

An Existentialist Critique of Punishment

Nicholas Logan

“We’re all going to die, all of us, what a circus! That alone should make us love each other but it doesn’t. We are terrorized and flattened by trivialities, we are eaten up by nothing.”¹

—Charles Bukowski

Abstract: In this paper, I provide an account of the way in which practices of punitive justice in the United States permanently foreclose the possibility of an open future for the punished. I argue that participation in a system where those forms of punishment are utilized is an act of bad faith because it involves the denial of the existential freedom of others as well as our own. Using Hannah Arendt’s account of Adolf Eichmann, I show how such acts of bad faith are both natural modes of thought as well as inherently dangerous. Finally, I demonstrate that existentialism provides us with the ability to recreate our relationship to others and resist acts of bad faith, especially when it comes to crime and punishment.

In what sense does punishment in the United States foreclose an open future for the punished? In her work *Social Death*, Lisa Cacho demonstrates how criminality becomes an ontological attribute for those who commit crimes. In her discussion of illegal aliens in the United States, she writes:

A person does not need to *do* anything to commit a status crime because the person’s status is the offense in and of itself. In the United States, criminal laws that make status in and of itself a crime have been

¹ Charles Bukowski, *The Captain is Out to Lunch and the Sailors Have Taken Over the Ship* (Santa Rosa: Black Sparrow Press, 1998), 10.”



ruled unconstitutional, yet both criminal law and immigration legislation inherit broader meanings and tangled histories of status and conduct have made it difficult (if not impossible) to regulate and reprimand conduct without status-based consequences. The term *de facto status crime* also captures the ways in which criminalized conduct has been intimately linked to the use of “status” to refer to identity categories, such as race, gender, sexuality, and class ... it refers to others’ perception that a person of a certain status is certain to commit future crimes and may well have already committed crimes unwitnessed.²

In this way, criminality becomes associated with someone’s identity or essence. Cacho goes on to elaborate that “*de facto* status crimes can be defined as specific activities that are only transparently recognized as ‘criminal’ when they are attached to statuses that invoke race (gang member), ethnicity (illegal alien), and/or national origin (suspected terrorist).”³ The actions of these people are assumed to be criminal based merely on identity attributes: we are assured that there is a criminal type. Thus, mere existence (as perceived illegal alien, gang member, etc.), regardless of their actual actions, is made ontologically criminal. Given drastic disparities between racial groups in terms of incarceration rates and sentence lengths,⁴ Cacho’s theory of *de facto* crimes suggests that existing as a person of color in the United States is to exist in a criminalized context.

This type of ontological attribution is an example of Sartrean bad faith. In existentialist terms, existence always precedes essence, meaning, “If man, as the existentialist conceives him is indefinable, it is because at first he is nothing. Only afterward he will be something, and he himself will have made what he will be. Thus, there is no human

² Lisa Cacho, *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected* (New York: New York University Press, 2012), 43.

³ *Ibid.*

⁴ Marc Mauer and Ryan S. King, “Uneven Justice: State Rates of Incarceration by Race and Ethnicity,” *The Sentencing Project* (2007), accessed December 5, 2012, http://www.sentencingproject.org/doc/publications/rd_stateratesof-incbyraceandethnicity.pdf

nature"⁵ For Sartre, bad faith involves the denial of one's ability to be self-defining and, further, the refusal to recognize the complexity and ambiguity of the Other. It is a denial of the freedom that each person has to do or be otherwise.

In this light, there are many ways the practices of the United States' justice system involve bad faith. Forms of punitive justice that deny the possibility of an open future to someone who has committed a crime denies one's existential freedom to change. As Lewis Gordon outlines in his work *Bad Faith and Antiracist Racism*, if humankind is constantly "in the making,"⁶ we act in bad faith whenever we attribute an essence or nature to someone because it denies one's existential freedom. *De facto* status crimes, as well as punishments like the death penalty and life-without-parole sentences, attribute an essence to the offenders: that they are permanently unworthy of being a part of our collective society. If a human person is "the being who hurls himself toward a future and who is conscious of imagining himself as being in the future,"⁷ then forms of punishment like permanent incarceration and state-sanctioned death, which deny such future-oriented freedom, are not adequate responses to crime, no matter the seriousness of the crime. Incarceration involves entrusting the state and its representatives with dominion over the body and freedom of the prisoner. The death penalty denies a convicted criminal an opportunity to change or to make amends for what he or she has done.⁸ Many other practices that revolve around the justice system lend themselves to making certain attributions about the nature of criminals. Disclosure of felony conviction is often a legal requirement in applying for a job or higher education.⁹ Convicted felons often have their right to vote taken away

