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Pathology of the Carceral State

on Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, Princeton University Press 2014

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2014 WAS THE YEAR of the carceral state. The police killings of Michael Brown and Eric Garner (followed by a refusal to indict the officers who shot them), alongside the brutality revealed at Riker's Island, prompted not only unprecedented media debate but also ongoing protests in the streets. Defenders of the current regime have responded by demanding increased deference to police authority and to the dictates of those charged with keeping public order. The recent murder of two police officers in New York promises to increase the tensions in a country already divided over the question of the carceral state. The debates going on now in the media and on the streets mark a growing awareness of the threats it poses to our democracy, and they offer a profound challenge to the systems of racial order we have inherited from the past. But for anything to happen we will have to stop viewing the problem of policing and incarceration as separate problems, and stop seeing them as issues driven solely by their relationship to crime. Instead, it is necessary to recognize the carceral as extending far beyond prisons, as a self-perpetuating set of institutions and interests whose rationale extends far beyond the question of crime and punishment.

For 40 years now the United States has been creating a vast and unprecedented carceral machine. Its size and reach stagger the imagination: jails and prisons, immigration detention and deportation centers, parole and probation offices, digital, electronic, and human surveillance. Its human costs are enormous — federal and state prisons and jails hold over 2 million people in custody at any time; if you include those under parole, probation, or other forms of government surveillance for crime the number exceeds 8 million. Tens of millions of Americans have some form of criminal record. Their families are drawn in to the reach of the carceral state along with them. In global terms the United States stands alone. It has the highest incarceration rate in the world. Its penal practices are brutal compared to Europe. It deepens the racial divide in the country. It distorts the economy and polity. Above all it degrades lives and the country as a whole.

To understand this machine means holding a series of seemingly contradictory notions at once. Mass incarceration extends long-standing tendencies in American penal history while being a bold departure from previous practice; it has at its core a system of racial subordination, although race is now arguably less important than previously; it has marked an expansion in state power but is driven in important ways by the search for private profit; it is an instrument of law and order that operates in arbitrary and uncontrolled ways. Incarceration, originally justified as a defense of human dignity against the bodily brutality of ancien regime punishments, has now become the site of physical and psychological torture. And there is no end in sight to either mass incarceration or the wounds it imposes on human beings and American society.

Marie Gottschalk's commanding and disturbing *Caught* is our best guide to the political decisions and public policies that have created the carceral state and our present immobility on the issue of crime and its punishment. Gottschalk relentlessly tracks the different strands and effects of the carceral in the United States and in doing so offers a series of important insights and arguments. She moves through a remarkable range of issues: detailed critiques of penal policy and the limits of conventional reform; arguments over the place of the "new Jim Crow" both in the penal system and in our understanding of the penal system; the dismantling of rehabilitative programs, the increasing length of sentences, and the general debasement of prisoners and prison conditions; the endless surveillance faced by the formerly imprisoned or even charged; the dangerous effect of the growing importance of private prisons; the expansion of the immigration system; and the

emergence of new “monsters” to justify the increased punitiveness of the last decades. This carceral archipelago (to borrow a term from Michel Foucault) is so deeply embedded in American law and society precisely because it is so disparate and diffuse.

No one reading this book will be left with any doubt that the carceral state has an enormous and destructive effect on American democracy. Nor will they have any illusion that the proposals now being circulated in official policy circles are up to the task of righting that fact. No one reading this book will be left with any doubt that mass incarceration plays an active role in systems of racial subordination or that achieving racial equity in penal sentencing would actually solve the problems of mass incarceration. No one reading this book will be left thinking that the carceral system is the result of thoughtful analysis of how best to provide public safety. Unfortunately no one reading this book will be left particularly optimistic that that situation can be changed — even in light of the ongoing protests against police and carceral violence currently sweeping the country.

I

The broad history of mass incarceration is well known. Prior to the 1980s the size and reach of imprisonment in the United States was not significantly different from its western European counterparts. For most of the 20th century the United States sent slightly more than 100 per 100,000 people to prison. (That number is now over 500 in prison and over 700 if you include jails.) The death penalty had been in long secular decline and the Supreme Court suspended it in 1972. Courts began to take steps to ensure minimal constitutional standards for prisons and protections for prisoners. Serious criminological and legal opinion believed that there was a real possibility that the prison would soon fade away.

Of course past is not always prologue. At precisely the moment when the country's use of imprisonment appeared to face the possibility of serious reduction, states began a new expensive spree of prison construction. In 1976 the Supreme Court approved the restart of the death penalty. A bipartisan move toward determinate sentences (supported by liberals who thought it would curb the arbitrary authority of prison officials and by conservatives who aimed to curb the power of judges), combined with increasing lengths in mandated sentences, helped trigger vast expansion. Prison officials drew upon fears of riots and “revolutionary” inmates such as California's George Jackson to justify intensified control over their prisons and increased use of solitary confinement. In the early 1980s the “war on drugs” took off and with it not only a rise in the size of the federal prison system but also the exacerbation of extreme racial inequities in sentences and prosecutions.

