

DIAGNOSING THE CARCERAL STATE: A REVIEW OF *PROSECUTING POVERTY, CRIMINALIZING CARE*, BY WENDY BACH.

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I. INTRODUCTION

The contours of the carceral state have shifted. Recent work has documented the continuing devolution of mass incarceration down scale, from prisons to jails; the declines of incarcerated populations in once-bellwether states like California and New York, and the rising incarceration rates in places like Kentucky, Oklahoma, and Wyoming, alongside Louisiana, Arkansas, and Mississippi; and the growing numbers of people from rural communities subjected to criminalization and imprisonment.¹ These shifts in geography, demography, and state capacity have been accompanied by discourses that shape how communities might think about the role of incarceration.

In an under-cited and yet thoroughly influential and prescient anticipatory intervention into what would become a burgeoning movement in the 2010s, Rose Braz authored the sharp “Kinder, Gentler, Gender-Response Cages: Prison Expansion is Not Prison Reform.”² In the article, the organizer and co-founder of the stalwart abolitionist organization, “Critical Resistance,” observed that then Governor of California Arnold

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1. See, e.g., JACOB KANG-BROWN ET AL., VERA INST. OF JUST., THE NEW DYNAMICS OF MASS INCARCERATION (2018), <https://www.vera.org/the-new-dynamics-of-mass-incarceration>; JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. OF JUST., OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA (2017), <https://www.vera.org/out-of-sight>; BEA HALBACH-SINGH ET AL., VERA INST. OF JUST., THE CRIMINALIZATION OF POVERTY IN KENTUCKY: HOW ECONOMIC CRISES AND FLAWED REFORMS FUELED AN INCARCERATION BOOM (2023), <https://www.vera.org/publications/the-criminalization-of-poverty-in-kentucky>.

2. Rose Braz, *Kinder, Gentler, Gender Responsive Cages: Prison Expansion Is Not Prison Reform*, WOMEN, GIRLS & CRIMINAL JUSTICE, Oct./Nov. 2006, at 87, https://www.againstequality.org/wp-content/uploads/2009/10/gender_responsive_cages.pdf.

Lessons from the No New Jails Network and the New York City Struggle Against Carceral Feminism, in

161, 171-74.

Mohapatra,

observed in California has become a forceful logic of expansion across the United States, including in larger cities and smaller towns.⁸

Helping us to make sense of numerous elements of this conjuncture is Wendy Bach's *Prosecuting Poverty, Criminalizing Care*.⁹ To be clear, Bach does not necessarily foreground a broad claim that her study of the gendered criminalization of addiction among poor women in Tennessee helps to clarify the social forces producing the historical moment. Her meticulous analysis focuses closely on the convergence of law, medicine, punishment, and care in the lives of the women and providers she interviewed and whose cases she examined.¹⁰ In that regard, the book certainly and perhaps primarily can be read for its crucial contribution to the social science literature on racialized and gendered punishment and care, and for adding to that literature an important geographical and political focus on Tennessee.¹¹ In her empirical and legal analysis, Bach is also revealing elements of our historical moment that have been understudied, including how we think about the very constitution of the carceral state, including the growing criminalization and imprisonment crises in rural America, and in the process is performing urgent demystification work concerning arguments for collapsing care into cages.¹² The book details how police and punishment have become avenues toward receiving care; how jails and prisons have become tasked as locations for the implementation of care; and how punishment, in the form of incarceration and other forms of carceral control, has come to be equated with the provision of care itself.¹³

II. DRUG WAR CARE IN TENNESSEE

Most concretely, *Prosecuting Poverty, Criminalizing Care* examines the cultural and legal logics surrounding the passage and implementation of a

8. See Jack Norton, Lydia Pelot-Hobbs & Judah Schept, *Introduction: The Jail Is Everywhere*, in *THE JAIL IS EVERYWHERE: FIGHTING THE NEW GEOGRAPHY OF MASS INCARCERATION*, *supra* note 4, at 1, 4-5.