⁵ Jean-Paul Sartre, *Existentialism and Human Emotions* (New York: Citadel Press, 2010), 15.

⁶ Lewis R. Gordon, *Bad Faith and Racism* (New Jersey: Humanity Books, 1995), 50.

⁷ Sartre, *Existentialism and Human Emotions*, 15.

⁸ Jennifer L. Culbert, *Dead Certainty* (Stanford: Stanford University Press, 2007), 157.

⁹ Suzy Khimm, "States push to provide some ex-felons a second chance," *MSNBC*, accessed December 10, 2013, <http://www.msnbc.com/all-in/states-push-provide-some-ex-felons-secon>.



from them, giving them no legal representation or political power.¹⁰ There is a social stigma around having spent time in prison: we are assured that those in prison are bad, evil, and undeserving of our help. They become perceived criminals by nature. These types of judgments are a form of bad faith, insofar as “judgment is an act that brings a new interpretation of the world into being and, in so doing, reorients the world more or less violently excluding other possibilities for beginning.”¹¹ Making judgments about the inherent nature of others prevents us from “meeting the Other in the flesh”¹² and recognizing them as complex, existentially free human beings with the capacity to change. This is not to say that we should not take crimes seriously (in many cases, criminal actions themselves might involve an act of bad faith) but rather that we have a responsibility to respond to them in a way that does not deny the existential freedom of the Other. While there are cases of serious crime, such as premeditated murder or rape, that often require us to respond to them by restraining or incapacitating the offender for a certain amount of time, if we take existentialism seriously, we must ensure that such a response does not permanently deny the offender an opportunity to change or atone for the offense. To allow criminality to become an ontological structure is to allow other ontological attributions of ourselves: if I believe it is okay to permanently brand someone a criminal (you are a felon and unworthy of rights if you stole a car), then I validate the idea that someone can make a permanent attribution in the same way (I am forever a liar and should not be trusted if I lied once). Such attributions deny the possibility of an open and free future for everyone.

This system of justice is also one in which we deny our own existential freedom. Whenever one allows the laws of the state to determine right and wrong for oneself without individual reflection, one acts in bad faith. In this way, to serve on a jury and to hold the attitude, “I do not think what the accused has done is wrong, but they are guilty under the law,” is to act in bad faith, as it removes the individual from taking responsibility for his or her own evaluation of morality and appropriate action. This is the same type of bad faith that

¹⁰ “Felon Voting Rights,” *National Conference of State Legislatures*, accessed December 10, 2013, <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

¹¹ Culbert, *Dead Certainty*, 158.

¹² Gordon, *Bad Faith and Antiracist Racism*, 136.

one acts in whenever someone involved in the justice system is "just doing his or her job," from the prison guard involved in cavity searches that deny a prisoner dominion over the body, to the administrators who work to ensure certain incarceration quotas are met for economic purposes. They deny their own freedom to do otherwise and choose a world in which they fail to recognize the existential freedom of others. When we wordlessly live under a legal system that sanctions the death penalty and life-without-parole jail sentences, we will a world in which it is okay to deny an open future to others and ourselves. Further, we allow ourselves to live under a type of power relationship in which we can deny our responsibility not only to determine what is ethical but also how to respond to that which is said to be unethical.

