

# PUNISHMENT AS CARE: A DISCUSSION OF WENDY BACH'S *PROSECUTING POVERTY, CRIMINALIZING CARE*

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## I. INTRODUCTION

Wendy Bach's recent book, *Prosecuting Poverty, Criminalizing Care*, is a true delight to read. A model of clarity and explication, Bach manages to synthesize and advance a growing field of critical studies concerning a resurgent interest in marshalling the resources of the criminal justice system toward rehabilitative ends.<sup>1</sup> Most prominently represented by drug treatment courts (which offer court-supervised drug treatment rather than simple incarceration for many of those arrested for drug-related crimes), this trend toward "problem-solving justice" takes a variety of forms springing out of this original point of departure including mental health courts, prostitution courts, truancy courts, homelessness diversion programs, and so on.<sup>2</sup> As Benedikt Fischer identified in his early study on drug courts, these programs generally operate as a form of "judicial probation," holding punishment at bay while channeling a variety of services (drug treatment, educational programming, vocational training, etc.) toward individuals under their supervision.<sup>3</sup> In addition to receiving the benefits of these services, participants who successfully complete the requirements demanded of these programs often have their arrest record shielded and rendered invisible to

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

2. See *id.* at 64, 67 (citing *see* ROBERT V. WOLF, CTR. FOR CT. INNOVATION, *PRINCIPLES OF PROBLEM-SOLVING JUSTICE 1* (2007), <https://www.courtinnovation.org/sites/default/files/Principles.pdf> [<https://perma.cc/VJ37-JJ2A>]).

3. Benedikt Fischer, *'Doing Good with a Vengeance': A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America*, 3(3) *CRIM. JUST.* 227, 240 (2003).

most public searches.<sup>4</sup> Despite this friendly-sounding approach, these programs tend to feature a variety of elements which both limit their reach and actually work to intensify the punitive aspects of the criminal justice system:

– *greater surveillance and subsequent risk* (Each problem-solving court is structured differently, but impositions such as drug testing, phone calls home to ensure that one is obeying court-imposed curfews, and check-ups for the cause of any missed appointments are routine).<sup>5</sup>

– *hidden sanctions* (Sanctions are often applied while participants are still active within the program as a means of supposedly motivating participants who have failed to adhere to program rules. Part of the reason courts became involved in what is termed *problem-solving justice* is to involve judges who can legally impose sanctions more readily than probation officers.<sup>6</sup> These mini-sanctions sometimes involve short-term jail sentences which can themselves add up to more time served than if the person had simply plead guilty and served their sentence).<sup>7</sup>

– *sanctions for program failure* (Participants who fail to meet court requirements are sentenced based on the initial charges that were wielded against them.<sup>8</sup> Most programs require that participants plead guilty in order to participate, and thus participants lose the opportunity to plea bargain with the DA's office.<sup>9</sup> After being under the supervision of the court, and after suffering whatever sanctions they were subjected to, they must now serve an even longer sentence than if they had served their time based on a lesser plea.<sup>10</sup> With drug courts, approximately half of all program participants "fail" at treatment, and those who fail are disproportionately black and disproportionately the most impoverished.<sup>11</sup> Problem-solving justice intensifies the punitiveness of the criminal-justice system for these groups).<sup>12</sup>

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4. See BACH, *supra* note 1, at 158 (citing TENN. CODE ANN. § 37-1-153 (2019)).

5. See BACH, *supra* note 1, at 126.

6. See *id.* at 66-67, 162.

7. See *id.* at 161.

8. See *id.* at 161-62 (citing Josh Bowers, *Contraindicated Drug Courts*, U. CHI. PUBLIC L. & LEGAL THEORY, Working Paper No. 180, 9 (2007)).

9. See, e.g., BACH, *supra* note 1, at 161.

10. See, e.g., *id.*

11. See *id.* at 66 (citing Bowers, *supra* note 8); BACH, *supra* note 1, at 67 (citing KERWIN KAYE, ENFORCING FREEDOM: DRUG COURTS, THERAPEUTIC COMMUNITIES, AND THE INTIMACIES OF THE STATE 10 (2020)).

12. See KAYE, *supra* note 11, at 10-11; BACH, *supra* note 1, at 161-62 (citing Bowers, *supra* note 8); see generally REGINALD FLUELLEN & JENNIFER TRONE, VERA INST. OF JUST., DO DRUG COURTS SAVE JAIL AND PRISON BEDS?, 2, (2000) (discussing how drug courts punish noncompliance by sentencing participants more severely than non-participating defendants); Bowers, *supra* note 8 (arguing that participants of drug courts were sentenced longer than

– *net widening* (In some cases, it has been shown that the presence of a problem-solving court increases the likelihood that police will arrest more people, particularly in relation to juvenile cases.<sup>13</sup> In part this may happen because police feel they have somewhere beneficial to send a person upon arrest. It may also occur, however, because problem-solving courts extend the capacity of the court system to supervise more people, often by requiring them to plead guilty as noted above. Even when additional arrests are not made, problem-solving justice encourages ongoing reliance upon the criminal justice system, channeling resources into those institutions and away from possible non-punitive alternatives).

– *expanding the domain of control* (problem-solving justice brings greater criminal justice surveillance into the realm of the everyday. Decisions about who one can socialize with, who one can live with, one's clothing, and so on, all become matters about which a court can and does intervene, threatening one with punishment for a lack of compliance).<sup>14</sup>

Bach's work usefully emphasizes the integration of problem-solving justice within the overall dysfunctions of criminal justice, convincingly adding a number of important considerations through her examination:<sup>15</sup>

– *pressures to plead guilty* (Bach builds on the work of Alexandra Natapoff in detailing the ways that a lack of proper legal representation combines with threats of severe punishments, including pre-trial detention and the risk of having one's children removed by Child Protective Services, presses many people to plead guilty, whether the charges are legally sound or not).<sup>16</sup>

– *finer and increasing impoverishment* (Bach highlights the ways that the criminal justice system has increasingly imposed fines and penalties against those charged with misdemeanors, deepening the poverty of those who are unable to collectively or individually resist the charges).<sup>17</sup>

– *intersecting punishment systems* (Bach is very convincing in sketching the ways that systems of public welfare, child welfare, and even health care

conventional defendants even when graduates of the program were taken into account); RACHEL PORTER, TREATMENT ALTERNATIVES IN THE CRIMINAL COURT: A PROCESS EVALUATION OF THE BRONX COUNTY DRUG COURT.33 (2001) (highlighting how drug courts in the Bronx oversaw participants for lengthier periods than initially planned).

13. See JUVENILE DRUG COURTS AND TEEN SUBSTANCE ABUSE 31 (Jeffrey A. Butts & John Roman eds., 2004).

14. See REBECCA TIGER, JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM 50 (2013); See James Kilgore, *Repackaging Mass Incarceration*, COUNTERPUNCH (June 6, 2014), <https://www.counterpunch.org/2014/06/06/repackaging-mass-incarceration>.

15. See BACH, *supra* note 1, at 67.

16. See *id.* at 102-08, 117-22; see generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 50 (2018) (explaining how wealth and race play a key role in placing participants in drug courts).