These developments, to be sure, did not emerge out of thin air. Instead they built upon initiatives begun earlier under the Johnson, Nixon, Ford, and Carter administrations. In particular Johnson's signing of 1968's Omnibus Crime Control and Safe Streets Act dramatically increased federal engagement with local policing and punishment. One effect of the act was to encourage the growing militarization of police forces, primarily through the Law Enforcement and Assistance Administration. Johnson and his allies may have thought that by imposing new federal standards they would help protect minorities from local abuses (as well as preempt more radical conservative proposals) but as Naomi Murakawa has argued, this liberal emphasis on procedure and uniform standards helped legitimate the idea that new regulations could justify and control the expansion of the prison state. As the continual revelations of prison abuses show, this hope was a false one.

Although the Law Enforcement and Assistance Administration was abolished in 1982, the trends it symbolized and furthered did not end. Instead the 1980s and 1990s saw expanded, highly expensive prison construction, increasingly severe sentencing mandates (such as the growing popularity of three-strikes laws), bipartisan efforts (aided and abetted by the Supreme Court) to restrict inmate access to the courts and legal options, and an increase in the imposition of the death penalty and of life without parole. Growing costs and ideological commitments led more and more states to take up public private partnerships with private prison companies whose facilities were less regulated and whose conditions were even worse than regular prisons. Because the War on Drugs initially focused on the urban African American poor, the overrepresentation of black

males in prison skyrocketed.

But despite the devastating effects of the carceral state on black males, its reach did not stop there. With the coming of the 21st century, policing and punishment expanded even further and imposed itself even more forcefully on women, poor rural whites, and Latinos — especially through the machinery of immigration control. Now, as the country confronts recurrent examples of police violence and prison brutality, tens of millions of lives are marked by the carceral state. To see the extent of the change in American culture and law consider this fact: today the state with the lowest incarceration rate (Maine) has an incarceration rate that is nearly 50 percent higher than the national average in the early 1970s.

II

Caught engages with this history, but that is incidental to Gottschalk's main purposes. Instead she is concerned with the present and the future, in demonstrating how deeply the carceral is embedded both in our social practices and in our political imagination. In her hands, the carceral breaks from its foundation in jails, prisons, and death chambers to envelop whole communities in Kafkaesque webs of surveillance and legal oversight, a world we inhabit without yet having the language to grasp and analyze it. In the end, it is the sheer difficulty of capturing this totality, and the insufficiency of most frameworks of understanding and proposals for reform, that is the most profound message of the book.

This might seem obvious — after all, prisons have been constructed and sited precisely to keep them from the public view. But the problem goes further than this. Prison officials over the past decades have made it harder and harder for visitors to meet with inmates, prisoner newspapers have been shut down, and the press has been blocked as have investigators from rights groups and international bodies. It cannot be coincidence that this tightening on access to inmates followed upon the growth of court challenges in support of inmate rights and alongside the expanding use of solitary confinement as a tool of prison control and punishment. As James Whitman has shown, American punishments have always been exceptional in their emphasis on degradation, but the widespread use of long-term solitary confinement (decades long in the case of some prisoners), overcrowding, lack of adequate healthcare, the drastic reduction of prisoner libraries and education, and the imposition of petty cruelties mark our current penal regime as something new.

Once arrested, individuals are placed under an extensive network of public and private supervision and regulation. If released or acquitted, prisoners are followed by their arrest records, costing them jobs and places to live. If convicted, prisoners are disenfranchised (except in Vermont and Maine), often even after serving the sentence. As Gottschalk points out, somewhere around 6 million people are disenfranchised as a result of the carceral apparatus. In Florida alone approximately 10 percent of its voting age population are disenfranchised (1.5 million people) while the national rate of disenfranchisement for African Americans is nearly eight percent, and in Florida, Kentucky, and Virginia about 20 percent of Latinos likewise suffer substantial disenfranchisement — especially in states like Arizona and Florida. Mass incarceration alters political power within states, since prisoners appear in the census in the places where they are imprisoned, not where they live. The result — in an eerie echo of the effects of the 3/5 clause of the Constitution of 1787 — is to strengthen the power of rural counties at the expense of urban areas. But the effective burden of incarceration goes far beyond the issue of voting. Former inmates can lose the right to work in certain occupations or receive various social benefits, and in some places cannot take out student loans or live in public housing. One of the most striking of these restrictions concerns veterans' benefits. Veterans who serve time in prison may become ineligible for their veterans' benefits, their crime outweighing their service.