To be clear, to act in this type of bad faith seems to be a sort of default setting for most people. It is easy for the juror to make the distinction between innocent and guilty merely based on the fact that he or she gets to go home after the trial while the accused does not: "I am free, and there is a reason that the accused is not." Although this is an easy mode of thought for most people to slip into, it is also a dangerous one. Hannah Arendt's account of Adolf Eichmann in *Eichmann in Jerusalem* demonstrates the danger of these forms of bad faith.¹³ Eichmann, the Nazi party member ultimately tasked with the implementation of the Final Solution during World War II, is not portrayed as someone purely evil, but rather as someone who believed himself to be bound to duty toward his country. Described as overwhelmingly normal, Eichmann's justification for his actions in court was derived from a twisting of Kantian ethics that was something along the lines of "act as if the principle of your actions were the same as that of the legislator or of the law of the land."¹⁴ Eichmann was not himself particularly anti-Semitic, insisting that he personally had nothing against Jewish people.¹⁵ We see that even unquestioning, default participation in political structures can lead to exploitation and subjugation done in the name of duty.

Eichmann's actions involve a similar denial of existential freedom—both of his own and that of others—as those structures outlined above. Even though he recognized that the Third Reich

¹³ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1964), 26.

¹⁴ *Ibid.*, 136.

¹⁵ *Ibid.*, 26.



had created a “period of crimes legalized by the state,”¹⁶ Eichmann nonetheless espoused the virtues of blind obedience. This was a denial of his own freedom to do otherwise. Since Sartrean freedom involves not only choosing for oneself but also for all humankind,¹⁷ Eichmann had thus chosen a world in which it was perfectly moral for anyone to act the way he had, even if that included someone else denying Eichmann’s existential freedom. These actions involve a denial of others’ existential freedom (i.e., those people whom I am oppressing deserve to be oppressed because they are ontologically criminal), and a denial of one’s own existential freedom (I could not have done otherwise because of the totalitarian state). While this type of bad faith is quite obviously problematic, part of Arendt’s point in her work is that such acts are not necessarily borne from maliciousness, but they are rather a default mode of being—hence, the “banality of evil.”

How can an existentialist viewpoint help us in resisting these forms of bad faith? For Simone de Beauvoir, the oppressed have no choice but to revolt against their oppressors. She writes:

The oppressed has only one solution: to deny the harmony of that mankind from which an attempt is made to exclude him, to prove that he is a man and that he is free by revolting against the tyrants. In order to prevent this revolt, one of the ruses of oppression is to camouflage itself behind a natural situation since, after all, one cannot revolt against nature.¹⁸

There is an implied violence¹⁹ in this revolt that seems problematic, largely because one of the problems with punitive justice is that it seeks to justify the idea that two wrongs make a right. Treating violence with more violence seems only to further the problem. However, Beauvoir touches on something important with her discussion of nature. For my

¹⁶ *Ibid.*, 136.

¹⁷ Sartre, *Existentialism and Human Emotions*, 17.

¹⁸ Simone de Beauvoir, *The Ethics of Ambiguity*, trans. Bernard Frechtman (Secaucus, NJ: Citadel Press, 1948), <http://www.marxists.org/reference/subject/ethics/de-beauvoir/ambiguity/>.

¹⁹ This is a similar message to Sartre’s evaluation of Franz Fanon’s *Wretched of the Earth* (Grove Press, 1963).

own part, I find that one of the most valuable aspects of existential freedom comes not in our freedom to do as we wish but rather the freedom to think of our relationship with the Other in whatever manner we choose. Whenever we are told that human nature is such that people are generally cruel to one another, that people cannot be changed or reformed, we have the power to think otherwise. When we are victims of a crime, we can choose the way we think about what has happened to us. In other words, we have the ability to resist the ontological attributions of what constitutes criminal and victim. This does not mean we ignore the harm that someone has done, but it does mean we can choose the way that we react to it. David Foster Wallace in his speech "This Is Water" talks about the ways we can get out of our default mindset in our everyday life:

If you're aware enough to give yourself a choice, you can choose to look differently at this fat, dead-eyed, over-made-up lady who just screamed at her kid in the checkout line. Maybe she's not usually like this. Maybe she's been up three straight nights holding the hand of a husband who is dying of bone cancer. Or maybe this very lady is the low-wage clerk at the motor vehicle department, who just yesterday helped your spouse resolve a horrific, infuriating, red-tape problem through some small act of bureaucratic kindness. Of course, none of this is likely, but it's also not impossible . . . If you're automatically sure that you know what reality is, and you are operating on your default setting, then you, like me, probably won't consider possibilities that aren't annoying and miserable. But . . . the only thing that's capital-T True is that you get to decide how you're gonna try to see it.²⁰