17. See BACH, *supra* note 1, at 111-17, 156-62.

intersect with and become somewhat subordinated to the institutions of criminal justice, becoming more punitive in orientation as they do so.<sup>18</sup> Bach details the ways information is shared across these institutions, creating far denser webs of surveillance as well as diverse sources through which punishment can be inflicted.<sup>19</sup> This “*regulatory intersectionality*” can create intensely contradictory demands that are extremely challenging to meet).<sup>20</sup>

Bach’s detailed case studies additionally show how laws promoted as ways to channel care toward those in need sometimes result in punishment without services or care of any sort.<sup>21</sup> Her work sharply points toward the ways in which individual bias is compounded by institutional biases, highlighting not only the discriminatory enforcement of laws, but the discriminatory nature of the laws themselves.<sup>22</sup> Pressing in novel directions for this field of scholarship, she further shows ways in which participants in problem-solving justice schemas often engage very strategically with the institutions of punitive care that they confront, sometimes accepting the needed services (even to the point of getting deliberately arrested at times), but sometimes concealing otherwise relevant information or avoiding care altogether in an effort to avoid punishment.<sup>23</sup> Bach here highlights Carolyn Sufrin’s important work on “jailcare,” emphasizing the negative consequences which result when neoliberal devolution decimates welfarist structures that stand outside of the criminal justice system, creating instead a system closely linked to punishment systems that she refers to as *criminalized care*.<sup>24</sup> Bach is particularly good in detailing the negative

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18. *See id.* at 141-42.

19. *See id.* at 131.

20. *See id.* at 61-62, 68-69, 191-92; *see generally* Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support* 25 *YALE J. L. & FEMINISM* 317, 318 (2014) (defining “*regulatory intersectionality*” as a way in which “regulatory systems intersect to share information and heighten the adverse consequences of . . . unlawful or noncompliant conduct.”).

21. *See* BACH, *supra* note 1, at 61-62, 69.

22. *See id.* at 68-69.

23. *See id.* at 71-73, 146 (first quoting ORISHA A. BOWERS, ET AL., *SISTER REACH, TENNESSEE’S FETAL ASSAULT LAW: UNDERSTANDING ITS IMPACT ON MARGINALIZED WOMEN* 22; and then quoting Kelly Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers’ Institutional Engagement*, 97(4) *SOC. FORCES* 1785, 1786 (2019) (explaining a study of poor mothers in which some selectively revealed information to authorities to prevent a Child Protective Services report)).

24. *See* BACH, *supra* note 1, at 62-68, 153-56, 186 (first quoting CAROLYN SUFRIN, *JAILCARE: FINDING THE SAFETY NET FOR WOMEN BEHIND BARS* (2017)); then quoting WOLF, *supra* note 2 at 7; and then quoting KAYE, *supra* note 11, at 15); *see also* Kilgore, *supra* note 14 (offering the term “carceral humanism” in reference to this same phenomenon).

effects of criminalizing care, and her discussion concerning the dangers of child removal is especially strong.<sup>25</sup>

Through all of this, Bach is an authoritative and extremely skillful teacher and guide, and it struck me that she here deploys her background in law to its best effect, speaking with a lucid and clear prose that illuminates complex issues with perceptive acumen and admirable skill. I admit that when I first saw the nature of her case study—a Tennessee “fetal assault” statute which stood only from 2014 to 2016 criminalizing a pregnant woman’s drug use as a form of “chemical endangerment”—I feared it had too limited a scope as to be useful in addressing broader concerns. Bach, however, makes exceptional use of this study, relying upon the small case numbers to comprehensively examine each and every one of the 120 cases in which women were prosecuted, and deploying her theoretical lens in a way which makes the larger stakes clear.<sup>26</sup> Her text is a model of scholarship, and I have already taken advantage of her work by sharing her book as a gift to a drug court judge overseeing a court I have been examining. In honesty, whereas my book sometimes skirts into language that only an academic could love, Bach maintains an explanatory prose that is extremely useful in forefronting the actual stakes for people going through the programs. Meanwhile, Bach’s conceptual work in identifying the “regulatory intersectionality” of punishment systems offers a significant methodological analytic that points beyond the criminal justice system toward the important ways in which criminal justice combines with other disciplinary institutions (something very consequential in terms of the ways that actual people confront these networks of governance and control).<sup>27</sup> All of this makes Bach’s achievement admirable, useful, and essential to consider.

There were, nevertheless, three areas that Bach explored where I wanted her to push even further with her analysis: the topics of care, race, and gender. The first of these concerns her analysis of care, including both her diagnosis of “criminalized care” (which either acts as a smokescreen for punishment or leads to a “corruption” of care), and her proposed reform involving the separation of care systems from regimes of punishment.<sup>28</sup> Left unanswered here is a question that Bach raises but does not answer: how is it that punishment itself comes to be seen as a form of “care,” particularly within

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25. See BACH, *supra* note 1, at 31-32 (quoting Shanta Trivedi, *The Harm of Child Removal*, 43, N.Y.U. REV. L. & SOC. CHANGE 523, 528 (2019) (explaining “attachment theory” and the adverse effects an early rupture can have on a child); Miriam R. Spinner, *Maternal-Infant Bonding*, 24, CAN. FAM. PHYSICIAN, 1151 (1978).

26. BACH, *supra* note 1, at 4, 14-15.

27. *Id.* at 68.

28. *Id.* at 2, 6, 202.

the community court models that she explores?<sup>29</sup> Secondly, Bach does an admirable but, in my mind, incomplete job examining the role of race in criminalized care. While her analysis shows that racism alone cannot explain the ways in which destitute whites are often targeted by these systems, sometimes receiving even less “care” than impoverished blacks, her analysis could do more to examine the ways in which race continues to operate, both in relation to poor whites and at deeper levels of meaning.<sup>30</sup> Lastly, it struck me that there was more that could be said about the ways in which gender structured the field, particularly in relation to the gendering of “care” and of “punishment.” While perhaps not seeming to be intimately related, I believe these three topics—care, race, and gender—help to explain one another, and to resolve some tensions that she leaves unresolved.

With that in mind, I will offer some preliminary thoughts pertaining to these issues and their relationship to one another, putting forward what is admittedly an incomplete set of links that can only point toward arenas of future examination. I center this exploration around the meaning of care within white and male supremacist society, and the relationship of that care to something called punishment. I will then conclude by gesturing toward some of the political consequences of this analysis, and the ways in which it complicates Bach’s seeming comfort with systems of *uncorrupted* care.<sup>31</sup> It is my contention that reforms designed to keep care and punishment at arm’s length—while perhaps useful as a beginning (which, to be fair, is all that Bach claims)—are ultimately vulnerable and unsustainable due to the links between these themes that are implicitly embedded between these two zones.

## II. THE INTIMATE BONDS BETWEEN CARE AND PUNISHMENT

How then does punishment come to be understood as a form of care? This issue has been commented upon by a number of scholars examining drug treatment courts, perhaps most notably by Rebecca Tiger. In her book *Judging Addicts*, Tiger details the way in which the courts rely upon a system of “enlightened coercion,” a concept in which “force is the best medicine.”<sup>32</sup> Tiger begins her analysis with a discussion of medicalization and the way in

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29. *See id.* at 55-56.

30. *See id.* at 57-58.

31. *See id.* at 60.