States have managed their expanding prison populations by turning to private prison companies. Private prison corporations enable a variety of fiscal sleights of hand: prisoners can be sent out of state and held at lower cost; states can sell off facilities and lease them back in ways that mask the long-term costs of the system. For those politicians who want both greater punitiveness and a

reduced state, private prisons provide the perfect ideological project: they can turn to the market without reducing carceral control. Although the United States has a long history of allowing private companies access to prisoners' labor in the search for private profits, private prisons were all but nonexistent prior to the 1980s. The private prison industry (including larger entities like the Corrections Corporation of America or CCA) seized the opportunities provided by the age of anti-statist ideology. Once in place, they proved adept lobbyists and strategists to prevent any downsizing of the carceral apparatus. They also oversee prisons that are more dangerous, less secure, and with fewer resources for inmates.

The second extension concerns what Gottschalk terms the "criminalization of immigrants." The United States has a long history of criminalizing, denying entry to, and deporting immigrants. The 19th-century Chinese Exclusion Acts are perhaps the most famous but in the years following World War I the United States expanded its restrictions and made it difficult for anyone from Asia or Eastern Europe to enter the country. Despite this long history, however, the contemporary apparatus stands out. Since the 1990s, the federal government has created an unprecedented system of immigration prisons, increased deportations, and imposed itself in unprecedented ways in local law enforcement to ensure that the policing of immigrants is under federal supervision. Perhaps the most controversial of these is the "Secure Communities" program that dissolves the borders between criminal justice and immigration authorities by linking jails and courts with the Immigration and Customs Enforcement databases. This, in effect, punishes communities that do not participate in the program. But Secure Communities is only the tip of the iceberg; the growing reach of immigration authorities has led to a dramatic increase in both the confinement of immigrants (often held without formal hearings) and deportations (again without meaningful judicial oversight). Within the federal prison system, immigrants have been the fastest-growing population, and as a result, Latinos are now the largest population in federal prisons. Like mass incarceration itself, the criminalization of immigrants has simultaneously expanded the carceral capacity of the state and enabled private contractors to profit from the confinement of human beings. In light of the recurrent fears of an "invasion" from the south (despite the long-term decline in immigration from Mexico), the support of increased deportation and incarceration of Latino immigrants has been bipartisan (especially since 2001). Perhaps the clearest indication of this reality is that deportation increased in the transition from George W. Bush to Barack Obama, as did the number of immigration prosecutions.

Not surprisingly perhaps, the Kafkaesque quality of the carceral state emerges most clearly in the treatment of sexual offenders. Sex offenders produce the greatest fear across the public and, unlike some of the other targets of the carceral system, lack any meaningful political support. Indeed, the incarceration of sex offenders has spiked over the last 20 years. Partly this rise is a simple function of the expansion of incarceration more generally but in large part it is a result of the increased criminalization and prosecution of sexual offences, especially relatively minor offences such as the possession — not production — of child pornography. Yet, as Gottschalk points out, there isn't strong evidence linking possession of child pornography to child sexual abuse and most people convicted of possession have no other criminal record. The significance of the demonization of sex offenders lies not only in their increased incarceration. Instead, what marks them out is the regime of supervision and registration that they are subjected to for the rest of their lives. Even more than "common" offenders, those convicted of sexual offences are subject to rules of registration, limits on residence and employment, lack of privacy after release (with often-inaccurate sexual offence registries open to the public online), and the possibility of indefinite confinement in "civil" settings after they have completed their sentences. In a nation that increasingly defines individuals by the criminal act that they committed, those accused of sexual offences are the most clearly marked by an indelible stain.

All of these developments have been brought about through the decisions of elected political leaders, but they have been enabled by the cCourts. During the 1960s and 1970s courts departed from their long-standing indifference to the rights of defendants and inmates and intervened in the

process of criminal trials and sentencing, and in the organization of prisons. But for the last quarter century courts, and the Supreme Court in particular, have repudiated this moderate reformism and taken steps both to block petitioners's access to the courts and to remove oversight of prison administrations. Despite some notable triumphs in limiting the reach of the death penalty to youth and the mentally disabled, and the spectacular affirmation of prisoner's' rights to health care in *Plata v. Brown*, the courts have in general declared that the carceral archipelago is a legal world unto itself.

III

Systems of racial dominance have shaped criminal justice since the 18th century and efforts to control the African-American population have been at the heart of those systems. In the aftermath of Michelle Alexander's provocative *The New Jim Crow* (not to mention the repetitive police shootings of black men) any discussion of the carceral state must confront the question of race and its place in producing and sustaining the practices of punishment in contemporary America. *Caught* is no exception: it takes up the problem of race and the New Jim Crow directly. But *Caught* pushes the issue in new directions. Without denying that race plays a crucial role in the carceral state, Gottschalk makes clear that racial order is not what the carceral state is ultimately about.