So, too, do we have the power to reconsider and rethink our relationship with those who have committed crimes. Even in situations where someone has committed a violent crime, we have the freedom to choose the manner in which we think of our relationship to this person. Instead

²⁰ David Foster Wallace, "This is Water" (New York: Hachette Book Group, 2009), 89-94.



of thinking of the perpetrator as someone diametrically opposed to us, as a bad person who is evil, we might think of him or her as someone who is deeply troubled and needs help to reaffirm shared values. This is not to suggest that this task is simple or easy to do, nor is it to suggest that such a person might be at heart agreeable and kind instead of stubborn, angry, and vicious. It is not to say that such a person would not require some form of punishment or incapacitation. But we do ultimately have the freedom of choosing how to think of and react to such a person.

Ultimately, Arendt believes Eichmann deserving of his death sentence, stating that because he did not want to share the world with Jewish people, no one should have to share the world with him.²¹ In some ways, condemning Eichmann to death might make us guilty of the similar type of judgment Eichmann levied on the Jewish people. It is easy to consider such people monsters, but it is clear that we do not have to think of them in such a way. The recognition of how easy it is to follow the default mindset of “following orders” allows us to recognize how easily we might have behaved as he had. It is infinitely easier to allow our responsibility for making ethical evaluations and judgments to be assumed by the larger structure of our justice system. However, when we who are responsible for responding to a crime surrender that power which might allow us to reframe the way we think about our relationship to others—not as opposed to us, but connected—we act in bad faith.

Currently in the United States, there are 3,200 people serving life sentences without the possibility of parole for nonviolent sentences, sixty-five percent of whom are African-American. We live in a country that forecloses an open future on people who initially committed crimes like possessing a crack pipe and stealing gas from a truck.²² It seems clear that the justice system in the United States functions in a way that attributes an ontologically criminal nature to those who commit crimes, which denies the possibility of an open future for those convicted. If we will a world in which freedom is not possible for everyone, then our own capacity for freedom is diminished.

²¹ Arendt, *Eichmann in Jerusalem*, 256.

²² “Jailed for Life for Stealing a \$159 Jacket? 3,200 Serving Life Without Parole for Nonviolent Crimes,” *Democracy Now!*, accessed December 3, 2013, http://www.democracynow.org/2013/11/15/jailed_for_life_for_stealing_a.

In rethinking this justice system to respect the existential freedom of all involved, what might change? The elimination of life without parole sentences and the death penalty is one clear step toward respecting the complexity of all human beings, even those who commit violent crimes. Mandatory minimum sentences prove similarly problematic since they eliminate space to make meaning and recognize complexity in criminal acts. Automatic punishments such as this minimize spaces for the type of interpretive work that can allow for growth and change, rather than permanent harm done to all parties involved in a crime.

Further, we might find valuable alternative forms of justice, such as restorative justice, which tend to focus on the reaffirmation of shared values rather than establishing the guilt of the criminal. Focusing on the guilt of a criminal often brands him a criminal for life, ruining the possibility of meaningful reintegration into society. As George Bernard Shaw writes in *The Crime of Imprisonment*, such systems "torment the swindler for years, and then throw him back upon society, a worse man in every respect, with no other employment open to him except that of fresh swindling."²³ It is possible that we can view these people not as undeserving of our help but as those who need it the most. We have the freedom to take responsibility for the reintegration of the other. If we want the world to be a place in which we are recognized as complex and free human beings, then we must take responsibility for recognizing others as such. It is easy to deny our responsibility for others, to think, "I did not commit the crime, I am not the one responsible for making things better." This kind of thinking is the hallmark of the actions of Adolf Eichmann, of bad faith, of default modes of being. We are, in these cases, responsible for reaching out to those who have been deemed ontologically criminal and creating the possibility of an open future, not just for those convicted of crimes, but for the whole of society.

²³ George Bernard Shaw, *The Crime of Imprisonment* (New York: The Philosophical Library, 1946), 39.