32. TIGER, *supra* note 14, at 73, 88 (drawing the phrases from the work of psychiatrists Sally Satel and Frederick Goodwin, writing on addiction); *see generally* SALLY L. SATEL & FREDERICK K. GOODWIN, ETHICS AND PUB. POLICY CTR., IS DRUG ADDICTION A BRAIN DISEASE? 16, (1998) (discussing “enlightened coercion”); Sally Satel, *For Addicts, Force Is The Best Medicine*, WALL ST. J., (Jan. 6, 1998), <https://www.wsj.com/articles/SB884039470752577000> (regarding “force is the best medicine”).

which health is made into “a positive value that one cannot but choose.”<sup>33</sup> Medicalization marks an “assimilative” form of control which stands next to, and often operates in association with, coercive forms.<sup>34</sup> In terms of social understandings of drug use (the immediate issue in Bach’s study), addiction is understood to be a malady of the will, one which medicine can do little to directly impact. As she writes, “cure—abstinence—requires . . . the patient’s willpower to effect recovery because the physician has little to offer in the way of treatment . . . .[D]octors can’t cure the disease their field has helped create.”<sup>35</sup> Drug courts, she writes, appropriate medical discourse while offering their own use of force and threats of force as solutions.<sup>36</sup> Force—in the form of state violence directed by the criminal justice system—becomes the best medicine as it alone can instill “consequential thinking” through the direct infliction of hardship and pain.<sup>37</sup> “The job of the court is to teach addicts to think consequentially, and the way the court does this is by attempting to foster a sense of ‘accountability . . . to the court system but ultimately accountability to themselves and their families.’”<sup>38</sup> “Force” becomes “medicine” when it is meant to generate capacities of the will. State violence, when applied in an “enlightened” manner that aims at rehabilitation, can thus define treatment, and when applied in this way is not seen to be violence at all, but a form of “tough love” of the most necessary sort. Elsewhere, I have referred to this form of supposed love as “caring violence.”

This framing of the issue has achieved its most widespread acceptance in relation to the treatment of drug use, but it has gained traction in other areas where “diseases of the will” are at issue, such as with mental health courts and homelessness courts, as well as in other arenas where free will is presumed to have been compromised, as with prostitution courts.<sup>39</sup> “Care” takes the form of punishment because it is responding to the diagnosed need: a lack of self-control. It is impossible to undo the appeal of these courts without addressing the logic of this framing. “Care with accountability” or “accountability *as* care” offers what seems to be a meaningful solution when the problem is framed as “irresponsibility.” The systems of power here make

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33. TIGER, *supra* note 14, at 73 (quoting Richard Klein, *What Is Health And How Do You Get It?*, in *AGAINST HEALTH: HOW HEALTH BECAME THE NEW MORALITY* 15, 15 (Jonathan M. Metzler & Anna Kirkland eds., 2010).

34. TIGER, *supra* note 14, at 80-81.

35. *Id.* at 83.

36. *See* TIGER, *supra* note 14, at 87.

37. *Id.* at 88.

38. *Id.* at 15, 93, 130; *See id.* at 88; KAYE, *supra* note 11, at 223.

39. On “diseases of the will,” *see generally* MARIANA VALVERDE, *DISEASES OF THE WILL: ALCOHOL AND THE DILEMMAS OF FREEDOM* (1998).

a distinction between “the correctional” and “the punitive,” but this distinction revolves around the intended effect of the disciplinary measures, not the nature of the violence itself, thereby creating a rather blurred line between the biopolitical and the necropolitical.<sup>40</sup> Simply put, “corrections” is care, thereby making it difficult to fully disentangle the rehabilitative and the punitive.<sup>41</sup>

Criminalized care and the merely criminalized feature additional entanglements, and it is telling in this regard that practitioners working within problem-solving courts often seek to distinguish between those who are “ill” and those who are merely “criminal” (and thus undeserving of “care”). Punishment as a cure not only works to instill “consequential thinking,” it helps to allay concern about criminality by ensuring that those who willingly break the rules will receive their just dues. As Tiger comments, the court simultaneously frames drug users as both “sick” and “bad,” though the “sickness” is such that punitive tools—used with a benevolent hand—works both to cure the ill and to ensure that those who are merely “bad” will not escape.<sup>42</sup> The fact that the courts deem many people to have failed at treatment (pronouncing sentences upon them that are generally even longer than if they had simply pleaded guilty and not attempted “treatment”)<sup>43</sup> shows that the courts are “working” in this regard, distinguishing between *worthy victims* whose wills can be fortified and *unworthy villains* who either refuse such aid or are seen as too damaged to respond to this expression of love and care.<sup>44</sup> “Criminals,” these courts assure us, ultimately merit a punitive response that makes no pretense at benevolence, and the courts deliver that retribution when their “correctional” efforts fail. Problem-solving justice thus uses the same tools to address both the sickness of the undisciplined and the badness of the unruly, deciding who is who in the course of its penalizing and very consequential practice.

As Tiger’s commentary makes clear, medicalization is a form of control, one whose norms make opting out definitionally impossible.<sup>45</sup> Who could

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40. See TIGER, *supra* note 14, at 6-7, 53, 93-94.

41. Foucault likewise argues that “in its function, the power to punish is not essentially different from that of curing or educating,” noting that through their efforts “to alleviate pain, to cure, to comfort,” all of the carceral mechanisms in play seek “to exercise a power of normalization.” MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 303, 308 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978); see also Patricia Stuelke, *Reparative Reading and the Drug Wars’ Queer Children*, 33 *DIFFERENCES: J. FEMINIST CULTURAL STUD.* 60, 66 (2022); TIGER, *supra* note 14, at 88.

42. See *id.* at 23-26.

43. See KAYE, *supra* note 11, at 10, 238 n.37.

44. See *id.* at 24-27.

45. See TIGER, *supra* note 14, at 73-74.

classificatory principle and mechanism of domination



took both groups outside the realm of the “human,” and outside the realm of the “universe of moral obligation” that exists between “humans.”<sup>50</sup>

This imagery is more than past history. As suggested by the historian Evelyn Brooks Higginbotham, race generates concepts which continue to govern our analytic frameworks even when race is not immediately visible.<sup>51</sup>

Race serves as a “global sign,” a “metalanguage,” since it speaks about and lends meaning to a host of terms and expressions, to myriad aspects of life that would otherwise fall outside the referential domain of race.<sup>52</sup> By continually expressing overt and covert analogic relationships, race impregnates the simplest meanings we take for granted.<sup>53</sup> It makes hair “good” or “bad,” speech patterns “correct” or “incorrect.”<sup>54</sup>

In this way, race not only serves as a marker for the line between the human and the sub- or non-human, but also as a ground for innumerable other concepts which undergird social life and the assignation of social value.

I draw from Higginbotham’s ideas in suggesting that the metalanguage of race powerfully structures our contemporary ideas concerning the seemingly race-neutral ways we envision “drug addiction” and other forms of “irrationality”. Addiction, mental illness, and the supposed compulsions and traumas of prostitution—the common targets of problem-solving courts—are all framed as infringing upon the core elements of self which make us “human,” diminishing our will and capacities for agency, on the one hand, while on the other undercutting the familial social relations which are supposed to nurture and root our capacity to empathetically connect and interact outside of “selfish” market relations. The metalanguage of race works in association with all of these concepts, creating a broader chain in which each term helps to mutually define the other. This synergistic chain of associations is anchored in the meanings associated with the hierarchies of racial domination: whiteness-reason-legality-freedom-productivity-functionality-order-morality-family-empathy-life stand above and against blackness-irrationality-criminality-bondage-idleness-dysfunctionality-disorder-immorality-perversity-brutality-death. In the “post-racial” moment arising since the limited victories of the Civil Rights movement, these same conceptual pairings remain, but the racial component is spoken in *sotto voce*:

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50. *No Humans Involved*, *supra* note 46, at 2 (quoting Helen Fein, Inst. for the Study of Genocide, *Accounting for Genocide After 1945: Theories and Some Findings*, INT’L J. ON GRP. RTS., at 79, 84 (1993)).