Gottschalk traces the myriad ways that race and racism — in particular reactions to the growing assertiveness of African-American citizens at least since the 1940s — played in stimulating and justifying mass incarceration. But at the same time, she also demonstrates that race has ceased being — if it ever was — the dominant driver of the carceral today. The incarceration rate for African Americans and Latinos (especially males) remains astoundingly high compared to whites, and black males are seven times as likely as white males to be incarcerated. But drug offenders have been declining as a percentage of the prison population and the group of drug offenders with the greatest percentage of increase since 2000 has been whites, especially from rural areas. If the distinction between “crack” and “powder” cocaine has remained the best symbol of the connections between race and mass incarceration, the declining significance of drug offences suggests that we need to look elsewhere for the system's persistence.

But as the expansion of immigration prisons and the more general intensification of punitive debasement demonstrate, racial control is no longer the sine qua non of the carceral state — if it ever was. The war on drugs was a direct assault on poor urban communities, but race now functions as an ideological anchor, the young black male embodying the generalized threat that necessitates the expansion of incarceration to ever-new groups and into increasingly criminalized areas of life. To put the problem bluntly, young African-American and Latino males are the human casualties of the carceral state's growth, and they bear the brunt of a system whose purposes increasingly lie elsewhere. A larger percentage of young black and Latino men are incarcerated for longer and longer periods of time and subject to the brutalities of prison. Gottschalk's analysis of the political economy of the carceral reveals that the system now perpetuates itself not to achieve a strategic intervention in American society, but rather to enable those who have promoted, organized, and directed the carceral to continue to make their own emotional, ideological, institutional, and, yes, financial investments pay off. Incarceration now acts as a for-profit business and it is driven by the same imperative of all businesses, to grow or die. Our penal colony exists to reproduce itself and to give the rest of us the illusion of control.

IV

Still, Gottschalk aims at something more than simple, or even complex, analysis. *Caught* is that relatively rare academic book that hopes to move both public debate and policy. One can see this desire in the careful way that she dissects the most popular contemporary reformist nostrums (“getting right on crime,” “reentry, recidivism, and justice reinvestment”) for being at the same time too marginal and too individualistic. Her remarkable effort to track down all the different moving parts of the carceral state evinces a commitment to confronting the problem in full recognition of mass incarceration's political and economic power.

Ultimately, Gottschalk aims to convince us to separate the question of punishment and the question of crime reduction; she argues that cutting the Gordian knot between crime and punishment would allow us to think anew about both. For those on the right, accepting this point would mean acknowledging that our huge commitment to ever-increasing sentences and ever-expanding criminalization has been an error; that it ignores the research that shows that punishment is most effective in reducing repeat offences when it is targeted to accomplish specific and limited tasks — not when it throws an ever-increasing number of people into ever more brutal circumstances. And for those on the left, it would mean accepting that some punishment can affect behavior, that punishment is a problem worth thinking about, and that if the system of punishment is not a mechanism for reducing crime then it is possible to alter punishment without simultaneously altering the social conditions that produce crime. The vast resources spent on mass incarceration could be diverted elsewhere and we could begin to think about punishment as a moral and ethical problem and not as a fantasy of punishing others for the risks of the world.

But *Caught* makes this hope a distant one. The book's remarkable marshalling of social scientific and historical knowledge demonstrates over and over again the gap between such knowledge and public opinion and policy. We should all already know about the brutalities of the carceral state and of policing, we should not be surprised by police shootings or prison suicides. And yet the public seems to need to discover this over and over again — as if for the first time in each instance. In a world in which academic research has so little sway over any public discussion, it is hard to see how one can link effective analysis to effective politics. It is true that certain books (again like *The New Jim Crow* or at an earlier moment of penal crisis, Foucault's *Discipline and Punish*) can capture a wider public imagination. But they are few and far between. Mass incarceration is protected by willful ignorance. This ignorance is not Gottschalk's responsibility of course. It is ours. How to join together what we know with the politics emerging in response to carceral brutality is the first step, but as *Caught* makes clear, that first step will not be easy.

When I first started drafting this review, I intended to entitle it "Pathologies of the Carceral State." But I realized that that title could imply that there was some non-pathological core to the carceral state, a core that had become encumbered with overgrowth and distortion. But if Gottschalk makes one conclusion unavoidable it is that the carceral state is itself the pathology. Its very existence distorts American democracy, demeans American society, and blocks any meaningful discussion of punishment itself. Current protests in response to police and carceral violence are onto something important. Lives do matter, but not to the carceral state. What we make of that simple fact is up to us.