experiences that people find stressful, experiences that strip people of their autonomy, and stigmatizing experiences are antithetical to the care envisioned by Bach—a care rooted in supporting people’s dignity and well-being. Herd and Moynihan conceptualize the “loss of autonomy that comes from intrusive administrative supervision” as part of a program’s psychological costs.⁵³ Marissa, for instance, understood the numerous and seemingly arbitrarily scheduled meetings she had to attend as a statement of her worth in the eyes of treatment providers: “We’re not treated exactly, I think, in the right way. It seems that our time isn’t valued . . . It seems like I’m not valued very much.”⁵⁴ Marissa called the mother/child reunification house “a wonderful, wonderful idea . . . having a great place to come back together with your child and reunify and get on your feet.”⁵⁵ However, she sighed as she said, “the reality of the whole thing . . .”⁵⁶ The program held the promise of care, but for Marissa, it warped into something that left her feeling restricted and degraded.

Latanya, the mother who divulged her relapse to the counselor at her drug treatment program, described that program as “too in your business.”⁵⁷ She clarified that “they would always force you to speak when you really don’t want to, and always think something’s wrong with you if you don’t wanna talk.”⁵⁸ In group sessions, Latanya recalled, the counselor always called on her, pointing at her and telling her to speak to the group, even knowing that Latanya was not in the mood to talk: “I’m like, ‘Nothing’s wrong.’ Like, she would make me think something’s wrong.”⁵⁹ Even before

51. *Id.*

52. HERD & MOYNIHAN, *supra* note 31, at 2.

53. *Id.* at 23.

54. Interview with “Marissa,” *supra* note 48.

55. *Id.*

56. *Id.*

57. Interview with “Latanya,” *supra* note 37.

58. *Id.*

59. *Id.*

this counselor reported Latanya to CPS, and even as Latanya was complying with the treatment program, the service undermined her autonomy and stigmatized her for wanting to maintain some privacy. Kohler-Hausmann writes that the degradation and stress people experience in these kinds of interactions with authorities—in Kohler-Hausmann’s case, in the misdemeanor court process—constitute “tremendous” costs.⁶⁰ Treatment services, also, too often impose compliance and psychological costs on participants that “cumulatively signify and materialize their denigrated status,” in the words of Megan Comfort.⁶¹

Wendy Bach’s book calls on us to look closely at the interrelations of care, coercion, and punishment. As she examines how the criminal legal system is manipulated and crimes are redefined and created, ostensibly in order to provide care, she shows how care is corrupted and compromised as it is tied to a punitive system.⁶² We use Bach’s insights as a starting point to show how “care” in itself can be a penalty. Although certainly some individuals find state-mandated services to be helpful and therapeutic, many do not. These services, and, in particular, the multiple burdens that inhibit and complicate access to these services, can be seen as restrictive and punitive in and of themselves. Using the framework of administrative burdens, we show how these burdens to accessing care are part of a broader carceral system that punishes and regulates certain pregnant women—often low-income women of color who use substances that are criminalized.

These burdens, as Herd and Moynihan have shown, are a policy choice and reflect certain societal assessments of deservingness.⁶³ Yet, just as these burdens are created and barriers to access are erected, they could be dismantled. We could envision a world in which mothers have access to drop-in childcare, in which substance use programs accommodate mothers with children, or in which certain important services are also provided with convenient transportation. Rather than setting barriers to engagement, therapeutic programs could seek input from the clients they serve to hear about the services they want to participate in and the supports they believe would benefit them. As we learn from impacted mothers that programs designed to provide “care” are often experienced as punishment, we can work to develop systems that meet people where they are and provide them with the services they need.

60. KOHLER-HAUSMANN, *supra* note 23, at 267.

61. *Id.* at 214.

62. *See generally* BACH, *supra* note 1.

63. HERD & MOYNIHAN, *supra* note 31, at 25.