9. WENDY A. BACH, *PROSECUTING POVERTY, CRIMINALIZING CARE* (2022).

10. *Id.*

11. See, e.g., ALLISON MCKIM, *ADDICTED TO REHAB: RACE, GENDER, AND DRUGS IN THE ERA OF MASS INCARCERATION* (2017); JILL A. MCCORKEL, *BREAKING WOMEN: GENDER, RACE, AND THE NEW POLITICS OF IMPRISONMENT* (2013); BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* (2012); DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

12. BACH, *supra* note 9.

13. *Id.*

new state law in Tennessee regarding the crime of fetal assault.¹⁴ Concerned by the perceived rise in the number of newborns expressing symptoms of neonatal abstinence syndrome, or NAS, legislators intended for women to be found guilty of this new crime if they were discovered to have taken narcotics while pregnant, and their children were found to be harmed in some way by the ingestion.¹⁵ Importantly, the law was also premised on the idea that criminalization and prosecution were legitimate avenues toward treatment, and that criminal justice settings qualified as appropriate locations for that treatment's delivery.¹⁶

Bach examines this implementation, as well as its attendant cultural logics and broader implications, in both Memphis and east Tennessee, and therefore offers important insight into how these processes map across urban and rural communities. In that regard, Bach is able to engage in crucial and thorny questions about class, race, and the drug war. As part of her research, Bach pulled the birth record data for every infant in the state of Tennessee born with an NAS diagnosis while the fetal assault law was on the books.¹⁷ In 82% of the cases, the families reported income below \$25,000/year; 95% of the women were white.¹⁸ In short, NAS diagnoses concentrated in the northeastern part of the state and among rural, poor white women, due in large part to the use of prescription opiates. However, in one of the book's major findings, prosecutions tended to veer away from *actual diagnoses* of NAS, and instead simply targeted pregnant women who used drugs, and where evidence of harm to an infant was often lacking.¹⁹ In that regard, there were a couple of dozen cases in Memphis, which included about 40% Black women.²⁰

The moral panic around NAS, including the state's punitive response, evokes earlier iterations of the drug war, when the media-generated phenomenon of "crack babies" helped to mobilize a racist common sense around Black motherhood, addiction, and punishment.²¹ Like the eventual conclusions of medical professionals that poverty and prematurity were more consequential to the health of infants than exposure to cocaine, Bach also points to doctors who question the veracity of the NAS diagnosis and who

14. *Id.*

15. *Id.* at 1, 25-29.

16. *See id.* at 1, 19-22; 188-191.

17. *Id.* at 28.

18. *Id.*

19. *Id.* at 86-87, 97, 117-18.

20. *Id.* at 96.

21. ROBERTS, TORN APART, *supra* note 11, at 171; *see* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 32-34, 211-17 (1997).

argue convincingly that babies cannot be “born addicted.”²² Bach rightly points to the implications of this insight that fetal assault laws are much more about the criminalization of poverty and drug use.²³ Bach also observes differences in these phases of the drug war, which in some ways undoubtedly hinge on the different ways they were racialized.²⁴ But she also notes that the wages of whiteness that may have been afforded to even poor white women have been attenuated by decades of investment in carceral capacity, often as the state’s solution to its own organized abandonment of rural communities like those in east Tennessee.²⁵ NAS cases were on the rise, Bach notes, in part due to the rise in opiate use, itself a product of these broader social forces.²⁶ But was such a diagnosis justified? And if so, she asks, was it cause for the particular formation that concern tends to take in the carceral conjuncture: coercive intervention, family policing, and punishment?²⁷ In focusing on Tennessee, Bach furthers our understanding of criminalization and imprisonment in the south, and presciently guides us toward an analysis primed for a new emergent moment of attacks on bodily autonomy and reproductive rights in the state and beyond.²⁸

III. DEATH BY A THOUSAND CUTS: CLASS WAR AS CARE

Prosecuting Poverty, Criminalizing Care can be read both for the specific case study it offers and as a diagnostic of a constitutive element of the carceral conjuncture. In both regards, Bach illuminates the confluence of systems and capacities we tend to think of and theorize as separate. In the collaborations between professionals to provide wrap-around care, Bach documents the porous borders between medicine, drug treatment, child welfare, probation, police, and incarceration.²⁹ As such, Bach is pushing analysts to be more capacious and empirical in how we study the carceral state, which would seem to be partly constituted by some of the capacities we often position as alternatives to it.

The book’s focus on misdemeanors provides an urgent sense of the ways carceral state capacities and actors, including through official attempts to

22. BACH, *supra* note 9, at 11, 52-53; 89.

23. *Id.* at 6-8; 47, 145-147.

24. *Id.* at 56.

25. See BACH, *supra* note 9, at 56; see also TRAVIS LINNEMANN, MATH WARS: POLICE, MEDIA, POWER 118 (2016); DANIEL MARTINEZ HOSANG & JOSEPH E. LOWNDES, PRODUCERS, PARASITES, PATRIOTS: RACE AND THE NEW RIGHT-WING POLITICS OF PRECARIETY 54-55 (2019).

26. BACH, *supra* note 9, at 26-29.

27. *Id.* at 28.

28. *Id.* at 1-2.