51. See generally Evelyn Brooks Higginbotham, *African-American Women’s History and the Metalanguage of Race*, 17 J. WOMEN CULTURE AND SOC’Y 251 (1992).

52. *Id.* at 255 (quoting ROLAND BARTHES, MYTHOLOGIES 114 (Annette Lavers trans., Noonday Press 1972) (1957)).

53. Higginbotham, *supra* note 51, at 255.

54. *Id.*

whiteness-reason-legality-freedom-productivity-functionality-order-morality-family-empathy-life continue to stand above and against blackness-irrationality-criminality-bondage-idleness-dysfunctionality-disorder-immorality-perversity-brutality-death. The practices that have constituted racial inequality and oppression continue to infuse these chains of significance, not only defining our ideas, but mobilizing racial animus established through literally centuries of white supremacist violence and domination. As I suggest elsewhere, “[t]he result might be termed a para-racial formation, one that invokes an earlier/continuing racialized formation that has been sheared of its most obvious racial markers.”<sup>55</sup> These para-racial understandings govern a thoroughly racialized social order, though now in an allegedly colorblind manner.<sup>56</sup>

Bach’s approach to race leaves its metalinguistic capacity to structure meanings and affects unexamined, and I felt that the discussion on the topic of race—while insightful and useful on its own terms—was somewhat incomplete as a result.<sup>57</sup> Her observations on racial matters run chiefly in two directions: firstly to assert the ongoing existence of white racial privilege, and secondly, to complicate the meaning of that privilege and our understandings as to how it operates and is enacted.<sup>58</sup> Bach begins with a valuable discussion of structural shifts that have occurred in relation to race over the past decades, highlighting changes in the organization of white supremacy as the U.S. moved from a New Deal regime (which worked to shore up white identity while leaving most non-white people without protections from the market) toward new forms of racial domination in the neoliberal period (when social welfare protections were largely dismantled and carceral systems of control became much more prominent, especially targeting non-white communities).<sup>59</sup> As Bach points out, this transition impacted the nature of the welfarist institutions that continued to exist within neoliberal capitalism or which were created anew.<sup>60</sup> Citing the work of Wacquant on the transition from a “social welfare state” to a “penal state,” Bach argues that the New Deal created conditions in which social welfare programs operated largely independent of carceral institutions, while social welfare programs became increasingly stigmatizing, punitive, and surveillance-oriented (“workfare” rather than “welfare”) in the neoliberal

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55. KAYE, *supra* note 11, at 71.

56. *See id.* at 71-72.

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

58. *See id.* at 56-60.

59. *See id.* at 60-61.

60. *See id.*

period.<sup>61</sup> Care within the neoliberal penal state is not only significantly diminished, but also becomes closely aligned with the criminal justice system or even directly contained within it (as seen with problem-solving justice).

Bach continues with an analysis of the uneven and sometimes contradictory effects of this overall structure, and here I felt that Bach could push her analysis further.<sup>62</sup> Early on, she points out that the U.S. developed an extremely punitive response to the use of crack in the black community during the 1980s and early 1990s, including an entirely manufactured crisis regarding the rise of so-called “crack babies.”<sup>63</sup> Noting the shift toward concern about white opiate use in the 2000s, Bach notes that “the fact that the majority of women prosecuted for fetal assault were low-income white women, raises questions and adds complexity to our understanding of white privilege, white disadvantage, and the mechanisms of intersectional subordination.”<sup>64</sup> As she moved forward in discussing this complexity, however, it seemed to me that her analysis of white privilege missed some crucial dynamics in regard to the meaning of care and in relation to the dynamics of the racial state overall.

Bach has a few seemingly contradictory facts which she wishes to explain. On the one hand, she consistently points out the ways that blacks are often targeted by discriminatory surveillance and enforcement efforts.<sup>65</sup> She specifically highlights these facts in suggesting that black women are disproportionately represented in the cases that she examined, a particularly striking fact given that black women were relatively excluded from opiate prescription<sup>66</sup> and used opiates far less frequently than whites at the time of

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61. *Id.* at 50-62 (first quoting Loïc WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 226, 229 (2009); and then quoting R. KENT WEAVER, *ENDING WELFARE AS WE KNOW IT* 348 (2000); see BACH, *supra* note 1, at 63-64.

62. See generally *id.* at 61-73.

63. See *id.* at 47-56.

64. *Id.* at 56 (citing Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 *HARV. L. REV.* 770 (2020).

65. See *id.* at 61-62, 91-93, 96-98.

66. Bach misses an opportunity to point out that black communities seem to have been specifically excluded from pharmaceutical marketing plans for opiates as the companies were well aware that the possibility of abuse would receive far less scrutiny from the DEA if their product was sold in predominantly white communities and not predominantly black ones. See, e.g., Julie Netherland & Helena Hansen, *White Opioids: Pharmaceutical Race and the War on Drugs That Wasn't*, 12 *BIOsocieties* 217 (2017), <https://doi.org/10.1057/biosoc.2015.46>; Donna Murch, *How Race Made the Opioid Crisis*, *BOS. REV.* (Apr. 9, 2019), <https://www.bostonreview.net/forum/donna-murch-how-race-made-opioid-crisis/>; Stuelke, *supra* note 41, at 61; HELENA HANSEN ET AL., *WHITEOUT: HOW RACIAL CAPITALISM CHANGED THE COLOR OF OPIOIDS IN AMERICA* 9 (2023).

Tennessee's law.<sup>67</sup> Simultaneously, however, she wishes to explain the fact that as attention shifted away from the black use of crack toward the white use of opiates, the prosecution of poor white women came to predominate overall, with lawmakers citing the white-identified opiate crisis as their primary concern and prosecutors in predominantly-white East Tennessee being particularly active.<sup>68</sup> While the fetal endangerment law had been passed with the rationale that it would help drug-using women receive services, 65% of the mostly-white women in the Appalachian Eastern parts of the state received nothing other than punitive sanctions, rendering the offer of care a "smokescreen" at best (this occurred due to the lack of drug courts outside of the larger urban area of Memphis in the Western part of the state).<sup>69</sup> Meanwhile, black women were more likely to be located in Memphis and thus were more frequently channeled toward drug court and the opportunity to go to court-supervised treatment programs.<sup>70</sup> The overall pattern is somewhat complex: while black women were likely over-represented relative to their use of opiates, they were *under-represented* relative to their population in the state as a whole, with 95% of prosecutions targeting white women (in a state in which only 78.6% of the population was white).<sup>71</sup> How to reconcile these apparently contradictory patterns, with Black women more surveilled and policed, but with more access to treatment, yet nevertheless operating within an overall structure that focused—both rhetorically and in terms of prosecutions—on poor white women?<sup>72</sup>

In relation to these white women, Bach suggests that "If these women had privilege . . . that privilege was severely attenuated. In the end, their whiteness did not protect the women in East Tennessee from either

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67. See BACH, *supra* note 1, at 27, 42 n.16, 96-97. This pattern has, of course, shifted significantly in recent years, with Blacks now suffering more opioid overdoses per capita than whites. See Jason B. Gibbons et al., *Increasing Overdose Deaths Among Black Americans: A Review of the Literature*, 10 LANCET PSYCHIATRY 719 (2023), [https://doi.org/10.1016/S2215-0366\(23\)00119-0](https://doi.org/10.1016/S2215-0366(23)00119-0); One might also note the relative lack of attention paid to cocaine overdose deaths, a category in which blacks predominate. See Joseph Friedman et al., *Surging Racial Disparities in the US Overdose Crisis*, 179 AM. J. PSYCHIATRY 166 (2022), <https://doi.org/10.1176/appi.ajp.2021.21040381>.