29. *Id.* at 1-9, 129-42.

provide care, might be best understood as distributing death by a thousand cuts.³⁰ Misdemeanors, including those that do not result in incarceration, at least at first, nonetheless reveal the quotidian operations of the state and, of course, the interfaces that millions of people have with it every day. Bach notes that these kinds of offenses to which the women in her book were subjected are not just a product of a punitive system that has colonized care.³¹ Rather, they also are instrumental to the very reproduction of the system itself through the imposition of fines, fees, and taxes on defendants, conclusions that other researchers have recently drawn in other states, like neighboring Kentucky.³² The payments of these pervasive costs by almost exclusively poor people then travel widely within the state: to its general fund, to the Tennessee corrections institute, to driver education, to policing in public housing, to the salaries of public defenders, to electronic fingerprint imaging, and to a range of other public funds.³³ Moreover, Bach notes that counties and localities can impose additional funds, specifically for jail construction and renovation or the paying down of debt on those projects.³⁴

What, then, is the criminalization of care? It would seem that Bach is pointing us toward understanding this phenomenon as an expression of the organized violence that has come to characterize the state's solution to organized abandonment. To put that another way, like Ruth Wilson Gilmore, we might consider the criminalization of care in Tennessee as part of "the broad, deep front of a long brutal war. Class war, if you will, shaped by its modalities as race war, gender war, colonial war: the war of racial capitalism against all."³⁵ While the spectacular deaths carried out by police are the most recognizable expression of this war, the slow violence of misdemeanors are its daily churn.

One of the particularly startling contributions of Bach's book is that the waging of this particular front of war is often carried out, or at best facilitated, by people who may very well be aiming to provide assistance and care: doctors, nurses, social workers, treatment providers, probation officers.³⁶ As Bach writes in reference to the structural formations and ideas that characterize criminalized care, "Professionals – even, and perhaps especially, when they are attempting to help – are acting within the constraints of those

30. On this argument more broadly, see NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 67-68 (2014).

31. BACH, *supra* note 9, at, at 1-2.

32. BEA HALBACH-SINGH ET AL., *supra* note 1, at 3, 28, 34.

33. BACH, *supra* note 9, at 112-13.

34. *Id.* at 113.

35. Ruth Wilson Gilmore, *Foreword*, in *THE JAIL IS EVERYWHERE: FIGHTING THE NEW GEOGRAPHY OF MASS INCARCERATION*, *supra* note 4, at xiv, (Norton et al. eds. 2024).

36. See BACH, *supra* note 9, at 167-169.

systems and those ideas. Moreover, the failure of those professionals to challenge the status quo reinforces the systems as they currently operate.”³⁷

As such, Bach’s book joins a growing collection of work that demystifies the false notions of clean boundaries between criminal-legal processes on the one hand, and those of health care, child welfare, or education on the other. On the contrary, *Prosecuting Poverty, Criminalizing Care* demonstrates that the conditions of possibility for the criminalization that this book documents are, in part, the porous boundaries between those capacities.³⁸ In Bach’s words, her research reveals “a steady and open stream of communication between health care providers and the child welfare and criminal systems.”³⁹ At times, she notes, this flow of information, which can result in child welfare cases, the removal of children from their homes, and arrests, prosecutions, and incarceration of mothers, happens when women are following the recommendations from their doctors, who themselves are following the protocols of professional medical organizations.⁴⁰

War is, of course, violent. Bach and her interlocutors show that criminalized care is, in a word, violent, even if the language or intent might mystify the actual delivery of violence inherent in arrest and incarceration. In one example, in a section where Bach discusses the use of jails as treatment facilities, a doctor Bach interviews argues that the common practice regarding withdrawal in jail is inhumane.⁴¹ “You would not do it for another medical condition,” he argues.⁴² “It’s the equivalent of withholding insulin from a diabetic, absolutely. There is no doubt or argument about that, yet they do it all the time.”⁴³

IV. TAKING CARE BACK

Prosecuting Poverty, Criminalizing Care details new fronts of the drug war, identifies some of the sutures that have bound treatment and punishment into an even more capacious carceral state, and points out urgent, concrete, and principled ways for critics to begin to dismantle elements of it.⁴⁴ In these ways, the book can be read as a diagnostic of a crucial part of the carceral state in this conjuncture and contributes to the burgeoning critical prison

37. *Id.* at 209.

38. *See id.* at 4, 6.

39. *Id.* at 131.

40. *See id.* at 135.

41. *See id.* at 154-155.

42. *Id.* at 155.

43. *Id.*

44. *See id.* at 6-9.

studies literature that offers principled and abolitionist interventions into the carceral state and its attendant logics.

Specifically, Bach's book can be read alongside other work that engages urgent questions for scholars and practitioners interested in what we might call abolitionist care.⁴⁵ How might our pithy slogans, like "care not cages," both express our deep need and desire for non-coercive forms of care *and* at the same perhaps misrecognize the ways that, in this stage of the carceral conjuncture, care is often collapsed into the capacities and institutions we are aiming to dismantle?⁴⁶ How might a focus on the ways these capacities – medical, drug treatment, child welfare, and criminal justice – have become intertwined force us to adjust our analyses of the state, including helping us to more fully and concretely articulate a path out of the present?

Thankfully, Bach doesn't just leave us with these important, if thorny, questions. In the book's final part, Bach begins to illuminate what such a path might look like.⁴⁷ In the face of legal charges, the women prosecuted under the Fetal Assault law rarely were afforded any kind of procedural justice.⁴⁸ In one stark passage, Bach points to how women who very likely were legally innocent nonetheless pled guilty, the result of the system-wide heavy "price for fighting [charges] and the pressures to plead [being] just too strong."⁴⁹ Later, in the book's concluding Part, Bach writes "there was little procedural justice to be had. No trials, no motions, no evidence, just guilty pleas, jail time, fines, accusations of failure to comply, and more of the same cycle."⁵⁰ Bach carefully proposes reforms that might mitigate the harm waged against the women whose stories animate this book, but she crucially locates those reforms in the work of scholars and activists fighting for abolition, including of the "family policing" system.⁵¹

At base, Bach's proposals will be familiar for readers interested in dismantling the prison industrial complex: universal health care, high quality and affordable childcare, a robust and non-coercive safety net, and more. But the real power of her contribution lies in the granular and analytical

45. Vanessa E. Thompson, *Policing in Europe: Disability Justice and Abolitionist Intersectional Care*, 62 (3) *Race & Class* 61, 70-71 (2021), <https://doi.org/10.1177/0306396820966463>; Dean Spade, *Solidarity Not Charity: Mutual Aid for Mobilization and Survival*, Social Text, March 2020 at 131, 131-33 (2020), <https://doi.org/10.1215/01642472-7971139>; ARDATH WHYNACHT, *INSURGENT LOVE: ABOLITION AND DOMESTIC HOMICIDE* 2-3 (2021).

46. See Jeremy Levenson et al., *Abolition and Harm Reduction in the Struggle for "Care, Not Cages,"* INT'L J. DRUG POL'Y, 2023, at 1.

47. See BACH, *supra* note 9, at 190.

48. *Id.* at 189.

49. *Id.* at 103.

50. *Id.* at 189.

51. *Id.* at 193.

unpacking of the fusing of care and punishment in the carceral conjuncture. As such, the most poignant and resonant of her suggestions are those which offer refreshing provocations for and interventions in sacred liberal ideas about the benevolent state.⁵² In one recommendation, Bach calls for the repeal of mandatory reporting laws, arguing persuasively that they turn providers into investigators and withhold the kind of holistic care from the people who need it most.⁵³ In repealing such laws, she argues, discretion for referrals to punitive capacities would simply reside with those most qualified to assess the needs of a given individual or family – healthcare, educational, and social worker professionals.⁵⁴ In another, Bach cautions against the kinds of collaborations across agencies that might seem benevolent and efficient to those working within these systems.⁵⁵ But *Prosecuting Poverty, Criminalizing Care* reveals that such collaborations – which, to be clear, in Bach’s cases could and did involve OBGYN’s, addiction specialists, child welfare officers, probation officers, and police officers – accelerate and naturalize the mingling and indeed mutual constitution of care and punishment.⁵⁶

Prosecuting Poverty, Criminalizing Care reveals new dimensions of a very old history of gendered carceral violence by the racial capitalist state.⁵⁷ For Bach, the consolidation of care and carceral punishment betrays a foundational principle of the notion of care, even if, as historians and other scholars have shown, such care has always been provisional and contingent on racialized class positions. Early in the book’s introduction Bach writes that in its deepest sense, “care is something society owes to its members . . . housing, economic security, healthcare, safety, education.”⁵⁸ But care is also about dignity, and Bach argues that true care is achieved when fundamental needs are provided in a way that “enhances, rather than undermines, the dignity and well-being of individual, family, or community receiving that care.”⁵⁹ In other words, care is a fundamental public good, if not held in and practiced in common, then at least provided by a state whose capacities are organized around its provision as a first principle of that state’s very existence.

52. *See id.* at 191-92.

53. *See id.* at 202.

54. *Id.* at 203.

55. *Id.* at 207.

56. *Id.*

57. *See also* SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY 25 (2016); ROBERTS, *supra* note 21, at 4,6.

58. *See* BACH, *supra* note 9, at 4.

59. *Id.*