68. See BACH, *supra* note 1, at 56.

69. See *id.* at 108-10.

70. See *id.* at 56.

71. See *id.* at 26, 85-86, 99 nn.5-6.

72. See BACH, *supra* note 1, at 25, 58; see also Julie Netherland & Helena B. Hansen, *The War on Drugs That Wasn't: Wasted Whiteness, "Dirty Doctors," and Race in Media Coverage of Prescription Opioid Misuse*, 40 CULTURE, MED., AND PSYCHIATRY 664, 664 (2016); HANSEN ET AL., *supra* note 66, at 20-21 (exploring the racial messages embedded in media coverage of "white" opioid use).

punishment or deprivation of care.”<sup>73</sup> Bach’s analysis of this situation points toward the ironic effects that are built into white privilege:

[I]t is politically essential to acknowledge and understand the real suffering and subordination in poor white communities and to ask directly how that might inform the idea of white privilege.

....

... White privilege, understood as a system that subordinates people of color, is a double-edged sword. It is constituted by, and in fact relies on, the existence of white disadvantage. One cannot exist without the other. As Matt Wray has detailed, to preserve the purity of the idea of whiteness as superior, some white people and some white behavior has to be excluded from the racist ideal. So, poor white women who use opiates during pregnancy are, in Wray’s terms, *not quite white*.<sup>74</sup>

Here, I wanted Bach to be slightly more clear and to draw a bit more from the material she drew upon, particularly the work of the law professor Khiara Bridges.

Bridges elaborates on the ways in which white privilege can work against certain whites, who “are at times made vulnerable to disadvantage *because* they occupy a privileged social location.”<sup>75</sup> Noting that the early eugenics movement targeted white reproduction, Bridges highlights the ways that racial privilege can make white women’s bodies “an object of racial improvement” and “vulnerable to quality control.”<sup>76</sup>

Inasmuch as society prizes white procreation over its nonwhite complement, the higher esteem in which it is held has made white reproduction a site of particular interest to the state. This interest, in turn, has opened white people up to state violence—this time in the form of prosecutions for opioid use during pregnancy. As white privilege betrayed white people in the heyday of the eugenics movement, white privilege is similarly betraying white people—the pregnant ones—in the context of the opioid epidemic. That is, as white privilege actively produced white disadvantage during the eugenics movement, white privilege is actively producing white disadvantage during the opioid epidemic. The conclusion we might draw is that it is not odd for white privilege to coexist with white hardship: the former oftentimes generates the latter.<sup>77</sup>

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73. BACH, *supra* note 1, at 56.

74. *Id.* at 57-58 (citing MATT WRAY, NOT QUITE WHITE: WHITE TRASH AND THE BOUNDARIES OF WHITENESS (2006)).

75. Bridges, *supra* note 64, at 828.

76. *Id.* at 832 (quoting Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 468 (2019)).

77. Bridges, *supra* note 64, at 833-34.

All of this adds weight and helps to fill out Bach's claims.<sup>78</sup>

Bridges' analysis highlights an additional aspect as to the way in which white privilege works,<sup>79</sup> pointing toward the variable meaning of non-normativity in relation to race.<sup>80</sup> Here, Bridges cites other work to show that Black "crack babies" were generally portrayed as expensive burdens to the state and society while white *oxytots* are more frequently seen as "victims of society's failure to provide treatment to all who struggle with opioid use disorder."<sup>81</sup> As the criminologist Nancy Heitzeg suggests, "White criminality is increasingly defined and controlled via the medical model. This is made possible by the white racial frame, which constructs 'whiteness' as normative and white deviance as individual aberration or mental illness. Conversely, the white racial frame constructs Blackness as synonymous with criminality."<sup>82</sup> White supremacist response in this case is thus not only more lenient, but framed very differently, with whites seen as potentially

78. The precise reasons as to why there are no drug courts in rural Tennessee is little addressed beyond its association with rural poverty and the presumption that urban areas have greater resources. See BACH, *supra* note 1, at 56; This renders the histories of racial settlement and the political economy of resource extraction in Appalachia invisible in Bach's account, leaving the precise mechanisms by which ruralness becomes associated with a lack of social infrastructure somewhat naturalized and unexamined. See generally STEVEN STOLL, RAMP HOLLOW: THE ORDEAL OF APPALACHIA (2017); Jacob L. Stump, *What Is the Use of the Colonial Model (or, Better Yet, the Concept of Coloniality) for Studying Appalachia?*, 24 J. OF APPALACHIAN STUD. 151 (2018); ELIZABETH CATTE, WHAT YOU ARE GETTING WRONG ABOUT APPALACHIA (2018).

79. See Bridges, *supra* note 64, at 834.

80. I myself would disagree with the suggestion that these women are "not quite white" or Bridges' parallel suggestion that people classified as "white trash" might constitute its own ethnoracial group. See Bridges, *supra* note 64, at 841-44. Although I accept that whiteness is a fluid category that changes over time, I would argue that "white trash" generally references a type of debased *whiteness*. While the term "not quite white" may be appropriate when considering the historical emergence of whiteness, it does not strike me as properly reflecting upon contemporary whites who are impoverished. The inclusion into whiteness is in fact important as it works to frame white degradation (whether in the form of class oppression or "moral" transgression) as a type of deviance rather than as a natural and expected state. In this way, whereas non-normativity in black populations may be anticipated and unremarkable within the white supremacist imagination, non-normativity among whites may become a "disease" amenable to rehabilitation.

81. *Id.* at 834, 836 (first citing Editorial, *The Cost of Not Preventing Crack Babies*, N.Y. TIMES, Oct. 10, 1991, at A26, <https://www.nytimes.com/1991/10/10/opinion/the-cost-of-not-preventing-crack-babies.html>); and then citing Stephanie Dubick, *Pregnant and Addicted to Heroin, with Nowhere to Turn for Help*, VICE (June 15, 2017, 10:35 AM), <https://www.vice.com/en/article/payvbg/pregnant-and-addicted-to-heroin-with-nowhere-to-turn-for-help>); Bridges cites LAURA E. GÓMEZ, MISCONCEIVING MOTHERS (1997) in this regard and, I should note, neither author uses the term "oxytot." See generally Libby Copeland, *Oxytots: Instead of Learning from the Unfounded Hysteria of the Crack Baby Era, We're Repeating It*, SLATE (Dec. 7, 2014, 7:52 PM), <https://slate.com/human-interest/2014/12/oxytots-and-meth-babies-are-the-new-crack-babies-bad-science-and-the-rush-to-demonize-the-most-vulnerable-pregnant-women.html>.

82. Nancy A. Heitzeg, '*Whiteness, Criminality, and the Double-Standards of Deviance/Social Control*, 18 *Contemp. Just. R.*, 197, 197 (2015).

redeemable and blacks seen as dangerous threats to white society.<sup>83</sup> These observations point to the way in which notions of white fragility are embedded within white privilege. The primary focus within eugenics, for example, concerned the danger of degeneration.<sup>84</sup> Degeneracy was a process that could only affect whites as only whites were elevated in a way that could be lost.<sup>85</sup> The resultant paradigm meant that while blacks were viewed as immutably positioned in an inferiority that could not be altered, whites were mutable and could potentially degenerate, becoming—within this racialized imaginary—comparable to blacks, but always with the hope of redemption.<sup>86</sup> While the aim of eugenics was to ward off this possibility, the emerging profession of psychiatry—operating within the same worldview—sought to actively heal the racial sicknesses of white civilization,<sup>87</sup> ranging from neurasthenia and hysteria to homosexuality to alcoholism and drug addiction, all diseases allegedly caused by civilization itself.<sup>88</sup> Tellingly, psychiatry did not begin to address non-white populations in any significant way until after the transformations enacted by the Civil Rights and Black Power movements (at which point, it became much more punitive in orientation).<sup>89</sup> The “fragility” of whites within a system of white supremacy enabled these biopolitical forms of control over whites, as well as necropolitical forms of violence and domination directed against non-whites,<sup>90</sup> in order to ensure white life.

But while enormously useful in exploring the intersectional contradictions which inhere in white supremacist society, none of these analyses address the metalinguistic ways in which race works to ground and

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83. See Bridges, *supra* note 64, at 827-28, 834, 836 (citations omitted); BACH, *supra* note 1, at 167.

84. See Bridges, *supra* note 64, at 830 (citations omitted).

85. *Id.* at 831.

86. See *id.* at 829-32.

87. See, e.g., Catherine A. Stewart, “Crazy for This Democracy”: Postwar Psychoanalysis, African American Blues Narratives, and the Lafargue Clinic, 65 AM. Q. 371, 378-79 (2013).

88. Neurasthenia might act as a paradigmatic example in this regard, GAIL BEDERMAN, MANLINESS & CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880-1917, at 86-87 (1995), but similar arguments were made about homosexuality and other forms of “mental disease.”

89. See JONATHAN M. METZL, THE PROTEST PSYCHOSIS: HOW SCHIZOPHRENIA BECAME A BLACK DISEASE xii-xv (2009).

90. The English and Gender and Women’s Studies scholar Kyla Wazana Tompkins, for example, comments upon “the deployment of white fragility and white vulgarity as recurrent and conjoined signs of the presence and imminent threat of violent terror against nonwhite peoples in the United States,” highlighting the ways in which “white repair” and “white revenge” are often paired together. Kyla Wazana Tompkins, “You Make Me Feel Right Quare”: *Promiscuous Reading, Minoritarian Critique, and White Sovereign Entrepreneurial Terror*, SOC. TEXT, Dec. 2017, at 53, 53 (citation omitted).

energize seemingly race-neutral concepts. A focus on these para-racial aspects of meaning offers additional tools and returns us to the issue of criminalized care through a new lens, raising new political concerns and leading us to potentially different conclusions as a result. The chains of meaning detailed earlier are both racial and profoundly “civilizational,” pitting whiteness against blackness, but also pitting “civilization” against “savagery.” In a “post-racial” moment, the boundaries of these formations are reformulated, and non-whites who are class-advantaged can be invited into the boundaries of “civilization” via a “neoliberal multiculturalism.”<sup>91</sup> This is a project of limited social inclusion, one in which the foundational structures are slightly reformed but with as little disruption to that ~~white~~ civilizational project as possible.

As mentioned above, I contend that the figure of the addict becomes one of these para-racial figures. Addiction is said to strip away the elements which make us human, attacking our free will, removing us from intimacy and normative familialism, and dehumanizing us in ways which justify and even require state violence as a counter. At best, then, the state brings forth a “civilizing violence” to enact against dehumanized others such as the addict in an effort to make them “human.” As suggested by English scholar Patricia Stuelke, “Repair in the context of the drug wars is often imagined as an (always racialized) humanizing project—the reforming of uncontrollable nonhuman ‘appetites’ into regulated ‘human’ ones.”<sup>92</sup> 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. In their treatise on civility, the scholars Tavia Nyong’o and Kyla Wazana Tompkins elaborate upon these dynamics:

Civility is not care, but it pretends to be; civility is the affective shape of administrative violence. It is the velvet glove around the iron claw; it is the rationality of logistics. Civility discourse enforces a false equation between incivility and violence that works to mask everyday violence as a civic norm. The violence that is polite is thrice as damaging as the direct attack because it gaslights as it wounds.<sup>93</sup>

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91. See generally Charles R. Hale, *Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala*, 34 J. LATIN AM. STUD. 485 (2002); Nina Laurie et al., *Indigenous Professionalization: Transnational Social Reproduction in the Andes*, 35 ANTIPODE 463 (2003).

92. Stuelke, *supra* note 41, at 83 (citation omitted).

93. Tavia Nyong’o & Kyla Wazana Tompkins, *Eleven Theses on Civility*, SOC. TEXT ONLINE (July 11, 2018), <https://socialtextjournal.org/eleven-theses-on-civility/>.

At a structural level, this civilizational violence remains a tool of white supremacy, working to support societal arrangements (economies, legalities, and institutional rules) that subjugate non-white communities even while increasingly working in “multicultural” ways that position a few select non-whites who sometimes act as the face of that organized oppression.<sup>94</sup>

The political consequences of this analysis point toward a different approach to the institutions of “care” than suggested by Bach.<sup>95</sup> Bach consistently speaks as if “care” is always a positive trait, speaking of the dangers of “corrupted care” and “criminalized care,” but never of the problems of care itself.<sup>96</sup> These limitations also appear in a final chapter in which Bach orients us toward small-scale but not insignificant reforms that might be made while moving toward greater change.<sup>97</sup> Her claims here are modest and useful, speaking only of the ability to “reduce harm at the margins” via reform while placing primary emphasis upon the need for larger-scale mobilizations.<sup>98</sup> This is indeed a thoughtful approach, and Bach properly cautions us about the limits of legal and policy-oriented struggle.<sup>99</sup> Pointing toward a broader “need to transfer significant resources out of punishment systems and into high quality care systems,”<sup>100</sup> Bach spends much of the chapter detailing even smaller reforms, ways in which information flows can be restricted between the compromised care systems which currently exist and the institutions of criminalized control such as CPS

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94. See Jodi Melamed, *The Spirit of Neoliberalism: From Racial Liberalism to Neoliberal Multiculturalism*, SOC. TEXT, Winter 2006, at 1, 15-16, 18-19; In this vein, the American Studies scholar Dylan Rodríguez likewise argues that the success of Civil Rights provoked a reconfiguration of white supremacy which nevertheless maintained the fundamentals of its structure: “The liberal-progressive tendencies of the racist state and white civil society were tasked with cultivating a desegregated American Dream that was ideologically inclusive of the Black and nonwhite masses while simultaneously rearticulating, diversifying, and strengthening the logics of anti-Blackness and racial-colonial dominance on which that dream was/is based.” DYLAN RODRÍGUEZ, *WHITE RECONSTRUCTION: DOMESTIC WARFARE AND THE LOGICS OF GENOCIDE* 6 (2021). The result was a “multiculturalist” form of racial-colonial power centered on white supremacy and anti-Blackness. See generally *id.*; See also DIDIER FASSIN, *HUMANITARIAN REASON: A MORAL HISTORY OF THE PRESENT* (Rachel Gomme trans., 2012) on ways in which humanitarian narratives create villains against whom violence is justified, and Perugini and Gordon’s discussion of the use of “human rights” to justify colonial violence against Palestinians, NICOLA PERUGINI & NEVE GORDON, *THE HUMAN RIGHT TO DOMINATE* 71-100 (2015).

95. See Melamed, *supra* note 93, at 1.

96. See BACH, *supra* note 1, at 148, 150, 155, 162, 173.

97. See *id.* at 189-210.

98. *Id.* at 192, 193.

99. See *id.* at 208, 209. For another explication of these limits in a different context, see DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF THE LAW* (Duke Univ. Press 2015) (2009).

100. BACH, *supra* note 1, at 194.

and the criminal justice system.<sup>101</sup> Bach's position as a professor of law is again put to good use here, and she carefully envisions ways in which existing laws and mandatory reporting procedures concerning children's welfare could be re-thought as to minimize contact between institutions of care and those of punishment.<sup>102</sup> She finds inspiration in an innovative program in New Mexico that successfully implements many of these suggestions in the here and now.<sup>103</sup> Ultimately, she suggests, care should be offered "on a voluntary basis," with proposals for greater care within criminal systems met with "deep skepticism."<sup>104</sup> Generally, she points us toward the need to "separate care from punishment and to invest resources more significantly into care and support" and "wall off those programs from punishment systems."<sup>105</sup>

While I agree with Bach's suggestions, and find them to be valuable, practical, and original, they leave us with an unreconstructed vision as to the need to thoroughly rethink the meaning of care. Bach does excellent work in detailing the ways that care is "corrupted" when it is linked to criminalization, highlighting the ways in which patients fail to share information or avoid care altogether due to their all-too-accurate concerns that this information might be used against them in punitive proceedings, or ways in which medical advice is overridden by legal authorities who place a higher priority on traditional criminal control than medical considerations.<sup>106</sup> But while care cleaved from criminal governance offers some definite advantages, we are still pushed back into the same biomedical capitalism which created OxyContin<sup>107</sup> 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.<sup>108</sup> Without dramatic change, even the "high quality care systems" that Bach calls for would remain systems of assimilation, fundamentally compromised by both the need for profit and normalization, defining "cure" in confining, disciplinary ways that might not correspond to our own best possibilities and needs.<sup>109</sup> My own sense was

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101. *See id.* at 194-210.

102. *See id.* at 202-03.

103. *See id.* at 197-202.

104. BACH, *supra* note 1, at 206-07.

105. *Id.* at 207.

106. *See id.* at 71-76, 170-71 (citations omitted). Bach discusses how most cases revolved around drug exposure to prescribed medications, often as part of Medication-Assisted Treatment (MAT), while less than 10% concerned heroin. *Id.* at 29 (citation omitted).

107. Arthur Gale, *Sacklers Sacked But Purdue Still Caused Opioid Epidemic*, MO. MED., Mar./Apr. 2022, at 119, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9339402/>.

108. *Id.*

109. BACH, *supra* note 1, at 194.

that Bach unfortunately ended up offering a vision of incorporation into a slightly upgraded version of existing care systems, not transformation. Presumably, these care systems would be modeled on the New Deal vision as it operated for whites, but now extended to non-whites as well. This “multicultural social-liberalism” (to coin a phrase) certainly offers more than multicultural neoliberalism, but it remains fundamentally committed to its civilizational (colonial and white supremacist) foundations. While I offer no criticism of the specific reforms Bach puts forward, my overall sense was that Bach is too trusting of the existing structures of care, criticizing only “corrupted” versions and pressing that we “pull care out of child welfare and place it into health care systems where it belongs.”<sup>110</sup>

The scholar of disability Eli Claire offers a set of considerations which challenge these framings. Claire highlights “the violence of cure,” arguing that “at the center of cure lies eradication.”<sup>111</sup> Acknowledging the ways that medicine can be beneficial, he nevertheless points toward the ways in which medicine is organized around the removal of an effort to remove “defects,” working to establish or restore a condition of “normality” or “the natural.”<sup>112</sup> “This kind of elimination benefits some of us in significant ways—saving our lives and increasing our comfort. At the same time, it also commits damage, routinely turning our body-minds into medical objects and creating lies about *normal* and *natural*.”<sup>113</sup> These two terms “are advertised as descriptions of who ‘we’ collectively are—a *we* who predictably is white, male, middle- and upper-class, nondisabled, Christian, heterosexual, gender-conforming, slender, cisgender . . . . [T]hese standards, which supposedly reflect some sort of collective humanity, are sold back to us as goals and products.”<sup>114</sup> Medicine frames health in ways that offer only one possible vision—remove the defect—hiding the embeddedness of deeply civilizational, privileged values behind the naturalness of “well-being.” Medicine in fact remains profoundly eugenic in orientation, promoting a highly exclusionary and productivity-oriented vision of the “good body.”<sup>115</sup> Claire calls for a deep engagement with these notions of health and medicine, “neither a whole-hearted acceptance nor an outright rejection of cure, but rather a broad-based grappling.”<sup>116</sup> This detailed assessment as to the

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110. *Id.* at 201–02.

111. ELI CLARE, *BRILLIANT IMPERFECTION: GRAPPLING WITH CURE* 26 (2017).

112. *Id.* at 26; *See id.* at 24.

113. *Id.*

114. *Id.* at 173.

115. *Id.* at 105. On medicine as a system which centralizes the productive capacities of the body, see BEATRICE ADLER-BOLTON & ARTIE VIERKANT, *HEALTH COMMUNISM* (2022).

116. CLARE, *supra* note 111, at 14.

benefits and harms of cure leads precisely to questions about the aims we seek. “[C]ertain body-mind conditions have been easily defined as trouble—a common cold as inconvenient, bronchitis as more urgent, and pneumonia as plainly dangerous . . . . Defining body-mind trouble is seemingly simple and intuitive. *But this simplicity is a façade.*”<sup>117</sup> Clare presses us to instead ask “which realities are defined as trouble by whom and for whose benefit?”<sup>118</sup>

In relation to drug use, the straitjacket of cure is overwhelmingly focused on abstinence. Even as norms and laws are changing in some quarters, they have specifically not changed in the world of criminalized care. As detailed in my own study of a drug treatment center which worked primarily with clients referred through the criminal justice system, recovery is defined through a combination of negative drug tests and, very importantly, accommodation to the needs of work (with women facing *further* demands regarding the enactment of respectably privatized sexuality and the performance of caring labor, especially if children are involved).<sup>119</sup> Undoing the system that problem-solving courts establish requires more than just separating structures of care from punishment structures, because the problem to which “care” is being directed has been defined precisely as a problem of the will for which “accountability” is the cure. The idea that people might find forms of meaningful life *with* drugs, for example, even when the substances sometimes cause real challenges and difficulties, is inconceivable within this civilizational frame. It is here necessary to think of health outside the narrowness of its civilizational, racially charged frame, to seek ways of living in the in-between spaces that are not controlled by either eugenic care or a war on crime, and that are instead open for possibility. Given these difficulties, the idea of addiction and the problems sometimes caused by drugs must be redefined with a new framework highlighting ways in which drugs have positive benefits (including pleasure),<sup>120</sup> and that the harms of even compulsive drug use do not erode one’s will at *all* times, nor do they inevitably lead to an erosion of self and automatic degradation of one’s fundamental humanity.<sup>121</sup>

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117. *Id.* at 72.

118. *Id.*

119. See KAYE, *supra* note 11, at 16. On the particular contradictions facing women within these systems of treatment, see also ALLISON MCKIM, *ADDICTED TO REHAB: RACE, GENDER, AND DRUGS IN THE ERA OF MASS INCARCERATION* (2017).

120. See KANE RACE, *PLEASURE CONSUMING MEDICINE: THE QUEER POLITICS OF DRUGS* (2009).

121. See HELEN KEANE, *WHAT’S WRONG WITH ADDICTION?* (2002); Kerwin Kaye, *De-Medicalizing Addiction: Toward Biocultural Understandings*, in 14 *ADVANCES IN MEDICAL SOCIOLOGY, CRITICAL PERSPECTIVES ON ADDICTION* 27 (Julie Netherland ed., 2012).

Abolitionist organizer and scholar Nadja Eisenberg-Guyot examines the ways that court-ordered participants in a women's drug treatment facility resisted rehabilitative pressures toward this violent project of "white reconstruction,"<sup>122</sup> instead finding ways to nurture alternative possibilities in the margins. Eisenberg-Guyot highlights the ways in which architecture was central to the civilizational project enacted by the treatment center, as well as the ways that the women's actions "gestured towards visions of healing and recovery that exceeded white supremacist, classist, and heteropatriarchal versions of rehabilitation."<sup>123</sup> As suggested above, Eisenberg-Guyot finds that "care" and "criminalization" work *together* in producing its "civilizing" effects, with the facility seeing the women as both "contaminated and contagious," thus "treat[ing] surveillance and community separation as both antidote *to* and border *containing* their disorder."<sup>124</sup> Pointing toward the boredom that the program induced, and its physical austerity (including a prohibition on many forms of personal adornment), Eisenberg-Guyot shows how women undergoing court-mandated treatment resisted in small ways, even in the simple hanging of drawings created by an incarcerated partner on the wall:

Against the rehabilitative vision in which personal aesthetics and affinities were a distraction, and isolation and boredom were the routes to self-actualized "recovery," Gracie's and Charlene's bedroom decor, in different ways, pointed outward towards the communities of care and kinship that gave their lives meaning. The material artifacts adorning their respective bedrooms represented their ongoing struggles to claim kinship and connectedness in the face of rehabilitation's attempt to sever them from their families, communities, and alternative futures. If the vision of family proffered by rehabilitation to Gracie as a white, working class woman from Long Island insisted that she hold herself at a "proper" distance from criminalized others and redeem her white feminine innocence through displays of virtuous, sober comportment and a turn inward toward the self-contained domestic unit, her choice to surround herself in prison art signified a form of outlaw kinship . . . .<sup>125</sup>

Overall, Eisenberg-Guyot's work shows how these women's lives and critiques of the therapeutic enterprise are often wrongfully narrated as a response to the imagined centrality of drugs in their lives, even when drugs

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122. Nadja Eisenberg-Guyot, *Pushing Back the Walls: The Politics of Maneuver in Women's Drug Rehabilitation*, 15 *DESIGN AND CULTURE* 187, 188 (2023) (citing DYLAN RODRIGUEZ, *WHITE RECONSTRUCTION: DOMESTIC WARFARE AND THE LOGICS OF GENOCIDE* (2021)).

123. *Id.* at 190.

124. *Id.* at 194.

125. *Id.* at 201.

are not necessarily as pivotal as is supposed.<sup>126</sup> Instead, women within the facility “resisted therapeutic mandates toward isolation, sensory deprivation, and endurance, and point us towards the centrality of *desire*—for self, for community, for healing, for beauty.”<sup>127</sup> While these particular women are certainly undergoing something that Bach would refer to as “criminalized care,” Eisenberg-Guyot’s analysis points us toward ways in which “recovery” has been frequently defined in ways that are socially oppressive and individually soul crushing.<sup>128</sup> Criminalized care of this sort should not be framed as simply a corruption of care, but rather care itself must be seen as a form of civilizing violence.

#### IV. GENDER AND THE QUEERING OF CARE

I turn finally to the issue of gender, and what its analysis might reveal about the care, both criminalized and not. At a foundational level, normative expressions of gender (including sexuality) are understood to be core features of civilizational whiteness and white supremacy. “Caring” interventions from problem-solving justice thus in many ways emphasize gender and sexual non-normativity as a key sign of the person’s inadequacy, targeting much of their disciplinary power toward the establishment of respectable, normative enactments.<sup>129</sup> Beyond this, there is an additional “metalinguistic” question as to the gender of these problem-solving interventions. If “care” is conventionally framed as feminine, and “punishment” as masculine, what type of hybrid is represented by the “tough love” of “criminalized care”? And perhaps more importantly, how might this gendered lens help us move forward in conceiving of alternative possibilities? Within this frame, Bach’s proposals seem oriented toward the restoration of an “appropriately feminine” coding of care, one in which care is not tainted by its association with punishment.<sup>130</sup>

While I fully support Bach’s specific proposals, I suggest that care itself needs to be “queered” if it is to be shorn from its linkages to civilizational/white supremacist values. By queering care, I mean to invoke a number of different strategies. The law scholar Dean Spade’s book, *Mutual Aid: Building Solidarity During This Crisis (and the Next)* offers one important place to start.<sup>131</sup> Spade’s text points toward the need for direct,

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126. *Id.* at 196–97.

127. *Id.* at 203 (citation omitted).

128. See generally Eisenberg-Guyot, *supra* note 122.

129. See McKim, *supra* note 119, at 11; KAYE, *supra* note 11, at 170-212.

130. BACH, *supra* note 1, at 207-08.

131. See generally DEAN SPADE, *MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT)* (2020).

mutual action in meeting one another's needs.<sup>132</sup> In this model, care is mutual and non-professionalized, and is directly linked to other forms of political mobilization and community.<sup>133</sup> Mutual aid works to flatten hierarchies of care, democratizes decision-making, and places enormous value on the need for self-determination in the direction of care.<sup>134</sup> All of this takes care outside of the realm of an institutionalized, hierarchical form of disciplinary control and makes new forms of living more possible. To the extent care cannot be rendered outside of formal institutions, and especially to the extent that we must find small reforms within existing systems of care, these structures must be pressed not only to divorce themselves from punitive systems, but also to care in new ways: to respect individual autonomy while enabling new forms of sociality and collective action, to decolonize fields of expert knowledge and to make them more accessible, and to democratize control over the institutions themselves. Individuals needing to engage with institutions of colonial care as it presently exists might additionally be encouraged to adopt strategies of appropriation (making use of resources toward unauthorized ends) and disidentification (making use of some tools developed by civilizational structures, but re-purposing them as much as possible toward anti-colonial and anti-white supremacist ends).<sup>135</sup> The activist efforts of ACT UP and of grassroots organizers creating new systems for harm reduction offer inspired examples of all of the above tendencies.<sup>136</sup> None of this, of course, is easy. Disability scholar and abolitionist theorist Liat Ben-Moshe details the arguments and affective appeals which bind people to controlling forms of institutionalized care, emphasizing among other issues the ways in which liberal frameworks of rights lead to exclusionary results.<sup>137</sup> Despite this, an emphasis upon the need to rethink care, and not simply to restore it to an "uncorrupted" state, is urgently needed, leading us toward possibilities which are otherwise impossible to imagine, much less to struggle for and create.

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132. *See id.*

133. *See id.*

134. *Id.* at 68-70.

135. *See generally* JOSÉ ESTEBAN MUÑOZ, *DISIDENTIFICATIONS: QUEERS OF COLOR AND THE PERFORMANCE OF POLITICS*, in *CULTURAL STUDIES OF THE AMERICAS* (1999).

136. *See generally* SARAH SCHULMAN, *LET THE RECORD SHOW: A POLITICAL HISTORY OF ACT UP NEW YORK, 1987-1993* (2021); MAIA SZALAVITZ, *UNDOING DRUGS: THE UNTOLD STORY OF HARM REDUCTION AND THE FUTURE OF ADDICTION* (2021).

137. LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 187-227* (2020).